

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES	)	
ASSOCIATION AND ITS NORRIS	)	
CHAPTER NO. 824,	)	
	)	
Charging Party,	)	Case No. LA-CE-3292
	)	
v.	)	PERB Decision No. 1090
	)	
NORRIS SCHOOL DISTRICT,	)	March 16, 1995
	)	
Respondent.	)	
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Appearances: California School Employees Association by Madalyn J. Frazzini, Attorney, for California. School Employees Association and its Norris Chapter No. 824; Schools Legal Service by Phil Lancaster, Bargaining Specialist, for Norris School District.

Before Blair, Chair; Carlyle and Johnson, Members.

DECISION

BLAIR, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Norris School District (District) to the proposed decision (attached hereto) of a PERB administrative law judge (ALJ). In her decision, the ALJ concluded that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)<sup>1</sup> when it unilaterally (1) transferred work from

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

- It shall be unlawful for a public school employer to do any of the following:
- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

existing unit classifications to a newly created classification, and (2) established the salary assigned to the new classification.

The Board has reviewed the entire record in this case, including the proposed decision, the stipulated statement of facts and exhibits, the District's statement of exceptions and the response thereto filed by the California School Employees Association and its Norris Chapter No. 824 (CSEA). The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and, therefore, adopts them as the decision of the Board itself.

#### DISTRICT'S EXCEPTIONS

On appeal, the District contends that it did in fact negotiate the duties and salary level with CSEA concerning the groundskeeper/custodian classification. The District states that the parties entered into a memorandum of understanding (MOU) concerning the matter on April 25, 1991, nearly 18 months prior to the earliest alleged violation of its duty to bargain this issue. The MOU attached to the District's appeal states:

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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.

CSEA and the Norris School District agree to the posting of a position which combines the two job categories "Groundskeeper" and "Custodian" (see attached).<sup>[2]</sup> The rate of pay will be based on the hourly rate for each job category and the number of hours assigned within each job category.

The District asserts that the existence of this MOU was "unknown to the representative of the District during the proceedings before the ALJ . . . ." In light of its claim that the parties have already negotiated this matter, the District asks the Board to reverse the ALJ's decision and deny the remedy.

The District also contends the ALJ erred in finding that all classified positions in the bargaining unit are eight-hour positions. The District attaches a memo to its appeal which proposes to demonstrate that the District employs numerous unit members in part-time positions.

#### CSEA'S RESPONSE

CSEA states that the MOU referenced by the District was not made part of the stipulated record. CSEA contends that the District is essentially asking the Board to reopen the record. CSEA asserts that the District has made no showing that it exercised reasonable diligence in attempting to discover and produce these documents at the time it entered into the joint stipulation of facts. CSEA states that the documents submitted

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<sup>2</sup>The attachment describes the position's duties and sets the salary.

by the District "lack authentication" and objects to their consideration by the Board.<sup>3</sup>

DISCUSSION

PERB Regulation 32320(a)<sup>4</sup> states, in pertinent part:

- (a) The Board itself may:
  - (1) Issue a decision based upon the record of hearing, or
  - (2) Affirm, modify or reverse the proposed decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper.

The Board has held that the standard applied to requests to reopen the record under PERB Regulation 32320 is the same standard as that governing requests for reconsideration of a decision by the Board itself.<sup>5</sup> The Board will reopen the record on the basis of newly discovered evidence that was not previously available and could not have been discovered with the exercise of reasonable diligence. (San Mateo Community College District (1985) PERB Decision No. 543.) The party requesting that the

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<sup>3</sup>In light of the Board's ruling in this case, the Board finds it unnecessary to address the remainder of CSEA's arguments on appeal.

<sup>4</sup>PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

<sup>5</sup>PERB Regulation 32410(a) states, in pertinent part:

The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

record be reopened must present a satisfactory explanation for the failure to produce the evidence at an earlier time. (San Joaquin Delta Community College District (1983) PERB Decision No. 261b; Regents of the University of California (Yeary) (1987) PERB Decision No. 615-H.)

In California State Employees Association (Garcia) (1993) PERB Decision No. 1014a-S, the Board considered a reconsideration request in which the union presented new evidence. The union admitted that the evidence it submitted was located within its own files. The Board concluded that since the union had access to the documents when the case was before the Board agent, the union failed to demonstrate that the evidence could not have been discovered with the exercise of reasonable diligence.

Similarly, in the present case, the documents the District asks the Board to consider were submitted by the District attached to its appeal. The District provides no satisfactory explanation why these documents were not previously available and could not have been easily discovered while this case was before the ALJ. If the Board were to reopen the record under these circumstances it would reward a party's neglect in presenting its case and result in numerous instances where new evidence is presented on appeal to the Board itself. Accordingly, the Board rejects the evidence offered by the District and declines to reopen the record.

The District also claims that the remedy requiring the parties to negotiate and the make whole order is inappropriate

because the parties have already reached agreement on this issue. If in fact the parties have previously negotiated the salary and duties assigned to the groundskeeper/custodian classification, this matter can best be resolved through PERB's compliance proceedings.

ORDER

Based upon the findings of fact, conclusions of law and the entire record in this case, it is found that the Norris School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5 (c) by unilaterally (1) transferring work from existing unit classifications to a newly-created bargaining unit classification, and (2) setting the salary for the new classification. By the same conduct, it has been found that the District also violated EERA section 3543.5(a) and (b).

Pursuant to EERA section 3541.5(c), it is hereby ordered that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to negotiate in good faith with the California School Employees Association and its Norris Chapter No. 824 (CSEA), the exclusive representative of the District's classified employees, by taking unilateral action concerning employees' salary and other terms and conditions of employment within the scope of representation, including the transfer of work from one classification to another;

2. Denying to CSEA rights guaranteed by EERA, including the right to represent its members; and

3. Interfering with employees in the exercise of their rights guaranteed by EERA, including the right to be represented by their chosen representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Upon request, immediately meet and negotiate with CSEA regarding (1) the transfer of work from one classification to another, and (2) all matters related to salaries, including the salary range to which the new classification of groundskeeper/custodian is assigned.

2. Unless the parties reach a contrary agreement, make employees in the groundskeeper/custodian classification whole for any difference between the salary agreed upon by the parties and that unilaterally established by the District, with interest at the rate of seven (7) percent per annum for the period beginning on the date of the unilateral action (October 15, 1992) until the date CSEA and the District reach agreement.

3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to

insure that the Notice is not reduced in size, defaced, altered or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the Director's instructions. All reports to the Regional Director shall be served concurrently on the charging party herein.

Members Carlyle and Johnson joined in this Decision.



**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California**

After a hearing in Unfair Practice Case No. LA-CE-3292, California School Employees Association and its Norris Chapter No. 824 v. Norris School District, in which all parties had the right to participate, it has been found that the Norris School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c). The District violated EERA by unilaterally (1) transferring work from existing unit classifications to the newly-created classification of groundskeeper/custodian, and (2) establishing the salary assigned to this classification. By the same conduct, it has been found that the District also violated EERA section 3543.5(a) and (b).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to negotiate in good faith with the California School Employees Association and its Norris Chapter No. 824 (CSEA), the exclusive representative of the District's classified employees, by taking unilateral action concerning employees' salary and other terms and conditions of employment within the scope of representation, including the transfer of work from one classification to another;

2. Denying to CSEA rights guaranteed by EERA, including the right to represent its members; and

3. Interfering with employees in the exercise of their rights guaranteed by EERA, including the right to be represented by their chosen representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Upon request, immediately meet and negotiate with CSEA regarding (1) the transfer of work from one classification to another, and (2) all matters related to salaries, including the salary range to which the new classification of groundskeeper/custodian is assigned.

2. Unless the parties reach a contrary agreement, make employees in the groundskeeper/custodian classification whole for any difference between the salary agreed upon by the parties and that unilaterally established by the District, with interest at the rate of seven (7) percent per annum for the period beginning on the date of the unilateral action (October 15, 1992) until the date CSEA and the District reach agreement.

Dated: \_\_\_\_\_ NORRIS SCHOOL DISTRICT

By: \_\_\_\_\_

Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.



STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES	)	
ASSOCIATION AND ITS NORRIS	)	
CHAPTER #824,	)	
	)	
Charging Party,	)	Unfair Practice
	)	Case No. LA-CE-3292
v.	)	
	)	PROPOSED DECISION
NORRIS SCHOOL DISTRICT,	)	(6/30/94)
	)	
Respondent.	)	
	)	

Appearances: Pat Sproul, Field Representative, for California School Employees Association and its Norris Chapter #824; Fekete, Carton, Hartsell, Grass, Ronich, Peters and Inman, by Phil Lancaster, Bargaining Specialist, for Norris School District.

Before W. Jean Thomas, Administrative Law Judge.

INTRODUCTION

An exclusive representative of a classified bargaining unit alleges that the employer unilaterally reduced the hours of a vacant eight-hour unit position and replaced it with two five and one-half hour positions without providing the representative with (1) prior notice, (2) an opportunity to negotiate the decision, or (3) the effects of such changes.

The employer denies that it reduced the hours of the position in question. It insists that the vacated position still exists, but remains unfilled. Instead, the employer maintains that it declared the existence of vacancies in two positions of a different classification, posted a job notice and filled both vacancies in accord with applicable provisions of the parties' collective bargaining agreement (CBA).

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

PROCEDURAL HISTORY

On March 15, 1993, the California School Employees Association and its Norris Chapter #824 (CSEA) filed an unfair practice charge against the Norris School District (District) alleging unlawful conduct in violation of the Educational Employment Relations Act (EERA or Act).<sup>1</sup>

The charge alleged that on or about October 15, 1992, the District unilaterally reduced the hours of a vacant eight-hour maintenance/groundskeeper position and replaced it with two groundskeeper/custodian positions of five-and-one-half hours each. The charge further alleged that on or about October 28, 1992, February 7, 1993, and March 1, 1993, the District refused to negotiate the decision to change the hours of the unit position in question or the effects of such change in violation of EERA.

Based on these allegations, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on May 18, 1993, alleging that the District's conduct described above, was in violation of section 3543.5(a), (b) , and (c).<sup>1</sup>

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

<sup>2</sup>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:

The District answered the complaint on May 24, 1993, denying all material allegations of unlawful conduct. The District also raised a number of affirmative defenses.

At an informal conference held on July 20, 1993, the dispute was not resolved.

After the case was noticed for formal hearing, the parties agreed, on September 29, 1993, that there were no material factual disputes and requested to file declarations setting forth their respective positions in lieu of a formal hearing. This request was granted by the undersigned on October 13, 1993, provided that the parties agree to submit stipulations of fact and relevant joint exhibits prior to submitting post-hearing briefs.

The stipulations of fact and exhibits were filed on December 1, 1993. On December 22, 1993, CSEA filed a post-hearing brief and the District filed a declaration in support of

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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.

its position. Thereafter the case was submitted for proposed decision.

FINDINGS OF FACT

Most of the relevant factual matters in this case are not disputed. The following findings of facts are based on the parties' stipulations, which are set forth verbatim as follows:

1. California School Employees Association Chapter #824 is the employee organization within the meaning of Government Code section 3540.1 (d) and is the exclusive representative.
2. The Norris School District is the employer in this matter within the meaning of Government Code section 3540.1 (k).
3. On or about September 20, 1992 an 8-hour per day Maintenance/Groundskeeper position was vacated due to the resignation of James White. Mr. White received a full Health and Welfare Benefit package under the applicable provisions of the 1991-93 Collective Bargaining Agreement.
4. The vacated position of Maintenance/Groundskeeper formerly held by Mr. White was not filled.
5. On or about October 15, 1992 the District posted two 5 1/2 hour per day vacancies in the job classification Groundskeeper/Custodian. The posted vacancies were subsequently filled.
6. The District's actions were consistent with the provisions of Article XI, Vacancy, section A of the 1991-93 Collective Bargaining Agreement, which states:

"A. When the District determines that a vacancy exists and that the vacancy shall be filled, notice shall be posted for five workdays in the District Office and at each job site."

The District declared vacancies in the positions of Groundskeeper/Custodian and followed the Collective Bargaining Agreement procedures to fill the positions.

7. The 1991-93 Collective Bargaining Agreement provides that the final step in the grievance procedure is advisory arbitration. California School Employees Association has not filed a grievance regarding this matter.
8. On or about December 16, 1992 representatives for California School Employees Association and the District met in an attempt to resolve the matter.
9. The District has not subcontracted or transferred the work of Maintenance/Groundskeeper outside of the bargaining unit.
10. The District has not reduced the hours of any active employee, nor has it taken action to lay off any employee. The position was voluntarily vacated. The net effect of the District's actions has increased the number of bargaining unit work hours.

The following findings of fact are based on evidence presented in the joint exhibits submitted with the stipulations of fact. These documents include the parties' CBA, in effect from July 1, 1990, through June 30, 1993.<sup>3</sup>

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<sup>3</sup>It is noted that Article XIV (Duration), section A, states that after June 30, 1993, the CBA will "... continue in effect until a successor agreement is negotiated."

On September 30, 1992, CSEA Field Representative Bob Baker sent a letter to the District stating that CSEA had heard that the District was considering replacing the eight-hour maintenance/groundskeeper position vacated by James White (White) with two five and one-half hour positions. Therefore, CSEA was demanding to negotiate the (1) decision and effects of reduction in hours of the vacant position, or (2) the effects of the decision not to fill either the maintenance/groundskeeper position or another vacant position in the grounds area.

The District responded to the letter on October 28, 1992, refusing to negotiate either matter. The letter further stated that the procedures for filling vacancies was already negotiated as provided for in Article XI (Vacancy), section A, of the CBA.

On November 13, 1992, CSEA sent another letter to the District renewing its demand to negotiate (1) the decision and effect of the reduction in hours of the vacated maintenance/groundskeeper position, (2) the effects of the decision not to fill two unit positions, and (3) the wage placement of the groundskeeper/custodian classification.<sup>4</sup> CSEA's letter stated that it understood one of the two groundskeeper/custodian positions had been filled. This letter also accused the District of assigning hours to the positions that fell below the contractual eligibility level for health and welfare benefits.

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<sup>4</sup>The October 15, 1992, job opening notice listed the salary for the groundskeeper/custodian position as \$8.44 per hour.

Appendix "A" of the CBA is entitled "Regular Classified Employees 1991-92 Salary Schedule." This schedule lists all classifications in the bargaining unit by job title as of July 1, 1991. Under the occupational grouping called maintenance, operations and transportation (MOT) services, it lists, among others, the classifications of maintenance/groundskeeper, groundskeeper, and custodian, but the classification of groundskeeper/custodian is not listed. Under the "hours/days" column, all of the aforementioned positions are shown as eight-hour positions.

At Step I of this schedule, the hourly rate for the maintenance/groundskeeper was \$9.09; for the groundskeeper \$8.48; and \$8.33 for the custodian.

Article II (Recognition) of the CBA contains the following language regarding the placement of new positions in the bargaining unit:

The District recognizes CSEA as the Exclusive Representative for all classified employees, excluding confidential, management and supervisory employees, as recognized by the Public Employment Relations Board ("PERB"). The District shall notify CSEA of any newly created classified position, including the proposed salary range and job duties. Any newly created classified position (excluding supervisory, management and confidential positions) shall be placed in the bargaining unit and shall be subject to the terms of the Agreement. Disputed cases shall be submitted to PERB for resolution.

Article V (Insurance Programs) contains provisions related to health and welfare benefits for members of the bargaining unit. Section B(3) of that article reads as follows:

3. Effective July 1, 1990, employees must have a workday of at least six hours in order to be eligible for pro-rated health and welfare benefits.

Following the parties' unsuccessful attempt on December 16, 1992, to resolve this matter, CSEA sent its final letter to the District on February 15, 1993. This letter protested the District's failure "to meet and negotiate in good faith over mandatory subjects of bargaining." It is not known whether the District responded to this letter.

#### ISSUES

1. Whether the District took unilateral actions on matters within the scope of representation?
2. If so, did such actions violate section 3543.5(a), (b) and (c) of EERA?

#### DISCUSSION

##### I. Scope of Representation Issues

Although the parties are in substantial agreement about the relevant facts of this case, they disagree in their characterizations of the District's actions as they pertain to matters that fall within the statutorily defined scope of representation.

A subject is not negotiable if it is not encompassed by the language of section 3543.2<sup>5</sup> which sets forth the "scope of representation" under EERA.

In addition to the topics listed in section 3543.2, the Board has adopted a test for determining the negotiability of subjects not expressly enumerated in section 3543.2. In Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim)<sup>6</sup>, the Board determined that a subject will be deemed 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

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<sup>5</sup>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, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22515 of the Education Code, . . .

<sup>6</sup>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].

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.

These principles concerning the scope of representation will be applied to the District's actions at issue here to determine whether they concerned negotiable subjects.

A. Reduction in Hours of the Maintenance/Groundskeeper Position

CSEA asserts that the District reduced the hours of the vacant eight-hour maintenance/groundskeeper position when it subsequently created the two groundskeeper/custodian positions at lesser hours.

The District insists that it did not reduce the hours of that position, and that it remains intact as a vacant position.

In a number of decisions, PERB has held that the level of services that an employer decides to provide is nonnegotiable. 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, p. 3; Davis Joint Unified School District (1984) PERB Decision No. 393, pp. 26-27.) Thus, if, as the District claims, it left the existing maintenance/groundskeeper position vacant, this decision was within its exercise of managerial prerogative. However, this action did not relieve the District of the duty to negotiate the effects of this decision on bargaining unit members

if it impacted matters within the scope of representation.

(Anaheim; Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.)

CSEA has presented no evidence to support its claim that the District actually reduced the hours of the vacant maintenance/groundskeeper position when the two groundskeeper/custodian positions were created. CSEA apparently believes that since the maintenance/groundskeeper classification consisted of only one position, which was occupied by White until he resigned in September 1992, the District must have decided to reduce the hours of that position in order to accomplish its subsequent action.

However, it is noted that there is another groundskeeper position in the unit that was also vacant at the time of White's resignation. One could conjecture that the District decided to reduce the hours of one or both vacant grounds positions when it decided to create two new positions. But there is no evidence which establishes that, in fact, the District governing board or its administration took any action(s) to that effect. The October 15, 1992, job opening notice is the only evidence of an "official" District action and it makes no express reference to the maintenance/groundskeeper position as a predecessor position.

Nor is there evidence that the District decided to abolish the maintenance/groundskeeper classification. In Alum Rock Union Elementary School District (1983) PERB Decision No. 322 (Alum Rock), the Board determined that the decision "to abolish a

classification and cease engaging in the activity previously-performed by employees in that classification" is a managerial prerogative. However, the effects on negotiable subjects of a decision to abolish a classification would be a proper subject of bargaining. (Healdsburg Union High School District, et al. (1984) PERB Decision No. 375 (Healdsburg).)

Thus, if the District abolished the maintenance/groundskeeper classification/position vacated by White with new positions of lesser hours, at a minimum, the District had a duty to bargain with CSEA over the effects of that decision on matters within scope. (Alum Rock and Healdsburg.)

Absent evidence to support a conclusion that the District either reduced the hours of an existing classification/position, or abolished the classification, there is no basis for finding that the District took action concerning the maintenance /groundskeeper position in October 1992 that encompassed matters within the scope of representation.

B. Creation of Groundskeeper/Custodian Positions

CSEA maintains that the District consolidated the duties of two existing classifications to create a new job classification that was nonexistent prior to October 1992.

Although the District claims that it "declared the existence of two vacancies" in the groundskeeper/custodian position, it has not explained how these positions came into existence. There is no proof that the classification was in the unit prior to White's resignation in September 1992.

The only plausible explanation for this "fiat" is that the District decided to create a new classification/position to meet its operational needs. Thus, for purposes of determining whether or not the District took actions on a matter within the scope of representation, it is concluded that the District declared the two positions vacant by creating a new classification for the positions.

The District further determined that the number of hours allotted to these positions were to be less than those assigned to the existing vacant grounds positions. The net effect of this action, it contends, was to increase the number of bargaining unit hours.

The creation of classifications is not specifically enumerated as a term and condition of employment within the scope of representation. However, in Alum Rock, the Board applied the Anaheim test to this subject and concluded that

. . . where management seeks to create a new classification to perform a function not previously performed . . . it need not negotiate its decision. [Fn. omitted.]

However, . . . those aspects of the creation . . . of a classification which merely transfer existing functions and duties from one classification to another involve no overriding managerial prerogative. Such changes amount to transfers of work between employees or groupings of employees, similar to decisions to subcontract work or to transfer work out of the bargaining unit. [Fn. omitted.] They do not represent a decision to undertake a new function or to eliminate an existing function. Thus, no decision on what functions are essential to management's mission is involved. The same functions are still being performed; an

existing classification is merely replaced by a new classification to do the same work under similar conditions of employment. [Citation omitted.]

. . . Thus, under Anaheim, the decision to transfer duties from one classification to another is negotiable.

Here, the District has not rebutted CSEA's assertions that it transferred duties from the existing classifications of maintenance/groundskeeper and custodian to the "newly-created" classification of groundskeeper/custodian. Although the duties of the maintenance/groundskeeper and custodian positions were not included in the documentation submitted by the parties, the October 15, 1992, job opening notice did include an extensive list of duties to be performed by incumbents in the position. According to the "job description" set forth on the notice, the position is required to

. . . operate and maintain a variety of power ground equipment; . . . perform groundskeeping maintenance and gardening functions; . . . [and] maintain an assigned facility, group of buildings or office space in a clean orderly and secure manner . . .

It is not known which, if any, of the former maintenance/groundskeeper duties ceased to be performed or which, if any, of the duties listed for the new position represent functions not previously performed by employees in the pre-existing classifications. However, since the custodian class still exists and the new class includes custodian and grounds duties, the "newly-created" classification undoubtedly represents the transfer of existing duties to a retitled classification. Also,

it is noted that the new positions report to the same MOT supervisor as the existing classifications. Thus, it appears that the same functions are being performed, the same work is being done under similar conditions of employment, but by employees under a new job title.

Given this determination, it is concluded that the District was obligated to negotiate the decision to transfer work from one classification to another. (See Alum Rock, pp. 12-13.)

### C. Assignment of Wage Rate

Wages are clearly an enumerated subject of bargaining. The California Supreme Court has held that the authority of an employer to prescribe a classification does not encompass the power to set the particular salary for such classification.

(Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168, 187 [172 Cal.Rptr. 487].) Further, salary adjustments for individual job classifications within the same occupational group are negotiable. (Sonoma County Board of Education v. PERB (1980) 102 Cal.App.3d 689, 697 [163 Cal.Rptr. 464]; Alum Rock.) Therefore, the District was obligated to negotiate with CSEA over the assignment of a salary range to the new classification of groundskeeper/custodian. (See Alum Rock, p. 16.)

## II. Unilateral Change Allegations

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 (1982) PERB Decision No. 196; Pajaro Valley Unified School District (1978) PERB Decision No. 51; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

Absent a valid defense, unilateral actions taken by an employer without providing the exclusive representative with prior notice and an opportunity to negotiate the proposed changes in matters within the scope of representation constitute 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).)

In summary, on the facts presented here, it has been found that the District was obligated to negotiate regarding: (1) the transfer of unit work from two existing classifications to a newly-created classification; and (2) matters related to salary, including the salary range to which the newly-created classification was assigned. Therefore, such actions amounted to

a change in policy concerning matters within the scope of representation.

It is further undisputed that such action was taken without giving CSEA prior notice or an opportunity to bargain over the changes. CSEA made a timely demand, on or about September 30, 1992, to negotiate what it believed at the time was a decision to replace the eight-hour maintenance/groundskeeper position with two five and one-half hour positions. CSEA further demanded on November 13, 1992, to negotiate both the decision and the effects of the rumored reduction in hours of the vacant positions and the effects of the decision not to fill the two vacant positions in the grounds area. The District refused CSEA's demand and unilaterally adopted and implemented its decision to fill two positions in the newly-created classification on or about October 15, 1992.<sup>7</sup>

The District also unilaterally determined the salary for the newly-created groundskeeper/custodian classification, despite CSEA's request to negotiate the wage placement of this classification. This conduct not only breached the parties' written agreement, which provided for notice to CSEA of newly-created classifications, and undoubtedly the opportunity to meet and negotiate over the subject of salary and job duties, but apparently was a change from the parties' understanding that such

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<sup>7</sup>CSEA does not challenge the right or the procedures utilized by the District to fill the two contractual groundskeeper/custodian positions.

negotiations would take place prior to the placement of a newly-created position in the bargaining unit.

These actions by the District were not merely an isolated breach of the contract, but amounted to a change in policy having a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment. Although the parties met in an attempt to resolve their dispute in December 1992, there was no agreement to submit the matters to the negotiating process.

Absent a valid defense, the District's unilateral change in matters within the scope of representation without prior notification CSEA and an opportunity to bargain the proposed changes amounted to a violation of section 3543.5(c). (San Mateo.)

### III. District Defenses

The District argues in its declaration that the management rights clause found in Article XVI, section C, of the CBA spells out its reserved right "to determine the workforce."

Even accepting the District's assertion of managerial prerogative, its actions cannot be excused on the basis of contractual waiver.

PERB has adopted the standard for waiver used by the National Labor Relations Board (NLRB), which requires that a waiver of statutory rights be "clear and unmistakable." A waiver will not be lightly inferred. (Amador Valley Joint Union High

School District (1978) PERB Decision No. 74; Placentia Unified School District (1986) PERB Decision No. 595.)

In resolving whether a waiver of a course of action or bargaining rights was "clear and unmistakable," express contractual terms as well as evidence of negotiating history-reflecting a conscious abandonment of the right to bargain over a particular subject can be examined. (Palo Verde Unified School District (1983) PERB Decision No. 321.)

In this case the District is relying on broad management rights language which does not expressly address the subject at issue. 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].) Since the language of section C does not cover the subjects of unit classification or the District's right to set salaries for such classifications, it is found that there is no "clear and unmistakable" contractual waiver of CSEA's statutory bargaining rights.

#### CONCLUSIONS

Based upon the entire record in this case, it has been found that the District breached its obligation under EERA to negotiate with CSEA when it unilaterally (1) transferred work from existing unit classifications to a newly-created classification, and (2) established the salary assigned to the new classification.

As a result of this conduct, it is found that the District violated section 3543.5(c). This conduct also interfered with

CSEA's right to represent its members in their employment relations with the District in violation of section 3543.5(b). Additionally, the same conduct interfered with individual unit members' rights to be represented by their chosen representative in their employment relations with the District in violation of section 3543.5(a).

#### REMEDY

Section 3541.5(c) gives PERB the power to issue a decision and order directing the offending party to cease and desist from an unfair practice and to take such affirmative action as will effectuate the policies of EERA.

CSEA seeks an order that the District be required to cease and desist from its unlawful conduct and make affected unit members whole for any loss of wages and benefits as a result thereof.

In this case it has been found that the District breached its obligation to negotiate in good faith with CSEA when it unilaterally (1) transferred work from existing unit classifications to a newly-created classification, and (2) established the salary assigned to the new classification. This conduct violated section 3543.5(c). This action also denied to CSEA its right to represent unit members in violation of section 3543.5(b). It also interfered with employees' rights to representation in violation of section 3543.5(a). It is thus appropriate to order the District to cease and desist from the foregoing, as well as any like or related activity.

PERB also has the power to order restoration of the status quo ante in order ensure that the employer does not benefit from its wrongful conduct. CSEA has not requested restoration of the status quo ante and thus it will not be ordered.

However, it is appropriate to order that the District, upon request, meet and negotiate in good faith with CSEA about the transfer of duties from the pre-existing grounds area classifications to the newly-created groundskeeper/custodian classification. Such negotiations should also include the salary and any other benefits to be assigned to this classification.

However, to ensure that meaningful bargaining will occur under conditions essentially similar to those that would have existed had the District bargained at the time the Act required it to do so, unless the parties reach a contrary agreement, the District is ordered to make employees in the groundskeeper/custodian classification whole for any difference between the salary the parties agree upon and that unilaterally established by the District, with interest at the rate of seven (7) percent per annum from the date of the unilateral action (October 15, 1992) until the date CSEA and the District reach agreement.

It is also appropriate that the District post a notice incorporating the terms of the order herein. Posting of a such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, has been ordered to cease and desist from this activity, and will comply with the order. It effectuates the

purposes of EERA that employees be informed of the resolution of a controversy, and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69; Davis Unified School District, et al., supra. PERB Decision No. 116.)

#### PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Norris School District (District) violated Government Code section 3543.5(c) of the Educational Employment Relations Act (EERA) by unilaterally: (1) transferring work from existing unit classifications to a newly-created bargaining unit classification, and (2) setting the salary for the new classification. By the same conduct, it has been found that the District also violated EERA section 3543.5(b) and (a).

Pursuant to section 3541.5(b) it is hereby ordered that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to negotiate in good faith with the California School Employees Association and its Norris Chapter #824 (CSEA), the exclusive representative of the District's classified employees, by taking unilateral action concerning employees' salary, and other terms and conditions of employment within the scope of representation, including the transfer of work from one classification to another;

2. By the same conduct, denying to CSEA rights guaranteed by EERA, including the right to represent its members; and

3. Further, by the same conduct, interfering with employees in the exercise of their rights guaranteed by EERA, including the right to be represented by their chosen representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Upon request, immediately meet and negotiate with CSEA regarding (1) the transfer of work from one classification to another, and (2) all matters related to salaries, including the salary range to which the new classification of groundskeeper/custodian is assigned.

2. Unless the parties reach a contrary agreement, make employees in the groundskeeper/custodian classification whole for any difference between the salary agreed upon by the parties and that unilaterally established by the District, with interest at the rate of seven (7) percent per annum for the period beginning on the date of the unilateral action (October 15, 1992) until the date CSEA and the District reach agreement.

3. Within ten (10) workdays of a final decision in this matter, post at all school sites and all work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District indicating that the

District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered by any other material.

4. Within thirty (30) workdays from service of a final decision, submit written notification of the action taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the Regional Director's instruction. All reports to the Regional Director shall be served concurrently on the charging party herein.

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. 323 00.) 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.)

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W. JEAN THOMAS  
Administrative Law Judge