STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTERS 246, 336 and 617, Charging Party,	)	Case No. LA-CE-1297
v.	)	PERB Decision No. 372
KERN COMMUNITY COLLEGE DISTRICT, Respondent.	)	December 29, 1983

Appearances; Maureen C. Whelan, Attorney for the California School Employees Association, Chapters 246, 336 and 617; Ronald D. Wenkart, Attorney (Schools Legal Service) for the Kern Community College District.

Before Gluck, Chairperson; Morgenstern and Burt, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Kern Community College District (District) and by the California School Employees Association, Chapters 246, 336 and 617 (CSEA or Association) to the proposed decision of PERB's 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)[1] by refusing to bargain over the effects of

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

layoff. He dismissed all charges that employees had been discriminated against because of their exercise of protected rights. The District excepts to the ALJ's finding that it refused to negotiate in violation of EERA. The Association excepts only to the ALJ's refusal to order reinstatement and back pay for the laid-off employees.

For the reasons stated below, we reverse the ALJ's finding that the District violated subsections 3543.5(b) and (c), and we therefore dismiss all charges against the District.

FACTS

The Board has carefully reviewed the record in light of the District's and the Association's exceptions and finds that the ALJ's findings of fact are free of prejudicial error. We therefore adopt them as the findings of the Board itself.

SUMMARY

On September 12, 1980, the District Chancellor, Dr. Young, circulated a memo to all staff members detailing the financial problems of the District and announcing the necessity to reduce

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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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> . . . . . .
>
> (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.

programs and services. On September 23, Young and other management officials met with the CSEA chapter presidents from the three District colleges to discuss the memo and the proposed reductions in services staff. There was evidence that District officials met regularly with the CSEA presidents on an informal basis to exchange information and work out problems. These meetings were not negotiating sessions.

On November 12, Lee Buzzard, field representative for CSEA, wrote to Vice-Chancellor Jack Hernandez, the District official responsible for collective bargaining. Buzzard stated that he had been advised of the possibility of layoffs, and requested that the District "return immediately to the bargaining table to negotiate the effects of any such layoff." On November 13, Hernandez responded, assuring Buzzard that "in accordance with . . . the contract, the District will consult with CSEA prior to any layoffs."

Section 6.12113 of the agreement between the District and CSEA reads as follows: "The District shall consult with CSEA prior to any planned reduction in staff."

On December 1, 1980, Buzzard again wrote to Hernandez, specifically demanding to negotiate the effects of layoff, and advising the District that its failure to respond would result in the filing of unfair labor practice charges.

Buzzard testified that subsequent to the December 1 letter, Chancellor Young called him to discuss the nature of the

letter. According to Buzzard, Young said that Hernandez was out of town, and that he (Young) was alarmed about the reference to an unfair labor practice charge. Buzzard told him that the appropriate thing to do would be to come to the table to negotiate the effects of the layoff. Young's response, according to Buzzard, was that it was his understanding that the District would be willing to consult with CSEA at any time on the issue of layoffs pursuant to a portion of the contract, but that the District was not at that time contemplating negotiating effects of layoff. Young himself did not testify.

On December 19, Buzzard submitted to Hernandez this list of nine proposals for negotiation.

1. District/CSEA cost and efficiency analysis of continued functioning of the Delano Center.

2. District/CSEA cost benefit analysis of changing carriers for health, welfare and related benefits.

3. District/CSEA analysis of potential duplication in management functions including, but not limited to personnel, purchasing, budget development and budget administration operations.

4. District/CSEA analysis of the cost, efficiency and service need for selected instructional programs.

5. District/CSEA analysis of the intended vs. actual use of each CETA funded position in the District.

6. District/CSEA analysis of currently received extra jurisdictional funds for their potential redistribution to salaries.

7. Seniority for CSEA chapter officers and job stewards exempting them from layoff.

8. No reduction in benefits if reductions in hours become necessary.

9. District acceptance of CSEA's layoff proposal including positions designated for layoff or reduction in hours.

On January 8, 1981, the Chancellor circulated a memo to all staff giving up-to-date information about contemplated reductions. Attached to that memo was a list of programs and services recommended to the Board of Trustees for reduction or discontinuance. Only certificated and management services were identified in the memo, classified services to be reduced or discontinued were to be determined later. There were estimates of classified services reductions, however. The estimated reduction in classified staff was 22 positions then vacant, 3 positions scheduled for retirements, and 11 other "reductions" for a total of 36 classified positions.

On January 21, the instant unfair labor practice charge was received by mail in the Los Angeles PERB office. On January 20, after the District received a copy of the charge, Hernandez responded to Buzzard's December 19 letter. Hernandez asserted that (1) the District had not yet taken action to terminate classified employees, (2) the District was "as always" prepared to consult with CSEA concerning any decision to eliminate classified positions, and (3) the proposals did not constitute a proper basis for negotiations for several

reasons, including the fact that some were outside of scope, the proposal for extra seniority for Association officials was illegal, and the fact that the District had not yet received a layoff proposal from CSEA. The letter acknowledged that the proposal regarding reduction in hours might be within scope if reduction in hours was contemplated.

The letter concluded as follows:

> Finally, your attention is invited to the provisions of Government Code section 3547 and Board Policy Manual section 21.4 concerning the manner in which initial proposals of exclusive representatives are to be presented prior to the initiation of negotiations. To the extent that you believe that you have a specific proposal, sufficiently detailed to give the public notice and an opportunity to make informed comment as is intended by the letter and spirit of the statute, you should present that proposal at a public meeting of the Board of Trustees of the Kern Community College District to initiate the process. The District reserves the right, of course, to disagree with your contention that any individual matter presented to the Board constitutes a proposal relating to matters within the scope of representation.

CSEA never presented another proposal. Buzzard testified that he believed that he had already submitted a proposal, and that Hernandez' letter was simply part of the District's continued refusal to negotiate.

On April 24, 1981, termination notices were sent out to several classified employees. Four employees were actually laid off at the end of the year, including two recent CSEA chapter presidents hired in 1975 and 1978, a member of the CSEA

negotiating team hired in 1978, and a maintenance worker from a group known for its pro-union activism, hired in 1959. All of these employees were in one- or two-position classes, and two of these employees in particular had been in conflict with District administration. Other CSEA supporters had their hours modified.

At the CSEA presidents' meeting with District officials in December 1980, CSEA President June Frederickson suggested that the District could plan more effectively so that there would not be new hires made at a time when employees were being laid off. In response to that suggestion, and in a general effort to avoid layoffs, the administration at Bakersfield College circulated a memo to classified staff in December of 1980 inviting them to suggest reductions in workload or work hours which would be acceptable or desirable to them.

This memo was approved by the local CSEA President, Merry Kay Ezell, and other CSEA representatives as long as any reductions were voluntary. There is no evidence that the District made any effort to contact Buzzard about this solicitation, and there were no negotiations over the letter or the changes to be made. Buzzard testified that he knew as early as December that reductions in hours were being made.

On another campus, at Cerro Coso College, the Director of Administrative Services, Ken Fite, told the local CSEA President, Frederickson, about a "reorganization" in which

various employees would have their duties changed. While the evidence indicates that employees whose duties were changed were agreeable to the changes, there were other employees who were distressed about this unusual way of filling vacancies and complained to Frederickson. Other employees were transferred to different shifts in conformance with the contract.

When employees began to complain, Frederickson again contacted Fite, who told her that the District had the right to make the changes. She also contacted Buzzard, who told her to record as accurately as possible the changes which were being made. She sent a memo to Buzzard dated February 26, 1981, detailing changes of duties and hours of three employees.

Administrators at Cerro Coso spoke to the individual employees to arrange for the reassignments and the changes in duties and hours.

Hernandez testified that the District did not notify Buzzard about the efforts to switch employees around since it was not the practice to contact him about items arising in the presidents' meeting; that he would be contacted about negotiable items, but that reassignment wasn't negotiable; and that the District had consulted as required by the contract on the changes. He characterized the solicitation of reduction in employees' hours as the District merely responding to employee requests.

CSEA later amended its unfair practice charge to include its allegations that the District violated EERA by reducing and changing the hours and duties of employees without consulting with the representative. Buzzard testified that he did not request negotiations on these changes since he felt that to do so would be futile, and because reduction in hours was covered by the proposal already submitted and the unfair labor practice charge already filed.

In initial negotiation for the 1977-79 contract, CSEA had made a detailed layoff proposal which was not agreed to by the District. The layoff language which was adopted was more general, and included the section noted above stating that "the District shall consult with CSEA prior to any planned reduction in staff."

In negotiations over the successor contract, the District proposed deleting this section, and CSEA proposed changing "shall" to "will," and deleting the word "planned." The parties finally agreed not to change the language at all. Buzzard testified that the CSEA bargaining team discussed a more detailed proposal, but never presented it to the District. Neither was any further layoff proposal made in reopener negotiations in the spring of 1981.

Buzzard testified that he understood the language requiring the District to consult to be a commitment from the District to consult on the decision to lay off, and that he believed that

it in no way detracted from CSEA's right to negotiate about the effects of layoff.

Section 6.171 of the contract contains a zipper clause by which the exclusive bargaining representative waives the right to meet and negotiate with respect to any subject incorporated as a part of the agreement.

DISCUSSION

We note initially that this is a particularly difficult case on its facts, since the District was obviously less than willing to admit its duty to negotiate the effects of layoff, while the Association was rather anxious to abandon its efforts to bring the District to the negotiating table. Further, the Association has not pursued before the Board many of its claims arising out of the District's actions in changing the hours and duties of employees,[2] and we cannot find that these issues have been fully litigated so as to permit us to make findings independently. On balance, however, we find that the Association's failure to make proposals within scope regarding the effects of layoff relieves the District of any violation arising out of its failure to negotiate that issue.

2The ALJ does not discuss the later changes except in the context of discriminatory treatment, and the charging party does not raise those incidents, nor the District's wholesale solicitation of reduction in hours without negotiation, by exception. Those matters are therefore not before us on appeal.

The Board has determined in previous cases that the effects of layoff are within the scope of negotiation, and that an employer is obligated to negotiate those effects upon request. Further, the employer must negotiate over the effects as soon as it decides to lay off, consistent with its duty to negotiate over the effects of a decision at a meaningful time. Newark Unified School District (6/30/82) PERB Decision No. 225. First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705, at p. 2711].

On November 12 and again on December 1, the Association made valid requests to bargain over the effects of layoff. Those requests were met only with the District's vague commitment to consult with CSEA. Since we have found that the District had an obligation to negotiate over this subject prior to implementation of the layoff, had events stopped there we might well find that the District was at that point in violation of EERA.

However, on December 19, CSEA submitted a list of proposals to the District, none of which concerned in-scope effects of layoff.

The proposals as originally submitted were admittedly in a rough form. Buzzard himself testified that the first six items—the various District/CSEA analyses—related to the decision to lay off. Since the proposals themselves are vague, and there was never any negotiation between the parties to clarify them, we have no reason to disagree.

In item 7, the Association sought seniority for CSEA officers and job stewards exempting them from layoff. On its face, this proposal would appear to be contrary to the Education Code provisions determining the order of layoff,[3] and, therefore, outside of scope as asserted by the District.[4]

Item 8 proposed maintenance of benefits if reduction in hours became necessary, but did not mention the effects of layoff.

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[3]Education Code section 88127 provides in pertinent part as follows:

> Order of layoff and reemployment: Length of service
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> Classified employees shall be subject to layoff for lack of work or lack of funds. Whenever a classified employee is laid off, the order of layoff within the class shall be determined by length of service. The employee who has been employed the shortest time in the class, plus higher classes, shall be laid off first. Reemployment shall be in the reverse order of layoff.

[4]Section 3540, detailing the purpose of EERA, provides in part:

> Nothing contained herein 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 of a merit or civil service system. . . .
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> See also San Mateo City Schools et al. v. PERB (1983) 33 Cal.3d 850.

Item 9 refers only to the CSEA layoff proposal, presumably yet to come.

The District responded on January 20, reiterating its willingness to consult on the decision to lay off, detailing the manner in which the Association's proposals were outside of scope with the exception of the reduction in hours proposal, and inviting the Association to submit proposals to the Board of Trustees. Buzzard never submitted another proposal, claiming that he believed that he had already done so, and that any further effort would be futile. Similarly, Buzzard did not file further requests to negotiate about the District's changes in the duties and hours of employees, on the same theory that these were matters covered by the previous request to bargain over effects, and that a further request would be futile.

We find that the District's January 20 letter corrected its initial position that it would only consult on the effects of layoff. While the letter was less than a clear offer to negotiate, it was not inconsistent with the District's duty to seek to clarify admittedly questionable proposals. Jefferson School District (6/19/80) PERB Decision No. 133. It was responsive to the proposals, stated why it believed certain proposals to be nonnegotiable, and invited CSEA to initiate the process by sunshining any specific, detailed proposal.

To the extent the District suggests that it is the duty of the exclusive representative to sunshine proposals, it is

incorrect. It is the District's obligation and responsibility to provide public notice and to present all initial proposals —its own, as well as those of the exclusive representative— at a meeting. Los Angeles Community College District (Kimmett) (3/3/81) PERB Decision No. 158. Here, however, the District's letter merely seems to suggest that the Association should follow procedures used in the past in the District to commence negotiations.

The Association never did so, in spite of the fact that three months elapsed before termination notices were ever sent out. We find that the District's January 20 letter was a lawful response to the Association's proposals, and that the Association was not warranted in concluding that further requests to negotiate would be futile. Since the Association did not submit in-scope proposals concerning the effects of layoff, the District was ultimately entitled to take unilateral action.

For the foregoing reasons, we conclude that the District did not refuse to negotiate the effects of layoff in violation of EERA.[5]

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint filed

[5]Since we find that the Association never submitted in-scope proposals on the effects of layoff, we do not consider the District's other waiver arguments.

by the California School Employees Association, Chapters 246, 336 and 617 against the Kern Community College District is hereby DISMISSED.

Member Morgenstern joined in this Decision.

GLUCK, Chairperson, concurring: The charge asserts that the District refused to negotiate the effects of its decision to lay off certain employees and reduce the hours of certain others. The validity of the charge depends upon a finding that CSEA made a demand to bargain which the District was obligated to honor.

Initially, CSEA made a general demand to negotiate the effects of the layoff decision. Had this history ended with the District's refusal, a prima facie case would have been made. This Board has held that the effects of a decision to lay off are negotiable[1] and a demand in general terms is sufficient to place the employer on notice of its duty to withhold implementation of its decision pending negotiation of its effects.[2] However, following the District's response that it was not contemplating negotiating such effects at that

[1]Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223.

[2]Newark Unified School District (6/30/82) PERB Decision No. 225.

time,[3] CSEA submitted nine specific proposals on which it demanded negotiations.[4] It is the District's alleged refusal to negotiate these proposals that the charge finally addresses.

None of the nine proposals required an affirmative District response. On its face, each, with the exception of numbers 8 and 9, concerns matters patently outside the scope of mandatory negotiations. Instead, each seems intended to open discussion of financial alternatives to the layoffs, and thus challenge the basic District decision. These proposals may have been appropriate for the consultation process contemplated by the collective bargaining agreement.[5] But, the decision to lay off is not negotiable[6] and the District was not obliged to consider these seven proposals in the context of section 3543.5(c)'s requirements.

Proposal 8 refers to the continuation of benefits in the event of an involuntary reduction of hours. The District contends that the contract provision dealing with benefits in the event of involuntary reduction of hours, together with the "zipper clause," constitute the parties' full agreement covering any reduction of hours. I agree. The benefits clause

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[3]This was the undisputed testimony of CSEA witnesses.

[4]See majority opinion, pp. 4 and 5.

[5]See majority opinion, p. 3.

[6]Newman-Crows Landing USD, supra.

is clearly intended to preserve certain entitlements for employees who are forced to accept reduced working hours. It is reasonable to assume that no such protection was sought for employees who requested reduced hours. At any rate, the subject of benefits in the event of reduced hours was negotiated and, through the zipper clause, CSEA agreed that the bargain it struck would remain in effect for the life of the agreement. That it may have turned out to be less of a bargain than CSEA thought at the time, does not impose on the District the obligation to surrender the agreement it made or reopen the subject for further negotiations.

Proposal 9 seeks negotiation of the designation of those positions[7] to be effected by the layoff and reduced-hours decisions. Assuming that these matters would otherwise be negotiable, the determination of the positions involved in the layoff is controlled by section 88127 of the Education Code.[8] The "immutable" nature of this provision removes the subject from the scope of required negotiations.[9]

As to the designation of those employees whose hours were to be reduced, the selection was ultimately made from those who

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[7]"Position" is understood to mean the number of personnel allocations within a given job or classification.

[8]This provision requires that layoff be by seniority.

[9] See Healdsburg Joint Union High School District (May, 1982) 33 Cal.3d 850, wherein the California Supreme Court upheld PERB's holding to this effect.

volunteered, pursuant to procedures approved by CSEA's president. Whatever negotiating rights CSEA may have had, it thus effectively waived.

I agree that the charges and complaint should be dismissed,