

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION, NEWMAN-CROWS LANDING)
CHAPTER #551,)

Charging Party,)

v.)

NEWMAN-CROWS LANDING UNIFIED)
SCHOOL DISTRICT,)

Respondent.)

Case No. S-CE-219

PERB Decision No. 223

June 30, 1982

Appearances: Michael Heumann, Attorney for California School Employees Association, Newman-Crows Landing Chapter #551; Robert A. Galgani, Attorney (Breon, Galgani & Godino) for Newman-Crows Landing Unified School District.

Before Gluck, Chairperson; Morgenstern and Tovar, Members.

DECISION

The California School Employees Association, Newman-Crows Landing Chapter #551 (CSEA) and the Newman-Crows Landing Unified School District (District) except to a hearing officer's proposed decision finding that the District violated subsections 3543.5(b) and (c) of the Educational Employment Relations Act (EERA)¹ by unilaterally laying off nine instructional aides without notifying and negotiating over the effects of the layoff with the exclusive

¹The EERA is codified at Government Code section 3540

representative, CSEA. The District excepts to the findings that (1) such effects of layoff as the timing and duration of layoffs and the number and identity of employees to be laid off are negotiable; (2) the District did not give sufficient notice to CSEA prior to making the decision to layoff; (3) CSEA did not waive its right to negotiate by failing to make an adequate request to negotiate; and (4) an appropriate remedy requires that the affected employees be reinstated and made whole retroactively to the date of the layoff. CSEA objects to the hearing officer's dismissal of that part of its charge alleging that the District violated EERA by not first negotiating the decision to lay off.

FACTS

At the time of the alleged violation, the parties were working under a two-year agreement, running from July 1, 1977 to June 30, 1979. During negotiations for this contract, CSEA had proposed detailed provisions on layoffs. Except for a

et seq. All statutory references are to the Government Code unless otherwise noted.

Subsections 3543.5(b) and (c) provide:

It shall be unlawful for a public school employer to:

(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.

section on voluntary demotions or reductions in hours in lieu of layoffs which was incorporated into the agreement, the District steadfastly maintained that proposals on layoffs were outside the scope of bargaining and not negotiable. There is nothing in the record to show that CSEA ever filed unfair practice charges because of the District's position.

The District's disputed actions arose from the passage of Proposition 13 in June 1978, and the District's concerns over prospective budget deficits. In May, in anticipation of the Proposition's passage, the District began contemplating cuts that would be necessary. In early June, the District superintendent spoke with Barbara Barlow, a member of the classified unit, its bargaining committee, and the chairperson of the CSEA state research negotiating committee, about the possibility of a reduction in the hours of instructional aides instead of layoffs. Both parties considered the discussions to be informal. At the Public Employment Relations Board (PERB) hearing, the superintendent further qualified the discussion by stating that he did not inform Barlow that the District was contemplating implementation of either alternative. In response to a question from CSEA's attorney, he said that at that time he was just trying to witness her reaction and to hear her suggestions as to alternatives. The superintendent also testified that he had a similar discussion with Greg Marvel, the CSEA field representative. Marvel, however,

denies this, and the hearing officer credited the latter's testimony, finding that the superintendent apparently had confused a conversation he had with Dorothy Lemas, the CSEA local president, with one that he did not have with Marvel.

On July 21, Lemas received the agenda for the District's July 25 board of trustees meeting. Item 7.1 proposed a resolution to eliminate nine teacher aide positions. Lemas notified both Barlow and Marvel. Marvel said that he was made aware of the resolution only several hours before the meeting; nevertheless, he attended the meeting and addressed the board.

While it is clear that Marvel criticized the resolution during his presentation, claiming that it was an illegal action, the record is less than clear as to whether Marvel referred to EERA violations, as well as those under the Education Code, and whether he requested the District to negotiate over the decision to lay off and its impact upon bargaining unit employees. Witnesses for CSEA testified that Marvel, in so many words, stated that the subject of layoffs was negotiable and that the District had the responsibility to meet and negotiate with CSEA. On the other hand, the District superintendent and board members testified that nothing in Marvel's presentation could be construed as a request to negotiate. Although, the District's witnesses seemed to waiver slightly in their recollections, in total, their testimony indicates that Marvel did not refer to the scope of

negotiations under EERA and did not make a request to negotiate on either the subject of the decision to lay off or the impact of such layoffs.

The hearing officer found the evidence to be uncontroverted and that CSEA never specifically requested to negotiate the effects of the layoffs. However, relying upon the demeanor of the witnesses, the fact that two District witnesses failed to deny, absolutely, that Marvel had made the statements he claimed to have made, and statements purportedly made by Patricia Morgan, the president of the school board at that meeting,² he found that the Association did believe that layoffs were negotiable and that it requested the District to negotiate.

After Marvel's presentation, the board voted 4-1 in favor of the layoffs. The affected aides were notified by letter on July 26 that they were to be terminated as of August 29. Again, the hearing officer credited the testimony of the CSEA witnesses.

²During the PERB hearing, CSEA witnesses and Morgan presented conflicting testimony as to her statements. The former testified that, in response to Marvel's presentation that the District should negotiate the question of layoff, Morgan exclaimed that the board is the body that makes decisions such as this, not CSEA. Morgan, however, claims that she made the response in reaction to Marvel's general statements about the illegality of the layoffs and that the essence of her comments was that the board had to make cuts and that she would prefer the laying off of nine aides to that of three teachers.

On August 15, Chapter President Lemas read a letter addressed to the board wherein she touched upon the lawfulness of the District's action under EERA. She wrote:

What the board did was take unilateral action without meeting with the representatives of . . . CSEA . . . to meet and negotiate on the layoff of these nine members.

.

I request that the school board reconsider and rehire these nine classified people.

The board made no response and did not subsequently seek to negotiate with CSEA prior to August 29. On August 29, the employees were laid off.

On January 24, 1979, CSEA filed unfair practice charges alleging that the District violated subsections 3543.5(b) and (c) by unilaterally laying off the nine employees without first negotiating in good faith the decision to lay off and the effects of layoffs. On January 26, a PERB hearing officer ordered CSEA to particularize its charges so as to provide a statement that would properly constitute an unfair practice charge.³ Among the particularizations that the hearing officer requested was:

³PERB rules and regulations are codified at California Administrative Code, title 8, section 31000 et seq.

Rule 32650(a) provides in part:

On its own motion . . . the Board may require the charging party . . . to

If the charging party made a request to negotiate, state whether the request was to negotiate about the procedure and sequence of the layoffs or whether or not there were to be any layoffs at all.

In its responding particularization, CSEA stated:

Charging Party requested the opportunity to negotiate about the layoffs, and indicated that the Respondent had failed to meet and negotiate on the issue prior to taking the action to layoff. Said request was made orally at the July 25, 1978 Board of Trustees meeting prior to the Board taking action, and was made by Mr. Greg A. Marvel, Field Representative of the Charging Party. The request was made to the full Board of Trustees and the oral response to the arguments presented by Charging Party at that meeting was that the Board was elected to run the District and that was what they were going to do. . . .

The request to meet and negotiate on the layoffs of the instructional aides was a general request to negotiate on the subject of the layoffs. It was pointed out by Charging Party at the July 25, 1978 meeting of the Board of Trustees that Charging Party had concerns as to the validity and/or accuracy of a seniority list of instructional aides.

DISCUSSION

We find that CSEA failed to demand to negotiate on the effects of the layoff. While it is not essential that a request to negotiate be specific or made in a particular form, Al Landers Dump Truck, Inc. (1971) 192 NLRB 207 [77 LRRM 1729] Schreiber Freight Lines (1973) 204 NLRB 1162, [83 LRRM 1612],

supplement the charge . . . with additional specified information

it is important for the charging party to have signified its desire to negotiate to the employer by some means. NRLB v. Columbian Enameling and Shaping Co. (1939) 306 U.S. 292 [4 LRRM 524]; American Buslines, Inc. (1967) 164 NLRB 1055 [65 LRRM 1265]. In Al Landers, supra, the board said:

[A] valid request to bargain need not be made in a particular form, or in haec verba, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.

In other words, a valid request will be found, regardless of its form or the words used, if it adequately signifies a desire to negotiate on a subject within the scope of bargaining. Here, the hearing officer found that CSEA requested to negotiate layoffs. However, he acknowledged that the record is uncontroverted and that CSEA never provided any indication that it desired to negotiate the effects of layoff. All available evidence indicates that it only requested to negotiate the decision itself, an issue which is not negotiable, infra.

In its response to the particularization request and in its testimony at the PERB hearing, CSEA asserted a demand to negotiate the issue prior to the District's "taking the action to lay off" -- that is to say before the District made its decision to adopt the July 25 resolution to lay off. It further claimed that it had made a general "request to

negotiate" but in the same response qualified its position as concern with "the validity and/or accuracy of a seniority list."⁴

While at the PERB hearing, Marvel said that he was primarily interested in negotiating the effects issue, he later admitted he never described these concerns to the school board. He further conceded that after the resolution's adoption, he considered the issue closed and that any further requests would be futile. He based this conclusion, in large part, on the Morgan response made during his presentation before the school board.

Even CSEA's version of Morgan's comments supports the finding that CSEA only intended to negotiate the decision itself. According to CSEA, she asserted that only the District was invested with the authority to make layoff decisions.

By claiming that the District's adoption of the resolution made any further negotiations futile, CSEA further indicated that it only desired to negotiate the decision to lay off. The District did not intend to implement the decision until August 29, 1978, and a request to negotiate effects could

⁴While the validity and/or accuracy of a seniority list may be subject to a grievance procedure, it is not negotiable because order of layoff and seniority are specifically prescribed by the Education Code, *infra*, p. 13, fn. 7. See Jefferson School District (6/19/80) PERB Decision No. 133.

consequently have been made during the intervening time. Furthermore, the Lemas letter of August 14 was directed at the July 25 unilateral decision prior to negotiating the decision to layoff and nothing more. It demands that the board "reconsider and rehire" the laid-off employees.

While the hearing officer's particularized request was inexplicably limited,⁵ CSEA's responsibility to file a prima facie charge was not relieved. It failed to do so.

In sum, CSEA gave no general notice of its interest in the effects of the layoff decision and, of course, submitted no related proposals. The District never expressed a refusal to negotiate on such matters and, indeed, never addressed the subject in any way. Under these circumstances, it is not possible to find that the District refused to negotiate on the effects of the layoff.

Accordingly, we find that the District's refusal to negotiate was directed only to the matter of the decision to lay off.

The effects of layoff identified and found within scope by the hearing officer (timing and duration of the layoff, number of employees affected, seniority, location, and severance pay)

⁵A more appropriate request to particularize would have asked CSEA to state the exact language used in its oral request to the school board to negotiate.

were never raised in the course of the hearing. Neither party had any knowledge that those matters would be ruled on. The District certainly had no opportunity to produce evidence or argument concerning their inclusion in the scope provisions of the EERA. In deciding these matters under these circumstances, the hearing officer exceeded his jurisdictional authority.

Only one issue was properly before him: did the District violate EERA by unilaterally deciding to lay off certain employees. An employer violates subsection 3543.5(c) by unilaterally changing a matter within the scope of representation without giving the exclusive representative notice of such changes so as to provide it with the opportunity to negotiate. San Mateo County Community College District (6/8/79) PERB Decision No. 94. In Anaheim Union High School District (10/28/81) PERB Decision No. 177, the Board established a test to determine whether a subject which is not specifically enumerated in subsection 3543.2(a) is negotiable under the Act:⁶

[A] subject is negotiable even though not specifically enumerated if (1) it is

⁶Subsection 3543.2(a) states:

(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

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 mediating influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

The layoff of employees unquestionably impacts on their wages, hours, and other conditions of employment. It may

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.

concurrently impact upon those employees who remain. Nevertheless, the determination that there is insufficient work to justify the existing number of employees or sufficient funds to support the work force, is a matter of fundamental managerial concern which requires that such decisions be left to the employer's prerogative. In CSEA v. Pasadena Unified School District (1977) 71 Cal.App.3d 318, the court interpreted Education Code section 45308⁷ and rejected CSEA's arguments that a school district's discretion to lay off because of a "lack of funds" should be limited. CSEA had argued that layoffs because of insufficient funds should not be permitted when, in fact, the District maintained an undistributed amount

⁷Education Code section 45308 provides in relevant part:

Classified employees shall be subject to layoff for lack of work or lack of funds. Whenever a classified employee is laid off, the order to layoff [sic] within the class shall be determined by length of service. The employee who has been employed the shortest time in the class, plus higher classes, shall be laid off first. Reemployment shall be in the reverse order of layoff.

For purposes of this section, for service commencing or continuing after July 1, 1971, "length of service" means all hours in paid status, whether during the school year, a holiday recess, or during any period that a school is in session or closed, but does not include any hours compensated solely on an overtime basis as provided for in Section 45128.

of reserve funds which evidenced to CSEA that there was no lack of funds. The court held that, absent evidence that the District clearly abused its discretion, it had clear authority to determine the amounts necessary to be committed to the legislatively authorized reserve funds. Concomitantly, the court implicitly recognized the District's authority to unilaterally decide when there exists such a "lack of funds" as to require the layoff of personnel under section 45308. Such a finding recognizes management's fundamental authority to determine its operating budget for a fiscal year.

The hearing officer's determination that the decision to lay off employees is not within the scope of mandatory negotiations is affirmed. The charge is dismissed in its entirety.

ORDER

Based on this entire record before the Public Employment Relations Board the charges filed by the California School Employees Association, Newman-Crows Landing Chapter #551 against the Newman-Crows Landing Unified School District are hereby DISMISSED.

By: Harry Gluck, Chairperson

Irene Tovar, Member

Member Morgenstern's concurrence and dissent begin on page 15.

Marty Morgenstern, Member, concurring and dissenting:

In this case, the District excepts to the findings that: (1) Such effects of layoff, as the timing and duration of layoffs and the number and identity of employees to be laid off, are negotiable; (2) the District did not give sufficient notice to CSEA prior to making the decision to lay off; (3) CSEA did not waive its right to negotiate by failing to make an adequate request to negotiate; and (4) an appropriate remedy requires that the affected employees be reinstated and made whole retroactively to the date of the layoff. CSEA objects to the hearing officer's dismissal of that part of its charge alleging that the District violated EERA by not first negotiating the decision to lay off.

I concur with the majority in upholding the District's exceptions in points 1, 2 and 4 above and in dismissing CSEA's single objection to the hearing officer's decision.

In dissent, I would point out that while the union could easily have been more precise in responding to the District's intent to lay off, both parties share the responsibility to make the negotiation requests more specific and narrowly drawn. CSEA's actions were sufficient to put the District on notice that the union wanted to negotiate the layoff to the extent it is negotiable. The Board has usually been loathe to find that a waiver exists except in the most unambiguous of circumstances. Therefore, on point 3 above, the proper decision would be

to find that CSEA did not waive its right to negotiate on those aspects of the layoff that are negotiable.

The majority is correct in stating that "the decision to lay off employees is not within the scope of mandatory negotiations." On the other hand, the impact of that decision is negotiable. Management does not have to negotiate on the decision to lay off in order to effect such a decision, and the majority is correct in refusing to reinstate the employees in this case. However, properly, the employer should now be required to negotiate on the effects of the layoff decision (e.g., severance, seniority, possible ~~reinstatement~~ or re-call rights).

Marty Morgenstern, Member