STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANSIS LUIS DARZINS, Charging Party, v. CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Respondent.	)	Case No. SF-CO-7-S PERB Decision No. 546-S December 13, 1985

Appearance: Ansis L. Darzins, on his own behalf.

Before Hesse, Chairperson; Jaeger, Morgenstern, Burt and Porter, Members.

DECISION

This case is before the Public Employment Relations Board on appeal by charging party of the Board agent's dismissal, attached hereto, of his charge alleging that the California State Employees' Association violated section 3519.5 of the State Employer-Employee Relations Act (Gov. Code sec. 3512 et seq.).

We have reviewed the dismissal and finding it free from prejudicial error, adopt it as the Decision of the Board itself.

ORDER

The unfair practice charge in Case No. SF-CO-7-S is DISMISSED WITHOUT LEAVE TO AMEND.

By the BOARD.

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415) 557-1350

September 23, 1985

Ansis-Louis Darzins
P. 0. Box 421265
San Francisco, CA 94142-1265

Jeffrey Fine
California State Employees Assn.
1108 "0" Street
Sacramento, CA 95814

Re: REFUSAL TO ISSUE COMPLAINT AND DISMISSAL OF UNFAIR PRACTICE CHARGE
Ansis-Luis Darzins v. California State Employees Association
Charge No. SF-CO-7-S

Dear Parties:

Pursuant to Public Employment Relations Board (PEPS) Regulation section 3273C, a complaint will not be issued in the above-referenced case and the pending charge is hereby dismissed because it fails to allege facts sufficient to state a prima facie violation of the State Employer-Employee Relations Act (SEERA.)[1] A The reasoning which underlies this decision follows.

On June 28, 1985 Mr. Ansis-Luis Darzins filed an unfair practice charge against the California State Employees Association (CSEA) alleging violation of the State Employer-Employee Relations Act (SEERA) section 3519.5. More specifically, charging party alleges that the CSEA breached the duty of fair representation owed to him when it refused to file a lawsuit challenging a ruling by the State Personnel Board (SPB) which upheld his discharge from employment during the probationary term.

On August 26, 1985 the regional attorney wrote to charging party pointing out deficiencies in the charge and instructing that, unless amended or withdrawn, it would be dismissed on or before September 5, 1985. On September 5, 1985 the regional attorney, having received no communication from charging party, initiated a telephone conversation with him. Charging party claimed that he had been out of the area and only returned on September 3, 1985. He therefore requested an extension within which to file an amended charge. The regional attorney granted him until September 13, 1985 for this purpose. On September 13, 1985 the regional attorney, having received no information from

[1]References to the SEERA are to Government Code sec Lions 3512 et seq. PERB Regulations are codified at California Administrative Code, Title 0.

charging party, initiated a further telephone conversation. Charging party claimed that he was asked by CSEA to appear in Sacramento that afternoon, and that the meeting could affect his case. The regional attorney therefore extended the deadline for filing a first amended unfair practice charge to September 16, 1985.

On September 18, 1985 charging party filed a completed unfair practice charge form, which appears to be intended as a first amended unfair practice charge in the above-entitled matter. The amended charge alleges a violation of SEERA section 3519.5. It adds essentially three new allegations: (1) the executive secretary of CSEA's representational appeals panel was under the erroneous impression, as of December 27, 1984, that charging party had appealed to the Division Council Member Representational Appeals Panel for further assistance; (2) a lawyer in Sacramento has on some unspecified date in the past found meritorious charging party's request that a writ of mandate be sought challenging the State Personnel Board ruling upholding his discharge, and expressed willingness to pursue such a matter on charging party's behalf; and, (3) J. D. Quinley admitted never having supervised charging party in the San Diego Gas & Electric 1982 General Rate case.

The regional attorney's warning letter, dated August 26, 1985 sets forth legal authorities which define the elements of a prima facie violation of the duty of fair representation (section 3519.5(d)). That letter is attached and incorporated by reference.

Further investigation of this charge revealed the following. CSEA has a policy concerning its representation of unit members. It is attached and incorporated by reference. CSEA accepts its obligation to provide formal representation in matters that are within the exclusive jurisdiction of the State Personnel Board (sec. 1601.01(b)(1)). CSEA reserves the right to determine whether it will represent a unit member in court; representation is provided "only in those cases determined by the Association to have merit." (Secs. 1601.01(c), 1601.02(a) and (e)(5), 1601.05(a)(2) and (3) and 1601.06(d).) The CSEA policy provides for internal review of decisions concerning representation. The headquarters staff may refer cases to the appropriate appeals body to determine whether or not such representation is to be afforded (sec. 1601.05(b)). Decisions by headquarters staff to grant or deny representation may be reviewed by the appropriate division council upon request of any beneficially interested party (sec. 1601.07(a)). The organization itself qualifies as a beneficially interested party: the Association may deny representation based on what it concludes to be in its "best interests." (Sec. 1601.06(b).) The division council may overturn a decision if it is found that the best interests of the Association requires a decision different from that previously rendered (sec. 1601:11(c)(3)).

Charging party has argued, during a conversation with the regional attorney, that CSEA failed to follow procedures set forth in its own policies. The legal staff of CSEA, in charging party's view, was not authorized to appeal to the division council to set aside an earlier decision granting representation. Charging party surmises that the legal staff was aware that it had no authority to appeal and therefore made it appear that charging party had appealed to the division council.

The additional allegations contained in charging party's first amended unfair practice charge do not cure the defects listed by the regional attorney in the warning letter dated August 26, 1985. First, no facts have been alleged which could demonstrate that the legal staff intentionally created the impression that it was charging party who appealed to the division council, and that this was a subterfuge designed to circumvent a prohibition against the Association itself appealing a lower decision to the division council. No facts have been. alleged or provided which dispute the apparent meaning of CSEA's policy: that CSEA is a beneficially interested party and may seek to establish, by appeal to the division council, that a request for representation is not in the best interests of the Association.

Second, that another attorney has found merit in charging party's claim does not, alone, establish that the Association's decision that the claim has no merit is arbitrary, discriminatory or in bad faith. United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258.

Third, charging party's suggestion that the conclusions of the State Personnel Board are vulnerable could not, alone, demonstrate that the CSEA denial of representation was arbitrary, discriminatory or in bad faith. As stated in footnote 3 of the warning letter, the investigation has revealed that CSEA based its determination that charging party's claim had no merit on the legal conclusion that no procedure existed to challenge the State Personnel Board's rejection of a probationary employee. Charging party was requested, during a telephone conversation with the regional attorney on September 13, 1985 to provide some authority, perhaps from the Sacramento lawyer who found merit in his case, which could establish that the CSEA legal staff reached the wrong conclusion and, that on the contrary, it is Procedurally possible to file a lawsuit challenging State Personnel Board rejection of probationary employees. Charging party has provided neither information nor allegations to such effect.[2]

[2]Charging party would have to allege facts which could demonstrate that an erroneous legal conclusion was a result of more than negligence. The error

For the reasons stated above, as well as those stated in the warning letter of August 26, 1985, the allegations of charging party's first amended unfair practice charge, combined with the allegations of the original charge, do not state a prima facie violation of SEERA section 3519.5(b). Accordingly, the allegations are dismissed and no complaint will be issued thereon.

Pursuant to Public Employment Relations Board regulation section 32635 (California Administrative Code, title 8, part III), you may appeal the refusal to issue a complaint (dismissal) to the Board itself.

Right to Appeal

You may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this Notice (section 32635(a)). To be timely filed, the original and five (5) copies of such appeal must be actually received by the Board itself before the close of business (5:00 p.m.) on October 13, 1985, or sent by telegraph or certified United States mail postmarked not later than October 13, 1985 (section 32135). The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself (see section 32140 for the required contents and a sample form). The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

---

would have to be arbitrary, discriminatory or in bad faith to support a violation of the duty of fair representation. Collins, supra.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specific time limits, the dismissal will become final when the time limits have expired.

Very truly yours,

JEFFREY SLOAN
Acting General Counsel

By _____
PETER HABERFELD
Regional Attorney

cc: General Counsel

STATE OF CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
San Francisco Regional Office
177 Post Street, 9th Floor
San Francisco, California 94108
(415} 557-1350

August 25, 1985

Ansis-Luis Darzins
P. O. Box 421265
San Francisco CA 94142-1255

Re: Ansis-Luis Darzins v. California State Employees Association
Charge No. SF-CO-7-S

Dear Mr. Darzins:

On June 28, 1985 Mr. Ansis-Luis Darzins filed an unfair practice charge against the California State Employees Association (CSEA) alleging violation of the State Employer-Employee Relations Act (SEERA) section 3519.5. More specifically, charging party alleges that the CSEA breached the duty of fair representation owed to him when it refused to pursue a ruling by the State Personnel Board (SPB) which upheld his discharge from employment during the probationary term.

An examination and investigation of this charge revealed the following information. On April 28, 1932 charging party was rejected from employment during the probationary period. On July 29, 1982 charging party was"- represented by *CTA* representative Harlan Glover before the SPB. S?S upheld the rejection on September 22, 1982, and on December. 15, 1982 denied charging party's petition for rehearing.

Charging party alleges that on March 15, 1983 he filed a petition for writ of mandate to overturn the SP3 ruling. On September 7, 1983, CSEA decided not to pursue the writ of mandate. However, on January 25, 1984, CSEA's Coastal Area Representative Appeals Panel granted charging party's request to seek a writ cf mandate. But, on January 12, 1985 CSEA's Division Council's Appeals Panel granted the request of its Oakland legal office and overruled the decision of the Coastal Area Representative Appeals Panel to seek a writ of mandate. Finally, on June 11, 1985 charging party's request for financial assistance to pay outside legal services was denied by CSEA.

Charging party has advanced five separate actions by CSEA which, he alleges, alone or together constitute a breach of the duty of fair representation. First; charging party alleges that on July 29, 1982 CSEA representative Glover failed to provide competent representational services to him before SPB. Second, on *a* certain date unspecified by charging party. CSEA attorney Callis "insisted by force to take on Darzins case." Third in approximately December 1984, the Oakland legal unit illegally attempted to reverse the Coastal Ares Representative Appeals Panel as a means of avoiding the Association's obligation to pursue charging party's writ of mandate, Fourth *CSEA* has failed in its continuing obligation to gather *depositions* which could

demonstrate that charging party was being retaliated against on the job for being a job steward. Fifth, the delay in pursuing the writ of mandate which has been occasioned by the appeals and reversals within the CSEA hierarchy of its original decision to file writ of mandate has caused charging party serious damage.

Statute of limitations: In San Dieguito Union High School District (1982) PERB Decision No. 194, PERB held that, to state a prima facie violation, charging party must allege and ultimately establish that the alleged unfair practice either occurred or was discovered within the six-month period immediately preceding the filing of the charge with PERB. EERA section 3541.5; Danzansky-Goldberg Memorial Chapels, Inc. (1982)- 264 NLRB 112 [112 LRRM 1108]; American Olean Tile Co. (1982) 265 NLRB No. 206 [112 LRRM 1080]; A.F.C. Industries, Inc. (Amcar Division) (1978) 234 NLRB 1063 [98 LRRM 1287], enfd as modified (8 Cir. 1979) 596 F.2d 1344 [100 LRRM 3074]. The National Labor Relations Board cases cited here hold that the six-month period commences on the date the conduct constituting the unfair practice is discovered. It does not run from the discovery of the legal significance of that conduct.

It is alleged that the exclusive representative denied charging party the right to fair representation and thereby violated section 3519.5(b). The fair representation duty imposed on the exclusive representative extends to contract negotiations (Redlands Teachers Association (Faeth.) (1978) PERB Decision No 72; SEIU, Local 99 (Kimmett) (1979) PEPS Decision No.. 105; Rocklin Teachers Professional Association {Romero) (1980) PERB Decision No. 124; El Centro Elementary Teachers Association (Willis) (1982) PERB Decision No. 232), contract administration (Castro Valley Teachers Association (McElwain) (1980) PERB Decision No. 149; SEIU, Local 99 (Pottorff) (1982) PERB Decision No. 203), and to grievance handling (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1983) PERB Decision No. 258). PERB has ruled that a prima facie statement cf such a violation requires allegations that: (1) the acts complained of were undertaken by the organisation in its capacity as the exclusive representative of all unit employees; and, (2) the representational conduct was arbitrary, discriminatory, or in bad faith.

This charge focuses on CSEA's conduct in processing or failing to process a grievance. PERB has enunciated the standard to apply to CSEA's conduct in this context. In United Teachers of Los Angeles (Collins) (1982) PERS Decision No. 258, the Board stated:

> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion, A union is also not required to process an employee's grievance if the chances for success are minimal. (Slip Op. at p. 5.)

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the Union's duty- (Ibid.)

A prima facie case alleging arbitrary conduct violative of the duty of fair representation,

> must, at a minimum, include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

Union conduct is unlawfully discriminatory if it withholds a benefit, which it is exclusively empowered to extend, solely on the basis of some irrational standard, for example, the unit member's nonmembership' status. San Francisco Federation of Teachers, Local 61, CFT/AFL-CIO (Hagopian) (1982) PERB Decision No. 222 (unlawfu arbitration upon payment of pro rata share of arbitration costs or th2 equivalent of annual. Federation dues, whichever *was* less).

There is no duty of fair representation owed to a unit member unless the exclusive representative possesses the exclusive means by which such" employee can obtain a particular remedy. The exclusive representative possesses the sole means by which a unit member has access to the negotiation process, as well as the grievance and arbitration procedure. There are, however, alternative sources of assistance available to a unit member who seeks to enforce statutory rights in a court of law. See Archer v. Airline Pilots Assn. (9th Cir. 1979) 609 F.2d 934 [102 LRRM 2827) cert. den. (1980) 446 U.S. 953 [104 LRRM 2303]; International Brotherhood of Workers v. Foust (1979) 442 U.S. 42, 46-47 [101 LRRM 2365]; Lacy v. Automobile Workers Local 287 (S.D. Ind. 1979) 102 LRRM 2847; and Freeman v. Teamsters Local 135 (7th Cir. 1984) 746 F.2d 1316 [117 LRRM 2873].

The unfair practice charge, as presently written, fails to state a prima facie violation of SEERA section 3512.5(b). First, the conduct of the CSEA representative alleged to have taken place on July 29, 1982 is time-barred.[1]

---

[1]SEERA section 3514.5(a) (I) forbids PERB from issuing a complaint in respect of any charge based upon an alleged

Allegations of conduct occurring prior to December 28, 19S4 similarly will be dismissed on the ground that they are not timely.[2]

Second, if not time-barred, the allegation that attorney Callis "insisted by force to take on Darzins' case," is nevertheless deficient for it fails to meet the standard set forth by PERB Rule 32615 (a) (5) to the effect that a charge must include

> a clear and concise statement of the facts and conduct alleged to constitute an unfair practice.

The charge does not include allegations which would amplify charging party's particular allegation concerning Mr. Callis. Alone, it does not suggest how the CSEA conduct could be considered "arbitrary, discriminatory or in bad faith."

Third, it is consistent with the exclusive representative's duty of fair representation to determine whether a unit member's complaint is sufficiently meritorious to warrant appeal within the administrative hierarchy or filing a lawsuit. United Teachers of Los Angeles (Collins), supra.. That CSEA lawyers' attempt to reverse the decision of the Coastal Area Representative Appeals Board Panel to represent charging party in a writ of mandate proceeding, without more, cannot establish that CSEA committed an unfair practice. (Collins, supra.) Labor organizations typically provide a role for its attorneys to perform in assessing unit members' claims. There are no allegations to suggest that CSEA's procedures were not followed in this instance or that their involvement was arbitrary, discriminatory or in bad faith.

Fourth, there are no facts alleged to suggest that the exclusive representative declined to pursue charging party's claim in an arbitrary, discriminatory or bad faith manner. No facts are alleged to suggest that the decision was based on any criterion other than the claim's likelihood of success.[3]

> unfair practice occurring more than six months prior to the filing of the charge.

[2]The charge, as presently written, is ambiguous with respect to the dates on which additional CSEA conduct allegedly took place. Specifically, charging party's allegation that CSEA attorney Callis "insisted by force to take on Darzins' case" as well as the allegation that CSEA attorneys unlawfully attempted to reverse the Coastal Area Representative Appeals Panel appear to have taken place prior to the six-month period immediately preceding the filing of the charge on June 20, 1935..

[3]It appears that CSEA lawyers opposing representation argued *inter alia*

Fifth, CSEA does not possess the exclusive source of assistance in. this matter. Charging party sought and could have obtained assistance from a private lawyer to challenge the SP3 determination in a court of law, CSEA is not bound by the duty of fair representation to provide legal assistance to charging party when he pursues an extra-contractual remedy.

If you feel that there are facts which would correct the deficiencies explained above, please amend the charge accordingly. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party (fonts enclosed) . The amended charge must be served on the respondent and the original proof of service must be filed with PERB (forms enclosed). If I do not receive an amended charge or withdrawal from you on or before September 5, 1985, I shall dismiss your charge. If you have any questions on how to proceed, please call me at (415) 557-1350.

Sincerely yours,

Peter Haberfeld

Peter Haberfeld
Regional Attorney

Enclosures

---

their conclusion that administrative mandamus was not available in rejection cases, since rejections are not proceedings "in which by law a hearing is required to be given." (Code of Civil Procedure section 1094.5.) Although a **hearing was held by the SPB, Government Code section 19175 does not require more than an investigation of the appeal by a rejected probationer. No hearing is required, and, as a consequence, mandamus would not be available. Additionally,** aside from the conclusion that there was **no** legal procedure **available, CSEA** lawyers apparently communicated to charging party that they **believed** his claim to **be** too weak to justify further proceedings. It *is* clear that charging party believed that he had strong evidence to support his case, and he therefore concludes that failure of CSEA to win his case or to represent him further must be the result of improper motive. However, no facts are alleged which support such a conclusion.

DIVISION 16: REPRESENTATION

1501.00 REPRESENTATION POLICY

1601.01 Scope of Representation

(a) **Representation** is the means by which the Association **makes** it combined resources available in order to insure **a** fair and full review of any infringement of **state employees'** rights and to obtain for them the full **realization** of any and all benefits to which they may **be entitled by** reason of being a state employee. (3D 56/80/2)

(b) **The** Association's policy is to provide formal representation only in merit-related and collective bargaining-related matters within the scope of the following **definitions: (BD** 98/81/4)

(1) "Merit-related" means matters that are within the exclusive jurisdiction of the State Personnel Board; (BD 98/B1/4)

(2) "Collective bargaining-related" means those actions arising under the California State Employer-Employee Relations Act (SEERA) or Higher Education" Employer-Employee Relations Act (HEERA) and within. the exclusive jurisdiction of the Public Employment Relations Board, as well as those matters arising out of a Memorandum of Understanding negotiated by the Association with the employer. (BD 56/80/2)

(3) "Formal representation" means representation of employees by staff employees of the Association. (BD 191/82/5)

(4) "Appeals body" as used herein applies to any group elected or appointed to hear appeals of staff representation decisions. (BD 56/80/2)

(c) Representation in court is not automatically afforded but shall he provided only in those cases determined by the Association to have merit. (BD 191/82/5)

(d) The Association shall provide advice and assistance to members with physical disability in obtaining their rehabilitation and return to state service in positions; within their capacity and limitations. (GW 1/68, BD 108/80/4)

1601.02 Representation Rights and Limitations

(a) The right of representation by the Association is subject to the financial ability of the Association and to

1601.02 (a) such specific limitations as may be imposed by the Association and is further subject to a formal request for representation and a review of the matter by the Association to determine whether or not the proposed case has merit. (BD 191/82/5)

(b) The Association will provide representation within the limitations set forth in Division 16 of this Policy File, to state employees based upon their status as follows: (BD 191/82/5)

(1) Active members in good standing and fair share fee payers, within a unit for which the Association is the bargaining agent, have the full right to good faith representation in any employment-related matter by the Association's designated representative, or legal counsel, without charge therefor. (BD 191/82/5)

(2) Associate members of the Association shall not be entitled to representation; (BD 56/80/2)

(3) Members of affiliate organizations have such rights to representation as set forth in their affiliation agreements with the Association; (BD 56/80/2)

(4) State employees within a unit for which the Association is the bargaining agent but who do not become members of the Association and do not pay a fair chare fee will be entitled to fair and impartial representation only in "collective bargaining-related" matters, and may be required to pay a reasonable fee for individual representation; (BD 191/82/5)

(5) State employees who have been designated management, confidential or supervisory employees within the meaning of SEERA and HEERA and who are active Association members, shall be entitled to representation to the extent authorized by law; (BD 191/82/5)

(6) State employees who are in units for which the Association is not the bargaining agent, and who are active Association members, shall be entitled to representation to the extent authorized by law. (3D 191/82/5)

(c) Representation will not be provided to members in matters resulting from events which occurred prior to the date of their application for membership in the Association unless required by law. (BD 191/82/5)

1601.02(d) Supervisory employees who were Association members for at least three years prior to July 1977 and can demonstrate that they resigned due to management pressure may receive representation after rejoining the Association providing that such supervisory employees rejoined the Association by July 1, 1980. (BD 101/82/3)

(e) The Association has the right to make fair and impartial decisions as to the merits of a particular request for representation including, but not limited to decisions: (BD 191/82/5)

(1) whether to undertake representation; (BD 191/82/5)

(2) whether to discontinue representation at any time; (BD 191/82/5)

(3) whether to recommend that a matter be settled prior to exhaustion of the applicable administrative procedures; (BD 191/82/5)

(4) whether to refuse to continue representation in the event that its recommendation of settlement is not satisfactory to the employee; (BD 191/82/5)

(5) whether to seek judicial relief and redress for a particular matter in addition to or in lieu of representation through any or all of the available administrative procedures; (BD 191/82/5)

(6) whether to discontinue its representation in judicial proceedings at any point to their exhaustion. (BD 191/82/5)

1601.03 Types of Representation

Representation consists of either services or indemnity, or both.

(a) Services consist of advice, council, and assistance rendered by competent and qualified persons, and may include investigation, negotiation, and settlement as well as appearances before administrative, judicial or legislative tribunals. (BD 191/82/5)

(b) Indemnity consists of money payment in reimbursement of either a portion of all of actual and necessary representation costs. The Association will not indemnify anyone for costs or expenses incurred without prior authorization by the Association. (BD 56/80/2)

1601.04 Representation Before Licensing or Examining Boards

The Association does not normally provide representation before licensing or examining boards but may provide such

1601.04 representation if the following conditions are satisfied: (BD 56/30/2)

(a) The individual seeking such representation faces revocation or suspension of his/her license and such license is a condition of employment; (BD 56/80/2)

(b) The license or certificate is sought to be revoked or suspended because of conduct which occurred in connection with the individuals employment; and (BD 56/80/2)

(c) The representation is specifically approved by the Association. (BD 56/80/2)

1601.05 Requests for Formal Representation

(a) All requests for formal representation shall be accompanied by a form signed by the individual requesting representation which: (BD 191/82/5)

(1) Certifies that he/she is a member, in good standing and was such prior to the time the matter involved in the request first arose or an employee within a unit for which the Association is the bargaining agent; (BD 191/82/5)

(2) Acknowledges that the Association may review the case for merit before representation is undertaken; (BD 44/79/2)

(3) Acknowledges that no representation in court proceedings will be undertaken unless approved by the Association; (BD 44/79/2)

(4) Authorizes disclosure of information concerning the case to the appropriate appeals body of the Association in the event an appeal is taken to such body; (BD 56/80/2)

(5) Acknowledges that the Association will be the exclusive representative and that if any other representative is retained, the Association may at its discretion thereby be relieved of any representation obligation. (BD 56/80/2)

(b) Headquarters staff may refer cases to the appropriate appeals body to determine whether or not representation is to be afforded prior to any action by staff (other than filing an appeal to preserve the member's rights). Those matters for which representation is granted shall be directed to appropriate headquarters staff for specific action in accordance with the decision of the appeals body. (BD 56/80/2)

1601.05 (c) Headquarters staff shall maintain a record of all requests for representation. Such records shall be adequate and sufficiently complete so as to advise the appropriate appeals body of the name of the person making the request, the nature of the request, the date upon which the request was received and the disposition of the request. Such records shall be maintained under the care and control of headquarters staff. They shall at all times be open for inspection by the appropriate appeals body. (BD 191/82/5)

1601.06 Denial of Representation

It is the Association's general policy to deny representation on the following grounds: (BD 56/80/2)

(a) Unapproved Actions

* The Association shall not provide representation with respect to disciplinary action arising from unapproved job actions. (BD 191/82/5)

(b) Best Interests of the Association

The Association shall not provide representation that would conflict with the best interests of the Association or require the Association or its staff to take a position in any manner inconsistent with established positions or policies of the Association. (BD 191/82/5)

(c) Conflict of Interest

The Association shall not provide representation services that would result in a conflict of interest for Association staff. Indemnity for representation costs may be authorized if prior approval is obtained from the Association. (BD 101/82/3)

(d) Lack of Merit

The Association may deny representation in matters that appeal to lack factual or legal merit. (BD 191/82/5)

(e) The Association may deny representation when it determines that an individual has another representative in the same matter. (BD 191/82/5)

1601.07 Review of Decisions

(a) Matters for which headquarters staff has granted or denied representation may be reviewed by the appropriate division council upon request, of any beneficially interested party. The division council may sustain, modify or set aside the decision of headquarters staff with direction to take action in accordance with the findings and conclusions of the division council.

1601.07 (a) There shall be no further review or appeal of the action taken by the division council and that decision shall be deemed final when rendered. (BD 56/80/2)

1601.08 Attorney-Client Relationship

The Association does not practice law nor solicit matters requiring legal services. It does employ staff attorneys **whose** services are made available in accordance with representation policy. The Association may authorize representation, but having given such authorization will not thereafter interfere in the attorney-client relationship so established unless authorized by the client. (BD 56/80/2)

1601.09 Function of Chapters

(a) Chapters should inform their members of the fact that representation is available for those who express a need for such help. (BD 191/82/5)

(b) Chapters should publicize to their members the person to whom grievance problems are to be referred. (BD 101/82/3)

1601.10 Function of Regions

Regional directors are to advise and assist chapters on representation matters and to assist them in following established grievance procedures. (BD 169/75/5)

1601.11 Function of the State Organization

(a) In representation matters, the function of the General Council is to establish general policies and standards to guide the representation program. (BD 56/80/2)

(b) The function of the Board of Directors is to establish general policies, procedures and standards to guide the representation program. (BD 56/80/2)

(c) The function of the division councils is to implement the policies, procedures and standards of the Association's representation program and to review prior representation actions. No decision shall be overturned by the division council unless it is found that one of the following situations exist: (BD 56/80/2)

(1) The prior decision conflicts with Association policy; (BD 56/80/2)

(2) The prior decision finding the matter lacked factual or legal merit is clearly erroneous; or (BD 191/80/2)

(3) The best interests of the Association requires a

1601.11 (c) (3) decision different than the previously rendered. (BD 56/80/2)

The decision of the division council is final and may not be appealed further. (BD 56/80/2)

Approval of all requests for indemnification in excess of $1,000 is required by the division council before payment can be made. (BD 191/82/5)

(d) Headquarters office reviews individual cases, gives advice and assistance and provides technical or legal representation when appropriate. (BD 394/66, BD 115/74/2)

1601.12 Affirmative Action Policy

(a) The Association shall support affirmative action and as such prohibit discrimination in employment based on race, color, sex, religion, national origin, sexual orientation, ancestry, disability or age. (OPER 18/84)

(b) The Association shall enforce and pursue the development of affirmative action programs and laws to strengthen the implementation and enforcement of existing civil rights and affirmative action legislation. (OPER 18/84)

(c) The Association shall provide support in accordance with Association policy on representation for those members who may believe they have been discriminated against in their work place by pursuing the filing of charges and legal actions where appropriate. (OPER 18/84)

(d) The Association shall ensure that the Association itself is in compliance with the letter and intent of appropriate federal and state laws. (OPER 18/84)

(e) Training in laws and issues relevant to the rights of protected groups identified in section 1601.12 (a) shall be incorporated into job steward training modules. (OPER 18/84)

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 257, AFL-CIO,	)	
Charging Party,	)	Case No. SF-CE-472
v.	)	PERB Decision No. 540
OAKLAND UNIFIED SCHOOL DISTRICT,	)	December 12, 1985
Respondent.	)	

Appearances; Norback & DuRard by Joseph R. Colton for American Federation of State, County and Municipal Employees, Local 257, AFL-CIO; Breon, Galgani, Godino & O'Donnell by Richard V. Godino for Oakland Unified School District.

Before Hesse, Chairperson; Morgenstern and Porter, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Oakland Unified School District (District) to a hearing officer's proposed decision. The District excepts to the hearing officer's finding that it violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)[1] by failing to fulfill its obligation to negotiate in good faith with the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO (AFSCME).

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

Section 3543.5 provides, in pertinent part:

The Board has reviewed the proposed decision in light of the parties' exceptions and the entire record in this matter. For the reasons discussed herein, we affirm in part and reverse in part the hearing officer's proposed decision.

FACTS

Beginning in November 1979, W. B. Lovell, the District's business manager, conducted a series of workshops with representatives of various employee organizations representing bargaining units in the District, including AFSCME, on the need to make budgetary cuts. The final staff recommendation was that the District reduce expenses by 10 percent in order to overcome the anticipated deficit of $10 million. At that time, salary and benefits constituted 86.1 percent of the budget.

On April 1, 1980, District representatives held a preliminary meeting with AFSCME to discuss budgetary problems in more detail and to alert it to possible cuts in personnel. Then, on April 9, 1980, Lovell again met with representatives of

---

> 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.

all bargaining units in order to show them the slide show he planned to present to the board of education that night. The presentation included recommendations that (1) 40 custodians be laid off, and (2) 150 custodial positions be reduced from a 12-month to a 10-month work year. The specific number of employees targeted for the layoffs and work-year reductions was determined by criteria used in Army/Navy studies, which calculated the needed person-hours based on the number of square feet to be covered.

During the course of this meeting, Nadra Floyd, AFSCME's business agent, told Lovell that the work year was negotiable and that, therefore, the District could not make the proposed changes unilaterally. Lovell responded, "We do not feel that way."

That night, Lovell made his presentation to the board of education. Floyd was present and made the same remarks to the board of education that she had made to Lovell.

On April 14, Floyd wrote to Dr. Ruth Love, District superintendent, voicing AFSCME's concerns and requesting to meet. The letter also requested specific information on who would be affected by the work-force reductions, the effect on employee benefits, the cost to the District of the tax-deferred annuity, and other pertinent information. Lovell, rather than Love, responded on April 29. He indicated that information was being prepared for the board of education and would be made available to AFSCME only when it was made public. He also

indicated he would call Floyd in a few days to set up a meeting with AFSCME.

On April 30, Superintendent Love sent the board of education a document reflecting that, in an executive session held on April 23, 1980, the board had approved the recommended layoffs and work-year reductions. The purpose of this document was (1) to publicly announce the board's action, and (2) to request board approval to freeze all hiring. The document noted that, following the executive session on April 23, managers and supervisors were instructed to advise each person whose position was affected by the cuts that the employee would be laid off or the employee's work year would be reduced effective June 30.

When the instant dispute arose, Ruth McClanahan had just assumed the position as director of staff relations/chief negotiator for the District. During the summer of 1980, she was responsible for representing the District in negotiations with 12 units, all of which were involved in negotiating new or successor contracts.

McClanahan learned of the decision to reduce certain positions from a 12-month work year to a 10-month work year early in May. She began to formulate the District's position in discussions with several people, including Lovell, John Wimberly, director of building operations, and Jim Rodrigues, assistant to the director of building operations. McClanahan telephoned Floyd and said they would need to sit down and negotiate the effects of the layoff and the reduction of hours.

The parties first met on May 7, 1980. The District announced that the work year for 150 positions was being reduced from 12 to 10 months and that 40 positions were being eliminated. Its position is reflected in a letter dated May 7 to AFSCME:

> The District maintains the position that it is not required to bargain the decision to layoff, but acknowledges a duty to bargain a reduction in work year/hours and other "effects of layoff."

Notwithstanding the District's announced position, it suggested four alternatives to the proposed layoffs and reduction in work year. They were:

1. Eliminate 40 more positions in lieu of reduced work year.
2. Give no salary increases for 1980-81.
3. Give up tax-sheltered annuities.
4. Take a pay cut.

In order to evaluate the District's proposed alternatives, AFSCME said it needed more information. The union requested financial information on the cost to the District of the tax-sheltered annuity and figures on salary increases for the unit. It also sought information regarding use of vacation and sick leave during the summer. The District said it needed to save funds to negotiate 1980-81 salary increases for employees, and AFSCME said it needed to know the level of salary or compensation increase the District had in mind for 1980-81 in order to address the issue. AFSCME requested a list of employees scheduled for layoff and the site where each worked.

The District stated that it did not presently have that information.

AFSCME also made proposals concerning ways to save funds other than by reducing the work year, i.e., by selling property or making non-personnel cuts. In addition, Floyd made proposals that she felt addressed the impact of layoff. Her proposals referred to the 40 abolished positions and the effect such work-force reductions would have on those school sites left with one custodian. Also, to limit the number of active employees laid off, AFSCME proposed that the reduction be applied to persons on disability leave.

On May 7, 1980, the same day that the parties began negotiations, the board of education took official action to lay off and to reduce the work year of custodial employees, using inverse seniority. It formally adopted Resolution #28992, which stated:

> NOW, THEREFORE, BE IT RESOLVED that the Board thereby directs the Superintendent to abolish or reduce the work year, no later than June 30, 1980, of certain classified positions as indicated on Attachments A and B, respectively, pursuant to Education Code section 45117.2

According to the District's witness, the District was ready to give notice and could not delay the personnel reductions

---

[2]Attachment A eliminated 40 custodial positions. Attachment B reduced the work year for 182 custodial positions. Apparently, 32 reduced-year positions were vacant.

without jeopardizing compliance with the 30-day notice requirement in the Education Code.[3]

On May 12, the parties again met, and the District responded to some of AFSCME's information requests. AFSCME was provided with the list of employees scheduled for layoff and the site where each employee worked. The District also provided the cost of salary increases for all maintenance employees, but not for custodians only. The District informed Floyd that, since the possible savings from the tax-sheltered annuity was only $391,000, elimination of that benefit was not a viable alternative. Nevertheless, Floyd was again informed that, if the union could come up with an alternative, McClanahan would take it to the board of education. Absent such an alternative, however, the board's action to lay off and reduce the work year would stand.

On May 27, while negotiations were underway, Love sent notices of reduced work year to the affected employees, characterizing the action as an involuntary reduction in hours in lieu of layoff.

At the May 30 negotiating session, the parties again discussed cost-saving alternatives such as school closures, the tax-sheltered annuity, and sale of property. The District said these alternatives had already been considered and rejected by the board of education, and the board was firm in its position

---

[3]Education Code section 45117 provides that:

> . . . affected employees shall be given notice of layoff not less than 30 days prior to the effective date of the layoff.

that it would not reconsider the alternatives. The District stated that, since notices had been sent to the affected employees, it was too late to implement any alternatives.

The District also announced that custodians working during the summer would not get the usual July or August vacation. Instead, all vacations would be delayed until after summer.

When the parties next met on June 4, 1980, the District provided AFSCME with a draft memorandum which, as the hearing officer noted, conveyed a "this is what we are going to do" impression and presented a "take it or leave it attitude." The draft memorandum set forth a job description for head custodians which included, among other duties, "perform regular duties as necessary." Since there would be only a head custodian present at each site from July 1 to August 27, the head custodian would be required to perform all the regular custodial duties previously performed by other custodians.

At the June 4 negotiating session, the District's position was that those items discussed in the draft memorandum were non-negotiable. The District's position was also that employees who returned to work during summer school were outside the unit, that the contract permitted minimal staffing, that the District could prohibit vacations in July and August, and that substitutes were outside the unit.

AFSCME raised concerns over nearly every item mentioned in the memorandum, including vacations, sick leave, pay for substitutes, and summer school and temporary employment. In the

face of AFSCME's proposals concerning summer school assignments, the District maintained that summer school was a temporary assignment since the employees would be on layoff status when they returned to work during the summer. The District adhered to its position that it had the right to maintain staffing levels in accordance with the contract and, therefore, had the right to unilaterally decide to prohibit vacations during the summer.

AFSCME voiced strong objections to the head custodian job description and to the school principal's authority to select custodians for all summer school positions.

In the end, the parties disagreed over the scope of negotiations, and AFSCME walked out of the June 4 meeting, stating that it was declaring impasse.

The following day, AFSCME wrote to PERB declaring impasse. It filed the instant charge and a request for injunctive relief with PERB on June 6. PERB denied the request for injunctive relief.[4] As to AFSCME's impasse declaration, the Board declined to appoint a mediator because the parties were not engaged in contract negotiations but, rather, mid-contract negotiations over the layoffs and reductions. The Board felt that the matter was best resolved by the unfair practice charge that had been filed.

---

[4]Oakland Unified School District (1980) PERB Order No. IR-16.

In a June 6 memorandum from Lovell to all school principals, the District reiterated its earlier position. Lovell advised the principals that:

1. Except for head custodians, all custodians were being changed to 10-month employees.

2. Except for true hardship, no custodial vacations would be granted between June 15 and August 27, 1980.[5]

3. The District planned to utilize certain procedures for vacations, sick leave, summer school assignments and watch duties, including:

a. Substitutes for vacation and sick leave (for leaves of five days or more) to be obtained from classified personnel records on the basis of seniority and persons offered the job must accept or deny the offer on the day it is made. Substitutes to be paid at the rate of pay received during the regular work year unless over five days, then to be paid at rate of position filled (Education Code section 45110).

b. Watch duty and civic center assignments not to exceed 35 hours per month.

c. Summer school positions to be treated like all other positions — post, principal selects — pay on an hourly basis contained in the posting (an amount less than that received by custodians during the regular work year).

---

[5]^This is a longer period than was contained in the June 4 draft memorandum. According to that document, the District only prohibited vacations from July 1 to August 27.

When the parties again met on June 11, Floyd gave McClanahan a letter which delineated those areas in which the District would have to make significant movement before AFSCME would withdraw its petition from PERB:

> 1. As a show of good faith negotiations, the District should rescind all 10-month layoff notices to custodians and halt all actions taken to implement the plan.
>
> 2. This union cannot negotiate "in the blind." The negotiations regarding reduction in hours must be integrated with contract negotiations.
>
> 3. The District should restore the 40 custodians scheduled for layoff.
>
> 4. The District, through its representatives, has repeatedly stated that the only reasons for this layoff is to free up monies for salary negotiations; yet, the only salary offer has been no wage increase. Before we can consider any monetary trade-offs, the District must make a realistic wage offer to this unit.

The District representatives caucused, returned and said that they originally had a proposal to present to AFSCME but, because of the letter, they would not present it and saw no need to meet further. Neither would they respond to AFSCME's letter.

Hopeful that the addition of a third party would help resolve the difficulties, the Central Labor Council invited McClanahan to explain to the Council why a strike sanction should not be granted. She was unable to attend but set a meeting on June 17 as an alternative. At this meeting, the District indicated it would take any plans or alternatives the union could suggest to the board of education and specifically invited proposals relating to the tax-sheltered annuity. No

proposal was forthcoming from the union, however.

On June 17, the parties had planned to meet because McClanahan said she had a proposal to make. She did not make a proposal, however, and thereafter, neither party requested further meetings. The layoffs and work-year reductions were implemented on July 1, 1980, as had been announced.

During the course of the layoff and work-year reduction talks, the parties' attention also focused on their successor agreement. The contract in effect between AFSCME and the District was due to expire on June 30, 1980. On March 26, 1980, AFSCME presented a comprehensive package as a successor contract. Although the District referred to wage increases in the layoff talks, when it responded to AFSCME's successor contract proposals on July 8, 1980, it proposed no wage increase. AFSCME attempted to persuade the District to combine talks regarding impact of layoff and reduced hours with the negotiations on a successor contract. The District refused to do so.

Similarly, during the successor agreement talks, the District would not discuss the impact of the layoffs or the work-year reductions because those issues were before PERB in the unfair practice charge which had been filed on June 6.

Due to legislation signed by Governor Edmund G. Brown, Jr. on June 30, 1980, the District received about $2.8 million it did not anticipate. Then, on the night of September 17, 1980, the board of education changed its position on a successor agreement and authorized McClanahan to make proposals that affected those employees whose work year had been reduced.

Relevant portions of the District's offer were:

> 1. The District proposes a 9-percent salary increase.
>
> 2. The custodial work year shall be 12 months for those for whom it currently is 12 months as a result of the layoffs pursuant to board action on May 7, effective July 1, 1980.
>
> a. The issue of restoration of the 150 custodians whose work year was reduced will become a negotiable item today as a result of the board's instructions to its negotiator in executive session last night.
>
> . . . . . .
>
> 7. Those 10-month employees who were in a paid status the day before or the day after July 4, 1980 shall be paid for the July 4 Holiday.

After give-and-take at the table, item 2 was changed by the District as follows:

> 2. A side letter of agreement shall be developed with the following stipulation:
>
> a. Salary increase of 9 percent, effective January 1, 1981, and restoration of the work year from 10 months to 12 months for those custodians in a paid 10-month status as of the signing of this agreement.

The effective date of January 1, 1981 was later crossed out and September 1, 1980 written in.

The final side letter read:

> The OUSD Board of Education agrees to 9-percent salary increase for fiscal year 1980-81, effective September 1, 1980; and to the restoration of the work year from 10 months to 12 months for those custodians in a paid 10-month status as of the signing of this agreement. Said restoration shall be effective on September 1, 1980. The restoration is effective only with respect

> to the initial 150 custodians who had their work year reduced from 12 months to 10 months pursuant to Board Resolution #28992, adopted May 7, 1980. It expressly excludes the custodians whose services were completely terminated pursuant to Board Resolution #28992.

Additionally, the District agreed to pay employees on 10-month status who were on paid status the day before and the day after July 4, 1980 for the July 4 holiday.

DISCUSSION

The District is correct in asserting that it did not violate section 3543.5(c) of EERA by failing to negotiate over the decision to lay off the 40 custodians. The Board has held that the decision to lay off is clearly within management's prerogative. Newman-Crows Landing Unified School District (1982) PERB Decision No. 223. In Newman-Crows Landing, at p. 13, the Board held that:

> [T]he determination that there is insufficient work to justify the existing number of employees or sufficient funds to support the work force is a matter of fundamental managerial concern which requires that such decisions be left to the employer's prerogative.

Nevertheless, the employer is obligated to provide the exclusive representative with notice and an opportunity to negotiate over the effects of its decision that have an impact upon matters within scope. Newark Unified School District, Board of Education (1982) PERB Decision No. 225; Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375.

As to the negotiability of the work-year reduction, we find

some merit in the District's argument that the work-year reductions, not unlike layoffs, suspended the employees' employment relationship for two months. Indeed, we agree that an employer may unilaterally reduce the employees' work year by means of a layoff and, at the same time, establish a reinstatement date two months hence. Here, however, such was not the case. In the instant case, the District reduced the work year of its custodial employees as an alternative to the layoff of an additional 40 custodians, and not as a layoff itself. Indeed, in the May 27, 1980 notice to the affected employees, the District stated that the reduction in work year was taken "in lieu of layoff." Thus, inasmuch as the Board has previously held that alternatives to layoff are negotiable as "effects" of layoff (see San Mateo City School District (1984) PERB Decision No. 383), the instant reduction in the work year was negotiable as an alternative to additional layoffs.[6]

The District, therefore, was required to negotiate over the layoff effects and the work-year reduction at such time as a "firm decision" on the layoffs had been reached. Mt. Diablo Unified School District (1983) PERB Decision No. 373. Contrary to the hearing officer's conclusion, we find that the District

[6]While Member Morgenstern agrees that the work-year reduction here was a negotiable decision inasmuch as it was promoted as a layoff alternative, as such it also constituted a reduction in the custodian's hours of work and was, therefore, negotiable on that basis as well. (Azusa Unified School District (1983) PERB Decision No. 374; Pittsburg Unified" School District (1983) PERB Decision No. 318; North Sacramento School District (1981) PERB Decision No. 193.)

had reached a firm decision to lay off custodians before the governing board passed its resolution on May 7, 1980.

The April 30, 1980 memorandum from Superintendent Love to the governing board reveals that the layoffs had been approved in the April 23, 1980 executive session. More importantly, the April 30th memorandum indicates that District supervisors and managers contacted the affected employees concerning the layoffs and reduction in work year prior to April 30, 1985. The May 7 resolution of the board of education was merely a formal announcement of its earlier decision. Thus, as of April 23, 1980, the District was required to negotiate in good faith as to the effects of its layoff decision and the decision to reduce the work year.

In so concluding, we note our disagreement with the hearing officer's reliance on the Board's reasoning in San Francisco Community College District (1979) PERB Decision No. 105 and San Mateo County Community College District (1979) PERB Decision No. 94, wherein the Board found that the districts committed per se violations when their school boards adopted resolutions. We agree with the District's assertion that the facts in the instant case distinguish it from the past PERB decisions. Those cases involved situations where the employer implemented the announced changes prior to affording the unions an opportunity to meet. In contrast to San Francisco and San Mateo, supra, where the board resolutions were adopted only a few days prior to implementation, the Oakland board resolution was adopted two months before implementation. Thus, inasmuch as the timeframe

provided ample opportunity for good faith negotiations to take place prior to implementation of the resolution, we find no per se violation evidenced by passage of the resolution. As outlined infra, however, since such good faith discussions did not ensue, we nonetheless find the District failed to satisfy its bargaining obligation.

Using the Board's totality of circumstances test,[7] we find the record supports the hearing officer's conclusion that the District violated EERA in the course of the layoff and work-year negotiations.

As noted above, the District was cognizant of the decision to lay off and reduce the work year as early as April 23, 1980. However, the District instructed the managers and supervisors to directly give the affected employees notice of the layoffs and reduction in work year rather than bargain with the employees' exclusive representative. Indeed, it refused to meet with the employees' exclusive representative until its intentions were made public by the school board resolution. Such conduct directly affronts the bargaining process. Moreover, not only did the District's conduct turn away from the negotiating

---

[7]PERB has held that:

> [T]he question of good faith in negotiations must be based on the "totality of the parties' conduct." In weighing the facts, we must determine whether the conduct of the parties indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained. (Oakland Unified School District (1982) PERB Decision No. 275.)

process, its publicly released resolution failed to even acknowledge a duty to negotiate. That announcement, by "direct[ing] the Superintendent to abolish or reduce the work year, no later than June 30, 1980," conveyed strict "marching orders" that worked only to vitiate the bilateral process.

We find that, in the course of the negotiating sessions that followed, the District continued to evidence bad faith bargaining by providing inadequate salary information to AFSCME. In spite of AFSCME's entitlement, as the exclusive representative, to information that is necessary and relevant to represent unit employees (Stockton Unified School District (1980) PERB Decision No. 143), the information the District provided covered all maintenance employees, not just those in the bargaining unit. Inasmuch as the District failed to set forth any reason why it was unable to provide the more limited and more useful information in the form AFSCME requested, we find additional evidence of the District's failure to bargain in good faith.

We also find merit in AFSCME's contention that the District improperly refused to combine the negotiations concerning layoff effects and work-year reductions with the negotiations on the successor agreement. In the instant case, the District continued to interject future wage increases as a possible variable in the layoff/work-year reduction plan. Having linked the future wage issue to the "effects" bargaining, it so entangled the subjects as to require that the District accede to AFSCME's demand to

combine negotiations.

In reaching our conclusion that the District's conduct, in toto, evidenced bad faith bargaining, we note our disagreement with the hearing officer's finding that there was no compelling reason why the District had to implement the layoffs on July 1, 1980. We find that, although a later implementation date could have been negotiated, the number of employees subject to the cuts and the severity of the action would necessarily have been compounded with each delay in implementation. In terms of the fiscal year, a layoff effective July 1 produces the greatest amount of savings and affects the fewest number of employees and students. Thus, inasmuch as the July 1 implementation date was not an arbitrary deadline, we do not view it as decisive evidence of bad faith bargaining.

The hearing officer also found that the District violated the Act by its failure to resolve a seniority list dispute.[8] We disagree.

Seniority is a mandatory subject of bargaining. Healdsburg Union High School District, supra. Here, however, the duty to negotiate seniority is limited by Article VII of the parties'

[8]The District and AFSCME discussed the accuracy of the seniority list during negotiations but, because of time constraints, were unable to "clean it up." The seniority list dispute was not a question of inaccuracies but, rather, of whose list should be used. The District's seniority list did not include custodians who were assigned to the children's centers. AFSCME maintained the appropriate seniority list was one which included the entire class of custodians.

contract which includes provisions for establishing the seniority list and its use in layoff situations. Thus, while the union has the right to negotiate which employees will be included on a particular seniority list, inclusion of a seniority provision in the parties' collective bargaining agreement evidences that AFSCME exercised its right to negotiate the composition of the seniority list. For that reason, its right to negotiate the subject of seniority in conjunction with the layoffs was superseded by its previous agreement. Marysville Joint Unified School District (1983) PERB Decision No. 314; South San Francisco Unified School District (1983) PERB Decision No. 343.

We also reject AFSCME's assertion that the District's insistence on keeping separate seniority lists is a violation of EERA. In our view, since the District's alleged misapplication of the contract did not amount to a change in policy but, rather, appears to be a contract interpretation dispute, no violation of the Act has been alleged. Grant Joint Union High School District (1982) PERB Decision No. 196. To correct what the union believed to be an improper application of the seniority article, the negotiated grievance procedure was the correct avenue of redress.[9]

The District takes exception to the hearing officer's proposed decision by stating she gave an "incomplete explanation

---

[9]In fact, the union did file a grievance against the District for "failure to follow seniority in the layoff of custodians." However, it failed to proceed in a timely fashion to the second step of the grievance procedure.

of the [PERB] decision not to defer" to arbitration. In the proposed decision, the hearing officer stated:

> Pursuant to a request for injunctive relief and an interim order of the Public Employment Relations Board . . . the issue of whether the matter should be deferred to arbitration was decided by a hearing officer on July 28, 1980, in a proposed decision not to defer to arbitration which became final on August 18, 1980.

We do not find that prejudicial error was committed by the hearing officer in her treatment of the decision not to defer to arbitration. She merely stated that the issue was presented and resolved in a prior decision. It was not an issue before her in the instant case and there was, therefore, no need to provide a detailed explanation of the effect of the decision not to defer.

Finally, the District asserts that the parties, in reaching agreement on a successor agreement and side letter, intended to settle the instant unfair practice charge. We join the hearing officer in finding no such intention.

The successor agreement was executed on November 12, 1980. Among other things, the parties agreed that the District would provide the union with two-weeks' notice in advance of its intended date for sending layoff notices to affected employees. It also provided for a 9-percent salary increase for fiscal year 1980-81, effective September 1, 1980. Pertinent to the issue raised here, however, there was no indication that this acted as a settlement of the unfair practice charge.

In a Side Letter of Agreement, the District restated its agreement to raise salaries 9 percent and further agreed to

restore the work year from 10 months to 12 months. We find it noteworthy that this restoration was effective only as of September 1, 1980. While the side letter provides holiday pay for those employees on paid status, neither document in any way redresses the custodians for the two-month period their work year was reduced. For that reason and because there was no statement or indication that this side letter was intended to act as settlement of the instant charge, we find that the hearing officer correctly concluded that neither document settled the instant unfair practice charge.

REMEDY

PERB has the statutory authority to fashion appropriate remedies. In this regard, section 3541.5(c) provides as follows:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

As noted above, the hearing officer ordered the District to cease and desist from taking unilateral action on matters within the scope of representation without meeting and negotiating with AFSCME, to reinstate custodians laid off out of seniority with appropriate back pay, to restore the 12-month work year, to make employees whole for any loss of earnings they suffered by virtue of the reduction in the work year, to post an appropriate notice, and to negotiate, upon demand, over the work-year issue with AFSCME.

We find the hearing officer's proposed remedy is inappropriate in one regard. An employer's decision to lay off is non-negotiable, and normally it is inappropriate to order the reinstatement of the terminated employees.[10] Here, however, the hearing officer held that a layoff was an unfair practice because it did not strictly rely on employees' seniority. Since we have found that the seniority dispute is a contractual issue and not an unfair practice, an order to reinstate custodians laid off out of seniority is inappropriate.

However, because the District unlawfully refused to negotiate the effects of its decision to lay off, we find it appropriate to order the District to negotiate, upon demand, those proposals which we have found to be within the scope of representation. Accordingly, we find it appropriate to order the District to negotiate any implementation of layoff issue which is consistent with the Decision herein.[11]

In order to recreate as nearly as possible the economic situation that would have prevailed but for the unfair labor practice, and in order to effectuate the policies of the Act, we

---

[10]Moreno Valley Unified School District (1982) PERB Decision No. 206, aff'd (1983) 142 Cal.App.3d 191; South Bay Union School District (1982) PERB Decision No. 207a.

[11]We note that the parties concluded negotiations on two successor collective bargaining agreements covering the periods of July 1, 1980 to June 30, 1981, and July 1, 1981 through June 30, 1984. These agreements include provisions concerning layoffs and restoration of the 12-month work year. Whether back pay liability ceased because of either agreement is a matter to be determined in a compliance proceeding.

also direct the District to pay the employees affected by the layoff their wages at the rate paid at the time they were laid off, from twenty (20) days following the date this Decision is no longer subject to reconsideration, until occurrence of the earliest of the following conditions: (1) the date the parties reach agreement; (2) the date the statutory impasse procedure is exhausted; (3) the failure of AFSCME to request negotiations within thirty (30) days of service of this Decision, or to commence negotiations within five (5) days of the District's notice of its desire to bargain with AFSCME; or (4) the subsequent failure of AFSCME to negotiate in good faith. In no event shall the sum paid to any employee exceed the amount he or she would have earned as wages from July 1, 1980, the date of the layoff, to the time he or she secured equivalent employment elsewhere.

To remedy the employer's failure to negotiate the decision to reduce the custodians' work year, we affirm the order that the affected employees be made whole for any loss of pay or actual costs incurred as a result of loss of benefits which they suffered because of the unilateral reduction in the work year.[12] All back pay will include interest at the rate of 10 percent per annum.

---

[12]As noted supra, the parties reached agreement to restore the 12-month work year. Thus, we need not order restoration of the 12-month work year.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Oakland Unified School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act. Pursuant to Government Code section 3541.5(c), it is hereby ORDERED that the Oakland Unified School District, its governing board, and its representatives shall:

1. CEASE AND DESIST FROM:

a. Taking unilateral action on matters within the scope of representation without first meeting and negotiating with the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO.

b. Failing or refusing to meet and negotiate in good faith with the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO, with respect to matters within the scope of representation as defined in Government Code section 3543.2 and specifically with respect to effects of and alternatives to layoff.

c. Denying to the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO, its statutory right to represent members of the unit as exclusive representative.

d. Interfering with employees because of their exercise of representational rights.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

a. Upon request, meet and negotiate with the exclusive representative over the effects of any layoffs or work-year reductions.

b. Pay to the employees laid off a sum equal to their wages at the time they were laid off, from twenty (20) days following the date this Decision is no longer subject to reconsideration, until occurrence of the earliest of the following conditions: (1) the date the parties reach agreement; (2) the date the statutory impasse procedure is exhausted; (3) the failure of AFSCME to request negotiations within thirty (30) days of service of this Decision, or to commence negotiations within five (5) days of the District's notice of its desire to bargain with AFSCME; or (4) the subsequent failure of AFSCME to negotiate in good faith. In no event shall the sum paid to any employee exceed the amount the employee would have earned as wages from July 1, 1980, the date of the layoff, to the time the employee secured equivalent employment elsewhere.

c. Make whole the affected employees for any loss of pay and benefits resulting from the reduction in work year in 1980.

d. All payments ordered above shall include interest at a rate of 10 percent per annum.

e. Mail copies of the attached Notice to the employees affected by the District's conduct within ten (10) calendar days after this Decision is no longer subject to reconsideration.

f. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, prepare and post copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for at least thirty (30) consecutive workdays at the District's headquarters office and at all locations where notices to classified employees are customarily posted. Reasonable steps shall be taken to insure that they are not defaced, altered, reduced in size, or covered by any other material.

g. Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with her instructions.

It is further ORDERED that the allegation that the Oakland Unified School District violated Government Code section 3543.5(c) by its refusal to negotiate the seniority list at issue in the instant case is DISMISSED.

At the compliance proceeding, the compliance officer shall attempt to accommodate any reasonable proposal regarding the method of payment of the monetary award ordered by the Board.

The District's request for oral argument pursuant to PERB Regulation 32315 is DENIED.

Member Morgenstern joined in this Decision.

Member Porter's Dissent begins on page 28.

Porter, Member, dissenting: I respectfully dissent. I am not persuaded by the overall record in this case that the totality of the circumstances in late 1979 and early 1980 demonstrate bad faith bargaining by the District.[1] But even assuming that there was bad faith bargaining, the record shows subsequent negotiations, bargaining and settlement between the parties.

During the parties' negotiations in May and June 1980 concerning the impending layoffs and the 12-month to 10-month work-year reductions, AFSCME attempted to join those matters with negotiations over the successor 1980-81 school year contract. AFSCME was particularly concerned with the percentage salary increase the custodians might obtain for 1980-81 as a result of the savings the District would achieve from the layoffs and the July/August work-year reductions. The District refused to merge the negotiations inasmuch as statutory and fiscal needs necessitated that the layoffs and work-year reductions be effected by July 1, 1980, and thus could not be intertwined with and made to await the future

---

[1]Such overall circumstances included in part: (a) the District's then-impending $9 to $16 million fiscal deficit for the 1980-81 (July 1, 1980 - June 30, 1981) school year, (b) the statutory and fiscal needs to implement and achieve layoffs and work-year reductions by July 1, and (c) the arrival in April 1980, of a new District negotiator who had to familiarize herself with, oversee and negotiate with 12 bargaining units concerning the grave fiscal problems, the large numbers of layoffs and work-year reductions in teachers and classified employees, and the ongoing 1980-81 contract negotiations with the various units.

resolution of the negotiations over the 1980-81 contract.[2]

Subsequent to AFSCME's filing of the unfair charge on June 6, 1980, and the effective date of the layoffs and work-year reductions on June 30, 1980, the parties commenced negotiations on the successor contract for the 1980-81 school year. These negotiations began on July 8, 1980, and continued into November 1980. At the commencement of the 1980-81 negotiations in July 1980, AFSCME attempted to include the layoff and work-year reduction matters in the bargaining. The District refused to bargain on such matters on the basis that the matters were before PERB on the unfair charges that AFSCME had filed.

During July, August and early September, 1980, the parties negotiated on other matters relating to the 1980-81 school year.

On September 18, 1980, the District's negotiator advised AFSCME that the District's board had authorized her to negotiate the layoff and work-year reduction matters which the board had previously refused to bargain with AFSCME. Proposals and counterproposals by the parties resulted in an agreement in November 1980 that: the 150 10-month custodians would be retroactively returned to a 12-month work-year status effective September 1, 1980 (having been bargained backwards from an original January 1, 1981 date, first to November 1, 1980, and

---

[2]Faced with a large fiscal deficit for 1980-81, it was the anticipated savings from the reduced work year during July and August which the District felt might possibly afford some basis for being able to offer a salary increase in the bargaining on the 1980-81 school-year contract.

finally to September 1, 1980); retroactive payment would be made of the July 4, 1980 holiday pay to the 10-month custodians who were working (summer school) but who would not otherwise have received the holiday pay because they were not 12-month employees at that time; and a retroactive 9-percent salary increase would be effective September 1, 1980. The record indicates that the 9-percent salary increase involved the salary savings the District had achieved from the work-year reductions for the 150 custodians in July and August 1980. Also, one of the results of bargaining the effective date of the restoration of the 150 custodians retroactively to September 1, 1980, was to entitle the 150 custodians to additional vacation pay benefits for the 1980-81 school year.

This negotiated agreement arrived at in November 1980 and finally ratified by AFSCME in January 1981, was entitled "MEMORANDUM OF TERMS OF SETTLEMENT," and states that the parties were agreeing to recommend to their respective membership and Board: "the following terms of settlement, and the execution of a new contract of agreement between . . ." for the period July 1, 1980 to July 30, 1982. An agreed-to side letter provided for the 9 percent salary increase and the restoration of the 12-month work year retroactively to September 1, 1980, and for the retroactive payment of the July 4, 1980 holiday pay to the 10-month work-year custodians. The subject matters of this unfair practice/bad faith bargaining charge having been subsequently negotiated, settled

and resolved by the bargaining between the parties, the complaint should accordingly be dismissed.

APPENDIX

NOTICE TO 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. SF-CE-472, American Federation of State, County and Municipal Employees, Local 257, AFL-CIO v. Oakland Unified School District in which all parties had the right to participate, it has been found by the Public Employment Relations Board that the Oakland Unified School District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act.

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

1. CEASE AND DESIST FROM:

a. Taking unilateral action on matters within the scope of representation without first meeting and negotiating with the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO.

b. Failing or refusing to meet and negotiate in good faith with the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO, with respect to matters within the scope of representation as defined in Government Code section 3543.2 and specifically with respect to effects of and alternatives to layoff.

c. Denying to the American Federation of State, County and Municipal Employees, Local 257, AFL-CIO, its statutory right to represent members of the unit as exclusive representative.

d. Interfering with employees because of their exercise of representational rights.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

a. Upon request, meet and negotiate with the exclusive representative over the effects of any layoffs or work-year reductions.

b. Pay to the employees laid off a sum equal to their wages at the time they were laid off, from twenty (20) days following the date PERB Decision No. 540 was no longer subject to

reconsideration, until occurrence of the earliest of the following conditions: (1) the date the parties reach agreement; (2) the date the statutory impasse procedure is exhausted; (3) the failure of AFSCME to request negotiations within thirty (30) days of service of the Decision, or to commence negotiations within five (5) days of the District's notice of its desire to bargain with AFSCME; or (4) the subsequent failure of AFSCME to negotiate in good faith. In no event shall the sum paid to any employee exceed the amount he or she would have earned as wages from July 1, 1980, the date of the layoff, to the time he or she secured equivalent employment elsewhere.

c. Make whole the affected employees for any loss of pay and benefits resulting from the reduction in work year in 1980.

d. All payments ordered above shall include interest at a rate of 10 percent per annum.

Dated: _____ OAKLAND UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent

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