STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS ROSEVILLE HIGH CHAPTER NO. 459,	
Charging Party,	Case No. S-CE-890
v.	PERB Decision No. 530
ROSEVILLE JOINT UNION HIGH SCHOOL DISTRICT,	June 30, 1986
Respondent.	

Appearances; William C. Heath, Attorney for California School Employees Association and its Roseville High Chapter No. 459; Kronick, Moskovitz, Tiedemann & Girard by Robert A. Rundstrom for Roseville Joint Union High School District.

Before Hesse, Chairperson; Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a dismissal by a PERB regional attorney. The Charging Party, California School Employees Association and its Roseville High Chapter No. 459 (CSEA), alleges that the Respondent, Roseville Joint Union High School District (District), violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally transferring bargaining unit work

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, in pertinent part, as follows:

to prisoners from Folsom Prison and to individuals providing community service through the Placer County Drunk Driving Program.[2] The regional attorney dismissed the unfair practice charge after concluding that the use of free prisoner labor was authorized by the parties' collective bargaining agreement (Agreement).

FACTUAL AND PROCEDURAL HISTORY

Specifically, the charge alleges that, on December 15 and 16, 1984, individuals provided by the Placer County Drunk Driving Program performed duties such as cleaning classrooms and changing light fixtures on District property. It is also alleged that, on December 20 and 21, 1984, prisoners from Folsom State Prison performed preparation work for concrete

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> It shall be unlawful for a public school employer to:
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> (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.

[2]While the individuals in the latter group are not literally "prisoners," for convenience, we will refer to both groups collectively as prisoners.

CSEA also alleged that the District failed to provide necessary information concerning the use of the prisoner labor; however, the dismissal of that allegation was not appealed.

installation on District property. The District does not deny these facts but maintains that the work would not have been done absent the availability of free prisoner labor, and that, in any case, the use of such labor falls within its contractual right to "contract out work."

Article 2 of the Agreement reads, in pertinent part:

> It is understood and agreed that the Board retains all of its powers and authority to direct, manage, and control to the fullest extent of the law. Included in, but not limited to, those duties and powers are the exclusive right to: . . . contract out work, except where prohibited by law; . . . .

In his warning letter of May 23, 1985 to Charging Party, the regional attorney assumed that the use of free prisoner labor represented contracting out as contemplated by Article 2 and focused only on whether such contracting out was otherwise prohibited by law. Assuming for the purpose of analysis that the subcontracting of janitorial services is prohibited by Education Code section (Ed. Code sec.) 45103,[3] the regional

[3]This was the conclusion of the Court of Appeal in CSEA v. Willits Unified School District (1966) Cal.App.2d 776. Ed. Code sec. 45103 states that, with certain enumerated exceptions, school districts must employ persons for positions not requiring certification, and that such employees and positions shall be classified. The Willits court held that Ed. Code sec. 45103 requires janitors to be classified employees of the school district and, thus, janitorial work cannot be subcontracted.

The District maintains that the Willits decision turned on the principle that school districts could lawfully contract only as provided by statute, and that this principle was overruled by section 35160 of the Education Code, which was added in 1976. Ed. Code sec. 35160 states:

attorney cited Arcohe Union School District (1983) PERB Decision No. 360 for the proposition that, since Ed. Code sec. 45103 sets an "inflexible standard," the subcontracting of janitorial services is a nonnegotiable preempted subject. He then concluded that, since the subject is outside the scope of negotiations, there could be no unilateral change. To the extent that the work was of a nonjanitorial nature, the regional attorney found that it was expressly authorized by Public Contracts Code sections 20114 and 20115.[4]

> On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

[4]Section 20114 states:

> In each school district, the governing board may make repairs, alterations, additions, or painting, repainting, or decorating upon school buildings, repair or build apparatus or equipment, make improvements on the school grounds, erect new buildings, and perform maintenance as defined in Section 20115 by day labor, or by force account, whenever the total cost of labor on the job does not exceed seven thousand five hundred dollars ($7,500), or the total number of hours on the job does not exceed 350 hours, whichever is greater, provided that in any school district having an average daily attendance of 35,000 or greater, the governing board may, in addition, make repairs to school buildings, grounds, apparatus or equipment, including painting or repainting, and perform maintenance as defined in Section 20115, by day labor or by force account whenever the total cost of labor on the job does not exceed fifteen

Though CSEA did not formally amend its charge, it did clarify its theory of the case in communications with the regional attorney. CSEA asserted that its charge alleged a "transfer" of unit work to other "employees," not the "contracting out" of unit work and, thus, the District's

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> thousand dollars ($15,000), or the total number of hours on the job does not exceed 750 hours, whichever is greater.
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> For purposes of this section, day labor shall include the use of maintenance personnel employed on a permanent or temporary basis.

Section 20115 states, in pertinent part:

> For purposes of Section 20114, "maintenance" means routine, recurring, and usual work for the preservation, protection, and keeping of any publicly owned or publicly operated facility for its intended purposes in a safe and continually usable condition for which it was designed, improved, constructed, altered, or repaired. "Facility" means any plant, building, structure, ground facility, utility system, or real property.
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> This definition of "maintenance" expressly includes, but is not limited to: carpentry, electrical, plumbing, glazing, and other craftwork designed consistent with the definition set forth above to preserve the facility in a safe, efficient, and continually usable condition for which it was intended, including repairs, cleaning, and other operations on machinery and other equipment permanently attached to the building or realty as fixtures.
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> This definition does not include, among other types of work, janitorial or custodial services and protection of the sort provided by guards or other security forces.

contractual right to subcontract is inapplicable. In his dismissal letter of June 26, 1985, the regional attorney relied on Goleta Union School District (1984) PERB Decision No. 391 in determining that the prisoners were not "employees" of the District and, therefore, the use of such workers could not constitute the "transfer" of unit work. In Goleta, the Board held that a particular group of counselors were "employees" of the district, therefore, the transfer of unit work to these counselors did not fall within the district's contractual right to contract out.

DISCUSSION

On appeal, CSEA argues that, though the prisoners are not literally "employees" of the District, their relationship to the District "resembles" that of employees and, in any case, the situation is more akin to a transfer of work to non-unit employees than it is to subcontracting. CSEA also argues that, because the prisoners are not paid for their services, traditional indicia of employment and subcontracting are of limited value. Further, CSEA argues that the bargain struck between the parties at the bargaining table did not contemplate the use of unpaid labor. Lastly, CSEA maintains that substantial issues of fact are in dispute, requiring a hearing for their resolution.

First, we believe the regional attorney misapplied the Board's decision in Arcohe, supra. Finding that a unilateral change is precluded because the subcontracting of janitorial work is prohibited by Willits and Ed. Code sec. 45103 and, thus, outside

the scope of negotiations, the regional attorney viewed the only remaining issue as whether the use of free prisoner labor constituted "contracting out." However, the holdings in Willits and Arcohe do not preclude a finding of a unilateral change where, as here, the parties' Agreement is co-extensive with any legal prohibitions against contracting out.

In Arcohe, the Board held that, because Ed. Code sec. 45103, as interpreted in Willits, sets an "inflexible standard," the contracting out of janitorial services is a nonnegotiable, preempted subject. However, the Board was careful to point out that the parties were not precluded from discussing proposals to incorporate the Education Code prohibition into their contract, or from broadening the prohibition. Notably, because such proposals would be lawful, the Board held in Arcohe that the employer's unilateral decision to contract out for janitorial work did constitute a refusal to bargain.

In the instant case, the parties have in fact incorporated into their Agreement the prohibition against contracting out for janitorial services by providing that the District could contract out "except where prohibited by law." Thus, to the extent that the District's actions constituted "contracting out" and involved janitorial work, this violated not only the Education Code but also the Agreement. Such a breach reflects a change of continuing impact on negotiated policy and, therefore, would constitute an unlawful unilateral change. Grant Joint Union High School

District (1982) PERB Decision No. 196.[5] Whether janitorial services were involved is a disputed fact that can be properly resolved only after an evidentiary hearing.[6]

Implicit in our analysis above is the rejection of the District's assertion that Willits was effectively overruled by the addition of section 35160 to the Education Code. Ed. Code sec. 35160 clearly overrules a long line of cases that held that school districts have the power to contract only as provided by statute. See, e.g., Grasko v. Los Angeles City Board of Education (1973) 31 Cal.App.3d 290. While the Willits court did consider this now antiquated principle, it did so only in deciding that Ed. Code secs. 15801 and 15955 (now sections 39644 and 39600, respectively) did not confer any statutory authority to contract out janitorial services.

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[5]By application of Grant, supra, we necessarily reject the Chairperson's legal conclusion expressed in her dissent that the District's conduct "is at most a breach of contract." Moreover, a contract interpretation dispute that is also an unfair practice is not an issue that "must be resolved by an arbitrator" unless the parties' agreement contemplates binding arbitration. In this case, neither the Chairperson in her dissent nor the District makes the assertion that it does.

[6]We specifically reject the Chairperson's factual conclusions that the work that was "contracted out" was not regular janitorial or maintenance work, that it would not have been done if the prisoners were unavailable, and that only overtime work was affected. The first two issues are in dispute and, therefore, are not properly decided in the context of reviewing a dismissal. San Juan Unified School District (1977) EERB Decision No. 12. (Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.) With regard to the overtime work finding, this Board has found an EERA violation based on the lost opportunity to earn overtime. See Lincoln Unified School District (1984) PERB Decision No. 465.

The main focus of the Willits court was its interpretation of Ed. Code sec. 13581 (now section 45103). The court expressly held that this section prohibited the contracting out of janitorial services.[7] Thus, while Ed. Code sec. 35160 indeed gives school districts broad authority, that authority is restricted to activities that are " . . . not in conflict with or inconsistent with, or preempted by, any law . . . ." It is, therefore, reasonable to conclude that, while public school districts have been granted the authority to contract, that authority is limited when expressly prohibited by law. The Willits court's interpretation of Ed. Code sec. 45103 represents such a prohibition.[8]

The remaining issue concerns the proper characterization of the use of free prisoner labor. The regional attorney and the parties have analyzed this issue by applying various traditional criteria for distinguishing between employees and independent contractors. While this approach is helpful, the emphasis is more properly placed on determining whether the District's contractual right to "contract out" work encompasses the

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[7]While the court's rationale could be used to support the argument that, absent express statutory authority, the contracting out of all classified work is prohibited, the court expressly limited its holding to janitorial services. We agree with the regional attorney that the contracting out of concrete installation work is authorized by Public Contracts Code sections 20114 and 20115.

[8]Our research has revealed no other basis for concluding that Willits has been overruled, either expressly or impliedly.

situation involved here. For example, the District's action might resemble neither a transfer of work to other employees nor subcontracting, in which case the District could not use Article 2 of the Agreement as a defense.

The regional attorney made the following observations in determining that the prisoners were not "employees" of the District:

> . . . the District had work for whomever was provided by Folsom State Prison or the Placer County Probation Department. These individuals had no contractual relationship with the District nor did they perform on-going work for the District. There was no written contract between the District and either the prison or the probation department.
>
> There is no indication that the District could decide how many or which individuals were provided. . . . the District had no part in deciding what pay, if any, or what non-monetary compensation would be given to participants in the programs. Although there is a factual dispute over the extent these individuals were supervised by District employees, it appears that evaluation of an individual's performance was done by the Prison or Probation Department staff. . . .

While these indicia might support the conclusion that the prisoners are not "employees" of the District, they do not conclusively establish that the use of the prisoners constituted "contracting out." We believe that this issue can be fairly determined only with the benefit of a full factual record reflecting the exact nature of the work done, the extent of supervision and control provided by the District, and the terms and nature of the arrangements made between the District and the

two prisoner programs. Evidence of the parties' negotiating history might also be probative of the breadth and meaning of the District's right to "contract out" work.[9]

In sum, we hold that CSEA has stated a prima facie case[10] of a unilateral change in a matter within the scope of negotiations.[11] A hearing is necessary to determine if the District's actions constituted "contracting out" within the

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[9]The Chairperson posits that it is unnecessary to ascertain what the parties agreed to by contract. We disagree. Here, as in Goleta, supra, the distinction between transfer of work and contracting out is critical because the parties' Agreement, by its terms, covers only the latter. The Chairperson's position that there is no distinction between the transfer of work and contracting out would overrule Goleta and is contrary to the commonly-accepted definitions of the two terms.

[10]The District objects to the consideration of factual allegations presented to the regional attorney but not made part of a formal amended charge. While this argument has merit, we nonetheless find a prima facie case based solely on the original charge. The charge described in some detail the use of free prisoner labor, and clearly alleged that unit work was affected. Further, the charge asserts that the District acted without legal right and without affording notice and an opportunity to bargain. Additional facts alleged in CSEA's appeal of the dismissal pertain almost exclusively to the District's control and direction of the prisoners' work, in support of the proposition that the prisoners are akin to employees of the District. Though we believe a prima facie case is stated irrespective of the inclusion of such detailed facts, we view them as implicit in CSEA's characterization of the District's action as a "transfer" of work as opposed to "contracting out."

[11]We have previously held that both the contracting out and transfer of bargaining unit work are within the scope of negotiations. Arcohe, supra; Rialto Unified School District (1982) PERB Decision No. 209. Of course, at hearing, CSEA may be unsuccessful in proving that unit work was affected by the District's actions, in which case the District would prevail.

meaning of Article 2 of the Agreement and, if so, whether such subcontracting unlawfully involved janitorial services.[12]

ORDER

The Public Employment Relations Board hereby ORDERS that the dismissal in Case No. S-CE-890 be REVERSED and that the general counsel issue a complaint consistent with the above discussion.

Member Burt joined in this Decision. Chairperson Hesse's dissent begins on p. 13.

[12]In her dissent, the Chairperson erroneously asserts that the majority opinion finds that work was "contracted out" to the prisoners, who "resembled employees," and that an unfair practice has been committed. As is clear from the above discussion, we have made no such finding, but have merely found that CSEA has stated a prima facie violation of EERA. The proper characterizations of the use of the prisoners and of the nature of the work itself are matters in dispute to be decided at hearing.

Hesse, Chairperson, dissenting: A complaint should not issue. The prisoners were not employees, they did not take work away from the bargaining unit, and the District was permitted by the specific language of the collective bargaining agreement to contract out services.

At the heart of the matter is whether the prisoners performed work that normally would have been done by the District's janitorial employees.[1] The relevant contract provision permits such removal of work from the bargaining unit. If the work performed is done by non-unit employees, it is properly termed a transfer of work. If performed by non-employees, as here, it is contracting out. The end result is the same — that is, the parties negotiated and mutually assented that work that could have been preserved for the bargaining unit employees was subject to being performed outside the bargaining unit. Whether the work is termed "transferred" or "contracted out" is a distinction without a difference

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[1]The unfair charge filed by CSEA ignores the existence of a contract provision that permits the District to contract out to non-employees, or to transfer to non-unit employees, work normally performed by bargaining unit members.

On appeal, CSEA argues only that the regional attorney who dismissed the charge erred in equating "contracting out" of work with "transfer of work." The majority opinion continues this confusion by finding that the work was "contracted out" to the prisoners, who "resembled employees." As noted above, I do not believe that the regional attorney or the majority properly focused on the contractual language that permitted both contracting out and transfer of work, depending upon to whom the work was given. Furthermore, the majority does more than address the limited issue on appeal and instead looks at the merits.

insofar as ascertaining what the parties agreed to by contract. Furthermore, the District was at liberty to implement the contract provision whenever it chose to during the term of the agreement.[2]

Contracting Out of This Work Was Not Unlawful

Even if the Board must look beyond the narrow issue raised on appeal and review the entire original charge, I disagree with the majority's findings. Article 2 of the parties' collective bargaining agreement provides, in pertinent part:

> It is understood and agreed that the Board retains all of its powers and authority to direct, manage, and control to the fullest extent of the law. Included in, but not limited to, those duties and powers are the exclusive right to: . . . contract out work, except where prohibited by law; . . . .

I agree with the District that this provision of the agreement allows it to contract out bargaining unit work.

The majority, however, finds that contracting out of janitorial work is prohibited by the phrase "except where prohibited by law." In making this finding, the majority relies on Willits, supra, which prohibited a district from contracting out janitorial services. I am not convinced that Willits is controlling in this case or that it is still good law. Willits is distinguishable on its facts and the nature of school labor relations is changed.

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[2] Fresno County Board of Education and Superintendent of Schools (1984) PERB Decision No. 409.

In Willits, the District laid off two janitors and contracted out their work. The court found this conduct violated Education Code section 13581 (now 45103), which requires the establishment of a "classified service." Based on that statute plus its predecessor, which specified that school districts should employ janitors, the court held, at page 785:

> It is our opinion that section 13581 is of ample breadth to make mandatory the employment of janitors to do the regular work of that occupation. (Emphasis added.)

In the instant case, janitors were not laid off. Furthermore, the work that was contracted out was not regular janitorial work, but rather was unusual maintenance work, and would not have been done if the prisoners were unavailable. CSEA admits that no regularly scheduled custodial or janitorial work was given to the prisoners to do. Rather, only overtime work was affected.[3] Thus, the employment status of the unit members was not disturbed. Even if, as the Association claims, this work was normally done by members of the bargaining unit, this case still falls outside the Willits fact pattern due to statutory changes in collective bargaining.

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[3]CSEA and the majority rely upon Lincoln Unified School District (1984) PERB Decision No. 465 for its position that any transfer of bargaining unit work that affects employee overtime is an EERA violation. However, Lincoln is easily distinguished from the instant case. In Lincoln, the employer transferred the bargaining unit work to other employees and volunteers. The Lincoln employer did not have the benefit of a contracting-out provision in the collective bargaining agreement.

An important element in Willits concerning the prohibition on contracting out was that "[s]chool district boards have power to contract only as provided by statute." (Willits, at p. 781.) At the time Willits was decided, the school board had no statutory authority to bargain about traditional labor relations. Instead, the school board made all the decisions, as permitted by statute. Since no statute authorized contracting out of janitorial work, such conduct was prohibited.

Today, labor relations is not so limited. Under EERA, school district employees may form and join employee organizations to negotiate with their employers over wages, hours, and terms and conditions of employment, i.e., matters within the scope of representation. One of those matters within scope can be contracting out where labor costs are at issue. As the majority notes, Willits was decided under an antiquated principle. It is my view that the Legislature mooted Willits by enacting EERA and Education Code section 35160.

District's Conduct is at Most a Contract Violation

Assuming, arguendo, that Willits is still good law, I still disagree with the majority position that an unfair practice has been committed.

If the majority is correct that contracting out of janitorial work is prohibited by law and therefore by operation of contract, the District's conduct is at most a breach of contract. A contract interpretation dispute as to whether a party to a collective bargaining agreement violated the contract

must be resolved by an arbitrator, not this agency. PERB's function is to insure that the parties engage in good faith bargaining. Here, the parties did so. If there is a dispute as to whether one party failed to live up to the negotiated agreement, an alternative dispute resolution is available and more practical.