STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO TEACHERS ASSOCIATION, Charging Party, v. MODESTO CITY AND HIGH SCHOOL DISTRICTS, Respondent.	Case Nos. S-CE-286 S-CE-287 Request for Reconsideration PERB Decision No. 566 PERB Decision No. 566a February 13, 1987

Appearances; Kenneth W. Burt II for Modesto Teachers Association; Breon, Galgani, Godino & O'Donnell by Daniel R. Fritz for Modesto City and High School Districts.

Before Hesse, Chairperson; Burt and Craib, Members.

DECISION

The Modesto City and High School Districts (District) and the Modesto Teachers Association (Association) each request reconsideration of Decision No. 566, issued by the Public Employment Relations Board (PERB or Board) on April 10, 1986. Having duly considered the requests for reconsideration, the Board itself hereby denies those requests, based on the following discussion.

In its Decision No. 566, the Board found that the District violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA or Act)[1] by implementing a

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

60-minute class cycle at its high schools for the school year 1979-80, thereby increasing the teacher workday. The Board ordered the parties to negotiate this issue, and ordered the affected teachers be made whole, with interest, for the increase in the workday. The Board declined to order a return to the status quo ante, because, in its view, such a return would disrupt the education process.

Pursuant to PERB Regulation 32410,[2] the District requests reconsideration of the remedy awarded by the Board. The District states that it voluntarily returned to the status quo ante at the beginning of the 1980-81 school year. In light of this, the District requests that the Board clarify its Order to reflect that any make-whole relief be limited to one school year. Further, the District asserts that the interest award is "inappropriate" and "unduly punitive" and, moreover, exacerbated by extraordinary Board delay. For these reasons, the District

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[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.

asks that no interest be awarded, or at least that any interest awarded should cease to run as of the date the District returned to the status quo ante. The District also argues that the Association failed to meet its burden of proof that the lunch period change in fact increased the teacher workday, and, therefore, asks that the Board modify its Order and dismiss the portion of the complaint that alleged that the unilateral change in student lunch period violated EERA section 3543.5(c). Finally, the District cites Modesto City School and High School District (1984) PERB Decision No. 414 and PERB Order No. Ad-143 for the proposition that because PERB concluded in that case that Districtwide past practice permitted unilateral changes in the teachers' duty-free lunch period so long as the teachers received the minimum 30-minute duty-free lunch period guaranteed by the Education Code, PERB should apply this finding in the instant case. If this were done, then the District could not have implemented a unilateral change.

The Association requests reconsideration of the Board's holding that the Association waived its right to negotiate school calendars. The Association requests oral argument,[3] and also asks for attorney fees and costs.

[3] December 19, 1986, the parties were notified that the Board denied this request for oral argument.

DISCUSSION

1. Return to the Status Quo Ante

We agree that a return to the status quo ante tolls an employer's back pay liability. All we have before us, however, is the District's assertion that it returned to the status quo ante. In Pittsburg Unified School District (1984) PERB Decision No. 318a, the Board stated that the reconsideration process

> . . . is not intended to provide a party with a forum in which to prove that, subsequent to the issuance of a Board decision, it has complied in whole or in part with the Board's Order. Such a claim is properly raised in a compliance hearing, should one be required. (Slip Op., p. 6, fn. 4.)

Likewise, where a party wishes to demonstrate that it voluntarily restored the status quo ante, thereby limiting back pay exposure, such a showing is best left to compliance proceedings. At such a hearing, evidence can be addressed as to whether the District took action that tolls the back pay award, and the actual amounts of back pay can be calculated by determining how many minutes the teachers' workday was increased.

Furthermore, a request for reconsideration must meet the strict requirements of PERB Regulation 32410(a). This regulation provides:

> . . . 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.

Here, the District's claim that it returned to the status quo ante fits none of those grounds set forth in Regulation 32410(a). Reconsideration by the Board based on a claim that the status quo ante has been restored is not appropriate, but is properly left to the compliance procedure where the consequences of a return to the status quo ante bear directly on the remedy ordered.

2. Interest Award

The Board, pursuant to section 3541.5(c), is empowered to ". . . take such affirmative action . . . as will effectuate the policies of this chapter." Previously, the Board has held that its delay in processing a case is "no basis upon which to deny employees a remedy for an employer's unlawful conduct." (Mt. San Antonio Community College District (1983) PERB Decision No. 297. See also, Corning Union High School District (1984) PERB Decision No. 399a; Pittsburg Unified School District (1984) PERB Decision No. 318a.) These decisions rely on and are consistent with private sector case law. Since 1962, the National Labor Relations Board (NLRB) has routinely attached interest onto back pay awards. (See Isis Plumbing & Heating Co. (1962) 138 NLRB 97 [57 LRRM 1122].) Federal courts have upheld this practice. In Bagel Bakers Council v. NLRB (1977) 555 F.2d 304 [95 LRRM 2444, 2445], the Court of Appeal, in upholding the NLRB, stated:

> Interest is normally granted on a back pay award. Assuming for the moment that the board was responsible for the delay, we can see no reason to shift its cost from the employers to the employees harmed by the illegal conduct. [Citations omitted.]

This same rationale has been followed by California courts. (See M. B. Zaninovich, Inc. v. Agricultural Labor Relations Bd. (1981) 114 Cal.App.3d 665, 682-683.)

Even if caused by PERB, delay does not compel us to suspend imposition of interest. In this case we see no reason to depart from established precedent which allocates the burden on the wrongdoing employer. Employees should be compensated for the lost time value of money owed to them.

3. Change in Lunch Period

In Decision No. 566, the Board stated:

> Whether and how much the decrease in the student lunch period actually increased the teacher workday was not made clear at the hearing. Thus, should the parties be unable to agree as to the total impact this had on the workday, a compliance hearing may be in order. (Slip Op., p. 20.) (Emphasis added.)

The District asserts that the above language implies that the Association failed in its burden to prove the 60-minute class cycle lengthened the teacher workday. We disagree. The thrust of our decision is to the contrary. Preliminarily, the parties do not dispute that the District unilaterally changed the starting time, thereby causing teachers to report ten minutes earlier than previously required. Further, the District increased each class period by three minutes. These two changes alone support our conclusion that the District

unilaterally increased the workday.

Less clear is whether the change in the lunch period and the passing period affected the overall teacher workday and by how much. These changes must be calculated in connection with the increase in the school day noted above.

Thus, although some questions exist as to the extent of any adverse effect on the workday, we conclude that the Association met its burden of proving there was an increase in the workday. We leave to a compliance hearing the determination of the extent of the increase in the workday due to changes in starting time, class periods, passing periods, and lunch periods.

4. Precedential Effect of PERB Decision 414

In Modesto City Schools and High School District (1984) PERB Decision No. 414, we held that the Districtwide practice regarding the length of the lunch period varied. Therefore, a change in the length of the lunch period at one school did not amount to an unlawful unilateral change, but was consistent with District practice. In this case, the District argues that we should apply the finding and reasoning of that decision. We disagree. As the events in this case preceded those in Decision No. 414 by three years, the later decision does not affect the outcome of this case. Moreover, in the prior Modesto case, the Board was not required to decide how long the District's practice endured. Nor has it been established in the instant case that the same practice existed three years

earlier. We therefore cannot say what the Districtwide practice was with regard to the length of lunch periods for the purposes of this case. Thus, the prior decision is not instructive in this case.

5. Association's Request

In its request, the Association reasserts its previous argument that it did not waive its right to negotiate the school calendars. We deny the Association's request for reconsideration because it is untimely.[4]

Even if we ignored the Untimeliness of the Association's request, however, we would still deny it because the Board has previously held that the mere reassertion of arguments considered and rejected by the Board in an underlying decision does not constitute the kind of "extraordinary circumstances" that justify granting reconsideration. (See State of California (Dept, of Developmental Services, Napa State Hospital) (Matta) (1984) PERB Decision No. 378a-S; Pittsburg Unified School District (1984) PERB Decision No. 318a; Rio Hondo Community College District (1983) PERB Decision No. 279a.)

Finally, we decline the Association's request for attorney's fees as the arguments raised by the District are not "without arguable merit," nor were the arguments made in bad faith. (See King City High School District Association et al. (1982) PERB Decision No. 197; Chula Vista City School District

[4]The request was not made within the 20 days required by Regulation 32410, footnote 2, supra.

(1982) PERB Decision No. 256.)

Inasmuch as the Association's request is based on arguments and evidence previously presented and considered by the Board when it made its determination in the underlying decision, no extraordinary circumstances are shown which justify reconsideration of that decision.

ORDER

The requests for reconsideration of PERB Decision No. 566 (Case Nos. S-CE-286 and S-CE-287) are hereby DENIED.

By the BOARD[5]

Chairperson Hesse's concurrence and dissent begins on page 10.

[5]Member Porter did not participate in this Decision.

Hesse, Chairperson, concurring and dissenting: I agree with the majority that questions regarding the effect of a return to the status quo ante on back pay are best left to a compliance proceeding. A compliance officer can determine if the District did return to the status quo ante, and can toll any back pay liability as of the date of the return to the status quo ante. I also agree that the Association's request for reconsideration is untimely and should therefore be denied. The Association's request for attorney fees and for oral argument should likewise be denied.

Generally, I agree that interest should be awarded until the affected employees are "made whole." But where this type of award does not effectuate the purposes of the Act, the Board should provide a different remedy; and where an interest award causes more harm than good, a more limited award would be proper.

In this case, our internal records[1] show that a large percentage of the interest liability is due to the delay of this Board in issuing a decision. This case was assigned to a panel in May 1983, but a decision did not issue until April 1986. Therefore, even after allowing a reasonable time of a year for deliberation, at least two years of interest is the result of Board inaction. The majority relies on cases in the

[1]PERB may take official notice of its records. (Mendocino Community College District (1980) PERB Decision No. 144; Antelope Valley Community College District (1979) PERB Decision No. 97.)

private sector, and prior PERB cases which adopted private sector rationale, for finding that delay in Board proceedings is insufficient reason to eliminate or reduce an interest award. I do not find the rationale in those cases persuasive or applicable to the public sector.

In the private sector, when an employer denies to an employee monies owing, or increases an employee's workday without adequate compensation, the employer has had the use of money that is not his. Imposition of interest insures that the employer does not benefit financially from the use of that wrongfully-withheld money. Assessment of interest is also fair because the employer can, if he chooses, recoup his losses by increasing production or decreasing expenditures.

This justification for imposition of interest in the private sector does not fit the public sector situation. A school district does not have the "use" of wrongfully unpaid monies during the time this agency takes to decide cases. Nor can it increase "sales" in order to discharge interest penalties. Public school districts receive a certain amount of money each year to perform their duties. They adjust their expenses within that framework. They cannot do the things private employers do to raise additional monies, nor can they invest their funds in anticipation of large interest awards. Thus, a hefty interest charge on top of a substantial back pay award could devastate a school district. In such a circumstance, no one would win.

The employees are not unfairly penalized by the limitation of interest because the original violation did not result in employees' pay being reduced. Rather, employees were not compensated for an increase in work time. Although the total increase has yet to be determined, by my estimation it represents only a small percentage of the total minutes worked every day by the employees. Thus, for each individual employee, the interest awarded by the majority would not represent an amount likely to have more than a minimal impact on overall earnings. But for the District, the cumulative effect of the total award could be tremendous.

I would not rule that interest is inappropriate here. Rather, it should be confined to the period prior to the restoration of the status quo ante. Such a limitation will not hurt the employees, and it will serve to make them whole, with reasonable interest compensation. At the same time, such a limitation will acknowledge and encourage the District's return to the status quo ante, without punishing it for the delay caused by this agency's inaction.