STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CAJON CHAPTER #179,	)	
Charging Party,	)	Case No. LA-CE-3170
v.	)	PERB Decision No. 1085
CAJON VALLEY UNION SCHOOL DISTRICT,	)	March 1, 1995
Respondent.	)	

Appearances: John A. Baird, Senior Labor Relations Representative, for California School Employees Association and its Cajon Chapter #179; Worley, Schwartz, Garfield & Rice by Timothy K. Garfield, Attorney, for Cajon Valley Union School District.

Before Blair, Chair; Garcia and Johnson, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California School Employees Association and its Cajon Chapter #179 (CSEA) and Cajon Valley Union School District (District) to a PERB administrative law judge's (ALJ) proposed decision (attached hereto). In the proposed decision the ALJ dismissed CSEA's unfair practice charge which alleged that the District unilaterally reduced the hours of several vacant classified bargaining positions in violation of section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).[1]

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3543.5 states, in pertinent part:

The Board has reviewed the entire record in this case, including the transcripts, exhibits, proposed decision, CSEA's exceptions, the District's exception and response to CSEA's exceptions. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them in accordance with the following discussion.

BACKGROUND

CSEA is the exclusive representative of a unit of classified employees of the District. CSEA has alleged that the District unilaterally reduced hours of several vacant positions without providing CSEA with: (1) notice, (2) an opportunity to negotiate the changes, or (3) a chance to negotiate the effects of such changes. The District claimed that it had a longstanding and uniform past practice of unilaterally modifying the hours of vacant bargaining unit positions. The ALJ determined that the changes in hours of vacant positions is a matter within the scope

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> It shall be unlawful for a public school employer to do any of the following:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

of bargaining as defined in section 3543.2(a).[2] Despite the District's failure to negotiate the change, the ALJ concluded that the District's past practice and waiver defenses supported the dismissal of CSEA's charge.

EXCEPTIONS

CSEA filed numerous exceptions to the ALJ's decision asserting, among other things, that the District failed to establish either a past practice or a waiver defense that permitted the District to unilaterally change the hours in vacant positions. CSEA also contends that the ALJ erred when she failed to find that the District violated EERA by failing or refusing to provide relevant and necessary information.

The District excepts to the ALJ's determination that a change in the hours of a vacant position is a negotiable subject. The District contends that it was, in effect, determining the level of service to be provided. Based on the law and the facts

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[2]Section 3543.2 provides, in relevant part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, . . .

of this case, the District also argues that CSEA's numerous other exceptions are without merit.

DISCUSSION

The District repeats arguments already considered by the ALJ when it excepts to the ALJ's finding regarding a change in hours of a vacant position. The Board concurs in the ALJ's analysis and determination that a change in the hours of a vacant position is a subject within the scope of representation, and therefore, a negotiable subject because it "impacted the numbers of hours which had been regularly assigned to positions that were temporarily vacant."

On appeal, CSEA argues that there is no defense to the District's action of reducing the hours of vacant positions without notice and an opportunity to negotiate the reduction. As such, the District's actions constitute a unilateral change in the terms and conditions of employment within the scope of representation as defined by section 3543.2(a).

A past practice is established through a course of conduct or as a way of doing things over an extended period of time. (Pajaro Valley Unified School District (1978) PERB Decision No. 51.) The District unilaterally increased and decreased the number of hours assigned to a wide spectrum of vacant positions over a four-year period commencing in 1989. This established the practice in the District. Since the District's changes were made in the usual manner, there was no unilateral alteration of the past practice.

CSEA contends they did not receive actual notice of the change in the hours of vacant positions. Actual knowledge is not required. (Modesto City Schools and High School District (1984) PERB Decision No. 414; Modesto City Schools and High School District (1985) PERB Decision No. 541; California State University (San Diego) (1989) PERB Decision No. 718-H.) The evidence shows that, going back as far as four-years before the charge was filed,[3] the District made numerous changes in hours of vacant bargaining unit positions. These changes affected every classification and happened at almost every job site. The adjustments to the hours assigned to the positions were overt to staff at the affected job sites. Based on the fact that the District changed the hours of vacant bargaining unit positions in 1991, 1992, and 1993, there is sufficient evidence to determine that CSEA had constructive knowledge of the change in hours of vacant positions.

CSEA asserts that during the 1990-1991 negotiations, the District reduced the hours of 13 bargaining unit positions without providing CSEA notice. However, the testimony of Smith contradicts this statement. She testified that during the 1990-1991 negotiations, prior notice was provided and the parties

[3]District Exhibit 3 contains a summary of all vacant classified positions filled from July 1, 1989 to June 30, 1993. Forty-seven separate vacant positions were reduced in hours prior to Labor Relations Representative Ann M. Smith's (Smith) November 20, 1991 demand. CSEA did not rebut the District's witness or documentary evidence which demonstrated that two and one-half years prior to CSEA's November 20, 1991, demand date, the District reduced hours in vacant instructional aide positions.

reached an agreement to reduce the hours of the 13 positions in question. Thus, in this instance, the change in hours of unit positions was treated by the District as a negotiable subject. Therefore, the Board rejects CSEA's exception.

CSEA introduced evidence that the District modified the hours of a position at Sevick School which was previously occupied by a six-hour-per-day Special Education Classroom Aide (SECA). This evidence was not disputed. In July 1992, CSEA was advised of the SECA's transfer and the subsequent reduction of the hours of that position. CSEA's failure to demand negotiations after receiving notice of the District's proposed action constitutes a waiver of the exclusive representative's right to negotiate the proposed action. Thus, the ALJ properly concluded that CSEA waived its right to negotiate concerning the reduction in hours of the Sevick School position through its own inaction.

CSEA claims that it requested relevant and necessary information from the District which the District refused or failed to provide. CSEA contends the ALJ erred when she failed to find that the District violated EERA when it failed or refused to provide the requested information.

The Board may consider unalleged violations when: (1) the respondent has had adequate notice and an opportunity to defend the charge; (2) the unalleged act(s) should intimately relate to the subject matter of the complaint and involve the same course of conduct; and (3) the matter has been fully litigated, meaning

the parties have had an opportunity to examine and cross-examine witnesses on the issue. (Santa Clara Unified School District (1979) PERB Decision No. 104.)

CSEA's initial charge did not allege the District's failure to provide requested information. CSEA did not informally or formally move to amend the complaint before the close of the hearing to allege such an allegation. The Board stated, at page 6, in Tahoe-Truckee Unified School District (1988) PERB Decision No. 668 (Tahoe-Truckee) that "failure to meet any of the above listed requirements will prevent the Board from considering unalleged conduct as violative of the Act [EERA]."

While the information requested by CSEA was discussed as an item of evidence at the hearing before the ALJ, the District did not have adequate notice nor an opportunity to defend, inasmuch as CSEA did not inform the ALJ or the District that the refusal to provide the requested information should be considered a charge. The Board in Tahoe-Truckee indicated that notice is a requirement whether or not the unalleged violation is distinctly separate from the charge. Therefore, the Board rejects this exception.

ORDER

The complaint and unfair practice charge in Case No. LA-CE-3170 are hereby DISMISSED.

Chair Blair joined in this Decision.

Member Garcia's concurrence begins on page 8.

GARCIA, Member, concurring: I agree with the majority decision and wish to add, for clarification, that the evidence supports that the California School Employees Association and its Cajon Chapter #179 (CSEA) had constructive notice of the Cajon Valley Union School District's (District) changes to vacant position hours. The actions and decisions of the District were open and establish constructive notice sufficient to impute the knowledge that is necessary before CSEA could be burdened with an obligation to demand negotiations. The record shows that CSEA did not timely demand negotiations on vacant position hours, and therefore the District was not obligated, as a legal matter, to discuss the changes.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CAJON CHAPTER #179, Charging Party, v. CAJON VALLEY UNION SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-3170 PROPOSED DECISION (6/10/94)

Appearances; John A. Baird, Senior Labor Relations Representative, for California School Employees Association and its Cajon Chapter #179; Worley, Schwartz, Garfield & Rice, by Timothy K. Garfield, Attorney, for Cajon Valley Union School District.

Before W. Jean Thomas, Administrative Law Judge.

INTRODUCTION

An exclusive representative charges the employer with unilaterally reducing the hours of several vacant classified bargaining unit positions without providing the representative with (1) notice, (2) an opportunity to negotiate the changes, or (3) the effects of such changes.

The employer believes that alteration of the number of hours assigned to a vacant position is not a mandatory subject of bargaining, and that, in any event, its long-standing and consistent past practice of altering the hours of part-time classified positions to meet operational needs is dispositive of this charge.

PROCEDURAL HISTORY

On March 2, 1992, the California School Employees Association and its Cajon Chapter #179 (CSEA) filed an unfair practice charge against the Cajon Valley Union School District (District) alleging unlawful unilateral conduct in violation of the Educational Employment Relations Act (EERA or Act).[1]

The charge alleged that on or about September 29, 1991, the District unilaterally reduced the hours assigned to a vacant instructional aide position at Lexington Avenue Elementary School (Lexington) from three hours to two hours.

Based on these allegations, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on March 19, 1993, alleging that the District's conduct described above was in violation of section 3543.5(a), (b) and (c).[2]

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2]Section 3543.5 states, in pertinent part:

> 3543.5. INTERFERENCE WITH EMPLOYEES' RIGHTS PROHIBITED
>
> It shall be unlawful for a public school employer to do any of the following:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

The District answered the complaint on April 8, 1993, admitting the change of hours without prior notice to CSEA and an opportunity to negotiate the decision, but denying that it refused to give CSEA an opportunity to negotiate the effects of this change. The District also advanced a number of affirmative defenses.

An informal conference on April 19, 1993, failed to resolve the dispute.

CSEA filed an amended charge on May 3, 1993, alleging nine additional instances of unilateral reduction of hours in vacant bargaining unit positions between June 30, 1992, and February 9, 1993.[3] On June 10, 1993, PERB issued an amended complaint alleging that the District unilaterally changed the hours of vacant bargaining unit positions at various school sites on November 24, 1992 (two separate actions); January 11, 1993; January 22, 1993; and February 9, 1993. These actions were alleged to be in further violation of section 3543.5(a), (b), and (c).

The District filed an answer to the amended complaint on June 28, 1993, wherein it admitted some, but denied most of the material allegations. Among its assertions, the District alleged

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> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[3]On June 8, 1993, CSEA withdrew allegations in the amended charge that the District made unilateral changes on June 30, September 8, October 15, and October 28, 1992.

that a vacant unit position at Chase Avenue Elementary School (Chase) was filled as a six-hour position and a three-hour position filled at Anza Elementary School (Anza) was a new position.

A formal hearing was held by the undersigned on July 13 and 14, 1993.[4] Post hearing briefs were filed on September 23, 1993, and the case was thereafter submitted.

FINDINGS OF FACT

Background

The parties stipulated, and it is therefore found, that the District is a public school employer and CSEA is an exclusive representative as defined in EERA. CSEA represents a comprehensive classified unit that consists of approximately 900 employees. The unit includes employees in the job classifications of instructional aide (IA) and special education classroom assistant (SECA) who work in the instructional services department.

SECAs' receive special training that enables them to work with students who have multiple learning disabilities. These students receive services through the District's special education program. The regular work hours of IAs and SECAs vary anywhere from two to six hours per day, four to five days a week.

[4]At the beginning of the hearing, CSEA withdrew paragraphs 15 through 26 of the complaint, based on the assertions made by the District in its amended answer concerning the six-hour position at Chase and the three-hour position at Anza.

The District has 31 school sites. There is a mix of sites on the traditional school calendar and year-round programs.

CSEA and the District are parties to a collective bargaining agreement (CBA) which is in effect until June 30, 1994.

Change in Hours of Lexington IA Position

On September 29, 1991, the District posted a classified transfer opportunity notice listing an IA position at Lexington as a two-hour-per-day assignment. Prior to September 19, 1991, the position was occupied by a bargaining unit member as a three-hour-per-day position. In mid-November 1991, the District filled the position at two hours as posted.[5]

When Angelina Elias (Elias), the CSEA chief steward, first became aware of the change in hours assigned to this position, she verified it by contacting Kathie Hillix (Hillix), the District director of personnel, on September 30, 1991. Elias took the position that a change in hours of any unit position had to be negotiated with CSEA. Hillix disagreed. Elias and Hillix then agreed "that they disagreed" on this issue and it remained unresolved.

Elias next contacted Ann Smith (Smith), the CSEA labor relations representative, about the matter. In a letter, dated November 20, 1991, to Wayne Oetken (Oetken), assistant

[5]Respondent exhibit 3 shows that the three-hour position was actually replaced by two two-hour positions which were filled on November 7 and November 14, 1991, respectively.

superintendent, business services and the District's chief negotiator, Smith demanded that the District negotiate its decision to reduce the hours of the position in question and return to the status quo until a negotiated agreement was reached. Additionally, Smith requested a list of all other vacant positions which the District had unilaterally reduced during the past year. At the time of her letter, Smith was CSEA's chief negotiator.

When the District did not respond, Smith sent a second demand letter to Oetken on January 27, 1992. Oetken responded by letter on February 4, 1992. In his letter, Oetken stated that the District was refusing CSEA's demand to negotiate the reduction in hours of any vacant unit position. Further, he stated that it was the District's position that the reduction in hours of vacant unit positions was related to management's prerogative to determine the type and amount of services to be provided.

The District did not formally respond to CSEA's request for information until July 14, 1993, the second day of formal hearing. Hillix testified that the information provided in the document did not exist in the summary format provided to CSEA prior to July 12, 1993. According to her, the information reflected in the document was retrieved from various District

records and compiled into a format that provided a method of discerning a change in hours of any vacated unit positions.[6]

The District conceded that prior to the receipt of this document, there was no way for CSEA to determine if the positions listed on the transfer opportunity bulletins reflected a change in hours because the hours assigned to a former position are not shown on the bulletin. Also, the District board agendas listing classified personnel services items do not show a change of hours with respect to new hires, reinstatements, reassignments, etc.

Prior to Smith's January 27, 1992 letter to the District, she spoke with Hillix about CSEA's request for information and Hillix told her that she would try to put the information together. Hillix said that it was going to take some time to prepare it. The District, however, did not begin to compile the information until a few months before the hearing.

Change in Hours of SECA Position -- Sevick Elementary School

CSEA first became aware of possible reduction in hours of unit positions at Sevick Elementary School (Sevick) in July 1992. Elias told Smith that the SECAs employed at Sevick had been told of possible transfers to other school sites so the District could reduce the hours of their positions. The three SECAs at Sevick

[6]This document, which is entitled "Classified Employment History" and identified as respondent exhibit 3, was prepared by Hillix's office. It covers the period from July 1, 1989, through June 30, 1993, but does not indicate whether the employee filled the position as a new hire, a transfer, a rehire, a promotion, or through the exercise of "bumping rights" in lieu of layoff.

were assigned to the preschool program. They each had six-hour positions, working 30 hours per week, five days per week. Sevick operates a year-round program.

On October 8, 1992, two of the SECAs -- Linda Endicott (Endicott) and Nancy Phillips (Phillips) -- along with John Collier (Collier), the CSEA site representative, met with their teachers and the site administrator, Lois Pastore (Pastore), to discuss the change in hours issue. The third SECA, Patsy Sarkela (Sarkela), was unable to attend the meeting because of jury duty.

At that time, the District was considering eliminating two six-hour positions -- those occupied by Phillips and Sarkela. The employees were given the option of accepting either a reduction in hours in their existing positions or transferring to other school sites pursuant to the exercise of their seniority and bumping rights. The outcome of the October 8 meeting was that one six-hour position would be eliminated. Seniority between the three SECAs would determine which employee would be laid off. It was later determined that Sarkela was the least senior and would be laid off.

On October 16, 1992, Hillix sent Sarkela a letter informing her that in lieu of issuing her a thirty-day layoff notice, she was being considered for reassignment. This decision, the letter stated, was based on a negotiated agreement between CSEA and the District sometime in 1992 that there would be "no further reductions or eliminations for the remainder of this school

year." Hillix's letter invited Sarkela to a meeting at Sevick with the special education administrators and Hillix on October 21, 1992, to discuss her reassignment.

The October 21, 1992, meeting included the three SECAs, Smith, other CSEA chapter representatives, Hillix, Pastore, and other special education District administrators. However, the District administrators present could not provide CSEA with definitive answers to the various concerns raised about the decision to change the staffing, etc., of the pre-school program. Although CSEA and Sarkela proposed changes in her assignment to avoid either a reduction of her assigned hours or a transfer, this offer was rejected and nothing was settled during the meeting.

A follow-up meeting was suggested with Marge Dean (Dean), the assistant superintendent of instructional services, but the meeting did not materialize. Smith was later told that Dean decided against another meeting because a decision had already been made and it would not be changed.

In early November 1992, Endicott, Phillips and Sarkela met with Hillix, Pastore and other special education administrators regarding the preschool program changes at Sevick. The decision was made that Phillips and Endicott would remain at Sevick with no reduction in the hours assigned to their positions and Sarkela would transfer to Chase to a 30-hour-per-week position.

Sarkela's transfer was effected on November 30, 1992.

In a bulletin to the Sevick staff, dated November 14, 1992, Pastore noted that future Sevick preschool program changes might require staffing with three-hour SECAs, rather than the six-hour positions which had previously been used.

On or about November 24, 1992, the District advertised the two three-hour positions that had been created from the position vacated by Sarkela in a transfer opportunity bulletin. One position was advertised as 12.5 hours per week and the other as 15 hours per week, each at four days per week.

The positions were eventually filled in January and April 1993, respectively, at three hours per day, four days a week. The employees filling these positions worked with the same teacher, in the same program, and during the same morning and afternoon workhours as did Sarkela.

Other Reductions in Hours of SECA Positions in 1993

On or about January 22, 1993, the District admits that it reduced the hours of a vacant six-hour SECA position at Ballantyne Elementary School (Ballantyne) and created two three-hour positions. Both positions were filled in February 1993.

On or about February 9, 1993, a six-hour SECA position at Avocado Elementary School (Avocado) was reduced to two three-hour positions which were filled on March 5, 1993.

In both cases, CSEA learned about the District's actions after the transfer opportunity bulletins had been posted.

Relevant Provisions of the CBA

The CBA contains three articles that are relevant to this case.

Article IV, which is entitled "Governing Board Rights," reads as follows:

> Except as limited by the provisions of this Agreement, the Management [sic] of the District and the direction of the working force, including the right to hire, promote, transfer, discharge, discipline for proper cause, and to maintain efficiency of the employees, is the responsibility of the Board. In addition, the work to be performed, the location of the work, the method and processes, and the decision to make or buy are solely and exclusively the responsibility of the District provided that in the exercise of such functions, the District shall not discriminate against employees because of participation in legitimate activities on behalf of the Association. The foregoing enumeration of Board rights shall not be deemed to exclude other rights of the Board not specifically set forth herein. The Board, therefore, retains all rights not otherwise specifically limited by this Agreement and the nonutilization of any Board right does not mean that the Board shall not maintain said right.

Article V (Hours of Work) reads in relevant part:

> 1. Workweek
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> The District workweek shall begin at 12:01 a.m. on Sunday and end at 11:59 p.m. the following Saturday. This is established for the purpose of payroll-computation. The individual workweek within the District workweek shall consist of forty (40) hours of five (5) consecutive days, Monday through Friday. However, individual workweeks may be assigned other than Monday through Friday when the needs of the District so require with the agreement of an employee.

2. Workday

Eight (8) consecutive hours except for the meal period, shall constitute a normal workday.

11. Payroll Calculation

For the purpose of payroll calculation, 2080 hours per year shall be used.

Article VI (Employee Compensation) reads, in relevant part:

1. The 1990/91 salary schedule shall be continued for the 1991/92 year effective July 1, 1991.

2. Longevity: +3.5 percent upon completion of each of the following years of service with the District: 8, 12, 16, 20, 24. .

3. Health and Dental Programs

Eight hour employee composite coverage:

(Kaiser "U" or Travelers)
(Delta Dental or Personal Dental Service)

Part-time Employee coverage:

Individual coverage will be paid by the District for employees working 4 through 7.99 hours for Kaiser "U" or Travelers and Delta Dental Service or Personal Dental Service.[7]

[7]Additional language concerning compensation and fringe benefits is contained in Exhibit "B" of the CBA. This amendment, effective July 1, 1991, states:

> A 3 1/2% longevity factor will be added at the completion of 8, 12, 16, 20 and 24 years of regularly employed service in the District, irrespective of the number of hours served per day.

Bargaining History

The parties have negotiated many times over the past six years. In addition to the regular contract reopener negotiations, they have also engaged in negotiations over matters not specifically covered by language of the CBA.

For example, in 1989, they negotiated over the result of a classification study done by the Personnel Commission[8] that impacted job duties, classifications, and salary schedules of unit members.

They also negotiated implementation of the District's year-round school program. These negotiations resulted in written contractual language.

In the spring of 1990, the parties negotiated the District's proposal to reduce the hours of approximately 55 occupied unit positions. The majority of those positions were located at

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> The District pays the full cost of the employee's health and dental premiums for persons assigned from 4 to 7.99 hours per day. Dependent coverage is available at the employee's expense. The District pays the full cost of the health and dental premiums for both the employee and employee's dependents for persons assigned 8 hours per day.
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> FRINGE BENEFITS (Composite coverage for full-time employees: individual coverage for 4 hours to 7.99 hour employees) Cajon Health or Kaiser; Cajon Dental or PDS. Income protection - American Fidelity.

[8]The classified employees have elected to be governed by a merit system, pursuant to California Education Code section 45220 et seq. The merit system is administered by the District Personnel Commission.

Chase. Near the conclusion of these negotiations, which continued through 1991, the District introduced a three-year approach to effecting a budgetary reduction at this site through the reduction in hours of existing positions and attrition. CSEA took the position that no unit position should be reduced below four hours because of the loss of health and welfare benefits to the affected employees.

The parties went to impasse and mediation during these negotiations. They eventually reached an interim agreement to reduce the hours of 13 vacated positions provided that the previous incumbents suffered no loss of salary or benefits.

During the 1991-92 school year, the parties again negotiated the District's proposed reduction in hours of a few occupied positions; however, their primary focus was negotiating the effects of layoffs. These negotiations also went to impasse before agreement was reached. The agreement led to written language pertaining to layoffs and a verbal agreement that there would be no further reduction in hours of occupied unit positions for the balance of the school year.

CSEA and the District have never negotiated over a decision to reduce hours of vacant unit positions. The District has never given CSEA notice of such intended actions, and prior to CSEA's November 1991 demand to bargain, CSEA had never demanded to bargain with the District over this subject. CSEA's first notice that the District would not bargain such a decision was in February 1992, when Oetken responded to Smith's letter.

When the parties met on October 21, 1992, regarding the Sevick situation, CSEA did not renew its demand to bargain because, according to Smith, CSEA felt it was "pointless" in view of the District's stated position. Instead, CSEA preferred to allow the issue to be addressed through its pending unfair practice charge and the PERB process.

In a letter to Hillix, dated October 23, 1992, Smith challenged the District's reduction of a six-hour vacant position to two three-hour positions at Greenfield Junior High School as an alleged unlawful action. Smith's letter also demanded a list of all vacant unit positions reduced in hours since January 1992. This letter, however, contained no reference to the Sevick matter.

No evidence was presented about the bargaining history of Article IV.

District's Past Practice

There is evidence that the District has had a past practice of altering the hours of various vacant unit positions without providing notice to or negotiating with CSEA over such decisions.

As mentioned earlier, the District offered documentary evidence which summarized the history of all vacant unit positions filled between July 1, 1989, through June 30, 1993. Hillix arbitrarily selected the dates included in this summary, based on CSEA's November 1991 request for such information regarding the preceding (1990) year. During the period between July 1, 1989, and October 31, 1991, which is the approximate time

that CSEA first demanded to bargain the reduction in hours of the Lexington IA position, this evidence shows that the District had reduced the hours assigned to 47 separate positions before they were filled. The reductions ranged from .5 to 5.0 hours, with an overall average of 1.4 hours per position.

The reductions included 23 separate IA and SECA positions. Within these classifications, one IA position was reduced one hour in both November 1989 and March 1990, and one position was reduced 4.5 hours in August 1990. A SECA position was reduced from six to three hours in September 1989, April 1990, and May 1990 (two positions).

During the same period of time, i.e., July 1989 through October 1991, the number of hours assigned to 32 unit positions were increased before being filled. These modification in hours were made to eleven IA or SECA positions. The average increase per position was 1.3 hours.

Oetken has served on the District's negotiating team since 1976 and as its chief negotiator for the past ten years. According to him, although the District has never given CSEA formal notice of its changes in the hours assigned to vacant positions, the District has routinely made such modifications whenever it deemed it necessary for budgetary or program needs. Inasmuch as the changes have occurred in every unit job class and job family at one time or another, Oetken believes that CSEA should have been aware of such changes. Oetken also said that the District has never questioned its right to unilaterally

modify hours of any vacant classified unit position to accommodate its staffing needs.

All determinations about the level of classified staffing, except for clerical positions which are determined by a District board formula, are delegated to the school site administrators or department heads. This includes decisions to fill or not fill vacant positions or to modify the number of hours assigned to each position.

Once the hiring process is initiated by the site administrator or department head, the personnel department handles the processing, including the preparation and distribution of vacancy notices, until the site or department head selects the employee to fill the position. If the employee selected involves a new hire, a reinstatement or the transfer of a current employee with a change of classification, this action goes to the District board for approval. If the action involves a lateral transfer, no board action is required.

According to the District, CSEA has access to this information through its regular receipt of the District board agenda.

ISSUES

Whether the District violated EERA by its failure and refusal to negotiate the reduction in hours assigned to several vacant classified bargaining unit positions in 1991, 1992, and 1993?

DISCUSSION

I. Positions of the Parties

CSEA contends that the District implemented a unilateral change in a mandatory subject of bargaining without an excusable defense. The unilateral action of reducing the hours assigned to a vacant position, it argues, has a direct impact on bargaining unit members' wages, hours, and other terms and conditions of employment. For example, CSEA asserts, it adversely impacts the rights of the bargaining unit regarding transfer and promotional opportunities, health benefits, retirement benefits and the leave benefit accrual rate.

CSEA further argues that if the employer is allowed to unilaterally reduce hours in vacant positions without negotiations, the employer could ultimately reduce the entire bargaining unit to part-time status by waiting until vacancies occur and filling them with part-time employees without ever negotiating the subject with CSEA.

The District admits that it unilaterally changed the hours of the IA and SECA positions at issue without providing CSEA with a prior opportunity to bargain such actions. However, it insists that the alterations of the number of hours assigned to vacant unit positions is not within the scope of representation under EERA. While it concedes that the number of hours assigned to a position are logically related to wages and hours, it argues that under the test for negotiability set forth in Anaheim Union High School District (1981) PERB Decision No. 177, (Anaheim) the

decision to alter the number of hours for a position that is vacant is not a matter within the scope of bargaining.

Next, the District states that it has had a long-established and consistent past practice of altering the hours of vacant part-time classified positions, based on its operational needs, without negotiating with CSEA.

With respect to the transfer of Sarkela and the subsequent modification in the hours of her SECA position, the District contends that CSEA waived any right it had to negotiate by failing to demand negotiations after receiving notice of the proposed action.

Finally, the District asserts that the management rights clause of the CBA authorizes the District to unilaterally modify the hours of vacant unit positions.

II. Legal Principles Relevant to Unilateral Actions

To establish a prima facie case of a unilateral change, the charging party must demonstrate facts sufficient to establish: (1) the employer breached or altered the parties' written agreement or previous understanding, whether that understanding is embodied in a contract or evidenced from the parties' past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon bargaining unit member's terms and conditions of employment); and (4) the change

in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (Grant) (1982) PERB Decision No. 196 (Grant); Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro); Davis Unified School District, et al. (1980) PERB Decision No. 116.)

However, an employer's unilateral action may not be unlawful where the action taken does not alter the status quo. "[T]he 'status quo' against which an employer's conduct is evaluated must take into account the regular and consistent past pattern of changes in employment." (Pajaro.) In determining whether an employer's action constituted a unilateral change, the trier of fact may interpret terms of a collective agreement or examine the established practice. (Pajaro; Rio Hondo Community College District (1982) PERB Decision No. 279.)

Absent a valid defense, unilateral actions taken by an employer without providing the exclusive representative with notice and an opportunity to negotiate the proposed changes in matters within the scope of representation constitutes a refusal to negotiate in good faith in violation of section 3543.5(c). (San Mateo County Community College District (1979) PERB Decision No. 94 (San Mateo).)

III. Scope of Representation Defense

In a series of cases, the Board has adopted a test for interpreting the scope of representation for enumerated subjects

of bargaining found in section 3543.2(a).[9] In addition to those topics specifically listed within the scope section, the Board has held that subjects not enumerated will nevertheless be negotiable, if (1) the subject is logically and reasonably related to hours, wages or an enumerated term and condition of employment; (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of its mission. (Anaheim)[10] Applying this test, PERB has held that a reduction in hours of occupied positions is within the scope of bargaining. (See, e.g., North Sacramento School District (1981)

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[9]Section 3543.2 provides in relevant part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, . . .

[10]This test was approved by the California Supreme Court in San Mateo City School District/Healdsburg Union High School District v. Public Employment Relations Board (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800].

PERB Decision No. 193; Pittsburg Unified School District (1983) PERB Decision No. 318; Oakland Unified School District (1983) PERB Decision No. 367 (Oakland); Healdsburg Union High School District (1984) PERB Decision No. 3 75 (Healdsburg).)

In a number of decisions, PERB has held that the level of services that an employer decides to provide is not a negotiable subject. This includes the creation of new positions and a determination of the number of hours to be assigned. (See, e.g., Mt. San Antonio Community College District (1983) PERB Decision No. 297 at p. 3; Davis Joint Unified School District (1984) PERB Decision No. 393, at pp. 26-27.) However, the effects of these actions may be negotiable if they impact matters within the scope of representation. (Alum Rock Union Elementary School District (1983) PERB Decision No. 322 (Alum Rock).)

In the present case, the District's unilateral actions impacted the number of hours which had been regularly assigned to positions that were temporarily vacant. The District made no changes in the duties or took other action which would indicate the creation of new positions. It simply opted to modify the hours assigned to existing positions and fill them at a lesser number of hours based upon its program or funding needs.

It is undisputed that the District took these actions without prior notice to CSEA. Even in the face of CSEA's demand to negotiate the change of hours of the IA position at Lexington,

the District refused to negotiate the subject or rescind its action.

PERB has not yet directly decided the issue of whether an employer's modification of the hours of a vacant unit position is within the scope of bargaining.[11] Therefore, the relationship of this subject to other PERB decisions addressing "unit work" as a scope of representation issue will be examined.

PERB has held that an employer decision to abolish a position in order to discontinue a service is a management prerogative not subject to bargaining. (Alum Rock.) The effects of such a decision, however, are subject to negotiation. (Healdsburg.) As noted above, the Board has also held that an employer may unilaterally determine the level of services to be provided, although any impact of such a decision on matters within scope must be negotiated. (Mt. San Antonio Community College District, supra. PERB Decision No. 297.)

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[11]In Oakland, the Board rejected the employer's contention that a reduction in the hours of positions was distinguishable from the effects on employees by finding that incumbent employees were affected by the decision.

In South San Francisco Unified School District (1983) PERB Decision No. 343, the Board found a violation for the employer's unilateral change in hours of a position based upon a contract prohibition against such change.

In Eureka City School District (1985) PERB Decision No. 481 (Eureka), the employer contended that because the affected employee had the option of transferring to other positions, it had reduced the hours of the "position" rather than the hours of the "employee." The Board rejected this argument and found a violation based on the unilateral reduction in hours of an incumbent employee.

On the other hand, the Board has required bargaining over decisions involving the "preservation of unit work" in cases where the employer plans to continue providing similar services. In transfer of work and subcontracting cases, the Board has required negotiation without finding a direct impact upon the wages and hours of incumbent employees. (Healdsburg, at p. 42; Solano County Community College District (1982) PERB Decision No. 219; Arcohe Union School District (1983) PERB Decision No. 360.)

In Rialto Unified School District (1982) PERB Decision No. 209, a case involving the transfer of unit work to non-unit employees, the Board indicated that the withdrawal of

> . . . actual or potential work from the unit is a withdrawal of hours associated with the work, affects the potential for promotion for unit employees, . . . weakens the collective strength in dealing with the employer, . . . and can affect the viability of the unit itself. . . .

In balancing the employee's interest against management prerogative, the Board observed that negotiations with the union could have allowed for the possibility of trade-offs and concessions, as well as suggestions of alterative means of accomplishing the employer's cost-reduction objectives in that case, and may have provided an opportunity for the interests of the employer and the employees to be accommodated. Additionally, it observed that the diminution of the unit had a destabilizing influence on labor relations in the district because of the loss of the employee organization's credibility and effectiveness.

Finally, the Board found that this type of decision was non-essential to the employer's mission in that it involved economic considerations without significant change in the level or kinds of services to be performed.

Relying upon the precedent cited above, by analogy it is concluded that a reduction or other change in hours of a vacant position is a matter within the scope of bargaining as defined in section 3543.2(a), inasmuch as it affects the "collective interests" of bargaining unit members in preserving work to the unit. In this case, the net effect of the District's reduction, was a diminution of workhours, wages, and other terms and conditions of employment specifically listed as within the scope of representation.

Unless other viable defenses have been presented, the District's unilateral change in a matter within the scope of representation without prior notification to CSEA and an opportunity to bargain the proposed changes will amount to a violation of section 3543.5(c).

IV. Other District Defenses

A. Past Practice

The District asserts as a secondary defense to the complaint that its modification of hours of vacant unit positions without negotiations with CSEA is consistent with a long-standing practice of taking such action unilaterally whenever necessary. The District further argues that its established past practice is

the "status quo" against which the conduct at issue should be evaluated, citing the standard mandated by Pajaro.

In addition to the testimony of its witnesses regarding this past practice, the District points to the documented evidence of changes in hours that it made over the approximate two and one-half year period prior to CSEA's November 1991 demand to bargain regarding the Lexington IA position.

CSEA did not rebut the evidence of the District's past practice. However, it argues, in its brief, that the quantity and kind of documented reductions did not result in the elimination of benefits for the employees subsequently filling the positions as resulted from the hours reductions complained of in November 1991, and thereafter.

The record shows that the District has increased and decreased the numbers of hours assigned to a wide spectrum of vacant unit positions over a number of years. During the period from July 1989 to October 1991, the changes in hours included IA and SECA positions. While the reduction in hours for most IA positions during this period was .5 hours, three positions were decreased 1.0 or more hours, excluding the one-hour reduction that occurred at Lexington in October 1991. Additionally, it is noted that an IA position at one site was reduced 4.5 hours in August 1990 before being filled. During this same period, two SECA positions at Sevick were reduced from five and four hours respectively, to three-hour positions in October 1989. Four

other SECA positions at other sites were reduced from six to three hours in 1989 and 1990.

Given this evidence, it is concluded that the District has demonstrated a past practice of modifying hours of vacant IA and SECA positions at sites throughout the District. Additionally, the evidence shows that the hour reductions of the Lexington IA position and the SECA positions at Ballantyne and Avocado that occurred between September 1991 and February 1993 were similar to the type of hour reductions made in the past.

For this reason, it is concluded that the District's actions at issue here (1) were not inconsistent with prior hour reductions in vacant positions, (2) did not represent an alteration of the "status quo," and (3) were not an unlawful unilateral change in hours. It is thus concluded that the District did not breach its negotiating obligation under section .3543.5(c) before taking such actions.

B. Waiver by Inaction

The District's past practice defense, however, is not applicable to the reduction in hours of the six-hour SECA position at Sevick previously occupied by employee Sarkela. Although the complaint did not allege that this position was occupied prior to the reduction in hours, or that the incumbent was transferred to avoid an hours reduction, evidence was presented as to a concurrent transfer/reduction in this instance.

PERB precedent is clear that a reduction in hours in a situation where an incumbent transfers to avoid the reduction is a negotiable matter. (See Oakland and Eureka.)

The District here does not claim, nor is there any evidence of, an established past practice of transferring an incumbent to avoid a subsequent hours' reduction of the position.

By way of defense, the District contends that its action in this situation was excused by CSEA's failure to demand negotiations concerning the transfer of Sarkela and the subsequent reduction in hours of her position. The District maintains that CSEA had prior knowledge of the District's proposed actions at least four months before the reduction in hours of her vacated position actually took place.

The evidence shows that Smith first learned of the proposed changes at Sevick from CSEA's chief steward Elias sometime in July 1992. It is undisputed that when the parties met on October 21, 1992, regarding this matter, Smith did not demand to bargain Sarkela's proposed transfer. Nor was such a demand made any time prior to November 30, 1992, when Sarkela was transferred.

PERB has consistently held that the waiver of bargaining rights by a union will not be lightly inferred; it must be clearly and unequivocally conveyed (Amador Valley Joint Union High School District (1978) PERB Decision No. 74 (Amador)) or demonstrated by behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. (San Mateo.) In San Francisco Community College District (1979)

PERB Decision No. 105, the Board stressed that a waiver will be found only when there is an intentional relinquishment of rights, expressed in clear and unmistakable terms.

For the reasons set forth below, it is concluded that CSEA waived its right to bargain the decision to transfer Sarkela to avoid a reduction in hours of the position she previously-occupied by failing to make a demand to negotiate the subject. While it is not essential that a request to negotiate be specific or made in a particular form, it is important for the union to have signified its desire to negotiate with the employer by some means. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.) In other words, a valid request will be found, regardless of its form or the words used, if it adequately signifies a desire to negotiate on a subject within the scope of bargaining.

It is clear that CSEA demanded to negotiate the decision and effects of the District's action to reduce the hours of the vacant Lexington IA position in November 1991 and January 1992, and that the District refused those requests in February 1992. However, it is clear that CSEA never provided any indication to the District between July 1992 and November 1992 that it desired to negotiate the decision or the effects of the concurrent transfer and reduction of hours of the position occupied by Sarkela.

Smith testified that she did not demand to bargain the issue because she felt it was "pointless" in view of the District's

stated position. However, the District had only refused negotiations over modifications in hours of vacant positions, but not with regard to the reduction in hours of an occupied position concurrent with the transfer of the incumbent to retain that employee's hours.

Apparently, CSEA erroneously assumed that a request to negotiate regarding this issue would be futile. However, the District's final decision regarding Sarkela's position had not been made when the October 21, 1992 meeting occurred. Thus, the failure of CSEA to demand bargaining precludes a finding that the District refused to negotiate this matter.

This conclusion is underscored by the evidence of Smith's October 23, 1992 letter to Hillix, again protesting the District's reduction in hours of another vacant unit position and demanding that the District cease and desist from such action. However, no mention was made in this letter that the union was protesting or demanding to negotiate with the District regarding Sarkela's position.

C. Contractual Waiver

The District's argument of contractual waiver is based upon its interpretation of the management rights language found in Article IV of the CBA. (See text, at p. 11.) The District insists that the terms in that provision

> . . . the work to be performed . . . [is] solely and exclusively the responsibility of the District . . . .

should be read as giving the District sole authority to determine the number of hours of daily service which will be required for a given vacant position that it intends to fill. The District equates its interpretation of this language with PERB precedent holding that decisions about staffing levels are matters left to management prerogative since they reflect managerial decisions regarding the level of service to be provided by the employer. This argument is not convincing.

The management rights language in Article IV does not specifically address unit employees' hours of work. Nor, in the absence of evidence regarding the bargaining history of this provision, can it be concluded that the general provisions of this clause authorize the District to unilaterally adjust hours of vacant positions to suit its operational needs. Additionally, Article V, which covers unit members' hours of work, does not address the subject.

Federal courts and the National Labor Relations Board have traditionally said that "only clear and unmistakable language will warrant a conclusion that waiver was warranted." (See NLRB v. Auto Crane Co. (10th Cir. 1976) 536 F.2d 310 [92 LRRM 2363, 2364] and cases cited therein.) PERB will find a waiver of bargaining rights only where the employer shows either clear and unmistakable language or demonstrative behavior amounting to waiver. (Amador; Placentia Unified School District (1986) PERB Decision No. 595.) The burden is thus on the District to show that CSEA clearly and unmistakably waived its rights to negotiate

the decision to reduce the number of hours assigned to vacant bargaining unit positions.

The District has only pointed to the management rights clause. A generally-worded management rights clause will not be construed as a waiver of statutory bargaining rights. (See Dubuque Packing Co. (1991) 303 NLRB No. 66 [137 LRRM 1185].) It is thus concluded that the language of Article IV does not constitute a "clear and unmistakable" waiver of CSEA's right to bargain the subject at issue here.

CONCLUSION

For all the reasons discussed above, it has been concluded that although the District took unilateral action upon several matters within the scope of representation when it reduced the number of hours assigned to vacant unit positions, such actions did not alter the "status quo" when evaluated against a regular and consistent past pattern of similar reductions in hours. It has also been concluded that although the District transferred an incumbent to another position concurrent with the reduction in hours of the employee's vacated position, CSEA waived its right to bargain these actions by failing to make a demand to negotiate.

Therefore, it is determined that the District has not violated the EERA by taking unilateral action upon matters within the scope of representation, namely, a reduction in the number of hours assigned to vacant bargaining unit positions. Thus, the charge and its accompanying complaint must be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is ordered that the complaint and the underlying unfair practice charge are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

W. JEAN THOMAS
Administrative Law Judge