* * * OVERRULED IN PART by *The Accelerated Schools* (2023) PERB Decision No. 2855 * * *

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KERN COMMUNITY COLLEGE CTA/NEA, Charging Party, v. KERN COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CE-1300 PERB Decision No. 337 August 19, 1983

Appearances: A. Eugene Huguenin, Jr., Attorney for the Kern Community College CTA/NEA; Ronald D. Wenkart, Attorney (Schools Legal Service) for the Kern Community College District.

Before Gluck, Chairperson; Tovar and Burt, Members.

DECISION

TOVAR, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Kern Community College CTA/NEA (Association) and by the Kern Community College District (District) to the attached proposed decision of a PERB administrative law judge (ALJ).

The ALJ found that the District had violated subsections 3543.5(b) and (c) of the Educational Employment Relations Act (EERA or Act)[1] by refusing to negotiate with the Association on the effects of the District's decision to layoff eight certificated employees. The District excepts to this finding,

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[1]The EERA is codified at Government Code section 3540 et seq. All statutory references herein are to the Government

while the Association excepts to the ALJ's refusal to order reinstatement and full back pay to the employees who were laid off.

For the reasons which follow, the Board affirms the ALJ's finding that the District violated subsections 3543.5(b) and (c). We also affirm the proposed remedy.

FACTS

Neither party has taken exception to the ALJ's findings of fact. Upon our review of the record, we find the statement of facts set forth in the proposed decision to be free of prejudicial error. On this basis we adopt the factual findings of the ALJ as the findings of the Board.

DISCUSSION

Initially, the District argues that, regardless of the propriety of its actions in this matter, the Association's charge is now moot and should thus be dismissed. Specifically, the District asserts that negotiations between the parties have

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Code unless otherwise noted. Section 3543.5 provides in pertinent part as follows:

> It shall be unlawful for a public school employer to:
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> . . . . . .
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> (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.

taken place since the filing of the charge pursuant to the reopener provision of their contract, which permitted each party to choose two subjects on which to reopen negotiations. The District argues that the Association has by virtue of the reopeners been afforded the opportunity to meet and negotiate on the subject of layoff effects, and in fact did negotiate certain provisions on transfer and reassignment which at least arguably deal with effects of layoff.

We cannot find that the charge against the District was rendered moot as a result of the District's participation in the reopener negotiations. Even if we posit, arguendo, that the Association succeeded in drawing the District into negotiations on layoff effects via reopeners, the Association was denied its statutory right to an opportunity to negotiate which arose independently from its request to negotiate those effects. If the Association was forced to sacrifice one of its two contractual reopeners as the only means by which it could negotiate its concerns on the effects of the layoff, it has clearly suffered an injurious deprivation of its EERA rights. This injury has not been mooted even if we accept the District's contention that the parties ultimately negotiated the matter of layoff effects via the reopeners. It is well settled that the subsequent signing of an agreement does not moot a subsection 3543.5(c) charge. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74.

The District next contends on exceptions that the Board should find that the Association never communicated to it any request to negotiate effects of the planned layoff (concededly a matter within the scope of representation) as opposed to the nonnegotiable managerial decision to layoff. In support of this argument it cites Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223. In that case, the Board held that no duty to bargain arose where, after receiving notice of the employer's intention to lay off, the exclusive representative expressed only a desire to negotiate the employer's decision to impose layoffs. The Board cautioned, however, that its decision should not be read to impose any strict rule of form as to a request to negotiate. "[A] valid request will be found, regardless of its form or the words used, if it adequately signifies a desire to negotiate on a subject within the scope of bargaining" (p. 8). The determination as to whether there has been a valid request is a question of fact to be resolved on a case-by-case basis. Delano Joint Union High School District (5/5/83) PERB Decision No. 307.

In the instant case, the Association's initial response was to press a demand to negotiate the layoff decision itself. Thus, on November 10, 1980, the Association sent a letter to the chancellor requesting "to negotiate the proposed layoff of . . . unit members."

One month later, however, a new request for negotiations was tendered. Thus, the Association's letter of December 10, which again requested the opening of negotiations, stated as follows:

> Layoffs or termination of employment has been legally held to be clearly within the scope of bargaining. It is also established Federal and State law that the employer must give the employee organization notice and the opportunity to negotiate over the effects of the decision; for example, the order and timing of employee layoff severance payments, relocation, retraining, and re-employment rights.

Further, at a meeting of the school board held the day after layoff notices were distributed, the Association's president gave a written presentation in which he alleged that the chancellor refuses "to negotiate the effects of such dismissals."

We find that the above-reviewed communications from the Association to the District were sufficient to put the District on notice that the Association desired to hold negotiations not merely on the subject of the layoff decision itself, but on the negotiable effects of that decision. The District nevertheless claims that it was confused as to the object of the Association's various requests for negotiations, and that it should not therefore be found to have violated its duty to bargain in good faith. However, consistent with our discussion in Newman-Crows Landing, supra, we reject the notion that a request for negotiations must meet a strict standard as to form

or language and conclude here that, if the District was unsure as to the object of the Association's requests, the duty to bargain in good faith behooved it as a minimum to seek clarification of the Association's position. There is no evidence in the record that it did so.

The District next argues that even if the Association tendered a sufficient request to negotiate the effects of the planned layoff, it had no duty to negotiate at that time. It contends that where an exclusive representative receives notice of contemplated employer action within the scope of representation, the EERA requires that the exclusive representative must submit a specific negotiating proposal pursuant to the public notice provisions at section 3547. Only after the exclusive representative has tendered such a proposal, argues the District, does the employer's duty to negotiate arise. Because in the instant case the Association never submitted a proposal, no negotiating duty ever arose and thus there could be no failure to perform that duty.

The District's reliance on section 3547 is misplaced. The duty to meet and negotiate arises under EERA section 3543.3, not section 3547. Section 3543.3 provides in pertinent part as follows:

> A public school employer . . . shall meet and negotiate with . . . exclusive representatives of appropriate units upon request with regard to matters within the scope of representation. [Emphasis added.]

The negotiating process can, and often does, include prefatory communications in which the parties work out a procedural format, timetable and other preliminary matters, all before substantive proposals are submitted. "Such preliminary matters are just as much a part of the process of collective bargaining as negotiations over wages, hours, et cetera." General Electric Co. (1968), 173 NLRB No. 46 [69 LRRM 1305]. The holding in General Electric, supra, has been cited with approval by PERB. See Stockton Unified School District (11/3/80) PERB Decision No. 143.

Consistently with this rationale, the Board has several times found a violation of the duty to meet and negotiate where no actual proposal had been submitted. Thus, in Newark Unified School District (6/30/82) PERB Decision No. 225, we held that the employer had violated subsection 3543.5(c) when it refused the exclusive representative's request to negotiate the effects of a proposed layoff, even though no substantive proposal had been submitted. See also, El Monte Union High School District (6/30/82) PERB Decision No. 220, where an employer's flat refusal of a union's threshold request that negotiations be held was found to be a violation of its negotiating obligation.

The District next argues that it had no duty to participate in negotiations as requested by the Association because a provision in the collectively negotiated agreement then in

effect between the parties excused them from that obligation. The provision forming the basis of this argument is as follows:

> 3. Written board and college policies and procedures in effect on the date of this contract that are within the scope of representation shall remain in effect until changes have been mutually agreed to by the board and the exclusive agent.

We find nothing in this language indicating that the Association had contractually agreed that the District would be excused from its statutory obligation to negotiate effects in the event that it decided to lay off bargaining unit members. In our view, the cited provision is straightforward and unambiguous, providing simply that the District cannot unilaterally make changes in matters within the scope of representation which are controlled by written board or college policies. Since the record contains no evidence indicating the existence of any written policy or procedures governing layoffs, this contract provision provides no legitimate basis for the District's refusal to agree to open negotiations as it did in the instant case.

Finally, the District argues that the ALJ erred in finding that it took unilateral action on any matter within the scope of representation when in January 1981 it adopted the resolution to eliminate certain services and then sent layoff notices to the eight certificated employees for whom there would be no work. It contends that the decision to eliminate services and lay off employees is nonnegotiable, and points to mandatory provisions of the Education Code which control the

order in which public school employees are to be laid off and which specify a required notice period which must be afforded those employees.

In Grant Joint Union High School District (2/26/82) PERB Decision No. 196, the Board held that to establish an unlawful unilateral change in the status quo, the charging party must produce evidence showing: (1) that the employer breached or otherwise altered the parties' written agreement or its own established past practice; (2) that the breach or alteration amounted to a change of policy (i.e., that it had a generalized effect or continuing impact upon terms and conditions of employment of bargaining unit members); and (3) that the change in policy concerned matters within the scope of representation. A unilateral change of this kind, the Board has held, is, absent a valid affirmative defense, a per se unfair practice. San Mateo County Community College District (6/8/79) PERB Decision No. 94; Moreno Valley Unified School District (4/30/82) PERB Decision No. 206, affirmed, Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191.

In Alum Rock Union Elementary School District (6/27/83) PERB Decision No. 322, the Board explained that a public school employer's decision to eliminate services and positions is a fundamental management prerogative and therefore not subject to the negotiating process. Thus, in the instant case the District's adoption of the resolution eliminating services was

not an unlawful action per se under Grant, supra. So too, the decision to lay off eight employees as a result of the elimination of services and positions is a matter reserved to the control of the public school employer and thus outside the scope of representation. Newman-Crows Landing, supra. Finally, the method by which the employees to be laid off are identified and given notice is controlled by mandatory provisions of the Education Code and is therefore to that extent nonnegotiable.[2] In particular, Education Code section 87743 makes the following pertinent provisions:

> . . . [W]henever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, and when in the opinion of the

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[2]EERA section 3540 provides in part that nothing in the ERRA:

> . . . 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.

Thus, insofar as the Education Code prescribes a mandatory act of a public school employer, that act is not subject to the negotiating process. Certificated Employees Council v. Monterey Peninsula Unified School District (1974) 42 Cal.App.3d 328; Healdsburg Union High School District (6/19/80) PERB Decision No. 132, affirmed, San Mateo City School District v. PERB (1983) 33 Cal.3d 850; Solano County Community College District (6/30/82) PERB Decision No. 219.

> governing board of said district it shall have become necessary . . . [for this reason] . . . to decrease the number of regular employees in said district, the said governing board may terminate the services of not more than a corresponding percentage of the certificated employees of said district, regular as well as contract, at the close of the school year; provided, that the services of no regular employee may be terminated under the provision of this section while any contact employee, or any other employee with less seniority, is retained to render a service which said regular employee is certificated and competent to render.
>
> Notice of such termination of services either for a reduction in attendance or reduction or discontinuance of a particular kind of service to take effect not later than the beginning of the following school year, shall be given before the 15th of May in the manner prescribed in section 87740 and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by the board in accordance with the provisions of sections 87413 and 87414. In the event that a regular or contract employee is not given the notices and a right to a hearing as provided for in section 87740, he shall be deemed reemployed for the ensuing school year.
>
> The board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render. [Emphasis added.]

Thus, where a district has determined that a service is to be eliminated, and that in turn employees must therefore be laid off, the Education Code appears to leave no room for

negotiation as to which employees will be terminated. Rather a specific system of layoff-by-seniority is mandated.

Education Code section 87743 as set forth in part above, also provides that where a district fails to adhere strictly to the notice provisions set forth therein, the employees are "deemed reemployed for the ensuing school year." Thus, an employer's distribution of notices in a manner consistent with the Education Code is necessary if the possibility of layoff, and thus the possibility of meaningful negotiations on the layoff plan, is to be preserved. Absent additional evidence, therefore, the Board will not find that a public school employer's distribution of the mandated layoff notices constitutes a refusal to negotiate.

Insofar, then, as the District argues that neither its January resolution to reduce services and personnel nor the ensuing issuance of layoff notices constituted per se unfair practices, it is correct, and the ALJ's characterization of those actions as an unlawful unilateral change was error. It is apparent, however, that the ALJ's determination that the District violated the EERA turned not on this misapplied terminology but on the evidence that it had refused the Association's request that negotiations be opened on the impact of those actions on matters within the scope of representation. As we said in Newark Unified School District (6/30/82) PERB Decision No. 225,

> Because it may reasonably be expected that a layoff of any magnitude will have an effect upon matters within scope, the proposal of layoff itself triggers the employer's obligation to provide notice and an opportunity to negotiate to the exclusive representative. Such a practice will give the parties an opportunity to negotiate before the fact, when such dialogue can potentially be of the greatest value. P. 6.

The litigated facts thus support a finding that the District violated the EERA by refusing to negotiate the effects of its decision to lay off.

Of course, where a public school employer and an exclusive representative have agreed in advance on a comprehensive policy to be implemented in the event of a layoff decision, the parties are not obligated to renegotiate those matters each time the District announces a decision to layoff. This is so even where such agreement is inferred from an existing, established or past practice. See Placer Hills Union School District (11/30/82) PERB Decision No. 262. In the instant case, however, the record contains no evidence that an established policy was in existence. In refusing to open negotiations on the within-scope effects of the layoff decision, then, the District was acting to assert unilateral control over those upcoming matters. Such action contravenes the fundamental purpose of the Act. Moreno Valley, supra. On the foregoing facts and discussion, therefore, we hold that the District violated EERA subsections 3543.5(b) and (c).

THE REMEDY

On exceptions, the Association argues that the limited back-pay remedy proposed by the ALJ is inadequate. It urges the Board to order a full restoration of the status quo ante. In support of this position, the Association cites numerous decisions of this Board in which, having found unilateral changes of matters within the scope of representation, we have ordered restoration of the status quo ante. These cases, however, are inapposite to the case at hand. Here, in contrast to the cited cases, the unilateral change - that is, the decision to lay off - was in a matter outside the scope of representation, and is therefore not subject to the negotiating obligation. It was only the effects of that decision which the District was obligated to negotiate. As the ALJ noted, a remedy requiring the District to restore the status quo ante would effectively negate the principle that the layoff decision is one reserved to the employer. This position is consistent with the past Board decisions on this question. See, South Bay Union School District (4/30/82) PERB Decision No. 207; Moreno Valley Unified School District, supra; Oakland Unified School District (7/11/83) PERB Decision No. 326.

For the reasons set forth in the proposed decision, we conclude that the remedy proposed by the ALJ is sufficient to secure the Association's EERA rights. There being no other exceptions to that remedy, we adopt it as the remedy of the Board in this case.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code section 3541.5(c), it is hereby ORDERED that the Kern Community College District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

Violating subsections 3543.5(b) and (c) of the Educational Employment Relations Act by failing and refusing to meet and negotiate in good faith, upon request, with the exclusive representative on the effects of the layoff.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

1. Provided the Association submits its proposals addressing the negotiable effects of the District's layoff within twenty (20) days of service of this Decision and Order, the District shall negotiate with the Association in good faith and shall commence the payment of wages to the terminated employees at the rate paid at the time of their termination. Such payments shall continue until the occurrance of the earliest of the following conditions: (1) the District and the Association reach agreement on the effects of the subject layoff on the employees in the subject bargaining unit; (2) the parties exhaust the negotiating and impasse procedures prescribed by the Educational Employment Relations Act; (3) the Association fails to bargain in good faith.

2. Within five workdays from the date of service of this Decision, mail a copy of this Decision and Order to each of the approximately eight terminated certificated employees.

3. Within five workdays from the date of service of this Decision, post at all work locations where notices to certificated employees customarily are posted, copies of the Notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the copies are not altered, reduced in size, defaced or covered with any other material.

4. Within thirty (30) days from the service of this Decision, notify the Los Angeles Regional Director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

C. ALL OTHER CHARGES ARE HEREBY DISMISSED.

Chairperson Gluck and Member Burt joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY NOTICE OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-1300, Kern Community College CTA/NEA v. Kern Community College District, in which all parties had the right to participate, it has been found that the District violated the Educational Employment Relations Act by refusing to negotiate over the effects of the layoff of eight certificated employees in June 1981.

As a result of this conduct, we have been ordered to post this Notice and will abide by the following. We will:

A. CEASE AND DESIST FROM:

Failing and refusing to meet and negotiate in good faith, upon request, with the exclusive representative on the effects of layoff.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

Provided the Association submits its proposals addressing the negotiable affects of the layoff within twenty days of service of the Public Employment Relations Board's Decision and Order, we will negotiate with the Association in good faith and will commence the payment of wages to the terminated employees at the rate paid at the time of their termination. We will continue to make those payments until we complete negotiations with the Association or until the Association fails to bargain in good faith.

Dated: _____ KERN COMMUNITY COLLEGE DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

KERN COMMUNITY COLLEGE, CTA-NEA, Charging Party, v. KERN COMMUNITY COLLEGE DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-1300 PROPOSED DECISION (4/28/82)

Appearances: A. Eugene Huguenin, Jr. and Kirsten L. Zerger, Attorneys for the Kern Community College CTA-NEA; Ronald D. Wenkart, Attorney, Schools Legal Service for the Kern Community College District.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On January 23, 1981, the Kern Community College chapter of the CTA-NEA (hereafter Association or Charging Party) filed an unfair practice charge against the Kern Community College District (hereafter District or Respondent) alleging that the District violated the Educational Employment Relations Act (hereafter EERA or Act) by refusing to bargain the implementation and impact of layoffs which took place in the spring of 1981.

On February 5, 1981, the Respondent filed an answer. On February 25, 1981, an informal conference was held. No settlement of any portion of the charge was reached.

On June 16, 1981, a formal hearing was held. Each party briefed its position regarding the issues presented at the hearing. The case was submitted on August 24, 1981.

FINDINGS OF FACT

It was stipulated that the Kern Community College chapter of CTA-NEA is an "employee organization" and that the Kern Community College District is an "employer" as those terms are defined in the Act.

On September 11, 1980, James Young, Chancellor and chief administrative officer of the District, sent a letter to all staff members outlining the financial problems of the District. He indicated that "a careful review indicates an overstaffing condition" and concluded "it will be necessary to reduce some programs and services now being offered." He also stated that this process is "complex and may take the entire academic year to conclude." This letter made no direct mention of layoffs.

On November 6, 1980, Dr. Young formally reported to the District's Board of Trustees that layoffs might be necessary for the 1981-82 academic year. This was the first public mention by the District that layoffs were being considered.

At this same November 6th meeting, Dean Close, then President of the Association, presented a five-page written statement to the Board of Trustees responding to Dr. Young's comments regarding the necessity for layoffs.

In this statement, Close stated that the Association "would like to discuss with you the long-established college-community, faculty-administration relationship; the Chancellor's proposal to eliminate faculty; the potential impact of this proposal; and, finally, to present the position of the faculty."

He concluded his remarks with: "The California Teachers' Association is insistent that negotiations be opened immediately to assure the faculty input and information with regard to this very sensitive labor issue."

Four days later, on November 10, 1980, Dean Close sent the following request to meet and negotiate the proposed layoff to Chancellor Young:

> Pursuant to Section 3543.2 of the Government Code, the Association herein requests a meeting with the district representative to negotiate the proposed layoff of Association Bargaining Unit members. Association representatives are available to meet, and anticipate an immediate response to this request.

In a letter of November 13, 1980, Dean Close requested meetings "on an informal basis in a non-negotiating posture" with Dr. Young and other District representatives "for the purpose of attempting to resolve the issues that came before the Board at the November 6 meeting, with particular regard to the possible reduction in the number of faculty members for the 1981-82 academic year."

On November 20, 1980, Chancellor Young answered Close's letters of November 10th and 13th by accepting only the request for informal meetings:

> Even though you asked for immediate negotiations in your first letter, we are proceeding on the basis of the second letter and will continue the process of your November 13 request for informal meetings.

Informal meetings between District representatives and Association members were held on November 18 and December 2, 1980, and January 6, 1981. These meetings, characterized by both parties as "informational," involved discussions of the District's financial status, current legislation regarding California public schools, communications with the state senator for the District, and other developments at the state level that might affect community colleges throughout the state. The chief negotiator for the Association, John Reid, was not invited to or present at any of these meetings. No bargaining took place at these meetings and no proposals were exchanged. There was no substantive discussions regarding either the implementation or impact of layoffs.

At the December 2 meeting, Chancellor Young told the Association to utilize their reopener provisions of the contract to make a proposal regarding the effects of layoffs.

In a December 10, 1980, letter to Dr. Young and the Board of Trustees, Dean Close restated the Association's demand for formal negotiations with regard to the proposed dismissal of

the District's regular contract certificated employees. As a part of this demand Mr. Close included the following:

> Layoffs or termination of employment has been legally held to be clearly within the scope of bargaining. It is also established Federal and State law that the employer must give the employee organization notice and the opportunity to negotiate over the effects of the decision; for example, the order and timing of employee layoffs, severance payments, relocation, retraining, and re-employment rights. (Citations omitted.)

In addition to the above described letter Mr. Close sent two other letters to Chancellor Young on December 10, 1980.

One of these is characterized by the following exerpts:

> Since we are committed to the positive resolution of our difficulties, we are submitting for your consideration some cost-saving and income producing suggestions generated from the faculty.
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> * * * * *
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> The faculty of the Kern Community College District has long enjoyed a positive and productive working relationship with the Board of Trustees and the District administration. In the past, when the District has faced challenges and/or crises, whether they were financial, philosophical, or theoretical, we have, through cooperative effort, been able to find effective, workable solutions. We are convinced that there is no reason to abandon the joint approaches which have served us well in the past.

The third letter was actually an attachment to the second in that, after some introductory remarks, it set forth the

cost-saving and income producing suggestions referenced in the second letter.

On December 30, 1980, Chancellor Young responded to the three December 10 letters from the Association. This response, in pertinent part, is as follows:

> I am in receipt of three letters dated December 10, 1980, which set forth the Association's position on reductions in programs and services. It is my intent and that of the Board of Trustees to continue the discussions we have held during the recent months.

On January 8, 1981, the District's Board of Trustees unilaterally adopted Young's recommendations for staff layoffs. No bargaining regarding the implementation or effects of these layoffs had taken place at the time of this unilateral decision. Pursuant to this action, approximately eight certificated employees received notices on or about January 21, 1981, of the District's intention to terminate their services.

On January 13, 1981, Chancellor Young wrote to John Reid, the Association's official negotiator, stating the Board of Trustees was prepared to hear reopener proposals from the Association, pursuant to the contract between the parties. Each side was entitled to "reopen" two subjects of its choice in addition to wages.

At a meeting of the District Board of Trustees on January 22, 1981, John Reid, as the newly appointed Association

president, addressed the Board. He stated, among other things, that the Association had "asked the District administration to meet with us in formal negotiations to resolve this issue. We have requested such negotiations, and we have demanded these negotiations. The Chancellor refuses to meet with us to negotiate the effects of such dismissals." He concluded with the statement:

> The faculty is left with only one recourse: An unfair labor practice charge is being filed against the Kern Community College District by CTA. This action is reluctantly taken. Even at this hour we again request to meet with the District administration in an effort to resolve the crisis facing us through the process of collective bargaining. If the District will meet with us in good faith negotiations, the unfair labor practice charge will be withdrawn.

On January 23, 1981, the charge initiating this case was filed.

On March 19 the Association submitted its reopener proposls to the District for "sunshining." One of these proposals arguably refers to an effect of layoffs. The District believes that this proposal represents the Association's proposals regarding the "effects of layoffs." The District points to the ongoing negotiations on these reopener proposals as a complete defense to the Association's charge of previously failing to negotiate.

Chancellor Young admitted that the District did have an obligation to negotiate the effects of layoff, but that he did

not communicate that admission to the Association except with regard to the January 13th letter which refers to contractual reopeners. The Chancellor went on to state that, in his opinion, the only other way that the Association could have properly brought to the bargaining table the subject of the effect or implementation of layoffs would be for them to have submitted a formal proposal to the District which would have been mutually acceptable to both parties. He insists that, had such a formal proposal been presented by the Association the District then could have decided whether it would agree to negotiate. He cites the contractual provisions regarding reopeners as his authority for such a position.

In May 1981 the District completed the termination process for approximately eight certificated employees.

ISSUES

1. Is the subject of "implementation and impact of layoff" within the scope of negotiations under the EERA?

2. After notice from the District, did the Association communicate a sufficiently clear demand to bargain such "implementation and impact?"

3. Did the District refuse to bargain such "implementation and impact?"

DISCUSSION AND CONCLUSION

A. Scope

With regard to the first issue, the Board in San Mateo City School District (5/20/80) PERB Decision No. 129, established

the test for determining whether a subject is within the scope of bargaining under the EERA. That test is:

(1) Does the subject logically and reasonably relate to one of the subjects enumerated in section 3542.2?

(2) If the subject arguably meets the threshold test, it may be necessary to apply the balancing test where the issue is neither patently within or outside scope, by considering:

(a) whether the subject is of such concern to both management and employees that conflict is likely to occur and whether the mediatory influence of collective bargaining is the appropriate means of resolving the conflict, and

(b) whether the employer's obligation to negotiate would significantly abridge his freedom to exercise those managerial prerogatives essential to achievement of the District's mission.

Under this test, both the implementation and impact of layoff have been held to be within the scope of representation by the Board. Healdsburg Union High School District (6/19/80) PERB Decision No. 132.

There was extensive discussion in the briefs regarding potential conflict between "implementation and impact of layoff" and specified Educational Code sections. As there were never negotiations of any sort prior to the date the instant charge was filed, the question of the proper parameters of such negotiations never came into issue. Therefore, it is

determined that the subject of implementation and impact of layoff is within the scope of representation.

B. Association's Demand for Negotiations

Although a unilateral change in the area of implementation and impact of layoffs is within the scope of representation the employer's action is not unlawful unless such change is made without notice and an oportunity to negotiate extended to the exclusive representative, Davis Unified School District (2/22/80) PERB Decision No. 116, Pajaro Valley Education Association (5/22/78) PERB Decision No. 51, NLRB v. Katz (1962) 369 US 736, [50 LRRM 2177].

On November 6, 1980, the District made the first public reference to the necessity for layoffs. At that meeting the Association president, Dean Close, made mention of cooperation but concluded with an insistence "that negotiations be opened immediately to assure the faculty input and information with regard to this very sensitive labor issue."

In addition to reading his statement a copy was given to the Board and made a part of the official records of that Board meeting.

On November 10, 1980, four days after the first public announcement of a layoff necessity, the Association sent an unequivocal request to negotiate to the Chancellor. However, the request was to negotiate "the proposed layoff of Association Bargaining Unit members."

On November 13, 1980, the Association requested "informal non-negotiating" meetings with regard to the possible reduction in the faculty for the 1981-82 school year. Chancellor Young, when answering the Association's letters of the 10th and 13th, agreed only to the informal meetings.

On December 2 at one of these "informational" non-negotiating meetings the subject of negotiations was discussed. Chancellor Young told the Association to make use of the reopener provisions of the contract to make a proposal regarding the effects of layoffs.

On December 10 the Association again requested negotiations. This time, however, they requested negotiations not only with regard to layoffs but referenced federal and state law that required the employer to give the employee organization the opportunity to negotiate over the effects of the decision to layoff. The District insists that the two other letters sent to the Chancellor on the same date regarding the continuation of the informal non-negotiating meetings were contradictory and confusing. The circumstances leading up to and surrounding these December 10, 1980 letters support a determination that the District knew, or should have known, that the Association was requesting, negotiations on both the subject of the decision to layoff and the effects of the layoff on bargaining unit employees.

C. District's Refusal to Negotiate

Although the District is correct when it states that it is not required to respond to a request to negotiate a subject that is outside the scope of representation, it cannot ignore a proper demand to negotiate just because it is included in the same letter as an improper one.

In Healdsburg Union High School District (6/19/80) PERB Decision No. 132, at page 8, the majority opinion stated:

> In my view, the side offering a proposal has a responsibility to frame it in such a way that it is susceptible to meaningful negotiations. Similarly, the side receiving a proposal has a responsibility to offer a meaningful response and not to summarily reject a proposal which may, in some respects, pertain to issues which are appropriately negotiable. However, while some refinement and specificity in drafting is necessary, the form in which proposals are initially presented marks only the beginning of the negotiating process. Indeed, if one side can refuse to negotiate about a proposal until the offering side has so narrowed it that it contains only items the former accepts as unquestionably within scope, then the bilateral process is thwarted rather than served.

On December 30, 1980, Chancellor Young responded to these three letters by stating, inter alia, "It is my intent and that of the Board of Trustees to continue the discussions we have held during the recent months."

On January 8, 1981, the District's Board of Trustees adopted the Chancellor's recommendations for staff layoffs.

Based on the circumstances set forth above, it is determined that the Association did request negotiations on the subject of the effects of layoff even though the language used was less than exact. In making this determination the Chancellor's manifested position, both at the time of the subject circumstances and at the time of the hearing is a primary factor. This position was that the District had to negotiate the effects of layoff, but it was required to do so only if the Association brought the subject to the negotiating table as one of its elective subjects pursuant to the reopener clause of the contract. The Chancellor also insisted that had the Association tendered an "effects of layoff" proposal prior to the time for reopeners the District could have negotiated such effects but was under no duty to do so.

The District insists that negotiations were proceeding at the time of the hearing and, therefore, the Association's charge was moot. The District is confusing the negotiations with regard to the reopener clause of the existing contract with the required negotiations in response to the change in the status quo occasioned by the District's announced layoffs. Any agreement reached as a result of the negotiations on the contractual reopeners would have been prospective only, to take effect on July 1, 1981, and would have had no effect on the layoffs to be implemented at the end of 1980-81 school year.

It is possible for an employee organization to contractually waive its rights to negotiate future unilateral changes. However, the burden would be on the employer to assert this defense. Although the employer did assert this defense, it was not persuasive. See "zipper clause" discussion below.

The District also insists that there was no refusal to negotiate as neither the Chancellor nor the Board of Trustees ever told the charging party they refused to negotiate the subject of "effects" of layoff and that silence is insufficient to constitute such a refusal.

The refusal was manifested, not by silence, but by the Chancellor's own December 30 letter. In that letter he acknowledged receipt of the unequivocal demand to negotiate, and stated that it was his intent and that of the Board of Trustees to continue only the informal discussions. In communicating that intent, he was also communicating a rejection of the Association's demand to negotiate.

The District insists that the contractual "zipper clause" precludes negotiations in the areas addressed by the contract. Paragraphs three and four in the Memorandum of Agreement between Charging Party and District contain the "zipper" clause and are as follows:

> 3. Written Board and college policies and procedures in effect on the date of this contract that are within the scope of representation shall remain in effect until changes have been mutually agreed to by the Board and the Exclusive Agent.

> 4. Written policies and procedures outside the scope of negotiations that directly affect the faculty are continued in effect, and proposed changes to these policies and procedures will be made available for consultation with the Academic Senates of Bakersfield College, Cerro Coso College and Porterville College.

There is nothing in either of these paragraphs which expressly waive any Association rights to negotiate any unilateral changes the District may effectuate during the life of the contract. The PERB has held that in order to have a waiver of a right to negotiate be effective it must be "clear and unmistakeable" and that a zipper clause alone will not constitute a clear and unmistakeable waiver of any otherwise negotiated item. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74 [2 PERC 2192].

It has been found that the District violated section 3543.5(c) by refusing to negotiate with the exclusive representative regarding the effects of the layoff for approximately eight certificated employees. These same circumstances, the unilateral change in working conditions, support a determination that the District violated section 3542.5(b). This determination is based on the fact that the exclusive representative, due to such unilateral change, was denied its guaranteed right to represent the employees with regard to any negotiations over changes in working conditions.

REMEDY

Section 3541.5(c) empowers PERB:

> ... 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.

It has been the practice of the PERB in unilateral change cases to order the employer to restore the status quo ante.

Therefore, it is appropriate to order the District to cease and desist from refusing to negotiate the effects of the layoffs and to take affirmative steps that will effectuate the policies of the EERA.

The question of whether a remedy in a case involving failure to negotiate the effects of layoff should include a restoration to employment order with a retroactive back pay award is a difficult one. The Board has issued status quo ante remedies in other cases involving unilateral changes in working conditions. Although it is appropriate to order the District to negotiate the effects of the layoff it has been held by the U. S. Supreme Court that "bargaining over the effects of a decision must be conducted in a meaningful manner at a meaningful time." First National Maintenance Corp. v. NLRB (1981) 69 L.Ed.2d 318, ____ U.S. ____ [107 LRRM 2705 at 2711].

In Stone and Thomas (1975) 221 NLRB 573,576 [90 LRRM 1570] the court said: ". . . .meaningful bargaining over effects can

only occur prior to the employer's making and acting on its decision."

The Board has held that the election to lay off is not negotiable. Healdsburg Union High School District (6/19/80) PERB Decision No. 132. Therefore, a remedy that negated that non-negotiable decision, absent extenuating circumstances, would have questionable legal justification.

The California Supreme Court, in Highland Ranch v. Agricultural Labor Relations Board (1981) 29 Cal.3rd 848; 176 Cal.Rptr. 753, examined an analogous ALRB order and held as follows:

> In its order, the ALRB directed Highland to bargain with the UFW over the effects of its decision to sell the business. At the same time, the board concluded that because of Highland's changed position and the employees' lack of any present economic bargaining power vis-a-vis Highland, a bargaining order, standing alone, would not adequately remedy the unfair labor practice in this case. Accordingly, in order to effectuate the bargaining order and to help ensure that Highland would not profit from its unfair labor practice, the ALRB accompanied its bargaining order with a "limited back pay" requirement that the NLRB has traditionally imposed to remedy comparable violations under the federal act. (See, e.g., Transmarine Navigation Corp. (1968) 170 NLRB 389 [67 LRRM 1419]; NLRB v. W.R. Grace & Co., Const. Products, supra, 571 F.2d 279, 283 & fn.6).
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> The NLRB fully explained the rationale for this type of remedial order in its seminal Transmarine decison, observing: "It is apparent that, as a result of the [employer's] unlawful failure to bargain

about [the] effects [of its termination of employment], the [employees] were denied an opportunity to bargain through their . . . representative at a time prior to the shutdown when such bargaining would have been meaningful in easing the hardship on employees whose jobs are being terminated. . . [ ]Under the circumstances of this case . . . it is impossible to reestablish a situation equivalent to that which would have prevailed had the [employer] more timely filled its statutory bargaining obligation. In fashioning an appropriate remedy, we must be guided by the principle that the wrongdoer, rather than the victims of the wrongdoing, should bear the consequences of his unlawful conduct, and that the remedy should 'be adapted to the situation that calls for redress.'" (170 NLRB at p. 389 (quoting Labor Board v. Mackay Co. (1938) 304 U.S. 333, 348 [82 L.Ed. 1381, 1391, 58 S.Ct. 904]).)

The NLRB continued: "Applying these principles to the instant case, we deem it necessary, in order to effectuate the purposes of the Act, to require the [employer] to bargain with the Union concerning the effects of the shutdown on its [former employees]. Under the present circumstances, however, a bargaining order alone cannot serve as an adequate remedy for the unfair labor practices committed by the [employer]. As we recently pointed out in Royal Plating and Polishing Co., Inc. [(1966) 160 NLRB 990, 997]: 'The Act required more than pro forma bargaining, but pro forma bargaining is all that is likely to result unless the Union can now bargain under conditions essentially similar to those that would have obtained, had [the employer] bargained at the time the Act required it to do so. If the Union must bargain devoid of all economic strength, we would perpetuate the situation created by [the employer's] deliberate concealment of relevant facts from the Union which prevented the Union from meaningful bargaining.'" (Id., at p. 390.)

> Under these circumstances, the NLRB determined in Transmarine that "[i]n order to assure meaningful bargaining and to effectuate the purposes of the Act, we shall accompany our order to bargain over the effects of the shutdown with a limited backpay requirement designed both to make whole the employees for losses suffered as a result of the violation and to recreate in some practicable manner a situation in which the parties' bargaining position is not totally devoid of economic consequences for the [employer]." (Ibid.)
>
> The limited backpay remedy that the NLRB adopted in Transmarine imposed a prospective requirement upon the employer to pay each terminated employee a daily sum equal to the employee's former wages during the mandated bargaining process. The order additionally provided that the employer's "limited backpay" obligation would terminate as soon as (1) the parties reached agreement on the issues subject to bargaining, (2) the parties bargained to a bona fide impasse or (3) the union failed to bargain in good faith. Finally, the NLRB also placed an absolute ceiling on the employer's potential monetary obligations under the order, specifying that in no event should any employee receive daily payments for a period of time exceeding the period it had taken the employee to obtain alternative employment after his termination.

Accordingly, it is appropriate to order the District in this case to bargain with the Association, upon request, about the effects of the subject layoff on the employees in the subject bargaining unit, and to pay to the terminated employees their normal wages at the time of the termination from five days from the service of the final decision herein until the occurrence of the earliest of the following conditions: (1) the date the District reaches agreement with the

Association on those subjects pertaining to the effects of the layoff on the employees in the subject bargaining unit; (2) a bona fide impasse in bargaining; (3) the failure of the Association to request bargaining within five days of the service of the final decision herein, or to commence negotiations within five days of the Respondent's notice of its desire to bargain with the Association; or (4) the subsequent failure of the Association to bargain in good faith.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foreqoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code section 3541(c), it is hereby ordered that the Kern Community College District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith, upon request, with the exclusive representative on the effects of the layoff.

2. Taking unilateral action with respect to implementing the effects of layoffs.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. The District shall bargain with the Association, upon request, about the effects of the subject layoff on the employees in the subject bargaining unit, and to pay to the terminated employees their normal wages at the time of the termination from five days from the service of the final decision herein until the occurrence of the earliest of the following conditions: (1) the date the District reaches agreement with the Association on those subjects pertaining to the effects of the layoff on the employees in the subject bargaining unit; (2) a bona fide impasse in bargaining; (3) the failure of the Association to request bargaining within five days of the service of the final decision herein, or to

commence negotiations within five days of the Respondent's notice of its desire to bargain with the Association; or (4) the subsequent failure of the Association to bargain in good faith.

2. Within five workdays from the service of the final decision herein, mail a copy of this decision and order to each of the approximately eight terminated certificated employees.

3. Within five workdays after the date of service of a final decision in this matter, post at all work locations where notices to certificated employees customarily are posted, copies of the notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the copies are not altered, reduced in size, defaced or covered with any other material.

4. Within twenty (20) consecutive workdays from the service of the final decision herein, notify the Los Angeles Regional Director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this order. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

C. ALL OTHER CHARGES ARE HEREBY DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on May 18, 1982, unless a party filed a timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on May 18, 1982, in order to be timely filed. See California Administrative Cide, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.

Dated: April 28, 1982

Allen R. Link
Administrative Law Judge