STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. MODESTO CITY SCHOOLS, Respondent.	)	Case No. S-CE-402 PERB Decision No. 347 September 27, 1983

Appearances; Kenneth W. Burt, II, Attorney for Modesto Teachers Association, CTA/NEA; Patricia W. Mills, Attorney (Breon, Galgani, Godino & O'Donnell) for Modesto City Schools.

Before Tovar, Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: The Modesto Teachers Association, CTA/NEA (MTA or Association) excepts to the proposed decision of a hearing officer of the Public Employment Relations Board (PERB or Board) dismissing the charge that the Modesto City Schools (District) violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA) by unilaterally altering the policy concerning teacher evaluations.[1]

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

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

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

FACTUAL SUMMARY

During the 1971-72 school year, before the effective date of the EERA and before certification of the Association as an exclusive representative of a unit of certificated employees in the District, the District's evaluation policy provided that permanent employees be evaluated every three years. The Stull Act was enacted in 1971. Education Code section 44664 outlined evaluation procedures for certificated employees and provided, inter alia, that evaluations of personnel with permanent status be conducted "at least every other year."

The District formed a committee in order to conform its evaluation policy to the Stull Act requirements.

The evaluation procedure adopted by the District provided that permanent teachers be evaluated every two years. Jim Enochs, assistant superintendent, participated on the

---

> (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.

committee which developed the evaluation standards subsequent to passage of the Stull Act. Enochs testified that the committee was directed to develop guidelines in conformance with the new law and consistent with the District's past practice which, he testified, permitted back-to-back evaluations of substandard employees.

Enochs stated that "our practice had been that substandard evaluatees were evaluated successive years, even if they were permanent employees." Enochs explained that the absence of the phrase "at least" preceding "every two years" was an inexplicable oversight, which was insignificant. He pointed out that, in 1972, no one worried about being challenged on "technical" points. He stated that:

> . . . we had past practice in front of us. And that, as I mentioned to you, was our charge, to bring it in line with the Stull Bill language, which meant we had to evaluate more frequently, but do not give up past practice, which allowed us to evaluate substandard employees in successive years.

In 1975, another committee was formed to revise the District's evaluation guidelines. Richard DeWolf, a teacher in the District, was a member of that committee. As a result of the committee's work, District policy 6360 was adopted in November 1976. That policy also required that permanent teachers be evaluated every two years.

DeWolf acknowledged that, without discussion, the evaluation procedure of policy 6360 was attached as Appendix B

to the parties' first negotiated agreement covering the 1976-77 school year.[2] However, in negotiations for the 1977-79 successor agreement, the issue of evaluations arose. The District sought to "clarify" what it perceived as its right to evaluate substandard teachers in consecutive years. It proposed that permanent teachers be evaluated "at least every two (2) years." (Emphasis in original.) Enochs testified that, while he had no specific knowledge about the 1977 negotiations, he had been advised by the District's legal counsel that, should the District accede to MTA's desires to move subjects from the appendices to the text of the contract, it should use more specific and precise language.

According to Jim Fletcher, resource teacher and District bargaining team member, the District offered this proposal for the following reason:

> . The District was seeking clarification, in terms of language, regarding the evaluation of permanent employees who are not normally scheduled for evaluation. The situation existed where some individuals indicated that such a right did not exist. The

[2]The appendices attached to the contract are described as follows:

> The following material is attached at MTA's request and is not directly part of the collective bargaining contract.
>
> These Appendices address themselves to agreements on issues of concern to the parties over the course of negotiations and of consult procedures under the Rodda Act.

> District was in the position of saying that past practice had indicated under any number of circumstances that individuals could be evaluated on years when they were not normally scheduled for evaluation, and that clarification language needed to be included into the contract to make that clear.

Jon Walther, MTA president and member of the 1977 MTA bargaining team, testified that the District also made a proposal which provided that it could evaluate ten permanent teachers per year who were not scheduled for evaluations. However, Fletcher testified he was not familiar with this proposal. In evidence is MTA's counterproposal which it submitted in response to the District's proposal for ten extra teacher evaluations. MTA countered with a proposal limited to five extra elementary and three extra high school teacher evaluations. The parties' negotiations reached impasse, and each presented its final written proposal to the mediator. The District proposed that permanent employees be evaluated if they received substandard evaluations or if good-faith reasons existed to deviate from the biennial pattern. MTA proposed that the evaluation procedures set forth in the 1976 agreement be maintained.

When the parties finally reached agreement on the 1977-79 contract, the prior evaluation procedure provision ("every two years") was retained in the attached appendix.

During negotiations for the next agreement, the District's initial position, presented to MTA in July 1980, was that

probationary and temporary employees be evaluated more than once each school year and permanent employees more than every two years if the evaluator determined that improvement was needed and assistance had been offered.

In February 1981, the District altered its evaluation proposal. It conditioned consecutive evaluations on the evaluator's determination that serious deficiencies existed, improvement was needed and assistance had been offered. In May 1981, the parties reached agreement. With four provisions excepted, the contract was made retroactive to 1979. Pursuant to a letter of understanding, a provision regarding teacher evaluations was made effective September 1, 1981. It provides:

> If serious deficiencies exist and are identified during the evaluation process, the District may offer assistance to and monitor and record the response of the employee during the following year. This process shall not be used as a means of harassment of any employee.

In its unfair practice charge filed on March 5, 1981, MTA alleged that on or about September 10, 1980, the District unilaterally changed the evaluation policy as it appeared in policy 6360. Specifically, MTA claims that, beginning in September 1980, the District:

> [E]valuated, observed and otherwise used the evaluation procedure, including conferences, on permanent teachers such as Lester Gosa and Val McFadin; despite the fact that these permanent teachers were evaluated under the policy during the 1979-80 school year.

Throughout the hearing, MTA witnesses maintained that the consecutive evaluations of Gosa and McFadin during the 1979-80 and 1980-81 school years were the first such incidents to occur and thus evidenced a change in past practice. DeWolf, employed as a teacher in the District for 26 years and a self-proclaimed expert on Stull Act evaluations, testified that he never heard of a teacher being evaluated every year and if he had known of it, he "would have raised hell." He later changed his testimony to limit this statement to the period after 1976.

Walther, employed by the District for over 15 years, testified that, since adoption of policy 6360 in 1976, he had been evaluated every two years and, until approached by Gosa in September 1980, had not been aware of other permanent employees being evaluated more frequently. Prior to 1972, Walther testified, tenured teachers were not observed or evaluated on a regular basis and there was very little teacher evaluating taking place.

McFadin testified that he was officially evaluated during both the 1979-80 and the 1980-81 school years. He had also been evaluated in the 1976-77 and 1977-78 school years.

MTA called Melvin Jennings, director of personnel, as an adverse witness and questioned him about the evaluations of Gosa. Joint Exhibit #4 contains documents which were prepared in the fall of 1980 and which refer to Gosa's previous evaluation. The exhibit includes classroom factual evaluation

forms and post-conference observation forms. One document is a memo dated November 3, 1980, addressed to Gosa and prepared by his principal, Jerome Kopp, which summarizes a meeting between the two. In pertinent part, the memo notes:

> 1. Informed Mr. Gosa that we would not conduct an official evaluation as prescribed by district policy for the 1980-81 school year, (Per information from the Director of Personnel)
>
> 2. Mr. Gosa was informed that we would continue to make regular observations of his program.

Jennings testified that he had conversations with Kopp concerning Gosa, but he testified that he did not remember making the statement referenced in point one of Kopp's memo. Jennings stated that his conversation with Kopp concerned Gosa's health and that Gosa was not evaluated during the 1980-81 school year because Gosa was placed on a medical leave of absence.[3] However, when further questioned, Jennings was

---

[3] TWO additional points in Kopp's memo referred to Gosa's health:

> 5.. Mr. Gosa indicated to Mr. Kopp that he was having a health problem and would be seeing his doctor in the next few days. He further indicated that he may find it necessary to take a medical leave of absence.
>
> 6. Mr. Kopp expressed his concern with regard to Mr. Gosa's health and indicated that if there was anything we could do to help to please let us know.

unable to explain why Gosa's medical leave prevented a second evaluation but did not prevent classroom observations.

The District presented evidence to support its claim that the past practice did include back-to-back evaluations of substandard teachers. Respondent's Exhibit #4 contains assorted evaluations, including those of: James Leonard, a permanent teacher, evaluated during the 1976-77 and 1977-78 school years; Howard Hill, evaluated in 1964, 1965, 1966, 1970 and 1971; Jack Wier, evaluated in 1974 and 1975; and McFadin, evaluated in 1976-77 and 1977-78. These documents were introduced without further comment from District witnesses. MTA witnesses testified that they had no knowledge of these or any other past consecutive evaluations and that, in general, MTA did not receive copies of teacher evaluations.

DISCUSSION

The District asserts that it is entitled to perform consecutive evaluations of all teachers whenever they are determined to be substandard. Such a policy is one of generalized application and continuing effect. Under the standard articulated in Grant Joint Union High School District (2/26/82) PERB Decision No. 196, the Association's allegation is cognizable as an unfair practice.

Since evaluation procedures are an enumerated subject of bargaining and within the scope of representation[4] and since

[4]Subsection 3543.2(a) provides in pertinent part:

the Association's interpretation of the policy precluding yearly evaluations does not contravene an inflexible standard established by the Education Code, MTA's charge would be sustained if the record demonstrated that the District unilaterally altered a provision of the agreement or the consistent past practice.

It is our assessment, however, that the record supports the hearing officer's conclusion that the existing policy has long been in place, and that that policy or past practice is one of evaluating teachers who are substandard on a "back-to-back" basis. Therefore, the District did not commit a unilateral

---

> 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. . . .

See Walnut Valley Unified School District (2/28/83) PERB Decision No. 289 and Jefferson School District (6/19/80) PERB Decision No. 133, rev. pen., 1 Civil 50255. See also Certificated Employees Council v. Monterey Peninsula Unified School District (1974) 42 Cal.3d 328 where the Court held that the meet and confer requirements of the Winton Act were applicable to development and adoption of teacher evaluation and assessment guidelines.

change when it simply continued to practice what it had been practicing for 17 years.

The language of the evaluation provision attached to the contract mandates the evaluation of permanent teachers "every two years." The detailed evaluation procedure specifically includes an express provision permitting more frequent evaluations of probationary employees. No similar exception appears in the written agreement exempting substandard teachers. Contrary to our dissenting colleague, we do not find from these facts that the policy unambiguously precludes consecutive evaluations. We find only that the policy is silent as to the frequency of substandard evaluations and would interpret the policy's silence in accord with the purpose intended to be served by the policy.

The Stull Act and the District's policy on teacher evaluations did not arise from a concern to protect teachers from an excessive number of evaluations. Rather, the issue of teacher evaluations grew from a public policy concern that a minimum frequency of evaluations be insured. In other words, the language of the policy must be read not as intending to restrict evaluations but to guarantee the maintenance of teacher competency. Under these circumstances, it seems incongruous to find that the parties intended, by their silence on the substandard teacher category, to foreclose the option of consecutive evaluations. We find, then, that the contract is

facially ambiguous and will not ignore the evidence regarding bargaining history or past practice. Marysville Joint Unified School District (5/27/83) PERB Decision No. 314; Rio Hondo Community College District (12/31/82) PERB Decision No, 279.

The bargaining history regarding the evaluation procedure spans a ten-year period. The 1971-72 Handbook, which permitted evaluations every three years, was nullified by the Stull Act's requirement that teachers be evaluated at least every other year. When the District committee rewrote its policy, it required evaluations every two years. Enochs' testimony was that it intended to preserve the consecutive evaluation practice in substandard teacher situations.

Enochs more specifically testified that in 1972, a committee, of which he was chairman, was constituted to bring the District's evaluation policies in line with the Stull Act while keeping them continuously in line with its existing practices. He testified that the existing practice at that time permitted back-to-back evaluations for substandard teachers. He acknowledged that the term "at least" was inadvertently omitted from the written policy but unequivocally insisted that it was their clear intention to maintain that practice. He stated, "That was our intention. Because we had past practice in front of us." He goes on to say that the charge of the committee was to bring the District in line with the Stull Act, "but not give up past practice which allowed us to evaluate substandard employees in successive years."

The evidence indicates that three of the several teachers on this committee were appointed by the Association and that the Association itself was interviewed before the policy was put into effect.

The Association argues it never knew of the policy or the practice of back-to-back evaluations of substandard teachers. Yet it put on no one to testify that Enochs was incorrect, that this was not the policy in 1972, that its recollection or knowledge of the policy was different, or that there was no such past practice before it. Indeed, all MTA witnesses who spoke from first-hand knowledge of that policy were careful to restrict their comments to the period of 1976 or later, even though many were teachers in the District earlier. •

In support of the instant case, MTA cites to the bargaining history as circumstantial evidence demonstrating that the District consistently perceived its agreement not to include a consecutive evaluation provision.

It can be argued that the District's efforts to specify its consecutive evaluation authority was designed to attain a previously unsecured right. It can also be argued, however, that the fact that the District rejected MTA's proposal permitting only a certain number of consecutive evaluations supports the District's contention that the past practice permitted back-to-back evaluations of all substandard teachers. As is true when interpreting the significance of a

union's unsuccessful bargaining demands, the employer, by its negotiating conduct, does not relinquish its right to act in accordance with the established past practice. See Beacon Piece Dyeing and Finishing Co., Inc. (1958) 121 NLRB 953; Globe-Union, Inc. (1977) 233 NLRB 1458. We are thus unwilling to deduce on the basis of these bargaining proposals that the past practice in fact precluded consecutive evaluations. Rather, we find plausible the District's contention that its efforts to clarify the policy language were motivated by the Association's demand to move the addended policy language into the body of the bilateral agreement.

Ultimately, the critical issue relevant to bargaining history involves the meaning of the language as written into the 1972 policy since it is uncontested that that language was incorporated without alteration into the 1976 agreement. MTA never squarely addresses this issue. No witness refutes Enochs' testimony that the policy in 1972 was to permit back-to-back evaluations. MTA avoids this issue and falls back on the argument it was unaware of the policy. However, in the face of the evidence that the policy has been in effect for 17 years, that the MTA representatives on the committee in 1972 had it before them, that this has affected several teachers, that one of the principal parties of this case had himself received back-to-back evaluations a few years earlier, and that the Association was a representative of the teachers during this period, we must conclude that the Association knew or should have known of the policy.

The strongest evidence in support of MTA's position is found in the testimony of Jennings, referring to the memo prepared by Kopp which states that a second evaluation of Gosa would not be conducted "as prescribed by district policy for the 1980-81 school year." Jennings' testimony does nothing to refute this direct language, and thus the memo appears to establish that at least one administrator viewed the policy as does MTA. However, Jennings became the personnel officer in 1980 and had ho first-hand knowledge of the past practice. Other District witnesses with prior direct knowledge of its history had the opposite view of the policy.

Based on the totality of the evidence presented, we conclude that MTA has failed to demonstrate that the District has unilaterally altered its evaluation policy because we find that the District has regularly conducted consecutive evaluations of substandard teachers. Thus, we dismiss MTA's unfair practice charge. We also deny MTA's request to present oral argument or supplemental briefs in this case finding that the record before the Board provides ample basis for our determination.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint against the Modesto City Schools is hereby DISMISSED.

Member Tovar joined in this Decision. Member Burt's dissent begins on page 16.

Member Burt, dissenting:

I agree with the majority that procedures for evaluation are within scope, and therefore that prior to changing such procedures the District must provide the exclusive representative with notice and an opportunity to negotiate. In this case the question is what the operative procedure for evaluations was, and thus whether a change occurred. Resolution of this question depends upon whether the District established a practice of evaluating allegedly substandard teachers more often than once every two years, contrary to the express language of its written policy.

The majority finds that the written policy is ambiguous, and that resort to parol evidence is necessary. For the conclusion that the written policy is ambiguous, my colleagues rely in part upon evidence of a practice contrary to the policy. In my view, resort to extrinsic evidence is neither necessary nor proper unless the policy is ambiguous on its face; there is an analytical flaw in looking to extrinsic evidence to create an ambiguity and then to find that resort to extrinsic evidence is proper. The policy in question provides that "permanent teachers are evaluated every two years . . . ." In the same clause, it provides for more frequent evaluation of probationary teachers. The Stull Act, with which the policy was designed to comply, itself contains

language permitting teachers evaluations "at least every other year." Given the language of the Stull Act, and the language in the very section of the District's evaluation policy in controversy, it is clear to me that the District knew how to draft clear and concise language providing for evaluations more frequent than every two years. Instead, it drafted language which clearly and unambiguously provided for evaluations every two years — no more, no less. There is no ambiguity in the District's policy which would justify a resort to extrinsic evidence.

Even if reference is made to extrinsic evidence to determine what the evaluation policy was, I do not find the evidence allegedly establishing a past practice to be convincing. The District relies upon evidence of 12 incidents involving preparation of evaluations more frequently than every two years. These 12 incidents, involving a total of four different teachers, occurred over a period of approximately 17 years. The evidence indicated that the District did not serve these more frequent evaluations on the Association, and that the Association did not have actual notice of the evaluations. In my view, for a practice to modify the express terms of a negotiable written policy, it must have been regularly occurring, open and notorious, and known to the Association. In essence, the District's argument is that it violated the written policy often enough to effectively supersede it by

practice, and that the Association never objected. In this case the evidence is that back-to-back annual evaluations occurred infrequently and sporadically, and were not known to the Association. On such facts, I cannot conclude that the clear terms of the policy were superseded by practice. That would be tantamount to holding that the Association waived its right to negotiate regarding a change in the negotiable subject of evaluation policy by failing to object to violations of that policy which it neither knew of nor had reason to know of.

I find further indication that the District policy permitted evaluation of regular teachers no more frequently than every two years in the fact that the District repeatedly attempted to modify the language in negotiations. I reject the majority's finding that it would be somehow unfair to rely upon evidence of the District's unsuccesful attempts to modify its policy during negotiations to show that the express terms of the policy governed. The majority confuses the statutory right to negotiate enjoyed by unions, a waiver of which will not be inferred, with the District's attempt in this case to demonstrate that the Association waived its right to object to the District's change in a negotiable policy. The District's contention that it modified its written policy by practice, and therefore that no unilateral change occurred, is an affirmative defense upon which it has the burden of proof. I see no problem with drawing the reasonable inference from its attempt

and failure to modify its written policy through negotiations, to wit, that absent a negotiated modification, the District itself believed that it lacked the right to evaluate regular teachers more often than every two years.

In summary, I would find the language of the District's policy to be clear and unambiguous on its face, and to allow evaluation of permanent teachers no more than once every two years. I would find resort to extrinsic evidence neither necessary nor proper. I would hold that if reference to extrinsic evidence is made, the departures from the written policy were sporadic and infrequent and, moreover, that they were unknown to the Association. Therefore, I would find that such departures from the written policy did not supersede it. I would find that the District's repeated attempts to modify the express language of the policy provide some indication that the District itself understood that it did not have the right to evaluate permanent teachers more often than once every two years.

I would thus hold that, by unilaterally changing its evaluation policy, the District violated subsections 3543.5(a), (b) and (c).