

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



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| SAN BERNARDINO TEACHERS ASSOCIATION, CTA/NEA, |) | |
| |) | |
| Charging Party, |) | Case No. LA-CE-509 |
| |) | |
| v. |) | PERB Decision No. 255 |
| |) | |
| SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT, |) | October 29, 1982 |
| |) | |
| Respondent. |) | |

Appearances; A. Eugene Huguenin, Jr., Attorney for San Bernardino Teachers Association, CTA/NEA; Ronald C. Ruud, Attorney (Atkinson, Andelson, Ruud & Romo) for San Bernardino City Unified School District.

Before Gluck, Chairperson; Tovar and Jensen, Members.

DECISION

JENSEN, Member: This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by both the San Bernardino City Unified School District (hereafter District) and the San Bernardino Teachers Association, CTA/NEA (hereafter Association). The Association also filed a response to the District's exceptions. The proposed decision of the hearing officer is incorporated by reference herein. In that proposed decision, the hearing officer concluded that the District did not violate subsection 3543.5(a) by its unilateral adoption of its "Certificated Rules of Conduct." The hearing officer found that certain rules, specifically Rules 2.1, 2.2, 2.4-2.6 and 4.6., were negotiable,

but that these particular rules were consistent with the parties' negotiated agreement. Further, he found that the District did violate subsections 3543.5(a), (b) and (c)¹ of the Educational Employment Relations Act (hereafter EERA or the Act) with regard to the adoption of Rule 2.3, because the rule, by its language, is a change from the past working conditions of employees. The hearing officer ordered that the District return to the status quo ante with respect to the past practice of teachers leaving school during work hours.

The Board has carefully reviewed the record in light of the parties' exceptions and responses thereto, and affirms the hearing officer's findings of fact and conclusions of law only insofar as they are consistent with this decision.

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all references shall be to the Government Code.

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 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.

FACTS

Between March 1978 and April 1979, the Association and the District negotiated a collective bargaining agreement which was ratified by the school board on May 3, 1979. During the approximate 30 negotiation sessions, neither side made any proposals specifically relating to the rules of conduct or tenure.

The parties negotiated an extensive evaluation procedure as part of their first contract adopted in 1978. The procedure was incorporated without substantial change into the 1979-80 contract. The evaluation process includes joint setting of performance objectives for each individual teacher and a broad list of professional duties required of teachers but makes no reference to discipline of teachers.

On May 29, 1979 Joseph Woodford, District director of employee relations and chief spokesman for the District during negotiations, notified the Association in writing that the District proposed to present a set of rules of conduct for certificated employees to the board of education for its consideration on June 21, 1979. (See Attachment A). These rules were prefaced by the statement that "violation of any of these rules shall be grounds for disciplinary action."

Mr. Woodford's letter stated in part:

. . . as you know these rules must be consistent with the specific and express terms of the contract. In

Article V, section 1 of the contract the District retained the right to terminate and discipline employees. In the exercise of this specifically reserved right, the District has developed these proposed "certificated rules of conduct" as a policy, as provided in section 1 of Article V. We have taken great care to insure that these rules of conduct are in conformance with the contract and law.

The letter concluded by encouraging input from the Association. However, the District did not offer to negotiate over the rules.

The District stipulated at hearing that it considered the proposed rules to be outside the scope of bargaining and/or authorized by the contract to be adopted unilaterally, and that it did not offer to bargain with the Association over the matter at any time.

The Association sent the District a letter of protest on June 6, 1979 vehemently opposing the District's "proposed rules." The letter charged, essentially, that the Association had already negotiated the standards of performance upon which certificated employees could be evaluated, the terms of which were embodied in various sections of the contract.

The District nonetheless presented the proposed rules, with slight revisions, to the board on July 19, 1979. Both Association President Royce Bell and Association Vice President Gerald Christensen spoke to the board in opposition to the proposed rules.

On July 27, Royce Bell and the executive director of CTA San Bernardino/Colton Chapters, Daniel G. Stubbs, met informally with Mr. Woodford in his office to present their specific objections to each of the rules. The Association's objections essentially were that the rules (other than Rules 1.5 and 2.3) were redundant, duplicative of the contract, unnecessary, covered by existing policy and the (Education) code, and in violation of the spirit of the contract. The District's position was that the rules were a codification of policies, procedures and unwritten practices that previously existed in the District. The District understood that the rules were redundant with existing Education Code sections, other state codes, board policies and written administrative procedures, but felt it was necessary to place all the rules in one document and preface the rules with a statement that violation "of any of these rules shall be grounds for disciplinary action." This position was based at least in part upon legal advice that the Education Code (see subsection 44932(g)) required a dismissal to be based upon written rules of a school board. Woodford testified that he drafted the rules with an eye on the contract provisions so that there wouldn't be a conflict.

The board of education adopted the rules of conduct on August 2, 1979 and implemented them immediately thereafter.

Of the 24 rules, the Association presented testimony with respect to only two rules, Rules 1.5 and 2.3.2 Royce Bell testified that his experience at two schools between 1967 and 1979 was that teachers were not required to check out when leaving campus for school business in contrast to Rule 2.3 which requires prior approval for leaving campus during the workday. Bell also testified that while serving as the Association's building representative for 14 years, he attended many meetings when checkout policies at various schools were discussed. Based upon these meetings, he testified that generally teachers could leave campus without prior approval for school business reasons and that most schools had sign-out sheets. Woodford testified that the previous unwritten policy required a teacher to inform his supervisor prior to leaving campus. He testified that a majority of principals required a verbal acknowledgment that a teacher was leaving. The record reflects that no uniform District practice existed requiring teachers to get prior approval before leaving campus.

²Rules 1.5 and 2.3 are as follows:

- 1.5 Certificated employees assigned to a regular classroom shall complete and make available lesson plans as directed by their supervisor.
- 2.3 No certificated employee may leave his/her respective work site during working hours without permission of his/her supervisor.

Bell also testified that, since 1967, the District had never required him to file lesson plans. Bell taught at both the junior high and high school levels during this period. District witness Joseph Woodford testified that at certain schools, particularly at the elementary level, lesson plans were required to be left on the desk, but that many times they were not provided, which sometimes caused problems when a substitute teacher appeared for work. Woodford testified that he had talked with principals concerning their individual policies regarding the requirement of lesson plans. He further testified that the adoption of Rule 1.5 has not changed the policies of any individual school concerning lesson plans, with one exception. A principal at Urbita School changed the school's policy to require additional lesson plans, emergency or contingency plans. A grievance was filed and resolved by the principal dispensing with the requirement. Similar oral complaints arose at two other schools which Woodford presumed had been solved in a like matter. The District's past practice with respect to this requirement of lesson plans appears to have varied from school to school with no uniform practice District-wide. Finally, Woodford testified that he gave instructions to his site administrators to continue to operate their schools as they have in the past, and that it was not the District's intent to set up a District-wide practice.

DISCUSSION

Negotiability of Rules of Conduct

1. Supersession

The Association excepts to the hearing officer's finding that the subject of rules of conduct as grounds for discipline are nonnegotiable.

The Association also excepts to the hearing officer's failure to find the adoption of the rules of conduct itself a violation, arguing that the rules are per se negotiable since they bear a logical and reasonable relationship to items enumerated in EERA section 3543.2.

In a series of cases dealing with supersession, this Board has interpreted the supersession language contained in section 3540 of EERA³ to contemplate that where a proposal pertains to a subject which is covered by the Education Code, the negotiability of that proposal is not precluded so long as it

³Section 3540 of the Act in relevant part states:

. . . 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.

does not directly conflict with the Code.⁴ Unless the statutory language clearly evidences an intent to set an inflexible standard or insure immutable provisions, the negotiability of a proposal is not precluded, provided it relates to an item within the scope of negotiations.

Education Code Sections 44932 and 44933 provide a scheme of grounds for the dismissal of certificated employees. The District's statement that "violation of any rules shall be grounds for disciplinary action" certainly encompasses the full range of disciplinary action. Education Code subsection 49932(g) authorizes dismissal of a permanent certificated employee for:

Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him.

The other subsections of Education Code section 49932 set forth mandatory criteria to be utilized in the dismissal of permanent certificated employees. Subsection 49932(g), however, includes reasonable regulations prescribed for the government of the public schools by the governing board of the school district. This provision is discretionary in that it does not set forth

⁴Jefferson School District (6/19/80) PERB Decision No. 133; Healdsburg Union High School District (6/19/80) PERB Decision No. 132.

specific mandated criteria. We therefore conclude that the determination of the negotiability of the rules of conduct as they affect the imposition of disciplinary action is not precluded by direct conflict with any mandatory provision of the Education Code. No evidence was presented at the hearing which demonstrated such a conflict. Since supersession has not been demonstrated here, the appropriate test to determine the negotiability of these rules of conduct is our scope test enunciated in Anaheim Union High School District (10/28/81) PERB Decision No. 177.

2. Scope

Subsection 3543.2(a) of the EERA sets forth the scope of representation and, in relevant part, states that:

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

In Anaheim Union High School District, supra, we stated that:

. . . a subject is negotiable even though not specifically enumerated if (1) it is 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 mediatory 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.

Disciplinary action, particularly termination, may have a direct impact on wages, health and welfare benefits, and other enumerated terms and conditions of employment since such action may reduce or eliminate entitlement to those enumerated items. Thus, rules of conduct which subject employees to disciplinary action are subject to negotiation both as to criteria for discipline and as to procedure to be followed. The unilateral adoption of such rules therefore violates the employer's duty to notify the exclusive representative and provide it with an opportunity to negotiate.⁵ San Francisco Community College District (10/12/79) PERB Decision No. 105; San Mateo City School District (5/20/80) PERB Decision No. 129; Pajaro Valley

⁵This action arose prior to the 1981 amendment to section 3543.2 of the EERA which adds subsection 3543.2(b):

(b) Notwithstanding Section 44944 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding causes and procedures for disciplinary action, other than dismissal, affecting certificated employees. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of section 44944 of the Education Code shall apply.

We do not therefore consider its effect on scope.

Unified School District (5/22/78) PERB Decision No. 51; NLRB v. Katz (1962) 369 U.S. 736 [59 LRRM 2177]. The mere compilation of already existing District rules or policies would not constitute a unilateral change.

The NLRB and this Board have stated that the "status quo" against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment, holding that changes consistent with past practices are not a violation of the "status quo" and are thereby lawful. Davis Unified School District et al. (2/22/80) PERB Decision No. 116; Pajaro Unified School District, supra; Stratford Industries, Inc. (1974) 215 NLRB 682 [88 LRRM 1240].

The District maintains that it did not commit an unfair practice by its adoption of the certificated rules of conduct because the rules were merely a codification of existing policies, procedures and practices. Furthermore, the District argues that the adoption of Rule 2.3 did not constitute a unilateral action on a matter within the scope of representation because the record clearly shows that it was implemented in a manner consistent with past practice.

Other than testimony by Woodford that the Association's primary objections to the individual rules of conduct were that they were redundant, duplicative of the contract, unnecessary, etc., the Association presented evidence of past practice with

respect to only two rules, Rule 1.5 (requirement of lesson plans) and Rule 2.3 (leaving the worksite during working hours). Since no evidence of past practices was presented as to the other 22 rules, and given the uncontradicted testimony of District witness Joseph Woodford that there was no change in past practice as to these rules, we find that the Association did not meet its burden in proving that there was a unilateral change in past practice as to those 22 rules.

The testimony regarding Rule 1.5 establishes that there was a unilateral change in the adoption of the rule. The requirement of lesson plans apparently varied from school to school. The District argues that since Rule 1.5 imposes the requirement to complete and make available lesson plans only as directed by the supervisor, and since all District site administrators were instructed to operate their schools as they had in the past, this rule was adopted in accordance with past practice. However, Rule 1.5 on its face, gives total discretion on the part of the supervisor to require lesson plans at schools which formerly had no such requirement. The fact that there was a grievance filed and two oral complaints lodged over implementation of Rule 1.5 also indicates that its adoption constituted a change in past practice.

Similarly, with respect to Rule 2.3, the record establishes that there clearly was a unilateral change in the adoption of the rule. Prior to its adoption, there was no uniform District

practice with regard to teachers getting prior approval before leaving campus. Rule 2.3 on its face prohibits employees from leaving the work site without permission of his or her supervisor. Although District witness Woodford testified that he gave instructions to his site administrators to continue to operate their schools as they had in the past, and that it was not the District's intent to set up a District-wide practice, the language of the rule itself was a variation from past practice and, as such, constitutes a unilateral change in past practice.

Applying the scope test to both Rule 1.5 and Rule 2.3 we find both rules to be logically and reasonably related to the enumerated terms and conditions of employment. Rule 1.5 is logically and reasonably related to hours because it is a mandatory job requirement which may necessitate the certificated employee to put in additional work time to prepare the newly required lesson plans which were previously unrequired. Rule 2.3 is certainly logically and reasonably related to hours of employment in that it may impact on employees' lunch or break periods or other non-duty time. By denying teachers the right to leave the premises without permission during non-duty time, the policy, in effect, modifies the workday.⁶ It is therefore related to hours.

⁶The rule on its face, prohibits leaving the worksite during "working hours" without permission. "Working hours"

Secondly, given the possibility of disciplinary action taken against an employee pursuant to these rules, the subject is of considerable import and concern to employees. Management also has an interest in having its policies and rules set forth clearly, in written form, enabling management to better administer and regulate its operations while at the same time providing its employees with a clear statement of District rules and policies. Thus, Rules 1.5 and 2.3 are of concern to both management and employees, and given the competing interests, these rules are likely to generate conflict. The mediatory influence of collective negotiations is the appropriate means of resolving that conflict. The negotiating process provides the necessary framework for clarifying the meaning of particular rules of conduct, for the discussion of disciplinary procedures and for the promotion of stable employment relations.

Finally, 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 District maintains its inherent right to initiate discipline, and can exercise its discretion in the determination of whether

denotes the entire period between beginning and ending time of a shift, including non-duty time such as lunch and breaks. Essex International (1974) 211 NLRB 112 [86 LRRM 1411].

a rule violation warrants the imposition of a particular penalty. Therefore, it is found that Rules 1.5 and 2.3 are within the scope of representation and would find that the District had an obligation to negotiate with respect to those rules. The District's unilateral adoption of Rules 1.5 and 2.3 constitutes a violation of subsections 3543.5(a), (b) and (c) of EERA.

REMEDY

Certain aspects of the hearing officer's order were not excepted to by either party. Except as otherwise indicated, those matters in his order not excepted to and therefore not considered here are adopted by the Board.⁷ We have considered the District's exceptions as to remedy and find them to be without merit. Therefore, we adopt the following ORDER.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the San Bernardino City Unified School District has violated subsections 3543.5(a), (b)

⁷The Board's remedial authority is found in section 3563.3, which provides:

The board shall have 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.

and (c) of the Educational Employment Relations Act by unilaterally adopting work rules which can subject an employee to disciplinary action. It is hereby ORDERED that the District, its governing board, and representatives shall:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the exclusive representative by unilaterally adopting rules of conduct leading to disciplinary action without providing the exclusive representative an opportunity to negotiate thereon.

(2) Denying the San Bernardino Teachers Association, CTA/NEA its right to represent unit members by failing and refusing to meet and negotiate about these rules of conduct.

(3) Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally adopting these rules of conduct.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(1) Reinstigate the status quo ante regarding the past practice regarding the requirement of lesson plans and the past practice of teachers leaving school during work hours. If the District desires to adopt any rule of conduct on this subject which impacts working conditions within scope, it shall give notice, and upon request from the Association, negotiate in

good faith regarding substance and procedure regarding that rule.

(2) Within ten (10) workdays following the date of service of this Decision, post at all school sites, and all other work locations where notices to employees customarily are placed, copies of the Notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to insure that said notices are not reduced in size, altered, defaced or covered by any other material.

(3) Within ten (10) workdays following the date of service of this decision, notify the Los Angeles regional director of the Public Employment Relations Board, in writing, of what steps the District has taken to comply herewith. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on charging party herein. This Order shall become effective immediately upon service.

Chairperson Gluck and Member Tovar 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 which all parties had the right to participate, it has been found that the San Bernardino City Unified School District violated the Educational Employment Relations Act by taking unilateral action in its adoption of Rules 1.5 and 2.3 of its certificated Rules of Conduct, without meeting and negotiating in good faith with the exclusive representative, the San Bernardino Teachers Association, CTA/NEA. It has further been found that this same course of action interfered with San Bernardino City Unified School District employees' exercise of rights protected by the Educational Employment Relations Act. As a result of this conduct, we have been ordered to post this notice, and we will abide by the following:

A. CEASE AND DESIST FROM:

- (1) Failing and refusing to meet and negotiate in good faith with the exclusive representative by unilaterally adopting rules of conduct leading to disciplinary action.
- (2) Denying the San Bernardino Teachers Association, CTA/NEA its right to represent unit members by failing and refusing to meet and negotiate about these rules of conduct.

(3) Interfering with employees' right to negotiate collectively through their exclusive representative by unilaterally adopting these rules of conduct.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

Reinstitute the status quo ante regarding the past practice regarding the requirement of lesson plans and the past practice of teachers leaving school during work hours. If the District desire to adopt any rule of conduct which impacts working conditions within scope, it shall give notice, and upon request from the Association, negotiate in good faith regarding the substance and procedure concerning that rule.

SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT

By: _____
Authorized Representative

Dated: _____

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

PERSONNEL

CERTIFICATED RULES OF CONDUCT

Purpose

The Board of Education expects that all employees holding positions that require State certification comply with the rules set forth in this policy. Classified employees are governed by rules and regulations prescribed by the Personnel Commission. It is not the intent of the Board of Education that these rules be exclusive, but that they supplement the school laws of the State, regulations prescribed for the government of the public schools by the State Board of Education, and other regulations adopted by the San Bernardino City Unified School District. Violation of any of these rules shall be grounds for disciplinary action.

1. Employee Obligations and Responsibilities

- 1.1 All certificated employees shall keep accurate records. This shall include, but not be limited to, student attendance, student progress, student discipline, etc.
- 1.2 All certificated employees shall complete and timely submit all projects, reports, and forms as directed by their supervisor; including, but not limited to, attendance reports, grades, employee cause of absence, etc.
- 1.3 Certificated employees are responsible for all students in their charge, and shall not leave students unsupervised.
- 1.4 No certificated employee shall administer corporal punishment to any student unless the established procedures prescribed by the Board of Education are followed.
- 1.5 Certificated employees assigned to a regular classroom shall complete and make available lesson plans as directed by their supervisor.
- 1.6 No certificated employee shall release any information or records designated by law or the District as confidential to any person or organization except as provided in District policy governing the release of confidential information and records.

CERTIFICATED RULES OF CONDUCT

1.7 Certificated employees are required to report all industrial accidents and accidents involving students to their supervisor or designee, or other appropriate District administrator within twenty-four hours of occurrence.

1.8 Certificated employees shall comply with all policies and procedures of the District.

2. Employee Attendance and Working Hours

2.1 All certificated employees shall report to work as designated by the District.

2.2 All certificated employees shall remain at work until the completion of the workday as designated by the District.

2.3 No certificated employee may leave his/her respective work site during working hours without permission of his/her supervisor.

2.4 Certificated employees shall not apply for or obtain a leave of absence under false pretenses. Leaves may be used only for the purposes for which they are obtained.

2.5 Certificated employees shall only use sick leave for authorized purposes.

2.6 Certificated employees shall report to work at the expiration of any leave of absence.

3. Insubordination

3.1 Certificated employees shall follow orders and directives given by their supervisor.

3.2 No certificated employee shall use abusive or obscene language directed toward other employees of the District. This shall include any derogatory, racial, or ethnic remarks.

CERTIFICATED RULES OF CONDUCT

4. Misconduct

- 4.1 No certificated employee shall possess, use, or be under the influence of any illegal drug or narcotic, as defined under State or Federal law, or marijuana while on duty or on school premises.
- 4.2 No certificated employee shall possess, use, or be under the influence of any alcoholic beverage while on duty or on school premises.
- 4.3 Certificated employees shall not knowingly falsify any work records or employment forms.
- 4.4 Certificated employees shall not sleep while on duty.
- 4.5 Certificated employees shall not use abusive or obscene language in the presence of students and/or parents. This shall include derogatory, racial, or ethnic remarks.
- 4.6 Certificated employees shall not participate in any strike or work stoppage or otherwise withhold services.
- 4.7 Certificated employees may smoke only in designated areas.
- 4.8 Certificated employees shall not park their automobiles on school sites except in designated areas.