STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 54,	)	
Charging Party,	)	Case No. LA-CE-1443
v.	)	PERB Decision No. 364
ANAHEIM CITY SCHOOL DISTRICT,	)	December 14, 1983
Respondent.	)	

Appearances; Madalyn J. Frazzini, Attorney for California School Employees Association, Chapter No. 54; David G. Miller, Attorney (Law Firm of David G. Miller) for Anaheim City School District.

Before Gluck, Chairperson; Tovar and Jaeger, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the California School Employees Association, Chapter 54 (CSEA or Association) and the Anaheim City School District (District) to an Administrative Law Judge's (ALJ) proposed decision finding that the District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)1 by

[1]EERA is codified at Government Code section 3540 et seq. All references are to the Government Code unless otherwise indicated.

Section 3543.5 provides in relevant part:

making unilateral changes of matters within the scope of representation.

We have reviewed the ALJ's proposed decision in light of the parties' exceptions and the entire record in this matter and affirm it in part and reverse it in part consistent with the discussion below.

FACTS

Failure to Maintain the Grievance Procedure After the Contract Expired

Since CSEA became the exclusive representative of the District's classified employees, the parties have negotiated four collective bargaining agreements. The terms of the agreements were as follows:

9/13/77 - 6/30/79
10/23/79 - 6/30/80
12/15/80 - 6/30/81
1/12/82 - 6/30/83

> 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.

In 1980, during the period of time between the expiration of the 1979-80 contract and the execution of the 1980-81 contract, CSEA filed several grievances with the District. The District refused to process these grievances, asserting that no grievance procedure existed since the contract between the parties had expired and no new contract had been signed.

As a result, CSEA filed unfair practice charges contesting the District's unilateral renunciation of the grievance procedure. These cases were settled at a PERB informal conference, resulting in a settlement agreement which was executed on January 30, 1981. The agreement provided, in relevant part:

> The parties, desiring to settle their dispute, agree as follows:
>
> 1. The District agrees to meet and negotiate, upon request, with CSEA concerning the November 1980 range changes for school clerks and offset press operators.
>
> 2. The District agrees not to make any range changes until negotiations commence.
>
> 3. Negotiations shall commence on or before May 18, 1981 and CSEA shall present its initial proposal on or before March 30, 1981. These dates may be extended by mutual agreement.
>
> 4. The District agrees that it will entertain proposals by CSEA during negotiations to extend the term of the agreement and/or to extend the provisions of the grievance machinery beyond the expiration date of the current contract.

By the time the settlement agreement was executed, the parties had negotiated the 1980-81 contract, which expired June 30, 1981.2

During negotiations for a successor agreement to the 1980-81 contract, the parties exchanged proposals and counterproposals concerning extension of the existing contract but were unable to agree to an extension of either the contract or the grievance procedure. When the Association filed various grievances in the fall of 1981, the District rejected them on the grounds that no grievance procedure was in effect since it had expired with the contract and had not been extended. The District maintained this position until January 12, 1982, when a new collective bargaining agreement was executed.

Unilateral Alteration of the Bus Route Bidding Procedure.

The District's bus drivers service approximately a dozen bus routes, which are divided into a.m. and p.m. runs with a rest period in between. The starting and ending time of the routes vary from one another as does the total amount of time required to complete each route.

The bus drivers are paid on an hourly basis. Article XI, subsection A of the parties' 1980-81 agreement guarantees each

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2The grievance procedure is set forth in Article VIII of the 1980-81 agreement. It provides for a four-step internal grievance procedure, which includes advisory arbitration as its third step and a Board of Education review of the arbitrator's decision as its fourth step.

bus driver a minimum of four hours of employment per day. Bus drivers are assigned their routes through a bidding procedure based on seniority. Since the overall length of the routes varies from one another, the outcome of the bidding procedure determines the number of hours worked and, therefore, the amount employees will be compensated.

The bidding procedure was included in Article XI, Section D, of the parties' 1980-81 agreement. That section provided, in relevant part:

> . . . . . .
>
> 3. For purpose of this section, a "run" or "route" shall mean either of the following:
>
> a. An a.m. run which shall be defined as any run commencing before 11 a.m.
>
> b. A p.m. run which shall be any run beginning at 11 a.m. or thereafter.
>
> Each driver shall bid for both an a.m. and a p.m. run.

In September 1980, in accordance with the procedure established in Article XI of the expired agreement, the bus drivers bid separately for a.m. and p.m. bus routes. On September 1, 1981, the District informed the bus drivers that for the 1981-82 school year they would not bid separately for the a.m. and p.m. runs. Instead they would bid for a daily route which would combine both the a.m. and p.m. routes.[3]

3The District's actions did not involve a change in the configuration or number of bus routes.

Both Transportation Foreman Clyde Moss and Assistant Superintendent Jack Sarnicky testified that the purpose of the District's actions was to improve student discipline on the buses by using the same driver on both the a.m. and p.m. route.

In the fall of 1981, the Association attempted to file a grievance based on the District's elimination of separate bidding for bus routes, but the District refused to process the grievance, claiming that the grievance procedure was no longer in effect.

Unilateral Modification of Extra-Work Assignment Policy

Article XI B.I. of the 1980-81 agreement, provided in relevant part:

> Extra work will be offered on a rotation basis for each of the two categories with the first assignment going to the senior driver, and so on until every driver has had an opportunity for extra work.

Past practice with respect to extra trip assignments had been for drivers who wanted an extra-work assignment to fill out a form left hanging on a clipboard where the drivers kept their assigned bus keys. If the senior driver requesting such an assignment was absent on the day extra work was assigned, then that driver was passed over and the next senior driver was given the opportunity to have the extra work assignment.

On Tuesday, November 10, 1981, extra trip assignment sheets were posted in connection with a request by the Anaheim Union High School District for a number of additional buses on

November 12. Elsie Sims was absent on November 10. Wednesday, November 11, was a holiday and Sims returned to work on Thursday morning, November 12. In the meantime, Audrey Hanno, a driver with less seniority than Sims, had indicated that she, as well as four or five other drivers, would accept the extra trip assignment for Thursday night, November 12, 1981. When Sims returned to work on Thursday morning, she responded affirmatively to the extra work assignment form which had been left on her clipboard since the previous Tuesday. This created a situation where more drivers had signed up than were required. Transportation Foreman Moss, attempting to comply with the contractual procedure, determined that Elsie Sims, the more senior driver, would be given the November 12 trip and that Audrey Hanno would be offered the next available extra work assignment. Hanno was offered an assignment for Friday, November 13. She rejected this assignment as she had originally rescheduled some personal plans from Thursday to Friday to accommodate the original assignment.

The Thursday trip which Hanno lost lasted from approximately 6:00 p.m. until 10:15 p.m. If Hanno had worked that assignment, approximately 45 minutes to one hour of her time on that trip would have been paid at an overtime rate.

In the fall of 1981, the Association attempted to file a grievance based on this conduct, but the District refused to process the grievance, claiming that the grievance procedure was no longer in effect.

Unilateral Substitution of Bus Route Assignments

Article XI, D.5 of the 1980-81 agreement contains the following language relating to assignment of bus routes:

> A date will be established for each driver to submit a bid for the routes. A master schedule will be posted so that all drivers may see the routes available. Drivers will receive appointments for their bid at specified time intervals and must be present at the appointed time to bid for routes. Any driver who is not present will be assigned the remaining routes. The District will identify all known routes in the initial bidding. After the driver has bid for the route, the bus will be assigned. . . . Switching of routes between drivers after the initial bidding will not be permitted.
>
> After the initial bidding for routes, there will be no rebidding for the balance of the school year. The District reserves the right to add runs, delete runs, or to modify stops on existing schedules. Following initial bidding of runs, the following items shall be considered in assignment of newly-created runs:
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> a. Availability of the bus.
>
> b. Location of the bus after completion of the newly-created run.
>
> c. Next run of the bus after completion of the newly-created run.
>
> d. Amount of waiting time created by addition of the new run.
>
> Provided the foregoing criteria has been met, the newly-created run will be offered first to the senior driver who has had a run deleted from the initial bid. If offerings resulting from deletions of runs are refused, the newly-created run will be offered to the senior driver who has had no

> runs deleted. The application of the above criteria shall be determined by the District. (Emphasis added.)

It had been the practice of the District for drivers who received a route through the bidding procedure to keep it for the remainder of the year.

Along with other bus drivers, Virginia Gonzales practiced driving her route on the Friday prior to the commencement of school in September 1981. Included in Gonzales[1] packet of runs was a route sheet containing the run to Juarez Elementary School, which she practiced driving but for which she had not bid. Transportation Foreman Moss included the Juarez route in her packet despite the fact that she did not bid on it.

The Juarez run consisted of picking the children up at the elementary school and driving them to the Willomena area. The run lasted approximately 30 minutes. On the first day of school, Gonzales drove to Juarez Elementary at the proper time, but no children were there. The principal of Juarez Elementary told her the run would not start for at least several more weeks. Gonzales kept the route sheet for the Juarez run in her possession for about a month. Later, to avoid confusion if another driver substituted for her, Gonzales gave the Juarez route sheet back to Foreman Moss. Moss told her she would get the route back when it actually began.

Gonzales was not assigned the run when it was begun later in the fall of 1981. Instead, the run was assigned to

Lynette Salaets because her existing runs took her right by Juarez Elementary School at the appropriate time. Salaets drove the run approximately two to three weeks. In order for Salaets to integrate the run into her schedule, the children had to leave their classes early. Thus, on approximately November 5, 1981, the run was again reassigned by Moss from Salaets to Audrey Hanno. Moss testified that he applied the contractual criteria, with particular emphasis on the impact of paid waiting time, in making this reassignment. Assigning the run to Gonzales would have resulted in paid waiting time for her. This was not the case for Hanno. The Juarez run had not changed between the time the Juarez route was included in the work schedule of Gonzales at the beginning of the year and the time it was assigned to Hanno.

The transportation foreman admitted on cross-examination that the Juarez run was not a "newly-created run" within the meaning of the agreement. Nevertheless, he testified that he utilized the criteria for assigning employees to a "newly-created run" when he assigned the Juarez run to Salaets and Hanno. He also testified that the run was approximately the same at the time of the hearing as it was when it was assigned to Gonzales at the beginning of the school year.

In the fall of 1981, the Association attempted to file a grievance based on the District's switching of bus routes, but the District refused to process the grievance, claiming that the grievance procedure was no longer in effect.

E. Unilateral Modification of Posting Procedure

In the parties' 1977-79 agreement, the language on posting provided: "All vacancies by specified job title, and locations whenever possible, shall be posted at the work locations at least five days prior to being filled." (Emphasis added.) This language requiring the District to post vacancies by separate job locations was omitted in the parties' two subsequent agreements (1979-80 and 1980-81). Thus, Article VI of the 1980-81 agreement provides, in relevant part:

> D. Vacant Positions
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> 1. For purposes of this provision, a vacancy is any unit position of four (4) or more hours which becomes vacant or any new position; provided, however, the District reserves its right to exercise its own discretion in determining whether the vacancy will be filled.
>
> 2. All vacant positions to be filled will be posted.
>
> Posting
>
> All vacancies by specified job title shall be posted at the work location at least seven (7) working days prior to being filled.

In April 1981, CSEA filed a grievance over the District's alleged failure to post for vacancies for the position of school secretary. That grievance was resolved when the District agreed to post all vacancies in that classification. In its response to the filed grievance the District stated that:

> Since the contract is silent on the issue of multiple vacancies in the same classification, your request to post the vacancies for the two existing vacancies will be granted.

At the beginning of the 1981-82 school year, the District posted two vacancies for the classification of Library Media Clerk, one at Gauer School and one at Mann School. Thereafter, the District posted an addendum to the first posting, adding the new vacancy in the same classification at Sunkist School. After these postings, the District conducted interviews for filling these vacancies. Pursuant to this interview process, the District chose four persons, rather than three, for the classification of Library Media Clerk, since a fourth vacancy had arisen at the Edison school.

In the fall of 1981, the Association attempted to file a grievance over the District's alleged failure to comply with the posting procedure, but the District refused to process the grievance, claiming that the grievance procedure was no longer in effect.

DISCUSSION

Survival of the Grievance Procedure

The ALJ found that the parties' January 30, 1981 settlement agreement of the Association's earlier unfair practice charge against the District constituted a waiver by the Association of any right to have the grievance procedure extend beyond the expiration date of the contract then in effect. Having found

such a waiver, he declined to rule on the underlying question of whether, absent a waiver, a grievance procedure survives the expiration of a collective agreement. The Association excepts to the ALJ's determination, asserting that, as a matter of law, a grievance procedure survives the expiration of a collective bargaining agreement and that the parties' settlement agreement did not constitute a waiver of the right to have the grievance procedure extend beyond the expiration of the 1980-81 agreement.

We agree with the Association that the ALJ erred in finding that the Association, by virtue of the settlement agreement, ceded to the District the authority to terminate the existing grievance procedure unilaterally. Therefore, we find it necessary to resolve the underlying issue of whether, and in what circumstances, a grievance procedure will survive expiration of an agreement.

The Board has long held that an employer may violate its duty to negotiate in good faith where it unilaterally alters an established policy concerning a matter within the scope of representation without providing notice and a reasonable opportunity to negotiate to the exclusive representative. Grant Joint Union High School District (2/26/82) PERB Decision No. 196; Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. The employer is precluded from making unilateral changes in the status quo both during the term of a negotiated

agreement and after that agreement expires until such time as the parties negotiate a successor agreement or they negotiate through completion of the statutory impasse procedure. Pittsburg Unified School District (3/15/82) PERB Decision No. 199; Modesto City Schools (3/8/83) PERB Decision No. 291; Bethlehem Steel Corp. v. NLRB (3rd cir. 1963) 320 F.2d 615 [53 LRRM 2878].

Section 3543.24 expressly includes within the scope of representation "procedures for the processing of grievances" established pursuant to sections 3548.5, 3548.6, 3548.7, and 3548.8.5 The Act places no express restrictions or

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4Section 3543.2 provides, in relevant part:

> (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. . . .

5Section 3548.5 provides that parties to a collective agreement "may include in the agreement procedures for final and binding arbitration of . . . disputes . . . involving the interpretation, application, or violation of the agreement." Section 3548.6 provides that, where the parties do not include

a limitations on the types of grievance procedures which are negotiable. The reference to subsections 3548.5-.8 is meant to reflect a specific legislative sanctioning of binding arbitration. It follows that a grievance procedure culminating in advisory arbitration, a lower level of terminal dispute resolution than binding arbitration, is also negotiable.

Such a view is consistent with well-established federal precedent finding that a grievance procedure is a term and condition of employment which may not be unilaterally modified. Bethlehem Steel Corp. v. NLRB, supra; Newspaper Printing Corp. (1975) 221 NLRB 811 [91 LRRM 1077]; Turbodyne Corp. (1976) 226 NLRB 522 [93 LRRM 1379]; Pease Co. (1980) 251 NLRB 540 [105 LRRM 1314]; Georgia Kraft Co. (1981) 258 NLRB 908; Northwestern Dodge, Inc. (1981) 258 NLRB 877, 889 [108 LRRM 1253]. It should be noted, however, that both the NLRB and the federal courts have traditionally treated the survivability of arbitration provisions differently from that of grievance procedures, despite the fact that arbitration is a negotiable term and condition of employment.

In Hilton-Davis Chemical Co. (1970) 185 NLRB 241 [75 LRRM 1036] , the NLRB held that parties are not required to submit

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grievance procedure in their agreement, they may submit their dispute to binding arbitration based on procedures established by PERB. Sections 3548.7 and 3548.5 concern enforcement of arbitration awards even where an arbitration award was not included in the agreement.

grievances to arbitration during a post-contract hiatus in the event that the grievance process does not settle the dispute prior to expiration of the agreement. The NLRB held that "arbitration is, at bottom, a consensual surrender of the economic power which the parties are otherwise free to utilize." Inasmuch as the agreement is a matter of mutual consent, the Board reasoned, the expiration of the agreement is a bar to the contract's enforcement. 185 NLRB at 242. See also Newspaper Printing Corp., supra; Turbodyne Corp., supra; Local 636, Warehousemen v. J.C. Penney (WD Pa. 1980) 103 LRRM 2618.

However, in Nolde Bros., Inc. v. Local 358, Bakery and Confectionary Workers Union (1977) 430 U.S. 243 [94 LRRM 2753], the U.S. Supreme Court held that, although the duty to arbitrate may not be implied in the absence of a contractual agreement, that duty is not automatically terminated simply because a collective bargaining agreement has expired. As the Court explained:

> Nolde contends that the duty to arbitrate, being strictly a creature of contract, must necessarily expire with the collective bargaining contract that brought it into existence. . . . Any other conclusion, Nolde argues, runs contrary to federal labor policy which prohibits the imposition of compulsory arbitration upon parties except when they are bound by an arbitration agreement. Nolde relies on numerous decisions of this Court which it claims establish that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to." [Citations omitted.]

> Our prior decisions have indeed held that the arbitration duty is a creature of the collective bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so. Adherence to these principles, however, does not require us to hold that termination of a collective bargaining agreement automatically extinguishes a party's duty to arbitrate grievances under the contract. [94 LRRM 2756] .

The Court found that the federal policy favoring private resolution of disputes was so strong that it would not readily infer that the parties intended the duty to arbitrate to terminate upon the expiration of a collective bargaining agreement. United Steel Workers v. Warrior and Gulf Navigation Co. (1960) 363 U.S. 574 [46 LRRM 2416]; United Steel Workers v. Amer. Mfg. Co. (1960) 363 U.S. 564 [46 LRRM 2414]; United Steel Workers v. Enterprise Wheel and Car Corp. (1960) 363 U.S. 593 [46 LRRM 2423]; John Wiley & Sons v. Livingston (1964) 376 U.S. 543 [55 LRRM 2769]. As the Court noted, 94 LRRM at 2757:

> The parties must be deemed to have been conscious of this policy when they agreed to resolve their contractual differences through arbitration. Consequently, the parties' failure to exclude from arbitrability contract disputes arising after termination, far from manifesting an intent to have arbitration obligations cease with the agreement, affords a basis for concluding that they intended to arbitrate all grievances arising out of the contractual relationship. In short, where the dispute is over a provision of the expired agreement, the presumptions favoring arbitrability must be negated expressly or by clear implication.

In Nolde Bros., therefore, the Supreme Court established a rebuttable presumption of arbitrability where the dispute arises out of a right "arguably created" by the expired collective agreement, where the parties have agreed to submit contractual disputes to arbitration, and where there is no clear evidence of an intention by the parties that the duty to arbitrate will terminate upon expiration of the agreement. Local 363, Warehouseman v. J.C. Penney, supra; Steelworkers v. Ft. Pitt Steel Casting Division, Conval Corporation (3d Cir., 1980) F.2d [105 LRRM 3232]; UMWA v. Jericol Mining, Inc. (ED Ky 1980) 492 F.Supp. 132 [107 LRRM 2380]; NLRB v. Haberman Construction Co. (5th Cir. 1980) 105 LRRM 2059; Glover Bottle Gas Corp. v. Local 282 (2d Cir. 1983) F2d [113 LRRM 3211]. Consistent with Nolde Bros., the NLRB has modified the rule previously established in Hilton-Davis, supra, and found that it is an unlawful unilateral change for an employer to repudiate its contractual duty to arbitrate upon expiration of the agreement absent clear evidence that the parties intended that duty to terminate upon contract expiration. American Sink Top & Cabinet Co. (1979) 242 NLRB 408 [101 LRRM 1166]; Digmore Equipment Co. (1982) 261 NLRB No. 176 [110 LRRM 1209].

In our view, EERA creates at least as strong a policy in favor of the private resolution of disputes through the arbitration process as is established under the National Labor

Relations Act. As noted above, section 3543.2 specifically provides that grievance procedures, up to and including procedures culminating in binding arbitration, are negotiable. (See discussion, supra at p. 14.) Further, section 3548.7 authorizes the parties to submit disputes to arbitration even where such a procedure has not been included in the negotiated agreement. Thus, we conclude that, in enacting EERA, the Legislature intended to establish a strong policy favoring arbitration as a means of resolving disputes between the parties. We, therefore, adopt the view expressed by the U.S. Supreme Court in Nolde Bros. that, unless the contract indicates expressly or by clear implication that the parties intended that the duty to submit grievances to arbitration terminates at the expiration of the agreement, that duty will survive. This would hold true whether the parties' agreement provided for binding or, as in this case, advisory arbitration of disputes.

A review of the record indicates that the parties' collective agreement provided that disputes between the parties arising out of interpretation of the agreement were subject to resolution through the grievance procedure, including the advisory arbitration provision. All of the issues which the Association sought to submit to the grievance procedure concern disputes which "arguably arise" out of the expired collective

agreement.[6] However, the District does raise the argument that the parties intended that their right to use the grievance procedure would expire upon termination of the agreement.

Although the contract itself contains no language limiting the right to file post-contract expiration grievances, the District argues that the parties' settlement agreement of a previous unfair practice charge against the District constituted a waiver of any right to have the grievance procedure extend beyond the expiration of the agreement. The District asserts that since the parties did meet and negotiate on this issue prior to contract expiration, the District fulfilled its negotiating duty.

On its face, the parties' settlement agreement merely obligates the District to entertain proposals by the Association to extend the grievance procedure in negotiations intended specifically to settle a past unfair practice charge. There is no evidence that the parties intended this settlement agreement to apply to future negotiations or to grievances arising out of subsequent contracts. Moreover, even if the settlement agreement can be construed as applying to future contract negotiations, it plainly does not authorize the District to take unilateral action terminating the grievance procedure if the Association fails to submit proposals

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[6]The discussion of each of the District's alleged breaches of the parties' collective agreement appears, infra, at p. 24 et seq.

concerning contract extension or the parties fail to reach agreement. On the contrary, as the Association asserts, the settlement agreement merely requires the District to act in a manner consistent with its statutory duty to negotiate in good faith.

The Board has long held that a waiver of a statutory right must be clear and unmistakable. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74; Sutter Union High School District (10/7/81) PERB Decision No. 175; Delano Joint Union High School District (5/5/83) PERB Decision No. 307. In our view, the evidence is insufficient to establish that the settlement agreement constituted a "clear and unmistakable" waiver of the Association's right to have the grievance procedure continue after expiration of the parties' collective agreement.

In sum, we find that the grievance procedure, including the provision for advisory arbitration, survives expiration of the agreement absent clear evidence of an intent to the contrary. We also reject the District's argument that the Association waived its right to have the procedure continue. Accordingly, we find that the District's unilateral repudiation of that procedure constituted a violation of subsection 3543.5(c). Grant Joint Union High School District, supra; American Sink Top & Cabinet Co., supra. Such conduct also constitutes a derivative violation of subsections 3543.5(a) and (b).

San Francisco Community College District (10/12/79) PERB Decision No. 105.

Unilateral Alteration of the Bus Route Bidding Procedure

The ALJ found that the unilateral elimination of separate bidding for a.m. and p.m. bus routes was an unlawful unilateral change since the combining of a.m. and p.m. bus routes for the purpose of bidding had an impact on the hours and wages of bus drivers. The District asserts that, notwithstanding the clear right established in the expired agreement permitting employees to bid separately for a.m. and p.m. bus routes, management has the right to determine the staffing of its bus routes. The District does not argue that a bidding procedure itself is outside the scope of representation, but that whether one driver or multiple drivers will staff a particular route is a managerial prerogative.

Since bidding procedures are not specifically set forth in section 3543.2, the negotiability of the subject matter must be analyzed in terms of the test set forth in Anaheim Union High School District (10/28/81) PERB Decision No. 177.[7] Under the Anaheim test, a nonenumerated subject will be found to be within the scope of representation if: (1) it is logically and reasonably related to wages, hours or an enumerated term and condition of employment; (2) the subject is of such concern to

[7]Cited with approval by the California Supreme Court in San Mateo City School District et al. v. PERB (1983) 33 Cal.3d 50.

both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

The record establishes that bus drivers were hourly employees who were paid based on the amount of time it took them to complete their assignments. Since the various bus routes differed in the amount of time needed to complete them, the procedure for assigning bus drivers to a particular route directly determined the wages that employees would receive, their hours of employment, and the amount of relief time they were entitled to during the workday. The uncontroverted testimony of bus driver Elsie Sims indicates that the combining of a.m. and p.m. bus routes reduced her hours of employment and affected her ability to determine a beginning and ending time for her shifts. She further testified that, had she been able to bid separately for a.m. and p.m. routes, the combination she would have chosen would have enabled her to increase her overall hours of employment while ending work earlier in the day. Based on this evidence, we conclude that the bidding procedure is reasonably and logically related to wages and hours of employment and, therefore, meets the first prong of the Anaheim test.

Clearly, the method for determining the wages and hours of employees is a matter of great importance to both management and employees and is, therefore, appropriate to the bilateral decision-making process.

The District asserts that permitting the bus drivers to bid separately for a.m. and p.m. routes would impermissibly interfere with its managerial right to structure the service which it offers to the public and to maintain student discipline on its buses. While an employer has the right to determine the number and configuration of bus routes, and the number of buses which it wishes to operate, there is no evidence that these matters were in any way affected by the established bidding system. Nor has the District established that the separate bidding system significantly affected its ability to enforce student discipline on its buses. The District offered no evidence that it was having disciplinary problems on the buses or that such problems were in any way attributable to the existing system of staffing. Rather, its argument was based on pure conjecture and speculation. Assuming, arguendo, that student discipline is a matter of fundamental managerial pregrogative, the District must nevertheless demonstrate that its staffing attempt here lies within that area preserved to lawful unilateral action. It has not done so.

Accordingly, we conclude that the bidding system in use in this case was negotiable and that the District's unilateral alteration of that procedure was a violation of subsection 3543.5(c) and, derivatively, subsections 3543.5(a) and (b). Grant Joint Union High School District, supra; San Francisco Community College District, supra.

Unilateral Modification of Extra Work Assignment Policy

The facts underlying this allegation are undisputed. The established practice in the District had been to offer extra-work assignments in the order of seniority as required by Article XI, B.I of the 1980-81 agreement. If a more senior employee was absent on the day of an assignment, a less senior employee would be offered the work. The more senior employee would then be precluded from getting the assignment. On November 10, Elsie Sims was absent. Therefore, she was passed over and other—less senior—employees accepted the assignments. When the employees returned from their November 11 holiday, Sims indicated that she would accept the assignment. As a result, Audrey Hanno, a less senior driver, was bumped. Although Transportation Foreman Moss offered her an alternative assignment, she refused, since it conflicted with other plans she had.

The ALJ found, and the Association does not disagree, that Moss essentially made a one-time, good-faith "mistake" which he attempted to rectify. Accordingly, the ALJ determined that no

"change of policy" within the meaning of Grant Joint Union High School District, supra, had resulted and he dismissed the charge. The Association excepts to this determination.

In Grant Joint Union High School District, supra, the Board held that a breach of contract may also be an unlawful unilateral change where it amounts to a "change in policy." However, the Board also made it clear that:

> . . . not every breach of contract also violates the Act. Such a breach must amount to a change of policy, not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. This distinction is crucial. A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. On the other hand, when an employer unilaterally breaches an agreement without instituting a new policy of general application or continuing effect, its conduct, though remediable through the courts or arbitration, does not violate the Act. The evil of the employer's conduct, therefore, is not the breaching of the contract per se, but the altering of an established policy mutually agreed upon by the parties during the negotiation process. Grant Joint Union High School District, supra, at p. 9.

We find that the District's conduct in this instance does not constitute a change in the the established extra-work assignment policy. Moss' actions were not intended to constitute a change in the established rule. As noted by the ALJ, after offering too few assignments to too many drivers, he attempted to rectify his error and reduce the surplus based on the seniority provisions of the agreement. As such, it can

hardly be concluded that these actions had a "generalized effect or continuing impact" on bargaining unit members so as to constitute a modification of established policy. We, therefore, dismiss the charge for failing to establish a unilateral change in District policy.

Unilateral Substitution of Bus Route Assignments

The ALJ found that the District's reassignment of the Juarez run from Gonzales to other employees was not prohibited by the parties' collective agreement and that, as such, no unlawful unilateral change had occurred. The Association excepts to this determination.

Article XI, Subsection D of the agreement prohibits mid-year reassignment of bus routes between drivers only where the route in question had been assigned through the bidding procedure. The agreement is silent concerning the rights of employees with respect to those routes which were not bid for by employees and were assigned unilaterally by management. Here the record establishes that Gonzales did not bid for the Juarez route, but was initially assigned the route when no one else had bid for it. Later, Transportation Foreman Moss reassigned the route to other drivers. The Association introduced no evidence that the District's action violated the agreement or deviated form established practice or policy. In the absence of such evidence, we cannot conclude that the District engaged in an unlawful act. Accordingly, the Association's charge is dismissed.

Unilateral Modification of Posting Procedure

The ALJ found that the existing policy in the District, as established by the expired 1980-81 agreement, required that each vacant position be posted individually, even if there were multiple vacancies in the same classification. He specifically rejected the District's argument that where there were multiple vacancies in the same classification, the District could post all the vacancies together. Accordingly, he found that the failure to post the Library Media Clerk positions separately was an unlawful unilateral change.

In its exceptions, the District reasserts its argument that the contract was ambiguous as to the question of separate postings for vacancies in the same classification, and that the past practice in the District had been to permit the District to post once for vacancies in the same classification.

The Association, in support of the ALJ's finding of a violation, asserts that the agreement is not ambiguous as to the requirement that each position be posted separately. Indeed, the Association argues that the agreement not only obligated the District to post vacancies by the specified number of openings within a classification, but that it was also required to indicate the work site where each vacancy was located.

We disagree with the ALJ's determination that, where there were multiple vacancies within the same classification, the agreement clearly required the District to specify the number of vacancies within a specific classification or the location of the vacancy. The agreement merely provides that "all vacancies by specified job title shall be posted. . . ." The agreement is silent as to the posting requirement where there are multiple vacancies within the same classification. Where an agreement is ambiguous or silent as to a particular issue, it is appropriate for the Board to examine past practice to ascertain the nature of existing policy. Marysville Joint Unified High School District (5/27/83) PERB Decision No. 314; Grossmont Union High School District (5/26/83) PERB Decision No. 313.

The uncontroverted testimony of Dr. Eli Vukovich, Assistant Superintendent for Personnel, indicates that the District's consistent position was that it was obligated to post once for multiple vacancies and not to specify either the number or location of the vacancies. He noted, however, that he periodically posted separately for vacancies within the same classification when it was "practicable." In an April 1981 settlement of a grievance brought by the Association over the failure to post a multiple vacancy separately, the District had agreed to extend the posting for several days but steadfastly refused to yield on its insistence that the decision whether to

post separately by number of vacancies and specific work site was within the District's discretion. Dr. Vukovich testified that this settlement was not intended as a waiver of the District's basic position that it was not required to post separately for multiple vacancies in the same classification. Finally, Vukovich's uncontradicted testimony indicates that, even after the settlement of the grievance, the District continued to post once for multiple vacancies within the same classification.

Moreover, the history of negotiations between the parties supports Vukovich's testimony concerning established policy in the District. Thus, in the parties' 1977-79 agreement the language on posting provided: "All vacancies by specified job title, and locations whenever practicable, shall be posted at the work locations at least five days prior to being filled." (Emphasis added.) In the parties' two subsequent agreements this language referring to specifying particular work sites in postings was omitted. This omission suggests that the Association gave up whatever right it once possessed to have vacancies specified by job location in its prior agreements.

In sum, we find insufficient evidence to establish that the District made an unlawful unilateral change in its job posting policy. The Association's charge is dismissed.

REMEDY

Subsection 3541.5(c) empowers the Board to fashion a remedy which will best effectuate the purposes of the Act. We have

found that the District has violated its duty to negotiate in good faith by repudiating the grievance procedure upon contract expiration and by unilaterally eliminating separate bidding for a.m. and p.m. bus routes, thereby altering the wages and hours of its employees. Accordingly, we find it appropriate to order the District to reinstate the grievance procedure as it existed under the 1980-81 agreement and to permit the Association to file any grievances which arose during the period between the expiration of that agreement and the execution of the parties' successor agreement. Finally, we find it appropriate to order the District to restore separate bidding for a.m. and p.m. bus routes unless or until the parties reach a negotiated agreement modifying that procedure.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that the Anaheim City School District shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by unilaterally repudiating the grievance procedure and by unilaterally changing employees' wages and hours by eliminating employees' right to bid separately for a.m and p.m. bus routes.

2. Denying the California School Employees Association its right to represent unit members by failing and refusing to meet and negotiate in good faith.

3. Interfering with employees because of their exercise of protected rights by failing and refusing to meet and negotiate in good faith with the exclusive representative.

B. TAKE THE FOLLOWING ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Reinstate the grievance procedure as it existed prior to the time that the District unilaterally repudiated that procedure for the purpose of permitting the Association to file grievances with the District concerning any alleged breach of the parties' 1980-81 collective agreement which the District refused to process.

2. Restore the 1980-81 grievance procedure for all other purposes unless or until the parties negotiate a successor agreement.

3. Restore separate bidding for a.m. and p.m. bus routes in accordance with the terms of the 1980-81 collective agreement unless or until the parties negotiate a modification of that procedure.

4. Within 35 days after the date of service of this Decision, post at all work locations where Notices to Employees are customarily 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 30

consecutive workdays. Reasonable steps shall be taken to ensure that this Notice is not altered, reduced in size, defaced, or covered with any other material.

5. Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with her instructions.

C. All other charges are hereby DISMISSED.

Chairperson Gluck and Member Tovar joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-1443, California School Employees Association, Chapter 54 v. Anaheim City School District, in which all parties had the right to participate, it has been found that the Anaheim City School District violated the Educational Employment Relations Act, Government Code subsections 3543.5(a), (b), and (c) by unilaterally repudiating the grievance procedure at the expiration of the 1980-81 collective bargaining agreement and by unilaterally altering the bus route bidding procedure, thereby affecting the wages, hours, and distribution of relief time of District employees.

As a result of this conduct, we have been ordered to post this notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by unilaterally repudiating the grievance procedure and by unilaterally changing employees' wages and hours by eliminating employees' right to bid separately for a.m and p.m. bus routes.

2. Denying the California School Employees Association its right to represent unit members by failing and refusing to meet and negotiate in good faith.

3. Interfering with employees because of their exercise of protected rights by failing and refusing to meet and negotiate in good faith with the exclusive representative.

B. TAKE THE FOLLOWING ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Reinstate the grievance procedure as it existed prior to the time that the District unilaterally repudiated that procedure for the purpose of permitting the Association to file grievances with the District concerning any alleged breach of the parties' 1980-81 collective agreement which the District unlawfully refused to process.

2. Restore the 1980-81 grievance procedure for all other purposes unless or until the parties negotiate a successor agreement.

3. Restore separate bidding for a.m. and p.m. bus routes in accordance with the terms of the 1980-81 collective agreement unless or until the parties negotiate a modification of that procedure.

Dated: ANAHEIM CITY SCHOOL DISTRICT

By _____
Authorized Representative

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