STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS MORGAN HILL CHAPTER #159, Charging Party, v. MORGAN HILL UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-844 Request for Reconsideration PERB Decision NO. 554 PERB Decision No. 554a March 20, 1986

Appearances: William C. Heath for California School Employees Association and its Morgan Hill Chapter #159; Littler, Mendelson, Fastiff & Tichy by Patricia P. White for Morgan Hill Unified School District.

Before Hesse, Chairperson; Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: The Public Employment Relations Board (PERB or Board), having duly considered Respondent Morgan Hill Unified School District's (District) request for reconsideration of PERB Decision No. 554, hereby denies that request for the reasons that follow.

DISCUSSION

In Morgan Hill Unified School District (1985) PERB Decision No. 554, the Board affirmed an administrative law judge's (ALJ) proposed decision finding that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations

Act (EERA)[1] by making a unilateral change in policy concerning a matter within the scope of representation when it allowed a former dispatcher to include her dispatcher hours in calculating her seniority for the purpose of bidding on bus routes. More specifically, the Board found that the Charging Party proved by a preponderance of the evidence that the renegotiated version of the parties[1] 1980-83 agreement was silent on the method of seniority calculation for initial bus route bidding and that the relevant provision of the original 1980-83 agreement continued to reflect the existing policy.

Pursuant to PERB Regulation 32410,[2] the District requests reconsideration of the Board's decision on two grounds, (1) prejudicial errors of fact, and (2) new law unavailable at the

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq. Regulation 32410 states, in pertinent part:

> (a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

time Respondent filed filed its exceptions to the ALJ's proposed decision. The District also requests reconsideration by the full Board.[3]

Reconsideration by the Full Board

The District correctly states that a request for reconsideration may be considered by an expanded panel or by the full Board. While it is Board policy to assign such requests to the original panel that considered the underlying decision, other members of the Board may join the panel if they so desire. This is consistent with EERA section 3541(c).[4] Nevertheless, there is no right to have a request for reconsideration considered other than by the original panel. California State university (1984) PERB Decision No. 351a-H.[5]

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[3]Additionally, the District requested that the Board's order in the underlying decision be stayed pending this reconsideration. The Charging Party opposed this request. However, such a request is not necessary for, pursuant to Regulation 32410 (as amended November 9, 1985), the Board's orders in unfair practice cases are automatically stayed upon the filing of a request for reconsideration.

[4]Section 3541(c) states:

> The board may delegate its powers to any group of three or more board members. Nothing shall preclude any board member from participating in any case pending before the board.

[5]The District apparently misreads California state University, supra, to stand for the proposition that reconsideration is restricted to the original panel.

Requests for reconsideration are brought to the attention of all Board members and those not on the assigned panel may exercise their right to join in the consideration of such requests.

The Grounds for Reconsideration

The District puts forth two main arguments in support of its request for reconsideration: (1) The agreement between former California School Employees Association (CSEA) chapter president Jay Yinger and the District (on August 27, 1983) to allow Vicki Rivera to bid along with the other bus drivers on August 31 by necessary implication included an agreement as to the method of calculating Rivera's seniority; and (2) the language of the 1982 renegotiated agreement reflected the existing policy on seniority for the purpose of annual route bidding.

The District claims that it has repeatedly argued that it relied upon an agreement between itself and Yinger as a defense to making a unilateral change in the method of calculating seniority. However, as the Board noted in the underlying decision, the District in fact has never before made this argument.[6] The District, therefore, now asserts for the first

[6]In support of its contention, the District cites its 8th, 9th and 10th affirmative defenses, as stated in its answer to the complaint, as well as various passages from its earlier pleadings. The 8th affirmative defense, which mentions "the parties' agreement," clearly refers to the parties' collective bargaining agreement. The 9th and 10th affirmative defenses, as well as the other cited passages, specifically refer only to the August 27 agreement to allow Rivera to bid at the same time as the other drivers. One passage merely describes the August 25 meeting where, as the District agreed previously, Yinger acted without actual or apparent authority.

time that the finding that Yinger acted on behalf of CSEA at the August 27 meeting compels a related finding that he also impliedly agreed at that time to the method used to calculate Rivera's seniority. We disagree that such a finding is compelled, In fact, the weight of the evidence strongly militates against such a finding.

Both Yinger and Director of Personnel Lee Cunningham testified that, because Rivera could not leave her dispatcher position until a replacement was found, the only subject discussed at the August 27 meeting was whether to have Rivera bid on August 31 and have her route filled by a temporary driver or to have her bid at a later date. Because the first option was both less disruptive and consistent with past practice, it was decided to let Rivera bid on August 31 along with the other drivers. There was no evidence of any discussion of the method of calculating Rivera's seniority. While it is true that Rivera could not have bid without a determined level of seniority, the evidence reflects that both parties viewed the calculation of Rivera's seniority and the timing of her bid to be separate issues.

The evidence clearly shows that Rivera's seniority was unilaterally determined prior to August 27, leaving only the mechanics of her bidding to be determined. Yinger testified that the August 25 meeting was of a factfinding character and that it produced no agreement as to Rivera's seniority. Instead, Cunningham left with a series of questions posed by

Rivera, which she explored and resolved prior to sending the memo of the same date to Rivera informing her that her dispatcher hours would be included. Cunningham's testimony confirms that it was she, in consultation with the superintendent, who made the decision to include the dispatcher hours. It was with the knowledge that this firm decision had already been made by the District that the parties met on August 27.[7] Merely by agreeing to let Rivera bid on August 31 and have her route filled by a temporary driver, CSEA did not expressly or implied acquiesce to or ratify the District's earlier decision as to the method of calculating her seniority.

In its prior pleadings, the District made a point of distinguishing between Yinger's role at the August 25 and August 27 meetings. The District now cites Ravenswood City School District (1984) PERB Decision No. 469[8] as support for its new assertion that Yinger should not have been allowed to remove his union president "hat" at the August 25 meeting. In Ravenswood, the Board found that threatening remarks from an administrator could be imputed to the district even though the administrator had earlier assisted the threatened employee (in

[7]An employee organization does not waive its right to bargain by failing to request negotiations after a firm decision has already been made. Arcohe Union School District (1983) PERB Decision NO. 360, Los Angeles Community College District (1982) PERB Decision No. 252.

[8]Ravenswood did issue after the district filed its exceptions to the proposed decision and, thus, we will consider it as new law and thus a proper ground for reconsideration.

an unofficial capacity) in preparing the grievance that precipitated the remarks. This result turned on the principle that the administrator's prior role in assisting the employee as a friend did not preclude a finding that she later acted within her formal role as a district official. The evidence revealed that the threatening remarks were made at the request of the administrator's superiors; thus, there was no question that at that time the administrator was acting as the district's agent. The Board did not hold that a supervisor could never remove his or her supervisory "hat."

Similarly, we find no reason to hold that a union president can never remove his or her official "hat." Normally, a union president would have at least the apparent authority to act on behalf of the union. Nevertheless, in the instant case, where it was understood by all participants that Yinger was not acting in an official capacity at the August 25 meeting, it would be illogical and inconsistent with accepted principles of agency to find his actions binding on CSEA. We note that the District has never claimed that Yinger acted in his official capacity at the August 25 meeting, nor demonstrated that it relied on his statements at the meeting in the belief that they reflected the official CSEA position on the method of calculating Rivera's seniority. Further, testimony revealed that at the beginning of the August 27 meeting, the District representatives sought clarification from Yinger that he was then acting in his official capacity.

The District next asserts that the Board erred in finding that the term "initial assignments" refers to the route bidding prior to each school year. Instead, the District maintains that "initial assignment," as used in the heading of Article IV, section C(5) of the parties' agreement, refers only to new hires. From this, the District apparently argues that, since there is no express provision concerning route bidding seniority, it must be governed by sections C(6) and (7), which provide that increases and decreases in hours be assigned by seniority calculated according to Education Code section 45308.

The District has not previously argued that "initial assignment" refers to new hires. In fact, in the District's Memorandum of Points and Authorities in support of Exceptions, there are two references to "initial assignments" in the context of the annual route bidding. The provision entitled "Initial Assignment" in the original 1980-83 agreement clearly pertained to the annual route bidding. The corresponding provision of the renegotiated agreement was also entitled "initial Assignment." In the underlying decision, we found no significance in the new provision on "initial assignment" because it contained no mention of seniority and neither party argued in favor of its literal interpretation.

If we were to interpret the new provision on "initial assignments" to apply only to new hires, as the District now requests, this would simply lend further support to our conclusion that the new agreement was silent on seniority for

annual route bidding. TO the extent that the District argues that the absence of any provision requires that sections C(6) and (7) should be applied, this is an improper ground for reconsideration. In the underlying decision, we thoroughly considered and rejected the applicability of these sections to the annual route bidding process.[9] The District's final argument in favor of reconside rests upon the assertion that general principles of contract construction require a finding that the 1982 renegotiated agreement superseded the original 1980-83 contract. To the extent that the 1982 agreement covered matters also covered by the original agreement, we of course concur. However, we found the 1982 renegotiated agreement to be silent on the subject of annual route bidding. Established policy may be embodied in the terms of a collective agreement, but where such an agreement is silent or ambiguous as to a policy, it may be ascertained by examining past practice or bargaining history. Rio Hondo Community College District (1982) PERB Decision No. 279; Pajaro Valley Unified School District (1978) PERB Decision NO. 51.

[9]The Board has repeatedly held that arguments which were previously asserted and rejected are not proper grounds for reconsideration. See, e.g., Pittsburg Unified School District (1984) PERB Decision No. 318a; Rio Hondo Community College District (1983) PERB Decision No. 279a.

ORDER

The request for reconsideration of PERB Decision No. 554 (Case NO. SF-CE-844) is hereby DENIED.

Member Burt joined in this Decision.

HESSE, Chairperson, dissenting: I again dissent from the majority opinion.