STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SOUTHWEST TEACHERS ASSOCIATION, Charging Party, v. SOUTH BAY UNION SCHOOL DISTRICT BOARD OF TRUSTEES, Respondent.	)	Case No. LA-CE-382 PERB Decision No. 207 April 30, 1982

Appearances: Charles R. Gustafson, Attorney for Southwest Teachers Association; Clifford D. Weiler, Attorney (Brown and Conradi) for South Bay Union School District Board of Trustees.

Before Jaeger, Moore and Tovar, Members.

DECISION

The South Bay Union School District Board of Trustees (hereafter District) excepts to the portions of the hearing officer's proposed decision in which he sustained the Southwest Teachers Association's (hereafter STA) charge that the District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (hereafter EERA or Act).[1]

The sole question before the Public Employment Relations Board (hereafter PERB or Board) concerns the District's exceptions to the hearing officer's remedy which, inter alia,

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[1]EERA is codified at Government Code section 3540, et seq. All statutory references in this decision are to the Government Code, unless otherwise noted.

ordered the District to reimburse those certificated employees who suffered financial loss as a result of the District's unlawful conduct.

FACTUAL SUMMARY

Since the 1975-76 school year, the District has maintained lead teacher positions. The job duties of lead teachers, while varying depending on the needs of the particular school, include instruction, teaching remedial reading and other activities designed to facilitate learning. During the 1977-78 school year, there were 10 lead teachers, each assigned to one of the District's elementary schools.[2] While classroom teachers worked 180 days per year, lead teachers were employed 192 days and received supplemental pay on a pro rata salary basis for these 12 additional workdays. Lead teachers also received their base pay plus a 5 percent salary differential.

In December 1977, the District and STA entered into a negotiated agreement which covered certificated employees including lead teachers.[3] The contract also contained a reopener clause which permitted either party to call for negotiations on April 1, 1978 concerning wages, health and welfare benefits and one additional article of its choice.

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[2]There are 11 elementary schools in the District. At one school, the vice principal functioned as lead teacher.

[3]Although no party disputes the workyear and salary schedule of lead teachers, the negotiated agreement does not so specify.

At the end of the 1977-78 school year, incumbent lead teachers were offered positions for the following year. Some teachers provided written acceptance. However, in June 1978, when the District adopted its publication budget, it reduced the amount budgeted for salaries by deleting lead teachers' stipends. As negotiations were in progress on reopeners, the District in August 1978 altered the publication budget by adding salary stipends sufficient to fund five lead teacher positions. Each lead teacher was to service two elementary schools. The budget allocation for the five lead teacher vacancies included the 5 percent salary differential but not the twelve additional workday assignments.

During the month of August, STA requested that the District negotiate regarding lead teachers but the District refused. It announced and ultimately assigned five lead teacher positions.[4]

DISCUSSION

In considering STA's unfair practice allegations, the hearing officer examined several facets of the lead teachers' employment relationship in order to determine whether the District had actually made a change and whether the item changed was within the scope of representation. He also

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[4]In early August, STA discussed the selection of lead teachers with the District and agreed that the assistant superintendent would have such authority.

addressed the District's defenses. The two issues raised by the District's exceptions refer only to the hearing officer's order and remedy.[5] With regard to the 1977-78 lead teachers who were not rehired as lead teachers for the 1978-79 school year, the hearing officer ordered reimbursement of the 5 percent salary differential and the pro rata pay for the 12 extra days. As to the five lead teachers who were employed as lead teachers during the 1978-79 school year, he ordered payment for the twelve discontinued extra days.

The District's argument with regard to the first remedy is based on the hearing officer's decision that the District had not materially varied the parties' contractual transfer policy. The District interprets this conclusion to mean that it was permitted to unilaterally eliminate five lead teacher positions and "transfer" these teachers to classroom teacher assignments. The District argues that, having been permissibly "transferred", prior lead teachers retained no right to differential pay or additional workdays. STA, urging the Board to sustain the hearing officer's remedy, argues that reimbursement for lost wages was permissibly based on the

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[5]Because the exceptions lodged by the District related to the remedy only, our discussion is so limited and we make no comment on other conclusions of law as appear in the hearing officer's proposed decision.

hearing officer's unchallenged conclusion that the District unilaterally changed the lead teachers' wages and workyear.[6]

We affirm the hearing officer's order that the District reimburse the five lead teachers not rehired the 5 percent pay differential and the pro rata pay for additional workdays previously paid to lead teachers and not to classroom teachers. Even reading the hearing officer's decision regarding transfers to mean that the District was free to unilaterally reduce the number of lead teachers,[7] the District does not escape its obligation to negotiate the

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[6]In its response to the District's exceptions, STA also argues that the hearing officer erred in concluding that the District did not alter the transfer policy. The District asserts that the Board should not entertain this challenge to the hearing officer's proposed decision because STA's argument is more than a response to the District's exceptions. We agree with the District's characterization of STA's response as being tantamount to an exception. As such, it was untimely. See PERB rule 32300, et seq., codified at Government Code section 31000, et seq.

[7]It is unclear from the hearing officer's proposed decision what was intended by his conclusion that the District acted properly in effecting the lead teachers' "transfers". Speaking in terms of "unforeseen circumstances", a phrase which appears in the parties' negotiated agreement referring to the required notice of transfer, the hearing officer found no material variance and thus no impermissible unilateral change. His separate discussion of job duties, which he found to have been altered but a matter outside of the scope of representation, also supports a conclusion that the hearing officer did not find that the District lawfully transferred the five lead teachers to classroom assignments but rather found that the notice of transfer as mandated by the negotiated agreement had been complied with. This interpretation of the hearing officer's conclusion undermines the premise of the District's exception.

effects or impact of that change. First National Maintenance Corp. v. NLRB (1981) 69 L.Ed. 318 [107 LRRM 2705]; NLRB v. Royal Plating & Polishing Co. (3rd Cir. 1965) 350 F.2d 191 [60 LRRM 2033]; NLRB v. Adams Dairy, Inc. (8th Cir. 1965) 350 F.2d 108 [60 LRRM 2084], cert.denied (1966) 382 U.S. 1011 [61 LRRM 2192]. Consistent with this basic tenet of labor law, the District was required to negotiate the consequential impact of its decision on the lead teachers' wages and workyear. Its failure to do so was a violation of EERA. San Mateo City School District (5/20/80) PERB Decision No. 129. Restoration of the status quo as to those items altered as a result of the elimination of lead teacher positions was thus an appropriate remedy.

The District's second exception concerns the remedy ordering the employer to pay the five rehired lead teachers for the twelve extra days previously assigned. The hearing officer ordered this action on December 11, 1979, and the District is arguing that that remedy is overly broad because it involves future action. The District suggests that the order is premature because the District may negotiate an agreement which would not include the 12 additional workdays.

The District's argument is unpersuasive. The order is directed to remedy the past unfair practice and the resumption of the 12 additional days restores the past practice. The

District may, as a result of the hearing officer's order that it cease and desist from refusing to negotiate, engage in future negotiating sessions with STA. However, this possibility in no way excuses the employer's past violation. Again, the ordered remedy was an appropriate restoration of the lead teachers' workyear as it existed prior to the District's unilateral change.

ORDER

Based upon the entire record and consistent with the foregoing decision, the Board affirms the hearing officer's conclusions that the South Bay Union School District Board of Trustees violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act. The Board hereby ORDERS that the District shall:

(1) CEASE AND DESIST FROM:

(a) Failing and refusing to meet and negotiate in good faith with the Southwest Teachers Association by taking unilateral action on matters within the scope of representation;

(b) Denying the Association its right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation;

(c) Interfering with employees' right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation;

(2) TAKE THE FOLLOWING AFFIRMATIVE ACTIONS WHICH ARE NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(a) Reimburse those employees who were lead teachers during school year 1977-78 but who were not rehired as lead teachers for school year 1978-79 wages in the amount of five (5) percent differential pay plus pro rata pay for twelve workdays for each school year beginning with the 1978-79 school year;[8]

(b) Reimburse those employees who were lead teachers during school year 1977-78 and who were lead teachers during school year 1978-79 wages in the amount of pro rata pay for 12 workdays for each school year beginning with the 1978-79 school year;[9]

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[8]In his proposed decision, the hearing officer ordered that the lead teachers not rehired as lead teachers in 1978-79 be reimbursed for the 1978-79 and 1979-80 school years. The remedy was apparently so limited because it was issued on December 11, 1979, during the 1979-80 school year. However, since the District's liability is not extinguished until it satisfies its obligation to negotiate with STA, the Board has altered the hearing officer's order to so provide. See (c) of the Order, infra.

The Board does not disturb the hearing officer's exclusion from the ordered remedy of the one lead teacher who declined the lead teacher position for the 1979-80 school year.

[9]In his proposed decision, the hearing officer included the following:

> In computing the amount of back salary due to individual lead teachers, the District may deduct any salary earned by a lead teacher during the twelve (12) day periods

(c) Reimbursement ordered above is to run from the date the wages and workyear were unilaterally changed until the occurrence of the earliest of the following events: (1) the date the District negotiates to agreement with the Association on matters pertaining to the wages and hours of lead teachers, (2) a bona fide impasse in negotiating, (3) the failure of the Association to request to negotiate within five days of service of this Decision, or to commence negotiations within five days of the District's notice or its desire to negotiate with the Association or, (4) the subsequent failure of the Association to negotiate in good faith;

(d) Pay in addition to the amounts specified in subparagraphs (a), (b) and (c) above, seven (7) percent interest per annum on the amount owing to each employee, measured from September 1, 1978 to the time payment is made;

(e) Prepare and post copies of the Notice attached hereto as Appendix "A" within ten (10) workdays following service at each of its work sites for thirty (30) workdays in

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immediately following the end of school years 1978-79 and 1979-80. McCann Steel Co. v. NLRB (C.A. 6, 1978) 570 Fed.2d 652 [97 LRRM 2921]. However back pay shall not be reduced by any amount received as unemployment compensation. Souix Falls Stock Yards Co. (1978) 235 NLRB 62 [99 LRRM 1316].

No party having excepted to this deduction, we make no alteration except, in accord with footnote 8, supra, we extend the District's liability in accordance with (c) above.

conspicuous places, including all locations where notices to certificated employees are customarily posted;

(f) Within ten (10) workdays after the end of the posting period, notify the Los Angeles Regional Director of the Public Employment Relations Board in writing of the actions taken to comply with this Order.

By: Barbara D. Moore, Member

Irene Tovar, Member

Member John W. Jaeger's concurrence begins on page 11.

John W. Jaeger, Member, concurring:

While I agree with the result the majority has reached, I find that portion of its analysis concerning the elimination of the five lead teacher positions unclear, and deserving more expansive treatment. In all other respects, I fully concur with the majority decision.

The majority characterizes the District's exceptions as being limited to disagreement with the hearing officer's proposed remedy. Essentially, the District argues that, since the hearing officer found that its conduct was permitted by the transfer provision of the contract, a remedy making the "transferred" teachers whole for their loss of wages is inappropriate. Thus, while it is true that the District's exceptions, narrowly read, appear only to concern the remedy, they are phrased in such a way that one must conclude that the District excepts not only to the proposed remedy, but to the finding that it made an unlawful unilateral change. It is therefore necessary to analyze the merits of the District's contention.

Subsection 3543.5(c)[1] prohibits an employer from unilaterally changing matters within the scope of

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[1]Subsection 3543.5(c) provides:

> It shall be unlawful for a public school employer to . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

representation in violation of the duty to negotiate in good faith. San Francisco Community College District (10/12/79) PERB Decision No. 105; Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51. The threshold question, therefore, in any case where it is alleged that an employer made an unlawful unilateral change, is whether the conduct at issue concerns a matter within the scope of representation as defined by section 3543.2.[2]

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[2]Section 3543.2 provides in relevant part:

> 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, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

The hearing officer found that the District unilaterally reduced the wages and hours of those employees not rehired as lead teachers for the 1978-79 school year, thereby violating the Act. I find that the hearing officer mischaracterized the conduct of the District. He should have found that the decision to abolish the five lead teacher positions was a matter within management's exclusive prerogative, and therefore not negotiable. Healdsburg Union High School District (6/19/80) PERB Decision No. 132. However, as the majority points out, just because the decision to abolish a position is not negotiable, the District is not relieved of its duty to negotiate over the impact of that decision upon wages, hours and working conditions. Healdsburg, supra, at p. 67.

The District maintains that the Association waived its right to negotiate over the impact of the decision to abolish the five lead teacher positions by negotiating Article 9 of the collective agreement, governing transfers. It argues that the loss of wages and hours sustained by the former lead teachers was a permissible consequence of a lawful "transfer." In Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74, the Board concluded that a waiver will only be found where there is "clear and unmistakable contract language or demonstrative behavior" waiving a reasonable opportunity to bargain. There is no evidence to indicate that the transfer provisions of Article 9

of the collective agreement give the district the unfettered right to reduce the wages and hours of transferred employees. On the contrary, Article 9.21, which defines transfers as "the permanent assignment of a unit member from one site to another" is, on its face, limited to transfers between school sites. It is silent as to the right of the District to reduce teacher wages or work year as the consequence of a "transfer."

Therefore, I would find that no waiver occurred, and on that basis affirm the hearing officer's determination that the District violated subsections 3543.5(a), (b) and (c) by refusing to negotiate over the impact of its decision to eliminate five lead teacher positions.

John W. Jaeger, Member

APPENDIX A

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

After a hearing in case no. LA-CE-382 in which all parties participated, it has been found that the South Bay Union School District Board of Trustees violated the Educational Employment Relations Act (Government Code subsections 3543.5(a), (b) and (c)) by taking unilateral action changing wages and hours of employment of employees who are lead teachers and represented by the Southwest Teachers Association. As a result of this conduct, we have been ordered to post this notice.

WE WILL ABIDE BY THE FOLLOWING:

(1) CEASE AND DESIST from failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation;

(2) CEASE AND DESIST from denying the Association its right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation;

(3) CEASE AND DESIST from interfering with employees' right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation;

(4) TAKE THE FOLLOWING AFFIRMATIVE ACTIONS WHICH ARE NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT.

(a) Reimburse those employees who were lead teachers during school year 1977-78 but who were not lead teachers for school year 1978-79 wages in the amount of five (5) percent differential pay plus pro rata pay for twelve workdays for each of the school years beginning with 1978-79;

(b) Reimburse those employees who were lead teachers during school year 1977-78 and who were lead teachers during school year 1978-79 wages in the amount of pro rata pay for twelve workdays for each of the school years beginning with 1978-79;*

(c) Reimbursement ordered above is to run from the date the wages and workyear were unilaterally changed until the occurrence of the earliest of the following events: (1) the date the District negotiates to agreement with the Association on matters pertaining to the wages and hours of lead teachers, (2) a bona fide impasse in negotiating, (3) the failure of the Association to request to negotiate within five days of service of this Decision, or to commence negotiations within five days of the District's notice or its desire to negotiate with the Association or, (4) the subsequent failure of the Association to negotiate in good faith.

(d) Pay in addition to the amounts specified in subparagraphs (a), (b) and (c) above, seven (7) percent interest per annum on the amount owing to each employee, measured from September 1, 1978 to the time payment is made.

Dated:

SOUTH BAY UNION SCHOOL DISTRICT
BOARD OF TRUSTEES

By: _____
Superintendent

*In computing the amount of back salary due to individual lead teachers, the District may deduct any salary earned by a lead teacher during the twelve (12) day periods immediately following the end of school years. McCann Steel Co. v. NLRB (C.A. 6, 1978) 570 Fed.2d 652 [97 LRRM 2921]. However back pay shall not be reduced by any amount received as unemployment compensation. Souix Falls Stock Yards Co. (1978) 235 NLRB 62 [99 LRRM 1316].

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