STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. OAKLAND UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-408 PERB Decision No. 275 December 29, 1982

Appearances; Andrew Thomas Sinclair, Attorney (Sinclair & Clancy) for Oakland School Employees Association; Ember Lee Shinn, Attorney for Oakland Unified School District.

Before Jaeger, Morgenstern and Jensen, Members.

DECISION

JENSEN, Member: This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by the Oakland Unified School District (hereafter District), and a response to those exceptions filed by the Oakland School Employees Association (hereafter Association or OSEA). The proposed decision of the hearing officer is incorporated by reference herein. In that proposed decision, the hearing officer found that the disputed Association proposals on (1) "in-service training" (but for a required minimum amount),[1] (2) "personnel selection" and (3) "minimum hours"

[1]NO exception was taken to this finding, and therefore it is not before us.

were within the scope of representation and that the District engaged in "bad faith surface bargaining" as to the latter two proposals in violation of subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (hereafter EERA or the Act).2

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

PROCEDURAL HISTORY

On October 4, 1979, OSEA filed two unfair practice charges against the District. As amended, in Case No. SF-CE-408, the

---

2EERA 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.

Association charged that the District failed to negotiate in good faith on six items in violation of EERA subsections 3543.5(b) and (c).

In Case No. SF-CE-409, the Association alleged the District failed and refused to grant members of the paraprofessional negotiating unit the pay increase granted to other classified employees in the District, thereby violating EERA subsections 3543.5(a), (b) and (c).

An informal hearing failed to resolve the charges, and a formal hearing was held on November 20, 1979. On the Association's motion, the hearing was reopened on September 12, 1980, to take new evidence concerning the credibility of a District witness. In addition, by agreement of the parties, official notice was taken of the portion of the record in Case No. SF-CE-469 between the same parties relating to standardization of paraprofessionals' hours.

On November 28, 1979, after the first hearing in Cases Nos. SF-CE-408 and 409, the Association filed a third charge against the District (SF-CE-428) in which it alleged the District attempted to condition ratification of the parties' negotiated agreement upon withdrawal of the two previous unfair practice charges. The Association also alleged the District negotiated in bad faith on a negotiations proposal involving a tradeoff of a salary increase in return for an unpaid day of sick leave. The Association alleged violations of EERA

subsections 3543.5(a), (b), and (c). By agreement of the parties, this charge was consolidated with the previous two and submitted for decision to the hearing officer on the basis of the record in SF-CE-408 and 409.

However, post-hearing settlement discussions resulted in the withdrawal by the Association of the charges in Cases Nos. SF-CE-409 and SF-CE-428 in their entirety, as well as portions of the charge in Case No. SF-CE-408. Therefore, in the instant case, we are faced solely with the following issues from Case No. SF-CE-408.

Did the District violate subsections 3543.5(a), (b), and (c) of the Act by failing or refusing to negotiate in good faith with the Association on the following items:

1. Four-hour minimum workday for new positions; and
2. The selection criteria to fill vacant positions within the negotiating unit?

FACTS

In November 1978, OSEA was certified as the exclusive representative of a classified employee negotiating unit, commonly referred to as the "paraprofessional" unit, consisting mainly of instructional aides, as well as community health assistants. The first set of negotiations began shortly thereafter and by June 30, 1979 the parties were close to agreement on the majority of issues, with grievance procedure, classification in services, and wages still outstanding.

On June 30, the District's chief negotiator, James Wilson, retired and was replaced by Loma Reno, already a member of the negotiating team and the District's personnel assistant who at that point became the District's chief negotiator. When Ms. Reno took over as chief negotiator, the parties reviewed the proposals to which there was tentative agreement to verify its accuracy as to the understanding of the parties.

By October 2, 1979, the District entered into a stipulation that certain items, including the provision of a minimum amount of in-service training for the paraprofessional unit, were beyond the scope of bargaining. The Association filed Charge No. SF-CE-408 based upon this stipulation.

By October 12, 1979, the parties had reached tentative agreements on basically all but four items. The parties decided to enter into a negotiated agreement leaving the four items for further negotiations. On October 22, 1979, the parties signed another stipulation regarding the District's position as to the negotiability of the remaining issues.[3]

---

[3]That stipulation stated:

> IT IS HEREBY STIPULATED that in addition to the terms listed in the Stipulation of October 2, 1979, the following items are considered to be beyond the scope of bargaining by the Oakland Unified School District with regard to the negotiations for the Paraprofessional Bargaining Unit and that the District will not bargain with respect to them:

Charge SF-CE-408 was then amended by OSEA to include the items in the new stipulation. The parties had agreed to a total package increase of 8.4 percent with the trade-offs being that the first day of sick leave would be without pay and certain concessions on eligibility requirements for health benefits. Ms. Reno took the tentative agreement to the board of education for approval on October 24, 1979, and the board agreed to ratify it with the four items left out.

On October 26, 1979, Ms. Reno met with OSEA representatives and informed them that the board had approved the tentative agreement. The Association asked if they could amend the tentative agreement on three items, including the first day of sick leave without pay. The school board refused the amendments. On October 30, 1979, the District sent OSEA a letter repudiating both stipulations and offering to bargain/explore the negotiability of the disputed issues. The letter, in relevant part stated:

---

1. The OSEA proposal with regard to unemployment insurance (Article VIII of the OSEA proposals);

2. Personnel selection (Article XII of the OSEA proposals);

3. Classifications (Article XIV of the OSEA proposals);

4. New positions (Article XV 1/2 of the OSEA proposals).

> . . . Since the School District does not wish to interpose artificial barriers to communication, and wishes to promote good faith bargaining between the parties, I invite OSEA to return to the bargaining table for further discussions. If OSEA will demonstrate how these particular items are within the scope of negotiations, the District team will gladly consider them and engage in good faith exploration as to the possibility of agreement.
>
> It also appears that the real problem is one of reaching agreement rather than determining whether these particular proposals are within scope. I did not fully realize the implications of the stipulations we entered on October 2 and October 22 respecting the scope of bargaining. While reserving all objections as to scope, I must repudiate these stipulations since the District has in fact bargained and remains willing to bargain over the seven proposals in question.

The parties met and negotiated on November 13 and November 16, 1979. On November 16, 1979, the Association asked the District to ratify the original tentative agreement. The District, however, refused to enter into the agreement in light of the upcoming unfair practice hearing scheduled for November 20. The District indicated it hoped to resolve all outstanding negotiation issues, including items previously part of the October 22 stipulation, at one time.

Disputed Proposals

A. The Four-Hour Minimum for "New Positions"

On September 7, 1979, OSEA submitted a proposal for "new positions" which provided:

> All new positions in this bargaining unit shall be for at least 4 hours. Only those persons presently employed in this bargaining unit may apply for such positions, unless no applications are received, in which case the position shall be advertised for the general public.
>
> a. Minimum qualifications may include experiences in elementary or secondary schools and/or experience in teaching math and reading;
>
> b. Applicants who meet the minimum qualifications shall be selected on the basis of seniority.

On September 12, 1979, the District submitted a counterproposal which provided:

> The daily work hours for members of this unit will be established to meet the needs of the district.

The District then modified its proposal on September 19, 1979 to provide:

> Positions in this unit are established to meet the needs of the district and provide a service to the students. All vacancies - those resulting from attrition as well as any newly established positions - will be reviewed to meet the criteria for the establishment of the positions.
>
> The daily work hours for members of this unit will vary from 2 hours per day to a maximum of 6 hours per day.
>
> The vacant positions will be posted and selections made on the basis of qualifications, affirmative action and seniority.

The Association wanted to increase paraprofessionals' work hours to a minimum of four because employees working less than

3 1/2 hours per day are not entitled to coverage under the Public Employees Retirement System, are not credited with Social Security contributions and receive a proportionally lower contribution to other health and welfare benefits.

According to the District's estimates, increasing these benefits for paraprofessionals would result in a 25-percent cost increase, and increasing the hours of all paraprofessional employees to a minimum of four would cost about one million dollars.

In negotiations on this proposal, the Association raised the possibility of increasing the minimum hours of only 25 to 50 employees rather than all of them, and also discussed the possibility of increasing employees' hours through attrition.

The District began negotiations with, and was bound by, a budgetary parameter set by the school board that "new monies" for the negotiations could not exceed 5 percent. It was the District's position that this amount of money was allocated for the paraprofessional bargaining unit for salary increases. If the employee organization wanted to increase the minimum hours of employees, they would have to take the increased cost of doing so out of the allocated funds. Ms. Reno testified that OSEA could "buy back" some four-hour positions from the funds allocated. She testified that she had no authority to bargain for anything beyond this allocated pool of money.

As previously discussed, the District entered into a stipulation on October 22, 1979 which stated that this proposal on new positions was not within the scope of negotiations and the District would not bargain over it. That stipulation was repudiated on October 30, 1979. Ms. Reno testified that she signed the stipulation because she was "frustrated."

At the negotiation sessions on November 13 and 16, 1979, the Association again raised the possibility of increasing the minimum hours of 25 to 50 employees. The Association then asked if the District would increase the hours of only two employees to four per day. The District rejected both these proposals on two grounds. First, its position was that there was a pool of "new money" (5 percent) which already had been allocated to other economic items, primarily salary. The Association would have to "buy back" four-hour positions by giving up other economic items upon which tentative agreement had been reached. Secondly, the District could not increase the hours of any position unless a particular school site needed a four-hour employee. The federal guidelines require each school site to establish its own budget, and through this budgetary process the school sites determine their needs for paraprofessional employees. However, Ms. Reno stated in negotiations that, if the Association wanted to take part of the 5 percent new money to pay for four-hour positions, the District probably could find some school sites which would be

able to use employees with the increased hours.

The hearing was later reopened to take additional testimony. Evidence was produced in the reopened hearing that attempted to impeach the District's negotiating position that it could not increase the hours of paraprofessional employees unless requested by the school sites. It was established that since at least 1977 there had been a written, administrative policy in the District to standardize paraprofessional positions at either three or six hours. The Association stated that it was unaware of this policy until after the hearing, and the District did not call the policy to the Association's attention during negotiations. The record is unclear as to whether OSEA had ever been informed of this policy in the past.

Despite the standardization policy, during the negotiations there were paraprofessionals in other than three- or six-hour positions. In addition, the parties stipulated that during negotiations there had been requests from school sites for positions that were for other than three or six hours and some of these requests were for four-hour positions.

After the hearing, the District took steps to enforce the standardization policy by eliminating paraprofessional positions which were for other than three or six hours.

B. Personnel Selection

OSEA submitted as part of its original proposals an article entitled "Personnel Selection" which provided:

> In the event of a vacancy within this unit, the most senior applicant who meets the minimum qualifications shall be selected.

The District did not initially make a counterproposal, but rather contended the proposal was out of scope. OSEA modified its proposal on October 10 after discussions with the District to read as follows:

> In the event of a vacancy within this Unit, the most senior applicant who meets the minimum qualifications shall be selected. For purposes of this provision, seniority shall be computed on the basis of the number of days worked, not on the basis of the number of hours worked.
>
> a. The employee with the earliest date of hire shall be presumed to have the greatest seniority, unless the employee has had leaves in excess of 60 days during the employee's employment history.

The District took the position that this modified proposal was also beyond the scope of bargaining. The October 22, 1979 stipulation listed personnel selection as being beyond the scope of bargaining. But again, that stipulation was repudiated on October 30, 1979, and the parties returned to the bargaining table.

The Association then submitted a revised version of its proposal on November 13, 1979, which stated:

> In the event of a vacancy within this bargaining [unit], the most qualified candidate shall be selected. The qualifications shall include only the following:

1. Experience in elementary and/or secondary schools;

2. Experience with mathematics and/or reading;

3. Number of days working in this bargaining unit.

In the event of equally qualified candidates, the affirmative action goals of the District shall be controlling.

The District responded with their first counterproposal on November 16, 1979, which stated:

> Employment, assignment and promotion are the sole right of the district. The most qualified applicant shall be selected for any vacant position. Qualifications criteria will be determined by experience in related grade level, and the requirements of the position.
>
> If the top applicants are substantially equal in qualifications:
>
> 1. The district's affirmative action goals shall be given priority; otherwise,
>
> 2. Seniority shall be the deciding factor.

The District's position was basically that the selection of the particular individual was a management prerogative. However, the District was willing to negotiate over the criteria for personnel selection of new vacancies or positions within the District or re-employment within the District. At the time of the hearing, the District was willing to bargain over this criteria and had a proposal on the table.

The principal disagreement between parties with regard to this proposal was the way in which seniority was to be computed

and the importance of affirmative action. Ms. Reno testified that after July 1, 1971, pursuant to the Education Code, seniority was computed on the basis of hours in paid status, rather than days. Accordingly, employees working the same number of days could accumulate seniority at completely different rates. Ms. Reno agreed that computing seniority as provided in the Education Code would have the practical effect of freezing employees working fewer hours under the District's personnel selection proposal into low seniority placement. However, the District was strongly against using days in paid status as the basis of computing seniority for fear that this would "confuse" employees. It would create dual seniority rosters because, according to the Education Code, lay-off and re-employment rights had to be computed based on hours in paid status. OSEA attempted to meet this concern by modifying their proposal to mention only "number of days working in this bargaining unit." However, the District remained strongly opposed to using any means other than that set forth in the Education Code to compute seniority.

DISCUSSION

A. Negotiability of OSEA's Proposals

The District excepts to the hearing officer's rationale and conclusion that the Association's proposal on the four-hour minimum for new positions and the selection criteria for vacant positions are within the scope of representation and hence

negotiable. We have carefully evaluated the District's arguments in respect to the negotiability of these proposals, and find them to be unconvincing. We therefore affirm and adopt the hearing officer's conclusions that both of these proposals are within the scope of representation.

B. Duty to Bargain

The District forcefully excepts to the hearing officer's conclusion that the District engaged in surface bargaining with respect to these two proposals in violation of its duty to bargain in good faith. The exception has merit and we reverse the hearing officer on this finding.

Both the National Labor Relations Board (hereafter NLRB) and this agency have held that the question of good faith must be based on the totality of the parties' conduct.[4] In weighing the facts, we must determine whether the conduct of the parties indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained.

To evaluate surface bargaining requires a detailed consideration of the totality of the parties' conduct to determine if that party is merely going through the motions of negotiations as an elaborate pretense to avoid agreement. NLRB

[4]NLRB v. Truitt Mfg. Co. (1956) 351 U.S. 149 [38 LRRM 2042]; NLRB v. Alva Allen Industries, Inc. (8th Cir. 1966) 369 F.2d 310 [63 LRRM 2515]; Muroc Unified School District (12/15/78) PERB Decision No. 80; Fremont Unified School District (6/19/80) PERB Decision No. 136.

v. Reed & Prince Mfg. Co. (1st Cir. 1953) 205 F.2d 131 [32 LRRM 2225].

However, EERA does not require parties to reach agreement or make concessions on every proposal. The NLRB and the courts have consistently ruled that adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. NLRB v. American National Insurance Co. (1952) 343 U.S. 395 [30 LRRM 2147]. See also NLRB v. Wooster Division of Borg-Warner Corporation (1958) 356 U.S. 342 [42 LRRM 2034]. And in NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229 [45 LRRM 2829], the Court said:

> The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained.

C. Four-Hour Minimum

The parties met through October 12, 1979 and negotiated over this proposal.

The District's October 22, 1979 stipulation as to the non-negotiability of this proposal was repudiated soon thereafter on October 30, 1979. We do not view this repudiation as evidence of a refusal to bargain but rather as a good faith appeal to return to the bargaining table with this proposal. The District continued to negotiate on the proposal on November 13 and 16, 1979. The District rejected the Association's subsequent proposals on the "four-hour minimum" because acceptance of the proposals would have to

involve trade-offs. The District reasoned that the Association would have to buy back these four-hour positions by giving up other economic items upon which tentative agreement had previously been reached. The District felt bound by a 5 percent budget ceiling for negotiations, and that these four-hour positions would have to come out of the limited monies available. The District further took the position that it could not increase the hours of any position unless a particular site needed a four-hour position. However, Ms. Reno testified that in negotiations she stated that if the Association wanted to take part of the 5 percent monies to pay for four-hour positions, the District probably could find some school sites which would be able to use employees with increased hours. This position does not reflect an inflexibility on the part of the District to negotiate over this proposal. Budgetary constraints are part of the variables in the bargaining process and the District did negotiate over these four-hour positions, pointing out, however, that funds for these positions were only available out of the 5 percent monies. This position is neither inflexible nor unreasonable and is not inconsistent with good faith negotiations.

The Association argues, and the hearing officer found, that the District's failure to inform the Association during negotiations about its policy to standardize hours in the bargaining unit was evidence of bad faith.

Under the facts presented in the instant case, we disagree. Nowhere in the record is it indicated that the Association made a request for such information. Certainly, District policies of this sort are reachable through requests for information and are generally available to the public. Absent such a request, the District is under no obligation to provide information. All districts have many policies in writing, which may be of use or interest to a union during negotiations. Furthermore, the record was unclear as to whether OSEA had ever been informed of this policy in the past. The record indicated that this standardization policy was implemented very sporadically from its inception in 1977 through the time of hearing. In light of the foregoing facts, we find neither a deliberate withholding of relevant information from the Association nor a duty of the District to provide information in the absence of a request.

D. Personnel Selection

The District originally contended the personnel selection proposal was beyond the scope of representation and signed the October 22, 1979 stipulation so stating. After its repudiation of the stipulation, the District negotiated over the proposal. The District took the position in negotiations that the selection of the particular individual was a management prerogative. However, the District was willing to negotiate over the criteria for personnel selection of new vacancies,

transfers to positions within the District or re-employment within the District. We find this position consistent with the District's obligation to negotiate over the proposal. The principal disagreement between the parties with regard to this proposal was the way in which seniority would be computed and the importance of affirmative action. The District's position of maintaining seniority pursuant to Education Code provisions, though perhaps evidence of hard bargaining, did not constitute a refusal to negotiate. That position was based on legitimate District concerns about setting up two different seniority systems within the District. This position does not rise to the level of inflexibility, but rather represents a firm District position taken consistent with good faith. We find that the District fulfilled its obligation to negotiate over this proposal in good faith.

E. Totality of the Circumstances

The evidence adduced at the hearing showed that the parties had reached tentative agreement on approximately 95 percent of all contract items on October 12, 1979. The District signed two stipulations in October stating basically that the outstanding items were beyond the scope of bargaining and that the District would not negotiate over those items. The District was willing to sign the tentative agreement and allow the remaining items to be resolved at the hearing. After District negotiator, Loma Reno, had obtained board approval of

the October 12, 1979 agreement, the Association sought to amend that agreement as to three previously negotiated items. The school board refused the amendments. On October 30, 1979, the District repudiated both stipulations.[5] The parties continued to trade actual proposals and negotiate. On November 16, 1979, the Association requested that the District ratify the original tentative agreement reached on October 12, 1979. The District refused, however, to enter into an agreement because they hoped to resolve all the outstanding negotiation issues at the unfair practice hearing which was four days away.[6] While the negotiations regarding minimum hours and personnel selection may evidence hard bargaining on the part of the District, the District did negotiate, and did not refuse to negotiate on those items after the District repudiated the two stipulations. The parties were close to an agreement and the record does not indicate that either party was acting in a manner to avoid agreement. The school board had ratified the tentative agreement with the exclusion of the disputed items. The Association's subsequent attempts to amend

---

[5]If the District had not repudiated its stipulations so rapidly, or had held to the position taken in the stipulations for an unreasonable amount of time, we would have found a per se refusal to bargain.

[6]The Association withdrew that portion of charge SF-CE-428 which alleged that the District attempted to condition ratification upon withdrawal of the unfair practice charges. Therefore that conduct is not before us here.

that tentative agreement, the reopening of negotiations on the disputed items and the pendency of the unfair practice hearing formed the basis of the District's rejection of the Association's request to go back to the October 12, 1979 tentative agreement. The District favored negotiating to resolve all the outstanding issues. Looking at the totality of the circumstances, we cannot find surface bargaining. There is insufficient evidence on this record to support that conclusion.

The charge alleging the District violated subsections 3543.5(a), (b) and (c) is dismissed.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board hereby DISMISSES the charges filed by OSEA against the Oakland Unified School District.

Members JAEGER and MORGENSTERN join in this decision.