

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



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| HOLTVILLE TEACHERS ASSOCIATION, |) | |
| Charging Party, |) | Case No. LA-CE-1144 |
| V. |) | PERB Decision No. 250 |
| HOLTVILLE UNIFIED SCHOOL DISTRICT, |) | September 30, 1982 |
| Respondent. |) | |

Appearances; John J. Maloof, Attorney (Horton, Knox, Carter & Foote) for Holtville Unified School District; Kenneth H. Parker for California Teachers Association.

Before Gluck, Chairperson; Jaeger and Morgenstern, Members.

DECISION

GLUCK, Chairperson: The Holtville Unified School District (District) excepts to a proposed finding that it violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act¹ by unilaterally adopting a mandatory retirement policy for certificated employees for the

¹EERA is codified at Government Code sections 3540 et seq. All statutory references are to the Government Code unless otherwise specified.

Subsections 3543.5(a), (b) and (c) provide as follows:

It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees; to discriminate or threaten to discriminate against employees, or otherwise

school year 1980-81 and by refusing to negotiate with the Holtville Teachers Association (HTA), the exclusive representative of certificated employees, concerning such a policy.

FACTS

The case was submitted by the parties on the following stipulated facts:

1. The HTA is the exclusive representative of the District's certificated employees.
2. A collective bargaining agreement was in effect during the time in which these events occurred.
3. On February 21, 1980, the District tabled until its February 26 meeting a motion to adopt the following policy:

. . . effective February 21, 1980, it is the policy of the Holtville Unified School District Board of Trustees that all certificated employees be mandatorily terminated with no notice required at the end of the school year in which they attain the age of seventy (70) or more years. Three educators will be appointed to consider the competency of teachers seventy (70) years of age who wish to continue.

to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(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.

Continuance of any type of employment with the District after the school year in which certificated employees attain seventy (70) or more years of age would be subject to the pleasure of the board and would be terminated on thirty (30) days notice.

4. On February 21, 1980, HTA requested in writing that the motion be tabled and that HTA be provided with a copy of the motion for study purposes and that "the board will agree to meet and negotiate the provisions of the resolution under the evaluation section of the contract." The letter further stated:

My advice from CTA staff attorneys in Los Angeles was to request that both of us, the District and Association, take the time to spell out the criteria for evaluating teachers beyond age 70 and to include the specifics in the contract to avoid possible unfair labor charges in the future. Since teachers beyond 70 may remain employed unless declared "incompetent," I respectfully request that we negotiate the terms of determining competence.²

The letter was signed by Ms. Singh, HTA's President.

5. On February 26, 1980, the District adopted the following motion instructing:

Dr. W. F. Pittman, District Superintendent, that for the coming school year, 1980-81, those employees being more than seventy (70) years of age will not be offered employment and said employees shall be notified of said Board action.

6. On February 26, 1980, Ms. Singh presented a letter to the District's board which stated inter alia:

²The quoted language appears in the exhibits.

The Association respectfully submits that the Board table any further action on this matter [mandatory retirement] until all the necessary legal information is obtained.

7. On February 28, 1980, two certificated employees, Anna T. Fonger and Velma I. Rose, aged 72 and 75 respectively, were notified in writing of the District's intent not to reemploy them with termination to be effective on June 5, 1980.

8. On March 5, 1980, Ms. Singh wrote Pittman that the Association demanded to bargain, pursuant to section 3543.2 of EERA, the rules and regulations specified under Education Code section 23922.

9. On March 25, 1980, Ms. Singh presented the District's board with a written demand to bargain:

You are hereby notified that the Holtville Teachers Association demands to bargain pursuant to government code 3543.2, the impact of the Holtville Unified School District's unilateral position to terminate because of age. HTA maintains the effects of the board's unilateral action constitutes a violation of 3543.5. Termination is not isolated, but carries with it rippling effects. . . . HTA maintains competency standards and evaluation of teachers age 70 and beyond are negotiable and are an integral part of transfer and reassignment policies. HTA has on the table an article concerning reduction in staff3

10. On April 8, 1980, Ms. Singh presented another letter to the board identical to the foregoing.

³See footnote 2, supra.

11. On March 25, 1980, HTA filed a grievance concerning Fonger's and Rose's dismissals. The District denied the grievance and HTA did not pursue it to advisory arbitration.

In addition to the above-stipulated facts, the record reveals that HTA's charge was filed on April 28, 1980 and reads, in part:

1. The Association president [at the 2/21 Board of Trustees' meeting] requested negotiations on a provision of the collective bargaining contract, Article XVII, Evaluations. A special meeting of the school board was held on 2/26 to consider the mandatory retirement policy. The Association presented a letter at that meeting calling for maintenance of benefits provided in the contract. On 2/28, two teachers received notices of non-reemployment for 1980-81 because of age. On March 5, March 25, and again on April [illegible], the Association presented the school district with a demand to bargain because the unilateral action of the Board of Trustees had impact on two teachers and the bargaining unit by means of salary, reduction of staff, and other terms and conditions of employment.

2. . . . the Board of Trustees has chosen to ignore the Association's written request to bargain with its unilateral action and has chosen to ignore the Association's [illegible] requests.

HTA's post-hearing brief states the issues as: (1) whether the District failed to negotiate criteria for teachers 70 years of age and over, and (2) the impact of the termination of employees Fonger and Rose.

The District's Position;

The District excepts specifically to the proposed finding that mandatory retirement is within the scope of required negotiations. It argues that Education Code section 449064 mandates retirement at age seventy and eliminates the requirement that "cause" other than age be found for termination. Further, according to the District, the "discretion" vested in school employers by section 44906 is not limited by a duty to negotiate since EERA demonstrates no such legislative intent.

HTA's Position:

The Association contends that the subject of mandatory retirement is negotiable as a matter relating to wages, benefits, and evaluations, and that an employer's discretionary authority is subject to its duty to negotiate since only matters which are conclusively mandated by the Education Code are not superseded by EERA's provisions.

DISCUSSION

The record before the Board, including the charge and the stipulated facts, makes it clear that HTA sought negotiations

4Education Code section 44906 reads, in pertinent part:

. . . When a permanent or probationary employee reaches the age of seventy (70) years, his or her permanent or probationary classification shall cease and thereafter employment shall be from year-to-year at the discretion of the governing board.

on the standards to be used in deciding whether to terminate or retain employees who have reached seventy years of age as well as the effects of any decision to terminate such employees. We find both subjects to be within the scope of mandatory negotiation.

In Anaheim Union High School District (10/28/81) PERB Decision No. 177, the Board developed a test for determining whether a subject not specifically stated in section 3543.2 is within scope. Applying that test now, we find that the subject of mandatory retirement clearly is of concern to both management and employees and likely to create conflict because of its profound effect on a most fundamental aspect of employer-employee relations - termination of employment. Further, the process of collective negotiations is a viable means of resolving such disputes since it furthers the statutory objective of bringing a matter of mutual vital concern within the framework of peaceful, private resolution and provides employees with the opportunity to dissuade the employer or offer alternatives to the employer's chosen course of action.

Anaheim requires that the Board exclude from scope those matters which so lie at the core of entrepreneurial control or which are of such fundamental policy that the duty to bargain about them would significantly abridge the employer's freedom to manage the enterprise or achieve the District's mission.

Here, the District has offered no evidence that teachers of seventy years of age or over, as a class, are incompetent or otherwise unfit for continued employment. Indeed, the District originally acknowledged that reemployment of aged teachers was to be based on "competence," a position it abandoned in favor of an arbitrary, categorical termination policy for which it advanced no business reasons during the course of the hearing.

The remaining prong of the Anaheim test is to determine to which subjects enumerated in section 3543.2, if any, the subject of mandatory retirement is reasonably and logically related.

Probably the most fundamental aspect of the employment relationship is its continuity under lawful terms and conditions. Where termination policies are not the result of preemptive statutory requirement,

the employee loses his job at the command of the employer; . . . the effect upon the "conditions" of the person's employment is that the employment is terminated; and, we think . . . the affected employee is entitled under the Act to bargain collectively through his duly selected representatives concerning such termination. Inland Steel Co. 1948 77 NLRB 1 [21 LRRM 1316], enforced (7th Cir. 1948) 170 F.2d 247 [22 LRRM 2505], cert. denied (1949) 356 U.S. 960 [24 LRRM 2019].

In Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223, the Board stated that layoffs affect the wages, hours, and possible fringe benefits of those employees

laid off. Nevertheless, the Board found that the decision to lay off is a nonnegotiable managerial prerogative because the grounds for such action are specified in the Education Code as lack of funds or lack of work and the process of negotiating the decision to lay off, possibly to the completion of the statutory impasse proceedings, could seriously abridge management's freedom to meet its financial obligations.

We find the matter of mandatory retirement distinguishable. As we have already stated, no comparable imperative has been demonstrated by the District. Nor is one to be found in Education Code section 44906, which clearly authorizes school districts to employ teachers who have reached age 70.

Because of the pervasive impact of compelled retirement on the subjects enumerated in section 3543.2, we cannot limit negotiation of such a policy to the procedures to be employed in determining whether aged employees are to be retained or terminated. To so limit bargaining is to give management virtually unlimited and total control over this fundamental employment relationship which the Legislature intended to be subject to the collective negotiation scheme. Without the opportunity to negotiate the standards for compelled retirement, the employee would be limited to little more than deciding through which door he or she must exit.

The District's claim that the Education Code mandates total separation of employees who have attained the age of seventy

ignores the plain language of section 44906 and is contradicted by its own argument that retention of aged teachers is within its discretion.

Similarly, its argument that its discretion as vested by the Education Code is not dependent on the meet and confer obligation is contrary to EERA's requirement that section 3543.2 matters be subject to the process of bilateral determination. For example, Education Code section 45022 vests school districts with the authority to set the salaries for its employees, yet it is beyond dispute that section 3543.2 makes wages of school employees subject to negotiation. It is the essence of section 3543.2 that covered matters which previously had been within management's discretion to implement, would now be subject to the negotiation process.

The Board has considered apparent conflicts between Government Code sections 3543.2 and 3540⁵:

⁵Government Code section 3540 reads:

. . . Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

The distinction lies between a statutory provision which mandates a specific and an unalterable policy and one which authorizes certain policy but falls short of being absolutely obligatory. As we read section 3540, those proposals which otherwise meet our test of negotiability are within scope, unless a conflicting Education Code provision precludes variance from its terms.⁶

Thus, negotiations would be precluded only where the statutory language clearly demonstrates a legislative intent to establish a specific and unalterable provision and where the contract proposals would tend to replace, modify or annul such provisions of the Code. We reaffirm this conclusion now.

Finally, the Board finds that by its unlawful unilateral act, the District concurrently violated subsections 3543.5(a) and (b) of the EERA. San Francisco Community College District (10/12/79) PERB Decision No. 105.

THE REMEDY

The hearing officer was without authority to order the District to reinstate employees Fonger and Rose since section 44906 of the Education Code requires that their permanent status and classification be terminated. Since the Code does not mandate total dismissal and since they were, nevertheless, dismissed in contravention of the District's duty

⁶Jefferson School District (6/19/80) PERB Decision No. 133, pages 7-10.

to negotiate and in the absence of any showing of cause, it is appropriate to provide the means by which they may be made whole while at the same time protecting the District from the obligation to continue the service of employees who might have been terminated had the District initially taken lawful action.

Therefore, the Board finds it appropriate to order that Fonger and Rose be paid at the rate they would have received had they been reemployed as year-to-year teachers from the date they would have been so reemployed less any retirement benefits they received until one of the following conditions is met:

1. The District, using the procedures and policies that were in effect prior to the adoption of its unlawful policy, determines whether employees Rose and Fonger shall hereafter be terminated or reemployed on a year-to-year basis; or

2. The status of the employees is determined pursuant to a negotiated mandatory retirement policy which conforms to Education Code section 44906 or pursuant to a policy unilaterally adopted after final exhaustion of statutory impasse procedures has been reached; or

3. The status of the two employees is determined pursuant to a settlement agreement reached by the parties.

The Board will also order the District to cease and desist from further implementation of its unlawful unilateral policy and direct the parties to negotiate a retirement policy upon request of either party.

ORDER

Based on the entire record in this case, the Public Employment Relations Board finds that the Holtville Unified School District violated subsections 3543.5(a), (b), and (c) by unilaterally adopting a mandatory retirement policy and by refusing to negotiate on such policy with the Holtville Teachers Association and by terminating employees Fonger and Rose pursuant to such unlawful unilateral policy. The Board further ORDERS that:

The Holtville Unified School District shall:

A. CEASE AND DESIST from:

(1) Implementing its unilateral mandatory retirement policy adopted in February 1980; and

(2) Refusing to negotiate with the Holtville Teachers Association on a mandatory retirement policy for certificated employees of the District.

(3) Denying the Holtville Teachers Association the right to represent unit members by refusing to negotiate over a mandatory retirement policy for certificated employees of the District.

(4) Interfering with employees because of their exercise of the right to select an exclusive representative to meet and negotiate with the employer on their behalf by refusing to negotiate over a mandatory retirement policy for certificated employees of the District.

In addition, the Public Employment Relations Board ORDERS that the Holtville Unified School District take the following AFFIRMATIVE ACTION:

(1) Pay to said employees, Anna T. Fonger and Velma I. Rose, the salaries each would have received had they been reemployed as year-to-year teachers commencing with the beginning of the school year 1980-81, reduced by the amount of retirement pay, if any, they received, until either the District determines by utilizing the procedures and standards in effect prior to the adoption of its unlawful policy that said employees hereafter be terminated or reemployed as year-to-year teachers, or the District determines by utilizing procedures and standards to be negotiated by the parties pursuant to this order that said employees shall be terminated or reemployed as year-to-year teachers, or the District determines, following exhaustion of statutory impasse procedures in such negotiations and utilizing lawful procedures and standards, that said employees shall be terminated or reemployed as year-to-year teachers or the parties settle the dispute concerning the employees by agreement.

(2) The District shall post a copy of the Notice attached hereto as Appendix A for a period of twenty (20) days commencing ten (10) days after service of this Decision and Order upon the District.

(3) The District shall notify the regional director, Los Angeles Regional Office, within twenty (20) calendar days thereafter of the steps it has taken in compliance with this Order.

Members Jaeger and Morgenstern concurred.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF CALIFORNIA

After a hearing in the Unfair Practice Case No. LA-CE-1144, Holtville Teachers Association v. Holtville Unified School District, in which both parties did participate, it has been found that the Holtville Unified School District violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act by unilaterally adopting a mandatory retirement policy and by terminating two certificated employees pursuant to that policy. As a result of these actions, we have been ordered to post this notice and abide by the following:

1. CEASE AND DESIST FROM:

Unilaterally adopting a mandatory retirement policy and from refusing to negotiate upon request of the Holtville Teachers Association on proposals for such a policy for certificated employees of the District, and from further implementing the mandatory retirement policy adopted by the District.

2. TAKE AFFIRMATIVE ACTION TO:

Compensate and or reemploy employees Anna T. Fonger and Velma I. Rose in accordance with the negotiated settlement with the Holtville Teachers Association or in accordance with the Order of the Public Employment Relations Board.

HOLTVILLE UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent of District

Dated: _____

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR TWENTY (20) CONSECUTIVE WORK DAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.