STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,	)	
Charging Party,	)	Case No. LA-CE-3821
v.	)	PERB Decision No. 1287
ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT,	)	September 25, 1998
Respondent.	)	

Appearance: Lozano, Smith, Smith, Woliver & Behrens by Christine M. Wagner, Attorney, for Antelope Valley Union High School District.

Before Caffrey, Chairman; Amador and Jackson, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Antelope Valley Union High School District (District) to a proposed decision (attached) by a PERB administrative law judge (ALJ). In the proposed decision, the ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally changing

[1]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:

> 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 discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights

promotional interview policies. The ALJ dismissed allegations by the California School Employees Association (CSEA) that the District unilaterally changed disciplinary procedures and grievance policies.

The Board has reviewed the entire record in this case including the unfair practice charge, the ALJ's proposed decision and the District's exceptions. The Board affirms the ALJ's decision in part, and reverses it in part, in accordance with the following discussion.

DISCUSSION

The Board finds the ALJ's findings of fact to be free of prejudicial error and hereby adopts them as the findings of the Board itself.

The Board finds the ALJ's conclusions of law concerning the alleged changes in disciplinary procedures and grievance policies to be free of prejudicial error and hereby adopts them as the decision of the Board itself. CSEA offered no exceptions to the ALJ's dismissal of its charge relating to these allegations.

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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.

The District excepts to the ALJ's finding that promotional interview policies were unilaterally changed by the District in violation of the EERA.

To prevail in a unilateral change case, the charging party must establish that the employer, without providing the exclusive representative with notice or the opportunity to bargain, breached or altered the parties' written agreement or established past practice concerning a matter within the scope of representation, and that the change had a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members. (Pajaro Valley Unified School District (1978) PERB Decision No. 51 at pp. 5-6 (Pajaro Valley); Grant Joint Union High School District (1982) PERB Decision No. 196 at p. 10.)

As noted by the ALJ, the District and CSEA were parties to a collective bargaining agreement (CBA) with a term of January 1, 1994 through December 31, 1996. At the time of the alleged unilateral change in promotional interview policy in early 1997, the parties' successor CBA had not gone into effect. It is a fundamental rule of labor law that certain terms and conditions of employment must remain in effect following the expiration of a CBA during the parties' negotiations over a successor agreement. (State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S at pp. 8-9; Pajaro Valley at p. 6; San Mateo County Community College District (1979) PERB Decision

No. 94 at p. 17; California State Employees' Assn. v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923, 936 [59 Cal.Rptr.2d 488].) Therefore, provisions of the parties' 1994-96 CBA remained in effect in early 1997 at the time of the disputed conduct in this case.

However, it is also clear that a waiver of the statutory right to bargain, such as reflected in a zipper clause within a CBA, does not remain in effect beyond the negotiated term of the CBA absent the expressed agreement of the parties. (Rowland Unified School District (1994) PERB Decision No. 1053 at p. 10.) Therefore, while provisions of the parties' 1994-96 CBA remained in effect subsequent to contract expiration in early 1997, the District and CSEA were obligated to bargain over negotiable subjects within the context of their successor agreement negotiations. The record reflects that the parties were engaged in that process in early 1997.

Among the provisions of the parties' 1994-96 CBA, which remained in effect in early 1997, is Article XVII concerning District Rights. It states, in pertinent part:

> 17.0 All matters not specifically enumerated as within the scope of negotiations in Government Code Section 3543.2 are reserved to the District. It is agreed that such reserved rights include, but are not limited to, the exclusive right and power to determine, implement, supplement, change, modify, or discontinue, in whole or in part, temporarily or permanently, any of the following:
>
> 17.6 The selection, classification, direction, promotion, demotion, discipline,

> and termination of all personnel of the District. . . .

The District asserts that this provision gives it the clear management right to change promotional interview policy.

The ALJ deals with this assertion briefly in footnote 5 at p. 18 of the proposed decision, which states in part:

> . . . although Article XVII of the agreement generally reserved District rights as to the 'promotion . . . of all personnel of the District,' there was no specific language in the agreement covering interview procedures. (Cf. Solano County Community College District (1982) PERB Decision No. 219.)

In Solano County Community College District (1982) PERB Decision No. 219 (Solano), a case which was decided in 1982, the Board concluded that a contractual provision giving the employer the right to direct, assign and transfer employees and determine staffing patterns did not allow the employer to unilaterally transfer work from the classified bargaining unit to the certificated bargaining unit. (Ibid, at pp. 10-11.) However, Solano is distinguishable from the instant case in that the disputed conduct, the transfer of bargaining unit work, was clearly not addressed in the contractual provision. Here, the disputed conduct involves the selection and promotion of District personnel, a subject clearly referenced in Article XVII of the parties's CBA. The issue in this case is whether that CBA language allows the specific action taken by the District.

The California Civil Code provides guidance in the interpretation of contractual language. Civil Code section 1638 states:

> INTENTION TO BE ASCERTAINED FROM LANGUAGE. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

Additionally, Civil Code section 1641 states:

> EFFECT TO BE GIVEN TO EVERY PART OF CONTRACT. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.

The Board follows this guidance in unilateral change cases in assessing whether the parties' written agreement has been breached, or alternatively allows the employer to take the action which forms the basis of the dispute.

The Board recently considered a case involving the issue of whether a broad employer rights provision of a CBA allowed the employer to take specific unilateral action. In Barstow Unified School District (1996) PERB Decision No. 1138 (Barstow) at p. 16, the Board determined that a provision giving the employer the authority to "contract out work" allowed the employer to contract out pupil transportation services, even though the provision was general and did not refer to any specific service to be contracted out. In Barstow, the Board reversed the proposed decision of the ALJ which held that the CBA language did not allow the action taken by the employer.

The instant case is similar to Barstow in that the Board must decide whether the broadly worded portion of CBA Article XVII concerning selection and promotion of personnel allows the District to make the change to its promotional interview policy which forms the basis of this dispute.

CBA Article XVII indicates that the parties have agreed that the District has "the exclusive right and power" to change or modify the "selection" and "promotion" of "all personnel of the District." The District may make changes "in whole or in part, temporarily or permanently." This language clearly and explicitly gives the District very broad authority over selection and promotion of District personnel. To find that this language does not allow the District to make a specific modification, such as a change in the number of promotional candidates to be interviewed in personnel selection, would be to ignore its clear and explicit meaning. Further, such an interpretation would essentially render the language meaningless and ineffective, since presumably no specific change in personnel selection or promotion could occur pursuant to this language. In accordance with Civil Code section 1641, the Board avoids an interpretation of contract language which leaves a provision without effect. (Riverside Community College District (1992) PERB Order No. Ad-229 at pp. 3-4; Barstow.) In order to give meaning to the language of CBA Article XVII, it must be interpreted as giving the District the right to change the way personnel are selected and promoted. Therefore, the action which forms the basis of this dispute is clearly and explicitly authorized by the CBA and there was no breach of the parties' written agreement.

The Board also notes that the fact that an employer has not exercised contractual rights in the past, does not preclude it from doing so in the future. (Marysville Joint Unified School

District (1983) PERB Decision No. 314.) Therefore, the fact that the District previously interviewed all promotional candidates for positions did not diminish its ability to change promotional interview policy pursuant to the clear and explicit language of CBA Article XVII.

Summarizing, CBA Article XVII remained in effect in 1997 at the time the disputed conduct in this case occurred. CBA Article XVII clearly gives the District the right to change selection and promotion of all personnel of the District, including the right to change the number of promotional candidates to be interviewed in personnel selection. Therefore, the District did not breach the parties' CBA and did not violate EERA section 3543.5(a), (b) and (c) when it took that action.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-3821 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Jackson joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-3821 PROPOSED DECISION (6/1/98)

Appearances: Carol Finck, Labor Relations Representative, for California School Employees Association; Lozano, Smith, Smith, Woliver & Behrens by Christine M. Wagner, Attorney, for Antelope Valley Union High School District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union representing classified employees alleges a school district made three unilateral changes of policy. The District denies the allegations and contends the dispute should be deferred to the parties' grievance and arbitration process.

The California School Employees Association (CSEA) filed an unfair practice charge against the Antelope Valley Union High School District (District) on July 18, 1997. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint on October 1, 1997, alleging the District had unilaterally changed policies concerning disciplinary procedures, grievances, and promotional interviews. The District filed an answer on October 23, 1997, denying any unilateral changes.

PERB held a formal hearing on February 18, 1998. With the filing of post-hearing briefs on May 20, 1998, the case was submitted for decision.

FINDINGS OF FACT

The District is a public school employer under the Educational Employment Relations Act (EERA).[1] CSEA is an employee organization under EERA and is the exclusive representative of the District's classified employee bargaining unit.

The District and CSEA were parties to a collective bargaining agreement for the term January 1, 1994, through December 31, 1996. Article XIV of this agreement (Grievance and Arbitration) provided for binding arbitration of grievances, but section 14.2.14 stated CSEA itself could grieve only with respect to violations of rights "specifically granted to the Association [CSEA] by an express provision of this agreement." Section 14.4.3.5 stated in part, "The arbitrator shall have no power to render an award on any grievance occurring before or after the term of this agreement."

On October 1, 1997, the District Board of Trustees approved a new agreement for the term January 1, 1997, through June 30, 1999. Article XIV of this agreement again provided for binding arbitration, but section 14.2.14 again limited CSEA grievances to rights "specifically granted to the Association by an express

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

provision of this agreement." Although the salary increases provided by the agreement were retroactive to January 1, 1997, Article XXIII (Duration) otherwise stated the agreement "shall become effective upon Board adoption on October 1, 1997." There was no language in the agreement specifically making its arbitration provisions retroactive to January 1, 1997, and section 14.4.3.5 again gave the arbitrator "no power to render an award on any grievance occurring before or after the term of this agreement."

Jan Medema (Medema), the District's personnel director since 1994, testified arbitration of grievances was nonetheless available throughout the first part of 1997 "[b]ased on the retroactivity of the [1997-1999] contract." Medema did not explain how this was consistent with Article XXIII, which made the agreement effective "upon Board adoption on October 1, 1997." She also did not explain how CSEA could have invoked arbitration based on an agreement not yet in existence.[2] I do not find Medema's testimony on this point credible as something a labor relations professional might sincerely believe, and this testimony damaged her credibility generally. Medema further damaged her credibility by testifying evasively when cross-examined about her knowledge of a 1995 arbitrator's decision

[2]Section 14.4.3.1 of the agreement required CSEA to invoke arbitration, which was Level III of the grievance process, within 10 days after the termination of Level II. Thus, once the agreement became effective on October 1, 1997, its arbitration provisions could possibly have been invoked only as to grievances for which Level II was terminated in or after late September 1997.

holding a grievance inarbitrable because the parties' agreement had expired.

Article XXI of the 1994-1996 agreement (Entire Agreement) stated in part:

> 21.1 It is agreed that during the term of this agreement, the parties waive and relinquish the right to meet and negotiate and agree that the parties shall not be obligated to meet and negotiate with respect to any subject or matter covered in this agreement even though such subjects or matters were proposed and later withdrawn.

Article XVII of the agreement (District Rights) stated in part:

> 17.0 All matters not specifically enumerated as within the scope of negotiations in Government Code Section 3543.2 are reserved to the District. It is agreed that such reserved rights include, but are not limited to, the exclusive right and power to determine, implement, supplement, change, modify, or discontinue, in whole or in part, temporarily or permanently, any of the following:
>
> 17.6 The selection, classification, direction, promotion, demotion, discipline, and termination of all personnel of the District, . . .

Other articles in the agreement included Article VIII (Promotion), Article XIV (Grievance and Arbitration) and Article XXII (Disciplinary Action).

Disciplinary Procedures

Article XXII (Disciplinary Action), section 22.0, defined disciplinary action as suspension, demotion or discharge. In section 22.1, the parties acknowledged informal corrective

measures such as conferences were not disciplinary actions. Section 22.3 required the District to give a permanent unit member written notice of disciplinary action, including specific charges and a statement "informing the unit member of his right to a pre-disciplinary hearing before the District Superintendent or his/her designee." Under section 22.4, the notice was to be accompanied by a "demand for hearing" form for the unit member to sign, date and file.

According to section 22.5, the pre-disciplinary hearing "shall constitute the hearing required by Section 45113 of the Education Code," which incorporates the basic constitutional rights recognized in Skelly v. State Personnel Bd. (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14] (Skelly). Section 22.5 also stated the hearing would be convened "not less than five (5) and not more than ten (10) days after the date of service of the notice of disciplinary action on the unit member." The unit member could be represented and would have the opportunity to present evidence "relative to the disciplinary action of which the unit member received notice." In practice, the hearings were held before the District's Assistant Superintendent of Personnel Services.

On April 15, 1997, the CSEA chapter president, another unit member, and a CSEA representative met with personnel director Medema to discuss some grievances filed by the unit member. Medema, however, said the meeting would be a Skelly hearing for

the unit member.[3] The CSEA representative asked that the meeting be rescheduled, because the unit member could not properly defend herself without notice. Medema refused to reschedule the meeting, but she did say the unit member could later appeal to the Superintendent or the Board of Trustees. Medema also said she had been advised the District had been doing Skelly hearings all wrong.

It is not clear from the evidence exactly what happened for the rest of the meeting. As far as the evidence shows, the unit member said she was a good employee, could not understand why she was there, and needed to keep her job. No disciplinary action was taken against the unit member at that point.

Some two weeks later, on May 1, 1997, the District sent the unit member a notice of disciplinary action, indicating her termination was being recommended. The notice included a statement of charges with supporting documents and a "demand for hearing" form. On May 16, 1997, the unit member signed and filed the form, acknowledging she had received the notice on that date. The unit member initialed a notation on the form scheduling a hearing for May 23, 1997.

When the May 23 hearing took place, the Assistant Superintendent of Personnel Services and a CSEA steward were in attendance, in addition to all those who attended the April 15 meeting. Medema again said the meeting would be a Skelly hearing

[3]Medema denied saying this, but I credit the CSEA president's testimony, which was corroborated by other evidence, over Medema's testimony, which was not corroborated.

for the unit member. A copy of the notice of disciplinary action was given to the unit member, who denied having already received it. CSEA objected to the apparent lack of prior notice, but the meeting proceeded. In a caucus, the unit member said she felt she had incriminated herself at the April 15 meeting and could not win. The unit member chose to resign.

Grievances

Article XIV (Grievance and Arbitration) established a grievance procedure with one informal level and three formal levels. At the informal level, section 14.3 stated, "Before filing a formal written grievance, the unit member shall attempt to resolve the complaint by an informal conference with his/her immediate supervisor," at which the unit member could be accompanied by a CSEA representative. The section did not expressly require the immediate supervisor to agree to an informal conference, however.

A Level I formal grievance was to be filed with the site administrator. Section 14.4.1.3 stated, "The site administrator, or designee, or the grievant may request a personal conference." The section did not expressly require anyone to agree to a Level I conference, however. Section 14.4.1.4 stated:

> The site administrator, or designee, shall communicate his/her decision to the grievant in writing within five (5) days after receiving the grievance.

An appeal to the Superintendent or designee at Level II was to be filed within ten days of receipt of the Level I decision.

In practice, Level II grievances were directed to the Assistant Superintendent of Personnel Services but were usually handled by personnel director Medema. Section 14.4.2.2 stated, "A [Level II] conference shall be held at the request of either the grievant, Superintendent, or designee." Section 14.4.2.3 stated:

> The Superintendent, or designee, shall communicate his/her decision to the grievant in writing ten (10) days after receiving the grievance. If the Superintendent, or designee, does not respond within the time limits provided, the grievant may appeal to the next move.

The "next move" was binding arbitration at Level III.

The complaint in this case alleges that "[o]n or about April 16, 1997" the District changed the negotiated grievance policy "by refusing to process grievances beyond the informal grievance meeting level." The evidence showed that sometime on or before April 16, 1997, Medema told a CSEA steward she "had been advised by her legal people that we had no contract, no grievance procedure, and no arbitration." On May 23, 1997, Medema similarly told the CSEA chapter president "we had no contract as far as the District was concerned, so we had no grievance procedure or arbitration."

It is unclear, however, to what extent the District acted on the view that there was no grievance procedure. The CSEA president testified he set up on-site meetings on grievances, some of them still at the informal level, only to have the meetings cancelled and the matters referred to the District

office. The CSEA president further testified he did not receive any Level I responses at all. The CSEA steward, however, testified she received Level I responses from supervisors other than one principal, who referred a particular matter to the District office. The steward acknowledged "a few" grievances did go all the way through Level II.

The District provided evidence of three grievances that received a Level II response and three others that received a Level I response. One of the grievances that received a Level II response had also received a Level I response from the principal cited by the CSEA steward as not responding. Ultimately, CSEA put in evidence only one specific written grievance to which the District apparently never responded at all.

Promotional Interviews

Article VIII (Promotion) addressed various issues concerning promotions but did not address the interview process. In the present case, the complaint alleges the District nonetheless had the following policy: "All bargaining unit members meeting the minimum qualifications for a promotional position were granted an interview." The complaint further alleges that "[o]n or about May 22, 1997" the District changed this policy "by issuing a memorandum which provides for the selective interviewing of some bargaining unit members, if there are no bargaining unit members in the top 8 to 10 applicants called for interview."

Attached to the unfair practice charge was a document dated "5/22/97" that was alleged to be "a memorandum stating that the

District would be using a different procedure for Courtesy Interviews for District employees." The document was not in memorandum form, but it was headed "Procedures for Courtesy Interviews for In District Employees" and stated what "would take place" if there were "no CSEA Bargaining Unit members in the top 8-10 applicants called for an interview." The evidence at hearing, however, showed the document represented only a proposal for an informal policy, offered by the District during negotiations but never adopted.

There was other evidence, however, that the District breached a policy on promotional interviews.[4] On January 14, 1997, the District posted the position of Risk Management Technician II (RMT II). The posting listed "desirable qualifications," some of which were minimum qualifications. In what appeared to be standard language, the posting stated, "Candidates meeting minimum qualifications will be contacted for [sic] by phone for further testing/interview."

Three employees testified they understood from experience the District's policy was to test or interview all promotional candidates meeting minimum qualifications. The CSEA chapter president testified that in 1990 or 1991 the then-Assistant Superintendent of Personnel Services stated the procedure was "if you pass the written test, you receive an interview."

[4]Although not cited in the complaint, this evidence was cited in the unfair practice charge and was not dismissed.

Personnel director Medema testified the District had not had a policy of interviewing all promotional candidates who met minimum qualifications. She did not cite any instances, however, where the District had not interviewed all such candidates, nor did she explain the apparently standard language on the RMT II posting. I do not credit her testimony on this point.

At least two unit members applied for the RMT II position, believing they met the minimum qualifications on the posting, but they were not called for an interview. Both of them testified they called Medema. One testified Medema told her too many people had applied, so the District scaled down to six the number to be interviewed. Medema testified she did not remember this conversation.

The second unit member testified to a similar conversation with Medema, which Medema did not deny. According to this testimony, Medema said 12 out of 13 candidates were qualified, which was too many, so the District had to find reasons to eliminate some from the interview process. Medema did not tell the unit member she was not qualified. The unit member followed up the conversation with a letter to Medema, with copies to the Board of Trustees. The letter generally corroborates the unit member's testimony.

Medema testified that this second unit member did not in fact meet the minimum qualifications for the position, and that all the candidates who did were interviewed. Medema did not explain how the unit member was unqualified, however. Moreover,

Medema did not explain how her testimony was consistent with the conversation she had with the unit member. I do not credit Medema's testimony on this point.

ISSUES

1. Is this matter subject to deferral?

2. Did the District unilaterally change policy on disciplinary procedures?

3. Did the District unilaterally change policy on grievances?

4. Did the District unilaterally change policy on promotional interviews?

CONCLUSIONS OF LAW

Deferral

EERA section 3541.5(a) states in part PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held this section established a jurisdictional rule requiring a charge be dismissed and deferred if (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement.

In Inglewood Unified School District (1991) PERB Order No. Ad-222, PERB held the grievance machinery of an agreement does not cover an issue for deferral purposes if the agreement does not give the charging party standing to grieve that issue. In the present case, section 14.2.14 gave CSEA standing to grieve only for violations of rights "specifically granted to the Association [CSEA] by an express provision of this agreement." The present case does not appear to involve any express provisions specifically granting rights to CSEA. Deferral is therefore inappropriate.

In State of California, Department of Youth Authority (1992) PERB Decision No. 962-S, PERB held the grievance machinery of an agreement does not culminate in binding arbitration after the expiration of the agreement, except for disputes that:

> (1) involve facts and occurrences that arose before expiration; (2) involve post-expiration conduct that infringes on rights accrued or vested under the agreement; or (3) under normal principles of contract interpretation, survive expiration of the agreement.

When the present case arose, the parties' agreement had expired. None of the three exceptions apply. Deferral is therefore inappropriate for that reason as well.

Finally, with regard to the alleged unilateral change in promotional interview policy, the District's conduct was not arguably prohibited by the parties' agreement. That issue therefore could not be deferred in any case.

Disciplinary Procedures

An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate that violates EERA section 3543.5(c). (Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

To prevail on a complaint of unilateral change, the charging party must establish by a preponderance of the evidence (1) the employer breached or altered the parties' written agreement or its own established 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 but amounts to a change of policy (that is, it has a generalized effect or continuing impact upon bargaining unit members' 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, supra, PERB Decision No. 51; Davis Unified School District (1980) PERB Decision No. 116.)

With regard to disciplinary procedures, the parties' agreement required the District to give an employee written notice of charges prior to the disciplinary action, and five to ten days prior to the Skelly hearing. The evidence showed the District complied with this requirement with regard to the second Skelly hearing, on May 23, 1997. Although the unit member

apparently denied the fact, the evidence showed she received the required notice on May-16, 1997.

The District did not comply with this requirement with regard to the first Skelly hearing, on April 15, 1997. The evidence did not show, however, that this was more than an isolated breach. I conclude CSEA has not proved a unilateral change with regard to disciplinary procedures.

Grievances

After the parties' agreement expired, personnel director Medema told CSEA there was no grievance procedure and no arbitration. Medema was partly right and partly wrong. Under State of California, Department of Youth Authority, supra, PERB Decision No. 962-S, an arbitration clause generally does not continue in effect after an agreement has expired. This does not, however, disturb PERB's longstanding holding that the rest of the grievance procedure does survive expiration of the agreement, absent clear evidence of an intent to the contrary. (Anaheim City School District (1983) PERB Decision No. 364.)

CSEA did not prove, however, that Medema's partly erroneous view of the law was linked to an actual change in the negotiated grievance policy. The evidence did not show the District changed policy by generally "refusing to process grievances beyond the informal grievance meeting level," as the complaint alleged; the CSEA steward acknowledged "a few" grievances did go all the way through Level II. The CSEA president testified some on-site grievance meetings were cancelled, but it does not appear the

parties' agreement actually required such meetings to be held before Level II. CSEA put in evidence one specific written grievance to which the District apparently never responded at all, but the evidence did not show this was more than an isolated breach. I conclude CSEA has not proved a unilateral change with regard to grievances.

Promotional Interviews

With regard to promotional interviews, CSEA did not prove the specific allegation in the complaint, that the District changed policy by issuing a memorandum on or about May 22, 1997. As discussed in the statement of facts, the May 22 "memorandum" turned out to be only an unadopted proposal. There was other evidence, however, that the District breached a policy on promotional interviews in connection with the RMT II interviews in early 1997.

An unalleged violation can be considered only if it is intimately related to the subject matter of the complaint, is part of the same course of conduct, and has been fully litigated, and if the parties have had the opportunity to examine and be cross-examined on the issue. (Hacienda La Puente Unified School District (1997) PERB Decision No. 1187, citing Santa Clara Unified School District (1979) PERB Decision No. 104.) All of these conditions are met in the present case. The violation with regard to the RMT II interviews was alleged in CSEA's original unfair practice charge and was not dismissed. It was alleged as part of the same policy change in the same general time period

(early 1997) as the May 22 "memorandum" referenced in the complaint. Three of CSEA's witnesses were examined and cross-examined on the subject, and the District's only witness (personnel director Medema) was also examined and cross-examined on the subject. The matter was fully litigated; I shall therefore consider it.

For the reasons stated in the findings of fact, I conclude the District had a policy of interviewing all promotional candidates who met minimum qualifications, and the District breached that policy with regard to the RMT II interviews. I further conclude this was more than an isolated breach. More than one unit member was directly affected: based on what Medema told the two unit members who called her, 12 candidates were qualified, but only 6 were interviewed. Furthermore, by denying the very existence of the policy, Medema in effect asserted the District's right to breach the policy in the future with respect to other unit members. (See Trustees of the California State University (1997) PERB Decision No. 1243-H, explaining Hacienda La Puente Unified School District (1997) PERB Decision No. 1186.)

The District did not plead and does not argue CSEA waived its right to negotiate the change in policy. Waiver is an affirmative defense that is itself waived if not raised by the respondent. (Morgan Hill Unified School District (1985) PERB Decision No. 554.)[5]

[5]I also note that in Article XXI of the 1994-1996 agreement, the parties waived a right to negotiate only "during the term of this agreement," which ended December 31, 1996. Furthermore,

For the foregoing reasons, I conclude CSEA has proved a unilateral change in promotional interview policy, and the District has not proved any defense. The District's conduct violated its duty to bargain in good faith with CSEA, in violation of EERA section 3543.5(c). This conduct also denied CSEA its right to represent unit members, in violation of EERA section 3543.5(b). This conduct also interfered with the right of unit members to be represented by CSEA, in violation of EERA section 3543.5(a).

REMEDY

EERA section 3541.5(c) gives PERB:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter [EERA].

In the present case, the District has been found to have violated EERA section 3543.5(a), (b) and (c) by unilaterally changing a policy on promotional interviews. It is therefore appropriate to direct the District to cease and desist from such conduct. It is also appropriate to direct the District to meet and negotiate about promotional interview policies, if CSEA so requests.

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although Article XVII of the agreement generally reserved District rights as to the "promotion . . . of all personnel of the District," there was no specific language in the agreement covering interview procedures. (Cf. Solano County Community College District (1982) PERB Decision No. 219.) A waiver must be established by clear and unmistakable language. (Ibid.)

In California State Employees' Association v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923, 946 [59 Cal.Rptr.2d 488], the court stated in part:

> Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an opportunity to meet and confer over the decision and its effects. (See, e.g., Oakland Unified School Dist. v. Public Employment Relations Bd. (1981) 120 Cal.App.3d 1007, 1014-1015 [175 Cal.Rptr. 105].) This is usually accomplished by requiring the employer to rescind the unilateral change and to make employees "whole" from losses suffered as a result of the unlawful unilateral change.

It is therefore appropriate to direct the District to rescind the unilateral change and restore the previous policy, if CSEA so requests.

In its unfair practice charge, CSEA requested the District be ordered to "[i]nterview all employees that had the minimum qualifications for the Risk Management Technician position with the practice of an appointed CSEA party on interview committee." There is no apparent point, however, in ordering the District to interview employees now for a position that (presumably) has been filled for over a year. There is also no apparent basis for ordering the District to place a CSEA representative on an interview committee.

It is appropriate the District be directed to post a notice incorporating the terms of the order in this case. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice the District has acted in an

unlawful manner, is being required to cease and desist from this activity and to take affirmative remedial actions, and will comply with the order. It effectuates the purposes of EERA that employees be informed both of the resolution of this controversy and of the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and upon the entire record in this matter, it is found the Antelope Valley Union High School District (District) violated the Educational Employment Relations Act (EERA or Act), Government Code section 3543.5(a), (b) and (c), by unilaterally changing a policy on promotional interviews.

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. Unilaterally changing promotional interview policies.

2. By the same conduct, denying CSEA its rights.

3. By the same conduct, interfering with the rights of employees to be represented by CSEA.

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

1. If requested by CSEA within 10 days of this proposed decision becoming final, meet and negotiate in good faith with CSEA concerning promotional interview policies.

2. If requested by CSEA, reinstate the prior policy of granting promotional interviews to all unit members who meet minimum qualifications.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to classified employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating 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 the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board, in accord with the regional director's instructions.

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 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 of Civ. Pro. 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.)

THOMAS J. ALLEN
Administrative Law Judge