STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BEVERLY HILLS EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-2725
v.	)	PERB Decision No. 789
BEVERLY HILLS UNIFIED SCHOOL DISTRICT,	)	January 19, 1990
Respondent.	)	

Appearances: California Teachers Association by Rosalind D. Wolf, Attorney, for Beverly Hills Education Association, CTA/NEA; Liebert, Cassidy and Frierson by Sandra Owens Dennison, Attorney, for Beverly Hills Unified School District.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Beverly Hills Unified School District (District) to the attached proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5, subdivisions (b) and (c), of the Educational Employment Relations Act (EERA)[1]

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to:
>
> . . . . . .
>
> (b) Deny to employee organizations rights

by unilaterally contracting out bargaining unit work involving a peer counseling program entitled the Opportunity Program (OP). The District excepts to the finding of a violation and, assuming a violation did occur, to the appropriateness of awarding back pay and reinstatement to the teacher assigned to the OP prior to the contracting out.

We have reviewed the entire record in this case, including the proposed decision, the District's exceptions and the response thereto, and, finding the ALJ's findings of fact free from prejudicial error, adopt them as our own. Consistent with the following discussion, we affirm the ALJ's conclusions of law with regard to the unlawful contracting out of bargaining unit work. However, finding reinstatement and back pay to be inappropriate in these circumstances, we modify the proposed remedy.

FACTUAL SUMMARY

The following is a synopsis of the pertinent facts in this case.

The OP is a peer counseling program in which students at Beverly Hills High School receive course credit for providing counseling and tutoring services to fellow students. The Community Internship Program (CIP) offers course credit to students who serve as interns in various fields. The CIP is part

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guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

of a larger program called the Applied Education Program. OP was once part of CIP, but had been operated as an independent program for many years prior to the events at issue.

The Maple Center is a non-profit community mental health organization that has traditionally provided various mental health services to the District, including counseling students with substance abuse problems, operating the teen brother/teen sister program, and assisting with the OP. The District was unable to locate any written contract for the services provided by the Maple Center, though the Maple Center is paid annually from the District's budget, as a line item expense. Since the 1985-86 school year, the District has paid the Maple Center a flat rate of $27,500 a year.

Prior to the 1987-88 school year, the District had assigned one full-time certificated employee to operate the OP on a day-to-day basis, involving at least six periods per day. Judith Warren held that position from 1976 to 1986, when she became a guidance counselor. She was replaced for the 1986-87 year by Susan Kelleher, a temporary employee with an emergency teaching credential.

Warren testified that her job duties had included: recruiting, interviewing, selecting and training student counselors; taking attendance; reviewing cases, records and quarterly reports; issuing grades; advertising the program to students who might wish to receive counseling; interviewing students seeking counseling and matching them with student

counselors; discussing with teachers, guidance counselors and others the progress of students in the program; and writing course evaluations. She also supervised interns (college or post-graduate students), some of whom were serving their internships with the District, and some of whom were serving their internships with the Maple Center.

Maple Center personnel were responsible for training and assisting the student counselors in the counseling aspects of the program. Thus, Maple Center employees conducted training sessions, reviewed notes from counseling sessions and provided critiques of the students' counseling techniques. They would also determine whether students who sought counseling should instead be referred to a professional counselor.

When Kelleher replaced Warren for the 1986-87 school year, she also worked full-time as OP director. However, due to her relative lack of training and experience, Kelleher did less training and supervision than Warren had done. Maple Center personnel, accordingly, took on more supervision and training duties, though the record does not reflect the magnitude of the accretion of duties.

Early in the 1986-87 academic year, a citizens' advisory group was formed to study ways in which the District could cut costs in order to balance its budget. Within the report issued by the group was a recommendation that the OP be eliminated. On March 10, 1987, the District's governing board adopted a resolution containing many of the group's recommendations,

including that involving the OP. The resolution "reduces and/or discontinues . . . particular kinds of services," which were then listed. The list included "High School Opportunity Program--1.0 FTE [full-time equivalent]." Beverly Hills Education Association, CTA/NEA (Association) representative Kenneth Eaves was present at the public meeting on March 10, and the ALJ credited his testimony that no mention was made at the meeting of continuing the OP. Shortly after the adoption of the resolution, Kelleher received a notice of nonreappointment. It is undisputed that the reason for the elimination of the 1.0 OP FTE was the budget crisis.

In March of 1987, while the parties were meeting to renegotiate their 1986-89 agreement, they discussed the layoffs adopted by the governing board on March 10. The District offered to negotiate the impact of the layoffs, but the Association never made any specific proposals in response to the offer. The ALJ credited Eaves' testimony that, in those discussions, no mention was made of continuing the OP and that he believed that it had been discontinued. Nor did the Association grieve the layoffs or notices of nonreappointment, though it did represent several employees who unsuccessfully challenged their terminations pursuant to Education Code section 44949.

Sol Levine, the principal of Beverly Hills High School, testified that, after the March 10 resolution was adopted, he investigated ways in which the District could continue to operate the OP. While he discussed continuation of the program with the

governing board, the board took no formal action. Ultimately, Levine decided to place the OP under the umbrella of the Applied Education Program, under the supervision of its director, Rhoda Sharp, and have the Maple Center take over the day-to-day operation of the OP.

While some of the former duties of the OP teacher were reassigned to Sharp, a certificated unit member, it is clear that the bulk of those duties were assumed by Maple Center staff. Sharp assigns pass/fail grades to the student interns, on the recommendations of the Maple Center staff, performs some liaison duties between the students seeking counseling and the District's staff/and meets with the student counselors about four times, per semester to discuss their progress. Maple Center staff members now perform all of the other duties formerly assigned to the OP teacher. Even though counseling is now offered only four periods a day instead of six, the services provided have essentially remained the same, as the number of student counselors and the number of students receiving counseling have remained fairly constant.

The ALJ credited Eaves' testimony that the first time he learned that OP would continue to be offered was at the beginning of the 1987-88 school year. Eaves questioned the District's superintendent about the matter, who responded on October 15, 1987, by forwarding a memorandum (dated September 22) from Levine which outlined the changes in the program. By letter dated November 17, Association consultant Jacques Bernier protested the

removal of bargaining unit work, demanded that a unit member be assigned to the program, and demanded that the District negotiate any intended removal of bargaining unit work from the OP. The District did not respond to Bernier's letter. On March 9, 1988, the Association filed its unfair practice charge.

DISCUSSION

The District's exceptions to the finding of a violation contain three main assertions: (1) the Association waived its right to negotiate by failing to respond to the District's invitation to bargain the effects of the layoffs and nonreappointments; (2) the Association waived its right to bargain over subcontracting by agreeing to the management rights clause in Article 17 of the parties' last collective bargaining agreement, and the ALJ erred by refusing to consider this defense; and (3) the contracting out of OP work was consistent with past practice. Relying primarily on the lawfulness of Kelleher's nonreappointment and her temporary (and emergency credentialed) status, the District also asserts that a make whole remedy is inappropriate.

Waiver By Inaction

The District claims the Association waived its right to bargain because of its failure to make any proposals dealing with the effects of the layoffs and nonreappointments, the contracting out of the former OP teacher's duties being one possible ramification of the nonnegotiable decision to eliminate the 1.0 FTE assigned to the OP. The District places great weight on its

assertion that the evidence does not show that the District ever told the Association that the OP was being discontinued. It asserts that the ALJ's crediting of Association witnesses' testimony that their impression was that OP was to be discontinued is insufficient evidence on which to conclude that the Association was not put on notice of subcontracting.

We believe that the ALJ properly rejected this defense. Our reading of the record fully supports the ALJ's finding that the OP was, in fact, discontinued, only to be revived a few months later when Levine secured the Maple Center's agreement to assume additional duties. Levine testified that, after the governing board eliminated the OP FTE, he sought a way in which the OP could be continued. By late May or early June, when he secured the Maple Center's agreement and the commitment from Sharp to provide overall supervision within the ambit of the Applied Education Program, Levine had succeeded in devising a way to continue the OP.

Our review of the record has revealed no basis on which to disturb the ALJ's credibility determinations concerning the Association's ignorance of the revival of the OP until the beginning of the next school year. The Board normally gives deference to the credibility determinations of ALJs, in recognition that, by virtue of witnessing the live testimony, they are in a much better position to accurately make such determinations. (Santa Clara Unified School District (1979) PERB Decision No. 104, pp. 12-13; Los Angeles Unified School District

(1988) PERB Decision No. 659, pp. 8-9.) Moreover, the documentary evidence gives the impression that the OP was to be eliminated. The March 10, 1987 board resolution states that the District "hereby reduces and/or discontinues the following particular kinds of services . . . ." On the list of services that follows is a reference to "High School Opportunity Program." A March 13, 1987 memo from the superintendent to all staff members references an attached list which details the budget reduction recommendations adopted by the board on March 10. Item number 16 on that list states: "Eliminate high school opportunity program (1.0 FTE)."

Therefore, we find that the ALJ was correct in concluding that the elimination of the OP and the later subcontracting of the former OP teacher's duties represent two distinct decisions, and that the notice the Association received in the spring of 1987 referred only to the former decision and did not logically include the yet to be revealed decision to contract out. As the ALJ stated, the two decisions are conceptually separate and have very different bargaining consequences. While an employer is obligated to bargain only the effects of a decision to lay off employees, subcontracting may be subject to decision bargaining. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223; State of California (Department of Personnel Administration) (1987) PERB Decision No. 648-S.) In sum, we agree with the ALJ that the Association could not have waived its

right to bargain over the subcontracting when it only had notice of the District's apparent decision to eliminate the OP.[2]

Contract Waiver

The ALJ refused to consider the District's contract waiver defense because it was not raised until late in the hearing. Before discussing the District's exceptions to that determination, it is necessary to explain the circumstances in which the issue arose.

Near the beginning of the hearing, the ALJ asked the parties about the status and importance of an unsigned contract that was on file with PERB, and stated that he thought the contract could be highly relevant. He asked if the parties could stipulate as to the status and effective dates of the unsigned contract. The Association's counsel claimed that the contract was not relevant to the issues in dispute. The District's counsel essentially echoed that sentiment, stating:

> Since we're not talking about the part of the charge that will be relevant to the MOU, I would agree that there is one that exists, but that we're not going to be pointing at that. If anything that we point to would be

[2]In support of his conclusion that the District's waiver by inaction defense was without merit, the ALJ cited Oakland Unified School District (1983) PERB Decision No. 367 and Solano County Community College District (1982) PERB Decision No. 219. While we agree with the ALJ's conclusion regarding this defense, we fail to see the relevance of the cases cited. However, his conclusion is consistent with Board precedent concerning waiver by inaction. (See, e.g., Placentia Unified School District (1986) PERB Decision No. 595; Los Angeles Community College District (1982) PERB Decision No. 252.)

the one that was in existence in '86-'87 when notices of layoff went out.

(Tr. Vol. I, p. 11.)

The District's counsel did not mention the contract waiver issue in his opening statement.

At the close of its case-in-chief, during the testimony of its last witness, the District introduced the current collective bargaining agreement,[3] with specific reference to Article 17, "District Rights." After being asked by the ALJ, the District stated that it was raising Article 17 as an affirmative defense. The ALJ replied that it was quite late to be raising such a defense, especially since there was no indication at any other time that the District would rely on such a defense. Bernier, the Association representative who knew the relevant bargaining history, was in an automobile accident and the Association was unable to contact him regarding the newly raised defense. The ALJ reserved a ruling on allowing the contract waiver defense and left the record open to allow the Association sufficient time to decide whether to provide evidence concerning Article 17. The record was closed after the Association failed to take advantage of that opportunity.

[3]The last executed agreement between the parties was effective from July 1, 1986 through June 30, 1989. In 1987, the parties renegotiated that agreement, but never executed the new agreement due to a dispute over an article which is irrelevant to the issues in this case. The unexecuted agreement, by its terms, was effective from some unspecified date through June 30, 1989. This agreement has apparently been implemented, with the exception of the disputed article. In any event, the provision at issue here, the management rights clause, was unchanged from the previous contract.

In his proposed decision, the ALJ concluded that the contract waiver argument should not be considered because of prejudice to the Association. The ALJ found that the Association was seriously misled by the District's comments at the outset of the hearing. The ALJ noted that, when the District introduced the contract into evidence, he had to elicit the purpose thereof. Even though the ALJ mentioned that no amendment to the answer had been proposed, the District did not move to amend its answer. The ALJ further noted that the contract waiver defense was unrelated to any evidence introduced in the Association's case-in-chief. Even though he afforded the Association an opportunity to present rebuttal evidence, the ALJ found that the untimely raising of the defense may well have been prejudicial since a potentially key witness was unable to attend the hearing because of an injury. The ALJ observed that parties are entitled to reasonable notice of the other side's claims and defenses, and to a litigation process founded on principles of fair play. The ALJ concluded that fairness would not be served by entertaining the contract waiver defense.

In challenging the ALJ's refusal to consider its contract waiver defense, the District asserts that it did nothing to mislead the Association and, in any event, the ALJ gave the Association sufficient time to present rebuttal evidence. The District also asserts that its denial in the answer of the allegation that it failed to provide notice and an opportunity to

bargain was sufficient to put the Association on notice that the District might present a contract waiver defense.

For the reasons stated at pages 19-22 of the proposed decision, we agree with the ALJ that he had the discretion whether or not to consider the District's untimely affirmative defense. As we affirm his finding that the Association was prejudiced by the District's untimely raising of the contract waiver defense, we conclude that, under the circumstances presented here, the ALJ correctly exercised that discretion.

In addition, we reject the argument that the District's answer should have put the Association on notice of the contract waiver defense. Simply denying that a unilateral action took place without notice and an opportunity to bargain may provide a clue that the respondent will assert a waiver by inaction defense, but it would not put the charging party on notice of all types of waiver defenses. The allegation and, logically, the District's general denial, pertain only to the circumstances surrounding the unilateral action itself.

We also agree with the ALJ that Los Angeles Unified School District, supra, PERB Decision No. 659 is instructive. While that case dealt not with an affirmative defense, but with an untimely motion to amend the complaint, the principles involved are analogous. In Los Angeles, as in the instant case, the ALJ directly asked the parties if a particular issue would be in dispute and received assurances that it would not. Nevertheless, late in the hearing, after the respondent, relying on the earlier

assurance, had already presented its case, the charging party moved to amend the complaint. In Los Angeles, the Board, recognizing the possibility of prejudice to the opposing party, erred on the side of caution and affirmed the denial of the untimely motion. We believe a similar approach is warranted here. Moreover, as the ALJ noted, PERB Regulation 32644.[4] which requires that a statement of affirmative defenses be included in the answer to a complaint, serves to assure a fair litigation process, particularly in light of the fact that the Board's unfair practice procedures does not provide for a formal discovery process.[5]

Past Practice

The District claims that the contracting out of additional work to the Maple Center was consistent with established past practice. First, the District points to the OP itself, which has always involved a mix of unit and nonunit work. The District also points to the Regional Occupational Program (ROP), parts of which were formerly taught by District teachers, but are now taught by county employees.

[4]PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

[5]Since we affirm the ALJ's refusal to consider the District's contract waiver defense, it is unnecessary to discuss the merits of that defense, and we decline to do so.

The District argues that, given its past practice, the contracting out is consistent with the Westinghouse[6] standards discussed by the Board in Oakland Unified School District (1983) PERB Decision No. 367. Pursuant to those standards, an employer may lawfully subcontract where:

> (1) the recurrent subcontracting is motivated solely by economic considerations; (2) it comports with the company's traditional methods of conducting its business operations; (3) it does not vary significantly from prior established practices; (4) it does not have a demonstrable adverse impact on employees in the unit; and (5) the union had the opportunity to bargain about changes in existing subcontracting practices at general negotiating meetings.

(Westinghouse Electric Corp., supra. 58 LRRM at 1259.) Lastly, the District urges that the Board extend the transfer of work analysis contained in Eureka City School District (1985) PERB Decision No. 481 to contracting out cases. In the District's view, the instant case merely involves the transfer of previously overlapping duties from unit to nonunit employees and should, therefore, be lawful.

While the Board in Oakland did discuss the Westinghouse standards, the Board disavowed any reliance on later cases applying those standards because they are hopelessly inconsistent. In our view, the key to the Oakland decision was the Board's finding that a significant increase in subcontracting constituted an unlawful "change in quantity and kind," even where

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[6]Westinghouse Electric Corp. (Mansfield Plant) (1965) 150 NLRB 1574 [58 LRRM 1257].

the same type of duties had been contracted out in the past. It is this standard that is appropriately applied in this case and, to the extent that the ALJ relied on Oakland, we agree with his analysis.

While it is true that the Maple Center had previously provided a significant number of services to the OP, never before did the Maple Center have the responsibility for running the day-to-day operation of the program. Previously, the Maple Center simply aided in training the students in counseling techniques. As a result of the contracting out at issue, the Maple Center staff is also responsible for the tutoring aspects of the program, along with a myriad of other duties formerly performed by the OP teacher. The unit work that was transferred to another unit member (Sharp) represents only a small fraction of all the duties involved in running the program. The bulk of the duties, including all of the day-to-day operations of the program, are now performed by Maple Center staff. When the number of duties contracted out is examined in isolation, it may not seem very large. However, within the parameters of the OP, the duties contracted out are of substantial quantity. Further, within the parameters of the OP, the type of duties contracted out changed dramatically. In sum, we affirm the ALJ's finding that a unilateral change in the "quantity and kind" of subcontracting occurred.[7]

[7]The District correctly points out in its exceptions that the ALJ erred by concluding that there was no evidence that the ROP was once taught, at least in part, by unit members and then

As the District acknowledges, contracting out and the transfer of unit work are analytically distinct and have been treated differently by the Board.[8] In our view, the Oakland analysis strikes the proper balance because it provides the employer some flexibility where similar subcontracting has occurred previously, while outlawing more severe changes that would have a significant effect on the unit. Consequently, we decline to extend the Eureka analysis to subcontracting.

Remedy

The ALJ's proposed remedy requires the District to cease and desist from unilateral subcontracting and orders that Kelleher, or another unit employee, if she declines, be offered the position of OP teacher beginning with the first academic year after the order becomes final. This is contingent upon the parties not having since negotiated over this decision to contract out. The proposed order also requires that Kelleher be made whole for any monetary losses suffered as a result of the unlawful subcontracting. The ALJ reasoned that she was entitled to such relief because there was no evidence that she would not

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was taken over by the county. However, the error is nonprejudicial, as we agree with the ALJ that, in these circumstances, such evidence as to a different educational program is not sufficient to demonstrate a general policy allowing the District to contract out unit work.

[8]While "contracting out" does involve a transfer of unit work in the general sense, the term refers to a transfer of unit work to those not in the employ of the employer in question. In contrast, "transfer of work" is a term of art referring to the transfer of unit work to nonunit employees of the same employer.

otherwise have been offered an appointment for the 1987-88 and 1988-89 academic years.

The District insists that, if there was a violation, reinstatement and back pay are inappropriate in this case. The District relies primarily on San Diego Community College District (1988) PERB Decision No. 662 (appeal pending, Civ. No. D009278), in which the Board declined to order reinstatement or back pay where the illegal contracting out had been preceded by an independent and lawful decision to lay off. If such relief is ordered, the District further insists that Kelleher should not be the recipient since she was hired as OP teacher on an emergency credential and there is no evidence that she would have been rehired or would have been eligible for the position. The District also objects to the proposed order requiring that Kelleher or another unit employee be offered a full-time appointment when the program had been reduced to only four periods.

We believe that the District's arguments with regard to San Diego have merit. As in San Diego, in the present case, there was a lawful decision to eliminate part of the educational program and to lay off (or not reappoint) the affected teachers. The later decision to revive the OP by unilaterally contracting out most of the former OP teacher's duties is much like the contracting out of certain foreign language courses in San Diego that occurred after an earlier decision to stop offering those courses. In San Diego, the Board declined to order reinstatement

or back pay because it was not possible to speculate that the employer would have again offered the language courses itself if it could not have contracted out the work. This was due to the separate nature of the decision to stop offering the courses and the later decision to contract out the work.

Likewise, in the instant case, the District had the right to discontinue the OP and that decision was not challenged by the Association. The decision to have the Maple Center take over the day-to-day operation of the OP in order to revive the program was a separate decision. The District's financial straits, and the fact that the Maple Center took on the extra duties without additional compensation, support the finding that the two decisions were independent. As in San Diego, it would unduly intrude upon the District's managerial prerogatives if the Board ordered reinstatement where the status quo ante would have been the elimination of the unit work due to the discontinuance of an educational program. The charging party is made whole by issuance of a bargaining order, which puts it in the same position it would have been absent the unlawful contracting out, i.e., in a position to offer alternatives to contracting out that might result in the revival of unit work lost due to the nonnegotiable decision to eliminate part of the educational program. In sum, given the sequence of events, even if the District had not contracted out the OP duties, there is no

evidence that Kelleher or another unit member would have been hired to perform those duties. Consequently, on the facts of this case, we find it inappropriate to order back pay and reinstatement.

The ALJ concluded that, since the District had a potential contract waiver defense that was waived in this instance, the remedy should be restricted to this particular subcontracting decision. As we affirm the ALJ's decision not to consider the contract waiver defense in this proceeding, and in light of the fact that the Association did not except to the proposed remedy, we agree that the remedy should be restricted to the decision to subcontract the work of the former OP teacher. In the absence of the make whole remedy which we have found to be inappropriate, we find it necessary to modify the language of the proposed order to better comport with our holding in this case and to minimize the potential for compliance disputes.

Generally, in order to make the bargaining order meaningful, it is necessary to restore the status quo ante, thereby approximating the positions of the parties prior to the unlawful action. (Rio Hondo Community College District (1983) PERB Decision No. 292.) However, the Board has declined to order an immediate return to the status quo where there is the potential for disruption from requiring such action in the middle of the

[9]Given the fact that Kelleher was a temporary employee who was able to teach in the OP during the 1986-87 school year only after securing an emergency credential, even if the unit position in the OP had not been eliminated, there is no evidence that she would have been rehired for the succeeding year.

school year. (See, e.g., Morgan Hill Unified School District (1985) PERB Decision No. 554, at p. 20.) Here, requiring the District to immediately rescind its agreement with the Maple Center for the provision of the duties of the former OP teacher would undoubtedly cause great disruption in the OP, creating not only administrative problems, but also creating hardship for the student counselors and those using the counseling services. Therefore, absent prior agreement of the parties or exhaustion of impasse procedures, the District is ordered to rescind or not renew the agreement with the Maple Center for the provision of the duties at issue here. However, this requirement shall not be effective until the end of the present school year.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to section 3541.5(c) of the Educational Employment Relations Act, it is hereby ORDERED that the Beverly Hills Unified School District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Denying the Beverly Hills Education Association, CTA/NEA (Association) rights guaranteed to it by the EERA by unilaterally subcontracting the job duties of the Opportunity Program teacher.

2. Failing and refusing to meet and negotiate in good faith with the Association by unilaterally subcontracting the job duties of the Opportunity Program teacher.

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

1. Upon request, meet and negotiate with the Association prior to contracting out the job duties of the Opportunity Program teacher. If, however, subsequent to the District's unlawful actions, the parties have reached agreement or negotiated through completion of statutory impasse procedures concerning this matter, further negotiations shall not be required as a result of this Decision.

2. Absent prior agreement of the parties or negotiation through the completion of statutory impasse procedures, restore the status quo ante by rescinding or not renewing the agreement with the Maple Center to perform duties formerly assigned to the Opportunity Program teacher. However, such rescission or nonrenewal shall not take effect until the end of the present school year.

3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration pursuant to PERB Regulation 3,2410, post at all school sites and all other work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the District. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, defaced, altered or covered by any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with her instructions.

Chairperson Hesse and Member Shank joined in this Decision.

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. LA-CE-2725, Beverly Hills Education Association, CTA/NEA v. Beverly Hills Unified School District, in which all parties had the right to participate, it has been found that the Beverly Hills Unified School District (District) violated the Educational Employment Relations Act section 3543.5(b) and (c). The District violated this provision of the law by unilaterally subcontracting the job duties of the Opportunity Program teacher.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Denying the Beverly Hills Education Association, CTA/NEA (Association) rights guaranteed to it by the Educational Employment Relations Act by unilaterally subcontracting the job duties of the Opportunity Program teacher.

2. Failing and refusing to meet and negotiate in good faith with the Association by unilaterally subcontracting the job duties of the Opportunity Program teacher.

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

1. Upon request, meet and negotiate with the Association prior to contracting out the job duties of the Opportunity Program teacher. If, however, subsequent to the District's unlawful actions, the parties have reached agreement or negotiated through completion of statutory impasse procedures concerning this matter, further negotiations shall not be required as a result of this Decision.

2. Absent prior agreement of the parties or negotiation through the completion of statutory impasse procedures, restore the status quo ante by rescinding or not renewing the agreement with the Maple Center to perform duties formerly assigned to the Opportunity Program teacher. However,

such rescission or nonrenewal shall not take effect until the end of the present school year.

Dated: _____ BEVERLY HILLS 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.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

BEVERLY HILLS EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-2 72 5
v.	)	PROPOSED DECISION (3/20/89)
BEVERLY HILLS UNIFIED SCHOOL DISTRICT,	)	
Respondent.	)	

Appearances: Rosalind D. Wolf, Attorney for Beverly Hills Education Association, CTA/NEA; Liebert, Cassidy and Frierson by Daniel C. Cassidy and Sandra O. Dennison, Attorneys for Beverly Hills Unified School District.

Before Douglas Gallop, Administrative Law Judge.

PROCEDURAL HISTORY

On March 9, 1988, Beverly Hills Education Association, CTA/NEA (hereinafter Association) filed an unfair practice charge alleging that Beverly Hills Unified School District (hereinafter District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (hereinafter EERA),[1] by implementing three unilateral changes in wages, hours and working conditions. Prior to the issuance of a complaint in this matter, the Association withdrew one of the unilateral change allegations, and the General Counsel of the Public Employment Relations Board (hereinafter PERB) dismissed the section 3543.5(a) portions of the remaining allegations. On August 11,

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

1988, the PERB's General Counsel issued a complaint alleging that the District violated section 3543.5(b) and (c) by unilaterally contracting out the job duties of the District's Opportunity Program (hereinafter OP) teacher, and by unilaterally changing its prior practice of permitting teachers employed by the District to enroll their children in the same school at which they worked. The District subsequently filed an answer to the complaint, denying the commission of unfair practices and alleging affirmative defenses. On September 14, 1988, the parties attended an informal settlement conference; however, the matter was not resolved. A hearing was conducted before the undersigned on November 18 and December 14, 1988. At the hearing, the Association withdrew the unilateral change allegation concerning the school enrollment of children of the unit teachers, based on a settlement agreement between the parties. The subcontracting issue was litigated, and the parties filed post-hearing briefs, the matter being submitted for decision on March 13, 1989.

THE FACTS

The District is an employer within the meaning of section 3540.1(k), and operates various public schools, including Beverly Hills High School (hereinafter BHHS). The Association, an employee organization within the meaning of section 3540.1(d), is the exclusive collective bargaining representative of the District's certificated employees. The last executed agreement between the parties was effective by its terms for the period

July 1, 1986 through June 30, 1989. In 1987, the parties renegotiated that agreement, but never executed the new agreement due to a dispute over an article therein which is irrelevant to the issues presented in this case. The unexecuted agreement is effective from an unspecified date through June 30, 1989.

BHHS has offered OP for many years, since perhaps as early as 1971. OP is a peer counseling program offering academic tutoring and counseling for students with personal problems. Student counselors or aides, numbering 20-40 in more recent years, receive course credit for providing these services to fellow students. OP was initially part of the District's Applied Education Program, which includes the Community Internship Program (CIP). CIP offers course credit to students who serve as interns in fields of specialized interest to them which are often career oriented. For many years, however, OP had operated as a program independent from Applied Education.

The Maple Center is a non-profit community mental health facility which is not operated by the District. The Maple Center has traditionally provided mental health services to the District, including counseling students with substance abuse problems, the operation of the teen brother/teen sister program, and services connected with OP. While the District was unable to locate a contract for services between it and the Maple Center, the Maple Center has been paid for its services to the District out of the District's budget, as a yearly line item expense. The

District has paid the Maple Center a flat rate of $27,500.00 for each of the academic years since 1985-1986.

The District had historically assigned one certificated unit employee to operate OP on a day-to-day basis. This was a full-time position, requiring at least six periods per day in the OP classroom at BHHS. Judith Warren, who led OP from 1976 to 1986, testified that her job duties in that position included recruiting, interviewing, selecting and training student counselors; taking their attendance; reviewing their cases, records and quarterly reports; issuing their grades on a pass/fail basis; advertising the program to students who might wish to seek counseling services; interviewing students seeking counseling and matching them with student counselors; discussing the progress of students in the program with their teachers, guidance counselors and other BHHS staff; and writing course evaluations. OP also engaged the services of volunteer interns, some of whom were selected and supervised by Warren, while others were selected by and were serving internships for the Maple Center. The interns observed the program in operation and participated in some supervision of the student counselors. In addition, interns acted in Warren's place when she was taking her lunch period and at other times when she was absent from the classroom.

The Maple Center has always played an important role in the OP. In addition to supervising and evaluating interns they provided to the program, Maple Center personnel were responsible

for training and assisting the student counselors in the non-academic aspects of their peer work. This included conducting counseling training sessions for the counselors, reviewing their notes from counseling sessions and providing input into their case handling techniques. Also, in cases where students who sought counseling appeared to be in need of professional help, Maple Center staff evaluated those students and issued recommendations as to whether student counseling or professional help would be the more appropriate course of action.

Warren became a guidance counselor for the District, and was replaced by Susan Kelleher, a temporary employee on an emergency teaching credential, for the 1986-1987 academic year. Kelleher also worked full-time as the OP director. Apparently due to her inexperience in the position, Kelleher was less actively involved in training students to perform psychological counseling than Warren had been, although she, like Warren, attended counseling training sessions conducted by Maple Center personnel.

Early in the 1986-1987 academic year, the District's budget reserves were almost entirely depleted, and it was forced to consider ways to balance its budget. A citizens' advisory group was established, and conducted a study of ways to cut costs in the District. The group then issued a report containing cost-cutting recommendations, a copy of which was obtained by the Association. Included in the recommendations was, "Eliminate

high school opportunity program (1. FTE)[2] $35,000." On March 10, 1987, the District's governing board met in an open session, which was attended by representatives of the Association. At the meeting, the governing board adopted many of the committee's recommendations by virtue of a resolution. Thus, the resolution "reduces and/or discontinues" several "kinds of services," including the "High School Opportunity Program - 1.0 FTE." It is undisputed that OP had historically been assigned 1.0 FTE. Association representative Kenneth (Gene) Eaves credibly testified that no mention was made at the meeting of continuing OP, and that his impression was that it was being discontinued.

Several classified and certificated employees were sent layoff or notice of non-reappointment letters. Kelleher's notice of non-reappointment is dated March 2, 1987, prior to the March 10 resolution, but was apparently not sent to her until after the resolution, and the District agrees that the reason for her notice of non-reappointment was the budget crisis. In March, the parties were meeting to renegotiate the 1986 agreement. The parties discussed the layoffs during those negotiations, and the District offered to negotiate their impact. Eaves credibly testified that no mention was made of continuing OP during

[2]"FTE" stands for "full-time equivalent," and means the number of staff positions at a given salary used to operate a program. For the District, the FTE salary level is $35,000 per year.

negotiations, and that he believed the program had been discontinued.[3]

Sol Levine, Principal of BHHS, testified that after the March 10, 1987 resolution was passed, he investigated ways to continue operating OP, and discussed this with the governing board. He decided that if Maple Center personnel could assume some of the duties previously performed by the certificated staff member, the program could be continued as part of the Applied Education Program, under the supervision of Rhoda Sharp, the Director. Sharp is a certificated unit employee. The governing board took no formal action on his decision. With respect to the role that Maple Center personnel would now have in the OP, Levine testified:

> What I ultimately decided to do was to have the arrangement that we presently have, which was to have the Maple Center play a major part in running and operating the Opportunity Program.

Levine subsequently contacted Maple Center representatives and discussed the availability of their staff to provide additional services to the program. The Maple Center agreed to furnish a staff member and an intern to provide these services to the program, but informed Levine that they would only be

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[3]The Association did not grieve the layoffs or notices of non-reappointment. Instead, some of the employees, but not Kelleher, filed and unsuccessfully litigated challenges to their terminations from employment pursuant to Education Code section 44949. The Association represented the employees in this action. All of the employees, with the exception of one who obtained employment elsewhere, have since been reinstated by the District, including Kelleher, who is now employed in a classified position.

available four periods per day. The Maple Center did not request, and did not receive, any additional funds for providing these additional services. Levine and Sharp discussed placing OP under the Applied Education Program. Upon being informed of the role that Maple Center personnel would now play in the operation of OP, Sharp told Levine that she could easily assume the responsibilities of overall supervision for the program in addition to her other duties.

Eaves credibly testified that the first time that he learned that OP would be offered under this staffing arrangement was at the beginning of the 1987-1988 school year, when Betty Nichols, a certificated employee and an Association representative, so informed him. Eaves questioned Bob French, the District's superintendent, concerning the program's status, and on October 15, 1987, French responded by attaching a memorandum from Levine dated September 22, which outlined the changes in the program. In a letter to French dated November 17, Jacques Bernier, a consultant to the Association, protested, inter alia, the removal of the OP teacher position from the bargaining unit, and demanded that a unit employee be assigned to it. Bernier further demanded that the District negotiate any intended displacement of OP bargaining unit work. The District never responded to the letter, and continues to operate OP with Maple Center personnel performing virtually all day-to-day functions.

While Sharp has overall responsibility for OP, she does not participate in its day-to-day operation. That function was

performed by Maple Center personnel and an intern in 1987-1988, and there is no intern assigned to the program during the current academic year. Maple Center personnel and/or interns have continued to perform the functions they did in the past, and have additionally assumed most of the responsibilities previously performed by the OP teacher. Sharp now assigns pass/fail grades to student interns in the program, but this is primarily based on the recommendations made by the Maple Center staff member, who bases those recommendations primarily on attendance and participation by the student interns. Since the Maple Center staff is less familiar with the District's staff than were the OP teachers, Sharp has assumed some of the liaison duties between the students seeking counseling and the District's staff. Sharp meets with student counselors about four times per semester to discuss their progress.

Although OP operates for two or three fewer periods than it had in the past, it appears to be providing the same type and level of services as it did when an OP teacher was assigned to it. Thus, Levine testified that other than the changes in program leadership, the services provided are unchanged. In 1987-1988, between 20 and 25 student interns participated in OP, and there was apparently no significant reduction in the number of students seeking counseling. In addition to their services to OP, Maple Center personnel now operate the teen brother/teen sister program out of the same classroom, in part during school

hours. In the past, the teen brother/teen sister program operated outside school hours.

The record shows that the District offers students the opportunity to enroll in the Regional Occupational Program (hereinafter ROP). ROP offers career-oriented courses in such fields as computer accounting and technology, community counseling, interior design, legal assistant work, office skills and television production. These courses are taught by ROP staff members, who are employed by Los Angeles County. Students obtain course credit for ROP courses, many of which are conducted during normal school hours.

THE ISSUES

1. Did the District unilaterally contract out bargaining unit work?

2. If so, do any of the District's affirmative defenses preclude finding a violation?

ANALYSIS AND CONCLUSIONS OF LAW

The Unilateral Change:

The complaint alleges that the District "contracted out" the job duties of the OP teacher. The PERB, following the United States Supreme Court's ruling in First National Maintenance Corporation v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705] and the National Labor Relations Board's (hereinafter NLRB) decision in Otis Elevator Company, a wholly owned subsidiary of United Technologies (1984) 269 NLRB 891 [116 LRRM 1075], has held that subcontracting decisions which are based, at least in part, on

labor costs are negotiable, provided that the decision is otherwise amenable to collective bargaining. State of California (Department of Personnel Administration) (1987) PERB Decision No. 648-S. In Arcohe Union School District (1983) PERB Decision No. 360, the PERB found that fiscal management, in itself, is not a management prerogative removing a subcontracting decision from the scope of bargaining, but that a decision to reduce the level of services provided by a school district is a matter within the district's prerogative.

In Fremont Union High School District (1987) PERB Decision No. 651, the PERB adopted United States Supreme Court Justice Stewart's definition of the term, "subcontracting" from his concurring opinion in Fibreboard Paper Products Corporation v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609], which defined subcontracting as the:

> . . . substitution of one group of workers for another to perform the same task in the same [location] under the ultimate control of the same employer.

In Fremont, the PERB concluded that a lease agreement for the operation of a summer school program did not amount to a transfer or subcontract of unit work because the district retained no control over the operation of the summer school, and could not be said to have been offering that service.

The PERB also examines the nature and extent of a district's subcontract or transfer of unit work, and its past practice, in order to determine whether the conduct is unlawful. In Oakland

Unified School District (1983) PERB Decision No. 367, the PERB held unlawful the district's unilateral subcontract of secretarial and clerical services, even though the association had acquiesced to some subcontracting of that work in the past, on the basis that the level of work being subcontracted had dramatically increased. In contrast, in California State University, San Diego (1989) PERB Decision No. 718-H, the PERB found that no unlawful transfer of unit work had taken place, where the job duties in question were performed on a sporadic basis, no layoffs took place and the association had acquiesced to the same type of work being performed by members of another bargaining unit. The PERB noted that in Eureka City Schools District (1985) PERB Decision No. 481, it had held that where a non-bargaining unit employee historically performed overlapping duties with a bargaining unit member, the district did not unlawfully transfer unit work merely by assigning more of the overlapping duties to the non-unit employee. In Eureka, however, the PERB did find a violation where the district unilaterally reduced the hours of the bargaining unit employee, even though the district contended that it did so because it was reducing the level of the services performed by that employee.

Based on the foregoing, it is concluded that the District has subcontracted a substantial portion of the OP teacher's job duties to Maple Center personnel. It is clear that Sharp's duties with respect to the program are largely ministerial, and that the bulk of the actual instruction and supervision are

performed by Maple Center personnel, who previously served primarily a training function for the counseling aspects of the program. While the Maple Center is not being paid any additional funds for these new services, it is still under at least a verbal or implied contract to provide such services as part of its line item fee paid by the District. Even if the Maple Center were volunteering its services, however, the same rules would be applied as in subcontracting or transfer of unit work cases, because the effect on unit employees would also be the same. See Roseville Joint Union High School District (1986) PERB Decision No. 580.

It is further concluded that by contracting out this unit work, the District changed a past practice. The record reflects that the District, for many years, assigned a certificated employee to select, supervise, assist and evaluate the student interns, and to coordinate and advertise the program to the students and staff. While those duties, to some extent, were intermingled with the services provided by the Maple Center, there was a sufficient delineation of such duties to find a change in past practice. Furthermore, unlike in Eureka, supra and California State University. San Diego, supra, the subcontracted duties herein were neither sporadic nor insignificant, but instead were permanent, substantial and resulted in the loss of a unit position. The District argues that there was no change in past practice because ROP courses have been conducted by persons not employed by the District.

This argument is not convincing, because the ROP is a different educational program, and because there is no evidence that unit employees have ever conducted ROP courses.

Additionally, it is concluded that this subcontracting decision was within the scope of representation. There is no doubt that the decision to reinstitute the program with services almost exclusively provided by Maple Center personnel was motivated primarily, if not exclusively, by labor costs. This is exemplified by the budget resolution and recommendations, which defined the cost savings for eliminating or reducing the various named programs in terms of FTE.

The evidence establishes that this was not a decision by the District to cease providing services. To the contrary, the District still offers OP to its students at BHHS and retains ultimate control over the operation of the program. While the program is now offered for fewer hours per day than previously, it is questionable whether there has been any tangible reduction in services, inasmuch as enrollment of student counselors appears to be constant, the content of the services is basically the same and there is no evidence that the program is not open to all students seeking counseling, as it was in the past. Moreover, even if there were a partial reduction in services, it would be concluded that the contracting out of those OP services remaining would be considered within the scope of the Association's representative functions.

It is further concluded that the decision to use Maple Center personnel to perform additional OP duties was amenable to collective bargaining. Quite possibly, the Association could have convinced the District to make cuts in other labor costs, to have reduced the O.P. position to part-time,[4] or made other proposals within the Association's scope of representation. While Levine did not specify the date when he decided to make these changes in the program, it appears that the District had ample time to give notice to the Association and to bargain over the decision prior to the commencement of the 1987-1988 school year.

The evidence establishes that the decision to have OP run, in effect, by Maple Center personnel was made without prior notice to the Association, and that the decision was implemented without notice or, at least, without adequate notice to afford the Association the opportunity to meaningfully bargain. The evidence further shows that when the Association requested bargaining, after implementation, the District did not respond, which is tantamount to a refusal.

Therefore, unless one or more of the District's affirmative defenses has merit, it is concluded that the District's conduct herein violated the EERA.

Affirmative Defenses:

In its answer, the District alleged separate affirmative

[4]The District, in practice, employs some of its certificated staff on a part-time basis.

defenses to the subcontracting and the now-settled enrollment of children allegations in the complaint. With respect to the subcontracting allegation, the answer raised two affirmative defenses, both of which state that the allegations, on their face, fail to establish sufficient facts to establish a violation. With respect to the enrollment allegation, the District alleged the above-cited affirmative defense (twice), and additionally alleged scope of representation and unspecified waiver defenses.

Near the outset of the hearing, the undersigned questioned the parties concerning the status and production of any collective bargaining agreement between them and stated that it appeared that the agreement was highly relevant to the issues herein. Shortly thereafter, the District's attorney gave an opening statement alleging, with respect to waiver, that the Association had waived its right to negotiate when it did not respond to the District's notice of the layoffs, including Kelleher's notice of non-reappointment, and its offer to bargain the effects thereof. In response, the Association's attorney objected to the presentation of any evidence regarding notice of the layoffs on the basis that the District had not raised waiver as an affirmative defense to the subcontracting allegation, citing the PERB's decision in Morgan Hill Unified School District (1985) PERB Decision No. 554. Counsel for the District responded that by denying in its answer that the Association was not given notice or the opportunity to bargain concerning the

subcontracting decision, the District had properly raised the issue of whether the layoff/non-appointment notices constituted a defense. A ruling on the District's ability to raise this defense was reserved, and the above-cited evidence concerning the layoff notices and offer to bargain the effects thereof was received.

At the conclusion of the Association's case-in-chief, the District moved to dismiss the charge, on the basis that the Association had not established a prima facie case. Counsel for the District, in support of the motion, stated that there was no subcontract because the Maple Center had received no additional funds and because a certificated employee was still overseeing the program. In addition, counsel again raised, as a defense, that the notices and failure to bargain effects in response to the District's offer constituted a waiver by the Association. The motion to dismiss was denied.

Bernier, the Association's consultant, and an important decision-maker in this matter, was not present during the second day of the hearing, reportedly due to injuries he suffered in an automobile accident. The Association proceeded in his absence. At the close of its case-in-chief, the District recalled its assistant superintendent of personnel, and through him, introduced the current, disputed agreement of the parties, with specific reference to Article 17, "District Rights." Article 17, in pertinent part, reads as follows:

ARTICLE XVII
DISTRICT RIGHTS

> Section 1.
> The District shall have within its complete discretion, in compliance with the Rodda Act, Article X, except as explicitly described in this Agreement, all of the rights normally-possessed by a public school District in the State of California. Said rights, powers, and authorities include but are not limited to the [right] . . . to contract out work.
>
> Section 2.
> The exercise of the foregoing rights, powers, authority, duties and responsibilities by the District, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and expressed terms of this Agreement and negotiated policies stated in Article X, definition of a "grievance", and then only to the extent such specific and expressed terms of this Agreement and negotiated policies stated in Article X, definition of a "grievance", and then only to the extent such specific and expressed terms are in conformance with the law.
>
> Section 3.
> The exercise of any right in a particular manner, or the non-exercise of any such right, shall not be deemed a waiver or limitation of the District's right or preclude the District from exercising such right in a different manner.

The above-cited language also appeared in the agreement in effect prior to the 1987 negotiations.

Upon the presentation of this evidence, the District was asked if Article 17 was being raised as an affirmative defense. The District's representative stated that it was, to which the undersigned responded that it was quite late to be asserting such

a defense, particularly since the potential relevance of the agreement had been raised at the outset of the hearing, with no indication at that, or any other time, that the District would rely on this defense.

The Association attempted to contact Bernier in order to decide whether to present rebuttal evidence, and what other response to make, but was unable to locate him. As the result, the record was left open in order to afford the Association sufficient time to decide whether to respond to the evidence concerning Article 17, it being assumed that in the absence of such evidence, it had none to present on this issue beyond the language of the agreement itself. At the same time, a ruling was reserved as to whether to consider this defense. Hearing nothing from the. Association, the record was subsequently closed.

PERB regulation 32644 reads, in pertinent part:

> 32644. Answer.
>
> * * *
>
> (b) The answer shall be in writing, signed by the party or its agent and contain the following information:
>
> * * *
>
> (6) A statement of any affirmative defense;
>
> * * *

PERB regulation 32645 reads:

> 32645. Non-prejudicial Error. The Board may disregard any error or defect in the original or amended charge, complaint, answer or other pleading which does not affect the

substantial rights of the parties. (Emphasis added.)

Waiver is an affirmative defense which is itself waived unless raised in a timely manner. Morgan Hill Unified School District (1985) PERB Decision No. 554. The question becomes, when does waiver have to be raised as a defense in order to be timely? The Association's reliance on Morgan Hill to establish that waiver must be raised in the answer is incorrect. In Morgan Hill. the PERB refused to consider a waiver defense because it had never been raised by the district. In Brawley Union High School District (1982) PERB Decision No. 266, the PERB again held that the failure to raise affirmative defenses at any time constituted a waiver of such defenses. In Colusa Unified School District (1983) PERB Decision No. 296, the PERB refused to consider an affirmative defense raised for the first time in the district's exceptions stating, "It is a well-established rule of administrative appellate procedure that a matter never raised before the trial judge is not properly reviewed by the appellate tribunal on appeal."

The Association's argument that affirmative defenses must be raised in the answer is best supported by the PERB's decision in Walnut Valley Unified School District (1983) PERB Decision No. 289, in which the PERB affirmed a hearing officer's refusal to consider a statute of limitations defense because it was not

raised in the answer.[5] It is noted, however, that with respect to the statute of limitations and deferral, PERB regulation 32646 separately requires a respondent to raise these matters in the answer, and to move to dismiss the complaint. In addition, the PERB has overruled Walnut Valley, supra and found that both the statute of limitations and deferral are jurisdictional matters, and need not be raised by respondents before they can be considered. California State University, San Diego, supra; Lake Elsinore School District (1987) PERB Decision No. 646.

In Los Angeles Unified School District (1988) PERB Decision No. 659, the PERB upheld the refusal of an administrative law judge (ALJ) to grant the charging parties' motion to amend the complaint during the hearing. The PERB had dismissed the allegation in question prior to issuing the complaint, and the charging parties had initially introduced evidence thereon for background purposes. When the charging parties moved to amend the complaint to reinstate the allegation, the ALJ denied the motion, stating that while it "appeared" that the matter was fully litigated, the respondent might have proceeded differently if the allegation had been timely raised. The PERB upheld this ruling, stating that the respondent may have been prejudiced by the charging parties' initial denial that they were seeking to establish an independent violation. Based on the foregoing, it

[5]See also Fresno Unified School District, et al. (1982) PERB Decision No. 208, where the PERB accepted a statute of limitations defense contained in an answer that was untimely filed.

is concluded that the consideration of waiver, as an affirmative defense not raised by the answer, is discretionary within the parameters of PERB regulation 32645.

The District's defense, that the Association waived its bargaining rights because it was given notice of the layoffs/notice of non-reappointment, will be considered. The District stated this defense in its opening statement near to the outset of the hearing, the matter was fully litigated and the Association was in no way misled. In addition, in agreement with the District, its denial of the complaint allegation that the subcontracting took place without notice should have also put the Association on notice of this defense.

The District's defense of waiver by virtue of Article 17 will not be considered. By its conduct, the District seriously misled the Association as to the raising of this defense, and even when it finally put on evidence pertaining to the issue, the undersigned had to elicit the purpose thereof from Respondent's counsel. Even after it was noted that no amendment to the answer had been proposed, the District proposed no such amendment.[6] Although the Association was afforded the opportunity to present rebuttal evidence, its ability to do so may well have been prejudiced by the timing of the defense, particularly since one

[6]It is further noted that the Article 17 defense was totally unrelated to any evidence presented by the Association in its case-in-chief. Thus, the District was fully in possession of the facts needed to raise the defense prior to, or at least earlier in the hearing, and was not responding to any new matter raised by the Association.

of its chief strategists was unable to attend the hearing due to an injury. In any event, while the PERB does not generally require the parties to submit to pre-hearing discovery, they are entitled to reasonable notice as to the other side's claims and defenses, and to a litigation process founded on principles of fair play. In other words, litigation tactics aside, a party is not obligated to undergo a "trial by ambush" in PERB proceedings. Therefore, it is concluded that the District has waived this defense for this subcontracting decision.

With respect to the waiver by prior notice defense, it is concluded that the notice of Kelleher's non-reappointment and offer to bargain thereon did not constitute notice that OP would be reinstated (or, as the District would have it, continued) with Maple Center personnel assuming total day-to-day operational control. It is clear that the Association's representatives reasonably believed that OP was going to be discontinued, and the evidence supports the finding that, in fact, the program was discontinued until Levine formulated his plan to revive it. The decision to discontinue the program, of course, had fundamentally different bargaining consequences than the decision to change the staffing of the program. The evidence establishes that the Association was not informed of the change in staffing OP until after it was implemented, and that its subsequent bargaining demand was ignored. As the result, this waiver defense is without merit. See Oakland Unified School District, supra. at

p. 5; Solano County Community College District (1983) PERB Decision No. 3 67.

It is therefore concluded that the District violated section 3543.5(b) and (c) by unilaterally subcontracting out bargaining unit work in the Opportunity Program.

THE REMEDY

Where an employer unilaterally changes terms and conditions of employment, the PERB typically orders the employer to cease and desist from its unlawful action, to restore the status quo ante, to comply with its bargaining obligations with the exclusive representative and to make employees whole for any damage they suffered as a result of the unlawful unilateral change. Rio Hondo Community College District (1983) PERB Decision No. 292. A cease and desist order is appropriate herein.

The PERB has consistently declined to order a return to the status quo where the parties have negotiated a new agreement covering the subjects of the unilateral change. Delano Union Elementary School District (1982) PERB Decision No. 213a; Rio Hondo Community College District (1983) PERB Decision No. 279a; Fountain Valley Elementary School District (1987) PERB Decision N6. 625. While it has been found herein that the District failed to timely raise Article 17 as a defense in this action, the District did present evidence that the parties have since entered into a renegotiated agreement which may cover the subject of subcontracting. Although the District has waived this defense

for this proceeding, it cannot reasonably be concluded that the defense is forever waived with respect to all future subcontracting decisions, particularly in light of the renegotiated contract. Therefore, the remedy will be limited to this specific subcontracting decision, until the violation is remedied.

Since there is no evidence that Susan Kelleher would not have otherwise been offered an appointment for the 1987-1988 or 1988-1989 academic years, it is appropriate that she be made whole for any monetary losses she suffered for those years. Kelleher's gross back pay shall be calculated on the basis of a full-time appointment to teach OP for the 1987-1988 and 1988-1989 academic years.[7] It is also appropriate that, unless the District has afforded the Association an adequate opportunity to bargain concerning this subcontracting decision, Kelleher, or if she refuses, another unit employee, be offered the OP teacher position on a full-time basis commencing the first academic year after this Order becomes final. The District, under this Order, may hire a new unit employee for the position, if Kelleher declines the offer to teach the course.

It is appropriate that the District be required to post a notice incorporating the terms of this order. It is important,

[7]A full-time appointment is the appropriate basis for back pay even though OP has operated on a part-time basis in those years. Had the Association been given appropriate notice and the opportunity to bargain it might have been able to negotiate enough savings in labor costs elsewhere to have enabled the District to continue OP on its previous schedule.

however, that employees not be misled as to the District's future subcontracting decisions inasmuch as the District may be entitled to raise Article 17 as a defense to such future decisions. Therefore, the notice will be limited to the specific violation alleged herein, and with respect to future subcontracting, will be conditioned upon contractual or other agreement by the parties granting discretion to the District in such decisions.

The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy, and the posting will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeal approved a similar posting requirement. See also NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to EERA section 3541.5(c), it is hereby ORDERED that the Beverly Hills Unified School District, its governing board and its representatives:

A. CEASE AND DESIST FROM:

1. Denying the Beverly Hills Education Association, CTA/NEA (hereinafter Association), rights guaranteed to it by the Educational Employment Relations Act by unilaterally subcontracting the job duties of the Opportunity Program teacher for the 1987-1988 and 1988-1989 academic years.

2. Failing and refusing to meet and negotiate in good faith with the Association by unilaterally subcontracting the job duties of the Opportunity Program teacher for the 1987-1988 and 1988-1989 academic years.

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

1. Unless the District and the Association have agreed, by contract or otherwise, that subcontracting decisions are within the District's sole discretion, offer to meet and negotiate in good faith with the Association prior to implementing any subcontracts for the performance of work now performed by certificated unit members.

2. Unless the District has afforded the Association an adequate opportunity to bargain concerning its decision to subcontract the job duties of the Opportunity Program teacher, offer Susan Kelleher, or if she declines, another certificated unit employee, the position of Opportunity Class teacher commencing with the first academic year after this Order becomes final.

3. Make Susan Kelleher whole for any monetary losses she suffered as the result of the District's subcontract for the performance of Opportunity Class teacher duties during the 1987-1988 and 1988-1989 academic years. Such payment shall include interest at the rate of 10 percent per annum.

4. Within ten (10) workdays from service of the final decision in this matter, post at all school sites and all other work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the District. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

5. Upon issuance of this Decision, written notification of the actions taken to comply with this Order shall be made to the Acting Los Angeles Regional Director of the Public Employment Relations Board in accordance with her instructions.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. A document is considered

"filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: March 20, 1989

Douglas Gallop
Administrative Law Judge