7 PERC ¶ 14162

GROSSMONT UNION HIGH SCHOOL DISTRICT

California Public Employment Relations Board

Grossmont Education Association, Charging Party, v. Grossmont Union High School District, Respondent.

Docket No. LA-CE-1264

Order No. 313

May 26, 1983

Before Tovar, Morgenstern and Burt, Members

Unilateral Change -- Workload -- Waiver -- -- 09.642, 43.44, 43.46, 43.621, 72.666 School district, by unilaterally changing schedules of special education teachers from four teaching periods/two preparation periods to five teaching periods/one preparation period, did not violate its bargaining obligation where evidence indicated that parties intended that contractual work load provision, specifying that teachers would "normally" be assigned five/one schedule, should apply to special education teachers. Since contract specifically identified teaching positions that were excluded from "normal" schedule, contract was clear and unambiguous that all others, including special education teachers, were subject to five/one schedule, regardless of past practice.

APPEARANCES:

Richard J. Currier, Attorney (Littler, Mendelson, Fastiff & Tichy) for Grossmont Union High School District; Charles R. Gustafson, Attorney for Grossmont Education Association.

DECISION

Tovar, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Grossmont Union High School District (District) to a hearing officer's proposed decision [see 6 PERC 13024 (1981)]. The hearing officer found that the District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)1 by refusing to negotiate with the Grossmont Education Association (Association) over a decision to change the work assignments of certain teachers by replacing a daily period of preparation time with a period of classroom instruction.

The District acknowledges that in 1980 it changed the work assignments of certain educationally handicapped department (EH) teachers from four classroom instruction periods and two preparation periods to five class periods and one preparation period and that it refused the Association's demands to negotiate that change; it denies, however, that in so doing it violated the EERA. The crux of its position is that a contract agreed to by the parties in 1978 and in effect at the time of the disputed change expressly granted the District the authority to assign any and all bargaining unit members, including EH teachers, to a five class/one preparation period schedule. By agreeing to a contract which ceded such authority, argues the District, the Association waived its right to negotiate over any particular District decision to exercise that authority.

The District also raises by way of defense the EERA's statute of limitations, set forth at subsection 3541.5(a),2 and the limitation on the PERB's authority to enforce contracts, set forth in subsection 3541.5(b).3 Finally, it argues that, regardless of other issues, the change in teaching

assignments from four classes/two preparation periods to five classes/one preparation period had only a negligible effect on matters within the scope of representation.4

For the reasons which follow, we find that the parties' collectively negotiated contract constitutes a complete defense to the Association's charge that the District violated the EERA when it refused the Association's demand to negotiate.5 We therefore reverse the hearing officer's decision and dismiss the charge. Because we dismiss on this basis, we find it unnecessary to resolve the questions of the statute of limitations and the precise extent to which the change in work assignments affected matters within the scope of representation.6

FACTS

In 1978 the District and the Association completed negotiations on a successor employment contract covering the members of the certificated employees unit. The agreed-upon term of the contract was July 1, 1978 through June 30, 1981.

For many years prior to the commencement of the contract, the standard teaching assignment for the District's classroom teachers had been six working periods, usually composed of five periods of classroom teaching and one period of preparation time. The preparation period was not duty-free, but rather was a work assignment during which teachers performed work-related duties. Some teachers, however, were assigned a six period schedule of *four* classes and *two* preparation periods.

Chief among those assigned a four class/two preparation period schedule were teachers in the District's special education program. The special education program consists of a number of District-wide departments, one of which is the educationally handicapped department. The teachers who are at the core of the instant controversy taught in either of two EH department programs: learning disabled group (LDG) and special day.

These EH teachers, like most of the special education teachers, had for many years taught a 4/2 schedule. In the midst of the spring semester, 1979, one EH teacher went on pregnancy leave and another EH teacher resigned. To fill these vacancies, one new teacher was hired and four EH teachers already on the faculty each agreed to teach an additional class as an overload assignment. These teachers were paid 25 percent additional salary as compensation for teaching, in effect, a 5-class, 2 1/2-preparation-period schedule.

The three-year term of the contract, following as it did on the heels of Proposition 13, was a period of financial difficulty for the District. Numerous cost-cutting measures were considered by the administration each year, and some were actually implemented. Thus, English department teachers had frequently been assigned a 4/2 schedule prior to the contract, although the practice varied among the District's nine high schools and from year to year; over the first two years of the contract, however, the administration phased out the 4/2 schedules for English teachers and reassigned them to 5/1 schedules. The record contains no evidence that the Association objected to these schedule changes.

In the fall of 1979, most of the special education program teachers were converted to 5/1 schedules. EH teachers, however, remained on a 4/2 schedule.

On January 15, 1980, a meeting of EH teachers was held, led by Ronald Blazovic, the chief administrator for the District's special education program. A member of the Association's board of directors was in attendance. One topic of discussion concerned planned budget reductions for the next school year. Dr. Blazovic informed the teachers in attendance that he had been directed to cut the special education budget by $100,000. One measure which had been proposed to accomplish this was that EH special day and LDG teachers should teach five classes and one preparation period. Another meeting was held in April 1980, at which EH teachers questioned Dr. Blazovic regarding problems they felt would result from the proposed schedule change and discussed various means by which their responsibilities might be reduced so as to minimize the impact of the change.

In August 1980, the Association's president met with the District's director of personnel and Dr. Blazovic, and learned at that time that the EH teachers would definitely be assigned a 5/1 schedule in September. When the school year began in September, the EH teachers were in fact assigned 5 periods of instruction. On October 2, and again on October 17, the Association tendered a demand that the District negotiate the subject of workload for EH teachers.7 These demands were refused by the District.

The Contract

The 1978-81 contract between the parties included, *inter alia,* articles on recognition and workload, which provided in relevant part as follows:

ARTICLE I RECOGNITION

. . .

The unit shall include: All certificated employees, including counselors, psychologists, school nurses, social workers and temporary teachers who work on a contract basis one semester or more.

. . .

ARTICLE XII WORKLOAD

Standard Teaching Assignment

The principal, after consultation with the department chairpersons, shall determine the daily time schedule for the bargaining unit members pursuant to this article.

The standard teaching assignment shall be six periods per day including a preparation period. A normal teaching assignment period shall be sixty minutes including passing time. This period may be reduced or increased by the building principal, but it shall not decrease or increase the total amount of time that a bargaining unit member shall remain at school. Driver training instructors shall not receive a preparation period. If the daily schedule for students is divided into modules of time greater or less than six (6) periods, the standard teaching assignment shall be equivalent, in classroom time, to the classroom time of a normal six-period day. All bargaining unit members are entitled to a thirty-minute duty free lunch.

Members, with the exception of driver training, will normally be assigned five periods of instruction per day or 25 hours per week, plus a preparation period which may be used for class preparation, curriculum development, or other professional tasks.

. . .

Workload

No member shall teach more than twenty-five (25) hours per week except by mutual consent of the District and the teacher involved. A member, other than driver training teachers, teaching a sixth (6th) period will be reimbursed for this extra assignment at one-fifth (1/5) of his/her placement on the salary schedule.

Elsewhere in the contract, a provision on "Transfer" is set forth. That provision is as follows:

ARTICLE XI TRANSFER

DEFINITION OF TERMS

1. *Transfer:* The voluntary or involuntary movement of one bargaining unit member from one school to another school. This does not apply to TMR, EMR, EH or other district-wide programs.

. . .

The TMR (trainable mentally retarded), EMR (educable MR) and EH programs mentioned in the transfer article are special education programs.

Finally, the contract contains a management rights clause, which provides in part as follows:

Article III Management Rights

The exercise of the powers, rights, authority, duties and responsibilities by the District as set forth below, and the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this agreement, and then only to the extent such specific and express terms are in conformance with law.

Former Association Presidents June Mott and Charles Feeser participated in the negotiation of the contract, with Mr. Feeser acting as chief negotiator. Mr. Feeser had no experience or training in collective bargaining prior to negotiating the original contract between the parties. Both witnesses acknowledge that EH teachers are in the unit, and that the contract provision on workload was generally intended to apply to all unit members. At no time were EH or any special education teachers discussed or referred to in the negotiation of the workload provision. Feeser and Mott testified that they never gave much consideration to special education teachers in negotiating the contractual terms because they perceived that it was a program which was extensively regulated by state law. They were under the impression that the Education Code controlled most working conditions for special education teachers. However, they acknowledge that at negotiations they were aware that no state law preempted them from bargaining as to employment conditions for special education teachers, and that they made no attempt to negotiate an exception for EH teachers to the express terms of the workload provision which call for a standard 5/1 assignment and limit extra pay to those teachers who teach six classes.

DISCUSSION

Generally, the EERA requires that a change in terms and conditions of employment within the scope of representation must be negotiated by the parties. *Moreno Valley Unified School District* (4/30/82) PERB Decision No. 206, 6 PERC 13107. However, an exclusive representative may, by contractual agreement or otherwise, waive its right to negotiate a given change, and the employer is thereby left free to make that change. See *Chico Unified School District* (2/22/83) PERB Decision No. 286, 7 PERC 14077.

The Board, consistently with the National Labor Relations Board (NLRB), has held that a waiver, to be effective, must be clearly and unequivocally conveyed. *Oakland Unified School District* (8/31/82) PERB Decision No. 236, 6 PERC 13201. "[W]e will find a waiver only when there is an intentional relinquishment of these rights, expressed in clear and unmistakable terms . . . ." *San Francisco Community College District* (10/12/79) PERB Decision No. 105, 3 PERC 10127. Here, the District points to specific contractual language which, it asserts, is the kind of express language which constitutes a clear and unmistakable waiver of the right to negotiate.

Cases decided by the NLRB have made clear that a contract provision which cedes to the employer unilateral control over a particular, clearly identified matter will operate as a waiver of the exclusive representative's bargaining right as to that matter. Thus, in *Ador Corp.* (1965) 150 NLRB 168 [58 LRRM 1280], the NLRB found no unfair labor practice where the employer

unilaterally laid off some employees following its decision to discontinue one of its product lines. The contract between the parties provided that:

> The management of the Company's plant and the direction of its working forces, including the right to establish new jobs, abolish or change existing jobs, increase or decrease the number of jobs, change materials, processes, products, equipment and operations shall be vested exclusively in the company; . . . Subject to the provision of this agreement, the Company shall have the right to . . . lay off employees because of lack of work or other legitimate reasons . . . .

Based on this provision the NLRB found no failure to bargain:

> The so-called management rights section of the collective bargaining contract in effect at the time the employer made his decision and took the basic steps in the implementation thereof, gave to the Company the exclusive right to eliminate production of any of its products and to lay off employees who were, as a consequence of such decision, no longer needed. The parties had, in effect, bargained about the manner in which such decisions were to be made during the term of the collective bargaining agreement and had agreed that the "Company" could take unilateral action in this regard.8

Similarly, this Board found in *Chico Unified School District, supra,* that the District did not violate the EERA when, as a result of a sick-out, it implemented a form of absence verification not previously required. We found that the contract between the parties expressly granted to the District the authority to institute that verification requirement. The Association had in effect waived its right to negotiate this change in District practice.

The Association in the instant case agreed to a contract which provides, *inter alia,* that "the standard teaching assignment shall be six periods per day including a preparation period." An exception to this flat rule is set forth for driver training teachers: they get no preparation period at all. A further variation on the "standard" assignment is provided with regard to teachers who work under non-standard (that is, other than 60 minutes) instructional periods: they are to be assigned the same total amount of work time, with the same ratio of class to preparation time. The contract then reiterates: "Members, with the exception of driver training, will normally be assigned five periods of instruction per day or 25 hours per week, plus a preparation period . . . ." Finally, the contract provides that: "No member shall teach more than twenty-five (25) hours per week except by mutual consent of the District and the teacher involved. A member, other than driver training teachers, teaching a sixth (6th) period will be reimbursed for this extra assignment at one-fifth (1/5) of his/her placement on the salary schedule."

The hearing officer concluded that because the contract provisions on workload include the terms "standard" and "normally" where setting forth the 5/1 work schedule, those provisions must constitute only a general rule which is by implication subject to exceptions. Finding that EH teachers were intended to be such an exception, he determined that the Association had never agreed to a contractual provision governing the workload of EH teachers and that the change to the 5/1 schedule should therefore have been negotiated. We disagree.

The Association admits that their contract negotiators never discussed or even considered the subject of EH teachers during negotiation of the workload article. In light of this admission, it cannot be concluded that the contract incorporates an affirmative intention that the workload provision not apply to EH teachers.

Further, where the parties did intend that there should be exceptions to general or "standard" provisions--both in the workload article and elsewhere in the contract--the contract states those exceptions expressly. Thus, the District negotiated an express exception for driver training teachers. Similarly, language was added to clarify the status of teachers who teach instructional periods of non-standard length. In another part of the contract--the article on "transfer"--it is

provided that "this does not apply to TMR, EMR, EH or other district-wide programs." The parties *could* have employed the express language noted, and *did* employ it in the transfer article, but did not use it in the workload article. As the workload article has no parallel provision, we find no basis for the hearing officer's conclusion that the presence of the terms "standard" and "normally" signifies an intention of the parties that the otherwise absolute language of the workload article should not apply to EH teachers.

Witkin, in his *Summary of California Law,* reviews the basic rules of contract interpretation.

> Every contract requires *mutual assent or consent.* There must be an agreement on definite terms. [Citation omitted.] But ordinarily (in the absence of fraud, mistake, et cetera) the outward *manifestation* or *expression* of assent is controlling. Mutual assent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding. "By the modern law of contract, the mere state of mind of the parties--with reference to the 'meeting of the minds,'-- is not the essential object of inquiry, the terms of the promise-act being determinable by an *external* and not by an internal standard . . . ." [citation omitted; emphasis in the original].9

In light of this statement of law, we do not rely on the testimony of the Association's negotiators as to what was in their minds during the negotiation of the workload provision of the contract.10 Rather, we determine the meaning of the provision from the unambiguous language of the contract.

The language of the workload article plainly states that "[t]he standard teaching assignment shall be six periods per day including a preparation period." It is reiterated that teachers will "normally be assigned five periods of instruction per day . . . plus a preparation period." Finally, the article states that "[n]o member shall teach *more* than twenty-five (25) hours per week . . . ," and specifies that extra pay is due only for teaching a *sixth* period. The terms "standard" and "normally," as they appear in the article, logically reflect the expressly identified exceptions to the standard assignment, i.e., driver training instructors and teachers assigned to instructional periods of other than 60 minutes. These terms, and the above-noted language expressly prohibiting only assignments of *more* than five classes, also reflect the contractually specified practice of assigning release time (and thus fewer teaching periods) to teachers who are designated as department chairpersons. Read together, these provisions clearly establish a ceiling or maximum teaching assignment of five classes, below which the District has the freedom to operate consistently with the contract. Thus, it can assign department chairs only four, or three, or two classes in its discretion. It can, and does, assign special non-teaching projects to teachers and relieve those teachers of 1 or 2 classes. Similarly, it can, and has in the past, sought to provide higher quality instruction by assigning only four classes to, e.g., English teachers and special education teachers.

We find the wording of the workload provision sufficiently clear, in light of its treble repetition and the absence of any expressed exceptions such as those which occur elsewhere in the contract, to establish a "clear and unmistakable" objective meaning. We conclude that by agreeing to these provisions, the Association waived its right to negotiate over the change in assignment.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board ORDERS that Case No. LA-CE-1264 is DISMISSED.

Members Morgenstern and Burt joined in this Decision.

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1 The EERA is codified at Government Code section 3540 *et seq.* All statutory references are to the Government Code unless otherwise noted.

Section 3543.5 provides, in pertinent part:

> 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.

[2] Subsection 3541.5(a) provides in pertinent part as follows:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
>
> (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . .

[3] Subsection 3541.5(b) provides as follows:

> (b) The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

[4] EERA's scope of representation is set forth at section 3543.2, and provides in pertinent part as follows:

> (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 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.

[5] In interpreting the contract to reach this conclusion, we do not exceed the jurisdictional limitation set forth at subsection 3541.5(b), *supra* at footnote 3, prohibiting PERB from enforcing agreements between the parties. The Board has previously articulated its basis for finding that such interpretation of contractual provisions does not constitute "enforcement" within the meaning of subsection 3541.5(b). See *Grant Joint Union High*

School District (2/26/82) PERB Decision No. 196; 6 PERC 13064; *Victor Valley Joint Union High School District* (12/31/81) PERB Decision No. 192, 6 PERC 13027.

6 We note that the reduction or elimination of preparation time is negotiable only to the extent that it affects matters within the scope of representation. *Modesto City Schools* (3/8/83) PERB Decision No. 291; 7 PERC 14090; *San Mateo City School District* (5/20/80) PERB Decision No. 129, 4 PERC 11092.

7 In light of evidence that a member of the Association's board of directors knew as early as January 1980 that the District had proposed the 5/1 schedule for EH teachers, the Association's October demands may well have been so belated as to constitute a waiver by inaction of the negotiating right. However, the District did not raise this theory as a defense. Thus, the Board does not rely on it in dismissing the charge.

8 *Ador Corp., supra,* 150 NLRB at 171. See also *Helvetia Sugar Cooperative* (1978) 234 NLRB 838 [98 LRRM 1290]; and *General Controls Co.* (1950) 88 NLRB 1341 [25 LRRM 1475].

9 B.E. Witkin *Summary of California Law,* Eighth Edition, 1973, p. 92.

10 See *Norris Industries* (1977) 231 NLRB 50 [96 LRRM 1078], where the NLRB, in finding a contractual waiver of the negotiating right, specifically rejected the union's contention that there was no meeting of the minds on the matter at issue in negotiations.