STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

POWAY FEDERATION OF TEACHERS, Charging Party,	)	Case No. LA-CE-2331
v.	)	PERB Decision No. 680
POWAY UNIFIED SCHOOL DISTRICT, Respondent.	)	June 15, 1988

Appearances; James M. Gattey, Attorney, for Poway Federation of Teachers; Brown & Conradi by Clifford D. Weiler for Poway Unified School District.

Before Hesse, Chairperson; Porter and Shank, Members

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Poway Unified School District (District) of the Administrative Law Judge's (ALJ) finding that the District violated Government Code section 3543.5(c) of the Educational Employment Relations Act (EERA)[1]. The ALJ found that the District violated section

[1]The Educational Employment Relations Act is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5(c) states:

> It shall be unlawful for a public school employer to:
>
> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

3543.5(c) by unilaterally establishing a compensation practice for a new program with no exact precedent.

FACTUAL AND PROCEDURAL SUMMARY

Prior to 1985, the District unilaterally developed and, for the past several years, has sponsored the "Poway Professional Development Program" (PPDP), designed to assist the District's teachers in improving their teaching skills. This voluntary program generally consisted of three full-day seminars in August and a series of three-hour discussions held during the school year in late afternoon or early evening. There was also a four-day program in March 1984 held during the school year. Teachers were compensated as follows: a $50 stipend for the full-day program held prior to the school year; a meal following the three-hour programs; and their regular contract salary during the March program, with a substitute provided for the classroom. The only aspect of the PPDP negotiated was the date of the sessions held during the calendar year.

During the summer of 1984, the District notified the Poway Federation of Teachers (Federation) of its decision to hold a two-day training and orientation program for new teachers on August 27 and 28. The Federation indicated a desire to negotiate compensation for the new teachers who attended. At a July 25, 1984 negotiating session, the District proposed that, since attendance would be voluntary, attendees would receive a

$50 stipend for each day. The Federation proposed a per diem payment based on the salary schedule in the collective bargaining agreement. No agreement was reached, and the program was later cancelled.

In November 1984, the District and Federation reached agreement on the calendar year for certificated employees for the 1985-86 school year. Classes were scheduled to start on Monday, September 9, with Tuesday, September 3, designated a "New Teacher Day," and September 4 through 6 as "Teacher In-Service" days. Friday, November 1, was designated as "Professional Growth" day for elementary school staff.

On either August 5 or 6, 1985, the District notified the Federation of a seminar scheduled for late August for newly hired teachers to be held in a hotel near Poway. The Federation asked for details in writing and shortly thereafter received a letter, dated August 7, from the District stating that the agenda for the seminar was not yet complete. The District also enclosed a draft of a letter to be addressed to the District's 30 new teachers, which read as follows:

> Dear_____
>
> You are cordially invited to attend a research seminar presentation, "Critical Attributes of Effective Instruction," presented by Douglas Minnis, Ph. D., Dean, Graduate School of Education, University of California at Davis. The seminar will be held on Thursday, August 29 from 8:30 a.m. to 12:30 p.m. at the Rancho Bernardo Inn in the Granada Room. A luncheon will be provided following the presentation for all those who attend.

> As a District, we are seeking to capitalize on the experience and expertise which is already evident in our classrooms, as well as the results of current research, to develop an orderly and consistent foundation for professional development. The seminar on August 29 is part of an ongoing program of professional seminars in which teachers and administrators work together to increase and highlight their awareness of teaching. As a teacher new to our District, this will be an excellent opportunity for you to find out more about this program and the instructional focus in this District. We are looking forward to having you join us. Please call the secretary for Instructional Support Services, Jean Goncharoff, at 748-0010, extension 182, by August 23 to reserve your place for the presentation and luncheon on the 29th. I hope you can make it; I am looking forward to meeting you.
>
> Sincerely,
>
> Yvonne Lux, Director
> Instructional Support Services

On August 13, Federation President James Dyer sent a letter indicating that the Federation thought the seminar was negotiable and failure to negotiate would be considered an unfair labor practice.

Negotiations on the new teacher seminar and other matters took place on August 26 and 28, and the positions of the parties were as follows. The District proposed:

> Commencing August 29, 1985, any newly employed member of the bargaining unit who attends the District's program for new teachers shall be compensated at the rate of $50 per day. For the 1985-86 school year attendance shall be voluntary. For each school year thereafter attendance shall be mandatory.

The Federation proposed:

> On August 29, 1985, any member of the bargaining unit participating in the district-sponsored research seminar presentation "Critical Attributes of Effective Instruction" from 8:30 a.m. to 12:30 p.m. shall be paid one-half their [sic] daily rate. It is understood that such participation is voluntary and only for the 1985-86 school year.

After negotiations, the Federation finally agreed to the $50 stipend, but not to the inclusion of the word "Commencing" since this implied the District's continuing right to pay only $50 in the future. The final District position was stated as follows:

> Commencing August 29, 1985, any newly employed member of the bargaining unit who attends a District preschool program for new teachers, outside contractual service, shall be compensated at the rate of $50 per day.

The final Federation proposal read:

> On August 29, 1985, any newly employed member of the bargaining unit participating in the District-sponsored research seminar presentation, "Critical Attributes of Effective Instructions," from 8:30 a.m. to 12:30 p.m., shall be paid $50.00.

No agreement was reached and the half-day seminar was held on August 29. Attendance was voluntary, and lunch was provided to the 22 teachers who attended. No other compensation was given.

Subsequently, the Federation filed an unfair practice charge alleging that the District, after breaking off

negotiations on a matter within the scope of bargaining, unilaterally refused to compensate teachers for their attendance at the seminar.

ALJ FINDINGS AND CONCLUSIONS

After determining that attendance at the seminar was indeed voluntary, the ALJ made three key findings. First, he concluded that the August 29 seminar was an "in-service" training program and, therefore, was within the scope of representation under Healdsburg Union High School District et al. (1984) PERB Decision No. 375. Second, he found compensation for in-service training programs to be negotiable; and, third, that the voluntary nature of the training in this case did not alter the negotiability thereof. In the latter finding, he relied on two cases decided under the Meyers-Milias-Brown Act (American Federation of State, County and Municipal Employees v. City of Santa Clara (1984) 160 Cal.App.3d 1006; Dublin Professional Fire Fighters Local 1985 v. Valley Community Services District (1975) 45 Cal.App.3d 116). The ALJ then concluded that the District's decision to hold the August 29 seminar was consistent with its past practice in that a like event had been held two previous years, in August 1983 and August 1984. In each instance, the District unilaterally determined the timing, content and speakers for the program and the Federation made no effort to negotiate.

The ALJ further determined that the Federation's contention that there was an inadequate opportunity to negotiate on the

two days prior to the seminar was not supported by the record. No effort was made to postpone the seminar and the Federation had three weeks notice that it would be held on August 29. In the parties' subsequent negotiations concerning the seminar, the only issue raised by the Federation was compensation.

Finally, the ALJ found that the District broke off negotiations by holding the seminar on the 29th, and giving no compensation other than a free lunch.

There was no dispute concerning the District's unilateral determination to provide teachers attending the seminar with a District-paid lunch, but no monetary compensation. The ALJ ruled that the District's past practice could be viewed as payment of a $50 stipend to teachers participating in a full-day program held on a day that was not part of the negotiated school year for certificated employees, while the District provided only a free meal as compensation to teachers for their attendance at a half-day program held on a day that was part of the negotiated school year.

The ALJ reasoned from the above that, since the August 29 training seminar for newly hired teachers was for a half-day, occurred before the start of the school year, and was voluntary, it did not fit the past practice. Therefore, the seminar had to be bargained. He further concluded that the District broke off negotiations without reaching impasse, and did not compensate teachers for the training other than by providing the lunch. The ALJ ordered the District to continue

negotiations and to pay the $50 stipend to each teacher who attended.

The District filed exceptions to: all findings that it refused to negotiate; the conclusion that the scope of bargaining includes compensation for a voluntary seminar during nonduty time; and the conclusion that the District departed from its past practice by unilaterally establishing the compensation for the seminar.

DISCUSSION

This appears to be a case of first impression insofar as the issue is presented of whether the scheduling of and compensation for a half-day, voluntary, professional seminar for new teachers held outside the calendared school year must be negotiated.

In the decision the ALJ assumes that all in-service training is negotiable and appears to assume, without specifically stating, that in-service training includes voluntary training held outside of duty hours. We believe the ALJ was wrong in this assumption and reverse for the following reasons.

Mandatory in-service training during regular work hours was held by PERB in Healdsburg Union High School District (1984) PERB Decision No. 375 to be negotiable. Therein this Board stated at page 83:

> Proposal 26.1 requires the District to provide in-service training for employees. Although not specifically enumerated, in-service training is logically and reasonably related to several enumerated subjects. Training that is necessary to

> insure employees' safety is negotiable since it relates to safety, an enumerated subject. Also, since training may have an impact on job performance of employees, it is related both to evaluation and grievance procedures and, therefore, potentially to wages as well.
>
> Training is of great concern to employees, since it may affect promotional opportunities and job safety. It is also of great significance to management, since training helps maintain a high level of employee performance, thereby affecting the quality of services which are delivered to the public. It is, therefore, an appropriate subject for the negotiation process.
>
> Finally, we can find no managerial prerogative which would be unreasonably interfered with if the District were required to negotiate over the subject of in-service training. Therefore, we find proposal 26.1 negotiable.

Member Harry Gluck, in his concurrence and dissent in Healdsburg, found this logic to be overly broad. He stated (page 96):

> I find this proposal to be not negotiable. Although it can be claimed that the training called for here bears some relationship to one or more enumerated items, I find that relationship too attenuated to be convincing. Training may result in better evaluations, better evaluations may result in less reason for discipline, less discipline may result in less loss of wages, and ad infinitum. This is not to say that a training proposal will always be not negotiable. A proposal to require corrective training following a poor evaluation or disciplinary action demonstrates the relationship Anaheim contemplates. Here, as it is written, CSEA simply seeks to compel negotiations on a proposal which would determine the content of the employees' working-hour assignments, a prerogative I view as the employer's.

With reasoning similar to that of Member Gluck, the Wisconsin Supreme Court in City of Beloit v. WERE (1976) 73 Wis.2nd 43 [242 N.W.2nd 231, 92 LRRM 3318], affirmed the Wisconsin Employment Relations Commission's interpretation of the statutory language that defined the scope of bargaining to be those subjects where "the function affects wages, hours and working conditions." The Wisconsin Employment Relations Commission found that in-service training, except to the extent that it impacted on calendaring the school year, was not negotiable.

Even prior to its Healdsburg decision, this Board recognized that not all aspects of in-service training are negotiable. In San Jose Community College District (1982) PERB Decision No. 240, the Board found that the District was not required to bargain its decision to substitute 15 teaching days for 15 in-service training days. The decision states at page 10:

> Consistent with our past decisions, we find that the Association failed to prove that the substitution of teaching days for in service days affected a matter with the scope of representation. There is no evidence in the record to indicate that the District's actions required certificated personnel to work more days, nor did it lengthen the working day, increase the number of working days per year, or affect the distribution of workdays. Moreover, the evidence fails to indicate that the discontinuation of the program increased preparation time or caused employees to use any duty-free or off-duty time to meet professional development requirements. Palos Verdes, supra; San Mateo City School

> District (5/20/80) PERB Decision No. 129; Sutter Union High School District (10/7/81) PERB Decision No. 175. Certificated personnel were previously paid to work 15 days per year at in service training; the calendar that was adopted requires teaching during those days instead. Therefore, there was no evidence presented to prove that the District's actions impacted a subject within the scope of representation.

Consistent with the Board's reasoning in San Jose Community College District, supra, we believe to be inaccurate the ALJ's conclusion that all in-service training is negotiable. On the contrary, such is negotiable only where there is a direct impact on wages and hours.

The ALJ also assumed that in-service training includes voluntary training not held during the calendared year or during working hours. This position is clear from his conclusion that the voluntary nature of the in-service training does not preclude a finding that such was negotiable. He cited two cases arising under the Meyers-Milias-Brown Act (MMBA) both of which concerned voluntary overtime work by employees where the employer changed the nature of compensation to be paid for overtime work. We do not believe these cases are appropriate precedents inasmuch as they involved overtime work rather than professional training. Furthermore, the meet and confer standard pursuant to the MMBA is broader than the scope of representation standard under EERA.

We find in-service training to be an inherently ambiguous concept. It may be construed to include only training

conducted during the calendared year, and during or just following the duty day. On the other hand, it may be given the more expansive meaning of all training offered or conducted by the school employer, as was assumed by the ALJ in this case. We find no definition or precedent on point. Since "training" is not an enumerated subject under section 3543.2, it is an appropriate subject for PERB to examine on a case by case basis. This approach is acceptable to the California Supreme Court, which stated in Banning Teachers Association v. PERB (1988) 44 Cal.3d 799, 805:

> A per se rule, adopted to spare the reviewing court the task of examining claims on a case by case basis deprives PERB of its statutory function to investigate, determine, and take action on unfair practice changes to effectuate the policy of the EERA and violates the established principal of judicial review that an administrative agency's interpretation is entitled to deference.

The record in this case illustrates three kinds of professional growth activities in the District. One is mandatory in the sense that a teacher who chose not to participate would lose a day's pay. The second type of professional growth activity, in contrast, may be considered voluntary in that the decision of whether or not to attend was left entirely up to each individual teacher. If the activity were held on an instruction day and the teacher opted to attend, his or her class would be covered by a substitute. Whether the teacher chose to participate in the seminar, or otherwise to

teach class, he or she would receive the normal contract wages. The third type of activity was purely voluntary and given on nonduty time, either outside the calendar year or on a Saturday or other nonduty day.

This case involves a professional growth activity that is purely voluntary. In San Mateo City School District (1983) 33 Cal.3d 850, the California Supreme Court approved this Board's three pronged test for determining negotiability under section 3543.2 enunciated in Anaheim Union High School District (1981) PERB Decision No. 177. The test is as follows:

> CA] subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

The essential inquiry under the first prong of the Anaheim test is whether voluntary training, outside of duty time and for which no compensation is paid, logically and reasonably relates to hours, wages or an enumerated term and condition of employment. There is no evidence in the record to indicate that such training impacted on or affected hours in any way since it was not mandatory, did not extend the workday or

require attendance on a nonduty day. Nor did it require preparation time or that employees use duty-free time to meet professional development requirements. Not even a tenuous connection can be made with any of the enumerated items in relation to the subject of the instant seminar. Thus, the training at issue fails in any way to be negotiable under the first part of the Anaheim test.

Even if such a connection could be found, we do not believe that the in-service training at issue survives application of the remaining parts of the Anaheim test. The second ground requires that the subject be of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict. Inasmuch as attendance was purely voluntary and took place outside duty hours, there is little or no likelihood of conflict regarding the scheduling of, or even the decision to provide such training.

The third prong of the Anaheim test necessitates an inquiry into whether requiring negotiations for voluntary training during nonduty time would "significantly abridge [management's] freedom to exercise those managerial prerogatives . . . essential to the achievement of the District's mission." The two subjects at issue herein entail the "scheduling" of voluntary training during nonduty hours and the "compensation"

therefore. The mission of the District is to educate students. To accomplish this mission the District has a continuing interest in fostering the professional development of its teachers. If training can be prevented or delayed by the parties' failure to agree to its related scheduling or compensation, thereby requiring the exhaustion of impasse and factfinding, essential managerial prerogatives would be abridged. No District would attempt to provide the training at issue herein if extensive bargaining were required in order to offer it to interested teachers.

The failure to survive any one of the three essential elements of the Anaheim test dictates that the subject matter at issue be declared nonnegotiable. Hence, the scheduling of and compensation for the new-teacher, voluntary half-day seminar were beyond scope.

One final issue is whether the District's willingness to negotiate over the holding of the seminar may be a waiver of the position that such training is nonnegotiable. At page 847 of Morris, The Developing Labor Law (2d ed. 1983), the author states:

> Either party may bargain about a permissive topic as if it were a mandatory subject without losing the rights, at any time before agreement is reached, to take a firm position that the matter shall not be included in a contract between the parties.

Morris then cites NLRB v. Davison (4th Cir. 1963) 318 Fed.2d 550 [53 LRRM 2462] which states at page 558:

> A determination that a subject which is non-mandatory at the outset may become mandatory merely because a party had exercised this freedom [to bargain or not to bargain] by not rejecting the proposal at once, or sufficiently early, might unduly discourage free bargaining on non-mandatory matter. Parties might feel compelled to reject non-mandatory proposals out of hand to avoid risking waiver of the right to reject.

We agree with the foregoing rationale. Consequently, the District did not waive its right to break off negotiations on August 28, and hold the seminar on August 29, because the subject matter was nonmandatory and outside the scope of bargaining.

ORDER

The unfair practice charges in Case No. LA-CE-2331 are hereby DISMISSED.