**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| UNITED EDUCATORS OF SAN FRANCISCO,<br><br>Charging Party,<br><br>v.<br><br>SAN FRANCISCO UNIFIED SCHOOL DISTRICT,<br><br>Respondent. | Case No. SF-CE-2742-E<br><br>PERB Decision No. 2040<br><br>June 23, 2009 |

Appearance: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for United Educators of San Francisco.

Before Dowdin Calvillo, Acting Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by United Educators of San Francisco (UESF) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the San Francisco Unified School District (District) violated the Education Code and the Educational Employment Relations Act (EERA)[1] by failing to classify teachers designated as Site Support Substitutes and Core Substitutes as probationary employees. The Board agent dismissed the charge for lack of jurisdiction and failure to state a prima facie case of an unlawful unilateral change by the District.

The Board has reviewed the dismissal and the record in light of UESF's appeal and the relevant law. Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

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

## BACKGROUND

In addition to traditional day-to-day substitute teachers, the 2007-2010 collective bargaining agreement between UESF and the District provides for two special categories of substitute teachers: Site Support Substitutes and Core Substitutes. Both categories are assigned to underperforming schools in the District. Site Support Substitutes are assigned to a single school for the entire year, while Core Substitutes fill positions at various schools as needed.

On February 26, 2008, the District's governing board adopted a resolution to layoff certain certificated employees. On April 8 and 9, 2008, a reduction in force hearing was held pursuant to Education Code section 44949. During the hearing, the parties stipulated that Site Support and Core Substitutes "will be classified as probationary employees for the purposes of seniority." Ultimately, no teachers were laid off by the District based on the February 26, 2008 resolution.

On July 1, 2008, the District began sending Site Support and Core Substitutes employment contracts for the new school year which classified them as temporary employees. On August 27, 2008, UESF filed a petition for writ of mandate in San Francisco Superior Court to compel the District to classify Site Support and Core Substitutes as probationary or permanent employees. The District demurred to the petition, asserting that PERB has exclusive initial jurisdiction over the matter and that UESF failed to exhaust its administrative remedies with PERB before filing the petition. On December 18, 2008, the superior court sustained the District's demurrer, finding that "[t]he Court has no jurisdiction of the subject of the causes of action alleged in the pleading."

Meanwhile, on November 18, 2008, UESF filed its unfair practice charge alleging that the District violated the Education Code and EERA by failing to classify Site Support and Core

Substitutes as probationary employees.[2] The Board agent dismissed the charge for lack of jurisdiction and failure to state a prima facie case of an unlawful unilateral change by the District. On appeal, UESF admits it "has no arguments to make in contradiction to the Regional Attorney's arguments set forth in the dismissal letter" and indicates that the appeal was filed merely to exhaust UESF's administrative remedies.

## DISCUSSION

### 1. Education Code Violation

The charge alleged that "the position of Core Substitute and the position of Site Substitute is not a 'temporary' position in that the function of the Core and Site Substitute does not fit the description of a temporary or substitute teacher as defined by the Education Code." The charge then alleged that the District improperly classified Site Support and Core Substitutes as temporary employees for the 2008-2009 school year.

PERB has no jurisdiction to enforce provisions of the Education Code. (*California Teachers' Assn. v. Livingston Union School Dist.* (1990) 219 Cal.App.3d 1503, 1525; *Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 664.) Thus, the allegation that the District violated the Education Code by misclassifying Site Support and Core Substitutes as temporary employees must be dismissed for lack of jurisdiction.

### 2. Unilateral Change

The charge also alleged that the District's failure to classify Site Support and Core Substitutes as probationary employees for the 2008-2009 school year breached the parties' April 2008 stipulation. PERB has no authority to enforce an agreement between the parties

[2] The charge alleged that the superior court sustained the District's demurrer to the petition, but the written order sustaining the demurrer did not issue until a month *after* the charge was filed. Thus, the court must have orally sustained the demurrer prior to November 18, 2008.

unless the breach of the agreement would also constitute an independent unfair practice. (EERA, § 3541.5, subd. (b); *Grant Joint Union High School District* (1982) PERB Decision No. 196.) We must therefore determine whether the District's alleged breach of the stipulation constituted an unlawful unilateral change in violation of EERA section 3543.5, subdivision (c).[3]

An employer's unilateral change in terms and conditions of employment constitutes a "per se" violation of its duty to bargain in good faith if: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., 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. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District, supra.*) UESF's charge failed to state a prima facie case of an unlawful unilateral change because the April 2008 stipulation, and by extension the District's alleged breach of the stipulation, does not concern a matter within the scope of representation.

EERA section 3543.2, subdivision (a) states: "The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment." EERA section 3540 provides, in relevant part, that EERA "shall not supersede other provisions of the Education Code." In *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, the California Supreme Court held that, when the Education Code "clearly evidences an intent to set an inflexible standard or insure

[3] EERA section 3543.5, subdivision (c) makes it unlawful for a public school employer to "[r]efuse or fail to meet and negotiate in good faith with an exclusive representative."

immutable provisions," parties may not negotiate a collective bargaining provision that would replace, set aside or annul the mandatory Education Code provision. (*Id.* at pp. 864-865, quoting *Healdsburg Union High School District and Healdsburg Union School District* (1980) PERB Decision No. 132.) In other words, a subject governed by a mandatory section of the Education Code does not fall within the scope of representation under EERA.[4]

Classification of substitute employees is governed by Education Code section 44917, while classification of temporary employees is governed by Education Code section 44919. Education Code section 44924 provides that "any contract or agreement, express or implied, made by any employee to waive the benefits of this chapter or any part thereof is null and void." Courts have consistently held that section 44924 voids any provision of an individual employment contract "purporting to waive the protections accorded certificated school employees by the Code, including the provisions governing their classification and termination." (*Bakersfield Elementary Teachers Assn. v. Bakersfield City School Dist.* (2006) 145 Cal.App.4th 1260, 1275; *Fine v. Los Angeles Unified School Dist.* (2004) 116 Cal.App.4th 1070, 1077; *Zalac v. Governing Bd. of Ferndale Unified School Dist.* (2002) 98 Cal.App.4th 838, 849.) Section 44924 also voids any provision of a collective bargaining agreement that

[4] Parties are not absolutely prohibited from bargaining over subjects addressed by mandatory provisions of the Education Code. For example, parties may negotiate over incorporating mandatory Education Code provisions into a collective bargaining agreement. (*Roseville Joint Union High School District* (1986) PERB Decision No. 580; *San Mateo City School District* (1984) PERB Decision No. 383.) Parties may also bargain over additional employee protections beyond those provided in the Education Code. (*California Teachers Assn. v. Governing Bd. of Hilmar Unified School Dist.* (2002) 95 Cal.App.4th 183, 197 [EERA § 3543.2, subd. (d) allows parties to negotiate payment of additional compensation based on factors other than years of education and years of experience]; *Fremont Unified School District* (1997) PERB Decision No. 1240 [procedures for rehiring temporary teachers].) However, these additional protections cannot circumvent or eviscerate mandatory Education Code provisions on the same subject. (*Board of Education v. Round Valley Teachers Assn.* (1996) 13 Cal.4th 269, 285-286; *California Teachers Assn. v. Governing Board* (1991) 229 Cal.App.3d 695, 705.)

waives a benefit provided by the Education Code. (*Adair v. Stockton Unified School Dist.* (2008) 162 Cal.App.4th 1436, 1452.) Because the Education Code provisions governing classification of certificated employees may not be waived by contract, teacher classification is not a proper subject of collective bargaining between school districts and employee organizations. Accordingly, the subject of teacher classification necessarily falls outside the scope of representation under EERA. For this reason, the charge failed to state a prima facie case of unlawful unilateral change.

## ORDER

The unfair practice charge in Case No. SF-CE-2742-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.