STATE OP CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS WHISMAN CHAPTER #355, Charging Party, | ) | Case No. SF-CE-1316 |
| v. | ) | PERB Decision No. 868 |
| WHISMAN ELEMENTARY SCHOOL DISTRICT, Respondent. | ) | February 14, 1991 |

Appearances: Patricia L. Roy, Senior Field Representative, for California School Employees Association and its Whisman Chapter #355; Littler, Mendelson, Fastiff & Tichy by Richard M. Noack and Karen R. Rodriguez, Attorneys, for Whisman Elementary School District.

Before Shank, Cunningham and Carlyle, Members.

## DECISION

CUNNINGHAM, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Whisman Elementary School District (District) to a proposed decision by an administrative law judge (ALJ), who determined that the District violated section 3543.5(b) and (c) of the Educational Employment Relations Act (EERA)[1] by utilizing

[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 guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

volunteers to perform work previously performed by classified unit employees. Based upon review of the entire record, we hereby reverse the ALJ's decision for the reasons set forth below.

## FACTUAL SUMMARY

In the fall of 1980, the District created a Tutorial Center Program (Center) within the District at the Crittenden Middle School (Crittenden). The Center was available to students during the regular school day if they were referred by individual teachers. The Center was also available to drop-in students on a voluntary basis before and after school and during lunch periods.

The Center was staffed by two full-time aides. In conjunction with teachers, the aides coordinated the work of the students who had been referred to the Center. Assistance to the students who had been referred by teachers involved: modification of lesson plans to meet individual needs of students; administration of practice tests and specifically designed diagnostic tests; the teaching of specific skills as requested by teachers; participation in parent conferences, assistance in research or reports; and assistance in organization of homework and long-term assignments.

The assistance provided to drop-in students was of a different nature than that provided to students who had been referred by teachers. Although drop-in students may have been eligible for some of the more sophisticated assistance provided to students referred by teachers, the practice of the Center

aides was to limit involvement to general assistance with research and homework. The aides also provided general supervision in the room, creating a study hall environment for drop-in students.

In 1982 the Center was eliminated due to lack of funding. The two instructional aides who staffed the Center, Donna Aiello (Aiello) and Helen Sasaki (Sasaki), were placed into five-hour-per-day aide positions from their full-time positions at the Tutorial Center. Both of these positions involved lower salaries than the instructional aide jobs.

Testimony reveals that, between 1982 and 1988, the District did not maintain or operate a program resembling the Center.

At the start of the 1988-89 school year, the new principal at Crittenden, Jack Boterenbrood (Boterenbrood), reviewed several programs in use at other schools in hopes of finding ways to offer additional support to students in his school. One of the programs which he implemented was a joint effort between the District and Moffett Field Naval Air Station (Moffett Field). A significant number of dependents of military personnel from Moffett Field attend schools in the District. Crittenden has been "adopted" under an Adopt-A-School program between various military units and school districts.

The program established to utilize the Moffett Field cooperation was called the Homework Club (Club). The Club was scheduled to be open from 2:30 to 3:30 p.m., Monday through Thursday. It operated on a walk-in basis, so that any student

who desired to attend could receive homework assistance from the Moffett Field volunteers.

Testimony revealed that a copy of the Daily Bulletin a school newsletter, announced that the Club would begin operation on Monday, November 28, 1988. It further indicated that the Club would be led by a certificated teacher.

Prior to the initiation of the Club, in early October 1988, Boterenbrood spoke to Sasaki, who holds a teaching certificate, about the possibility of starting the Club. He specifically asked her if she would be interested in supervising the Club, and, at this time, she informed him that she had worked in a tutorial setting and explained the operation of the Center. She requested time to consider this offer and, approximately one week later, notified Boterenbrood of her interest in participating in the new program.

The program began operation on November 28, 1988. On the first day of the program, Boterenbrood posted a job announcement for the position of Club leader. This description did not mention a requirement that applicants had to be certificated. Boterenbrood stated that no one formally applied for this position.

The program was initially supervised by either Boterenbrood or his assistant principal. However, the program is currently managed by Charles David Adams (Adams), a naval employee. Adams recruits potential volunteers at Moffett Field and schedules their work times. Notably, both Boterenbrood and the assistant

principal frequently check in at the Club to ensure that it is running smoothly.

The Club differed from the earlier Center in that no students were referred by teachers. The Club volunteers did not provide the same level of educational support provided to the students who had been referred by teachers to the Center. However, the assistance given to Club students was identical to that provided to drop-in students at the Center during the hours before and after school and during lunch breaks.

The District argues that a March 3, 1982 memo, referred to as the "Drotman memo,"[2] along with the Center aide's job description, is evidence that the Center aides performed duties clearly different, in both character and scope, from those performed by Club volunteers. However, the testimony of Aiello and Sasaki reveals that, while drop-in students at the Center may have been eligible for additional services, none of them actually received anything different than that received by students at the Club. This testimony went unrefuted by the District.

The California School Employees Association (CSEA) first learned about the Club when Aiello, CSEA chapter president, saw the November 23, 1988 announcement that the Club would begin operation the following Monday.

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[2]The Drotman memo was a memo prepared by Aiello and Sasaki for Gilda Drotman, special programs coordinator for the District. The memo, in part, listed the services being provided to scheduled and nonscheduled students.

Aiello, along with Sasaki, the other former Center aide, met with Boterenbrood and expressed their concern that volunteers from Moffett Field were going to be performing work which had previously been performed by classified employees of the District. Aiello and Sasaki presented Boterenbrood with further information about the original Center at this time.

Aiello argued that California Education Code section 35021[3]

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[3] Education Code section 35021 provides:

> Notwithstanding any other provisions of law, any person may be permitted by the governing board of any school district to perform the duties specified in Section 44814 or 44815, or to serve as a nonteaching volunteer aide under the immediate supervision and direction of the certificated personnel of the district to perform noninstructional work which serves to assist such certificated personnel in performance of teaching and administrative responsibilities. Such a nonteaching volunteer aide shall not be an employee of the school district and shall serve without compensation of any type or other benefits accorded to employees of the district, except as provided in Section 35212 of the Education Code and Section 3364.5 of the Labor Code.
>
> No district may abolish any of its classified positions and utilize volunteer aides, as authorized herein, in lieu of classified employees who are laid off as a result of the abolition of a position; nor may a district refuse to employ a person in a vacant classified position and use volunteer aides in lieu thereof.
>
> It is the intent of the Legislature to permit school districts to use volunteer aides to enhance its educational program but not to permit displacement of classified employees

prevented the District from using volunteers to staff the Club. After reviewing the information provided by Aiello, Boterenbrood rejected CSEA's claims that the use of volunteers in the Club constituted a violation of the Education Code.

The District has a noncontract grievance procedure wherein grievances are allowed over violations of policy, administrative regulation, title IX, or affirmative action issues. On December 16, 1988, CSEA filed a noncontract grievance protesting the use of volunteers in the Club based on the alleged violation of Education Code section 35021. That grievance was rejected by Boterenbrood on January 5, 1989. CSEA appealed Boterenbrood's decision to the superintendent of the District, Tim Cuneo (Cuneo). Aiello and Cuneo met on February 28, 1989. At that meeting, Cuneo explained that he felt the work of volunteers in the Club was completely different from that of the aides in the old Center program and, therefore, not a violation of the Education Code.

On March 20, Mike Maloney (Maloney), CSEA field representative, wrote to the District claiming the District had unilaterally transferred work out of the bargaining unit to volunteers from Moffett Field. Maloney further claimed that the District had an obligation to bargain with CSEA prior to taking such action. Maloney demanded that the District stop the Club program and negotiate with CSEA.

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nor to allow districts to utilize volunteers in lieu of normal employee requirements.

On April 4, the attorney for the District responded that the District would not stop the Club and would not bargain over the District's decision to use volunteers from Moffett Field. The District did, however, offer to negotiate with CSEA over the effects of its decision, if CSEA could identify any such effects.

PROPOSED DECISION

CSEA contends that the District's action constituted a unilateral transfer of work out of the bargaining unit and, thus, a failure to bargain in good faith. Alternatively, CSEA argues that the action was unlawful subcontracting.

The District, on the other hand, states that the work performed at the Club is not the same as that previously performed by the unit members; thus, its implementation of the Club did not impact on any mandatory subject of bargaining. If there was any obligation to bargain, the District argues that CSEA waived its bargaining rights by failing to schedule a negotiating session.

The ALJ analyzed the District's action under a transfer of work theory, based on the fact the Club was created by the District, operated on school grounds, and questions regarding the operation of the Club were directed to the assistant principal. The fact that the volunteers were not paid for their work does not act to remove this situation from a transfer of work analysis, reasoned the ALJ, based on the Board's finding in Roseville Joint Union High School District (1986) PERB Decision No. 580. In Roseville, the Board reversed a regional attorney's

dismissal of a complaint which found that the Roseville district's use of nonpaid labor did not constitute a unilateral transfer of work based on the fact that the volunteers were not employees.

Next, the ALJ addressed these facts under the Board's test for transfer of work cases as enunciated in Eureka City School District (1985) PERB Decision No. 481 (Eureka). The ALJ stated that there are two ways under this test to show a unilateral transfer of work out of the unit: (1) if unit employees ceased to perform work which they had previously performed, or (2) if nonunit employees began to perform work previously performed exclusively by unit members. The ALJ states, in his proposed decision:

> . . . CSEA will prevail if it can show, in the case at hand, that while the same work is still being done, bargaining unit members ceased to perform duties which they had previously performed.
> (P. 9.)

The ALJ then rejected the District's arguments that the work done in the Club is different from what was done in the Center. The ALJ relied on Lincoln Unified School District (1984) PERB Decision No. 465 (Lincoln). for the proposition that an employer may not avoid a unilateral transfer of work violation simply by limiting the transferred duties to only one or two tasks among several assigned duties. Thus, even though many more services were available in the Center, at a minimum, the unit members performed the same duties being done in the Club

by the volunteers.

Next, the gap in time between the closure of the Center and the initiation of the Club was addressed by the ALJ. The proposed decision distinguished Fremont Union High School District (1987) PERB Decision No. 651 (Fremont) based on the fact that, in that case, the closure of a summer school program was followed four years later by the transfer of the program to an outside entity. Here, states the ALJ, the District retained control of the Club and, in effect, reinstated a portion of the Center.

The District's waiver argument was also rejected by the ALJ. This rejection is based on CSEA's March 20, 1989 general demand that the District cease operation of the Club and negotiate. Lastly, concluded the ALJ, the District's offer to negotiate on the effects of the Club, if CSEA could enunciate any effects, does not absolve it of its duty to negotiate over the decision itself.

Thus, the ALJ determined that the District violated EERA section 3543.5(b) and (c) through its act of transferring duties from the unit members to volunteers.

## ANALYSIS

The District generally excepts to the ALJ's characterization of the nature of the services provided at the Center. If, argues the District, services provided in the Club are different than those provided in the Center, no unilateral transfer of work or subcontracting was possible. Aiello testified that the general

practice at the Center regarding unscheduled, drop-in students was to provide assistance on their assignments, when requested by students. She also stated that the work being done in the Club was the same work as that performed at the Center for drop-in students. Furthermore, Sasaki noted that, with few exceptions, homework assistance was the major service provided to unscheduled students at the Center.

Although the above testimony went unrefuted, the District argues that the Drotman memo, as well as the job description of the tutorial center aide, requires the finding that the services provided in the Center were of a different nature than those of the Club. However, both the memo and the job description list homework organization and/or assistance among provided services. This fact, coupled with the ALJ's finding that the testimony of both Aiello and Sasaki was credible, supports the conclusion that drop-in students actually received services which were very similar to the services provided at the Club.[4] However, it is undisputed that the services provided to scheduled students at the Center were much more comprehensive than services available at the Club.

As to the ALJ's conclusions of law, the District argues principally that the Eureka test was misstated and misapplied.

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[4]As there is no evidence in the record which supports overturning the credibility determinations referenced above, the Board will defer to the ALJ's findings in this regard. (Los Angeles Unified School District (1988) PERB Decision No. 659.)

Initially, the nature of the conduct by the District must be correctly characterized as a form of transfer of work or subcontracting, as these two forms of unilateral acts have been analyzed differently by the Board. (Beverly Hills Unified School District (1990) PERB Decision No. 789 (Beverly Hills), p. 18.)

For purposes of the discussion herein, contracting out refers to a transfer of unit work to those not in the employ of the employer in question. (San Diego Adult Educators v. Public Employment Relations Board (1990) 223 Cal.App.3d 1124, review den. Dec. 13, 1990, (San Diego II) p. 1133;. Beverly Hills, p. 17, fn. 8.) On the other hand, transfer of work involves a transfer of unit work to nonunit employees of the same employer. (San Diego II, p. 1133, fn. 5.) The ALJ analyzed the Club under a transfer of work theory, although acknowledging that the facts did not "fit neatly" into either a transfer of work or subcontracting model. The ALJ's choice of this model was based primarily on the nature of the relationship the Club retained with the District, as evidenced by the origination of the Club concept by the principal, and the management and control of the Club by the District.

Other factors in addition to those enunciated by the ALJ are important in the proper characterization of this program. Primarily, of course, the volunteers of the Club are neither nonunit employees of the employer, nor are they employees of Moffett Field for purposes of their volunteer work. In some sense, however, Moffett Field occupies the position of a second

employer in that its agent recruits persons to volunteer at the Club and it then supplies the "labor" by sending scheduled volunteers to the school site.

California Education Code section 35021 states, in pertinent part:

> [A] nonteaching volunteer aide shall not be an employee of the school district and shall serve without compensation of any type or other benefits accorded to employees of the district, except as provided in Section 35212 of the Education Code [insurance coverage] and Section 3364.5 of the Labor Code [worker's compensation coverage].

While PERB has no jurisdiction to enforce provisions of the Education Code, it has jurisdiction to interpret the Education Code as necessary to carry out its duty to administer EERA. (San Bernardino City Unified School District (1989) PERB Decision No. 723, p. 2.) Where EERA and the Education Code address the same or similar subjects, the Board seeks a resolution which harmonizes the legislative intent underlying the EERA with existing provisions of the Education Code. (San Bernardino, supra.) A long-standing rule of statutory construction states that the expression of certain things in a statute necessarily involves the exclusion of other things not expressed. (People v. Brun (1989) 212 Cal.App.3d 951, 954; see also Interinsurance Exchange v. Spectrum Investment Corp. (1989) 209 Cal.App.3d 1243, 1255, review den. July 27, 1989.) Therefore, because section 35021 expresses a legislative intent to limit those circumstances wherein a volunteer aide will be found to be an employee of the

District and because of the other factors present in this case, the Board finds that a subcontracting analysis is to be utilized under these facts.[5] Lincoln does not preclude this finding, for although the case referred to the use of volunteer members of the Band Boosters Club to drive buses on certain field trips as a transfer of work, the ALJ's opinion, specifically adopted by the Board, analyzes the facts of the case under the test enunciated in Oakland Unified School District (1983) PERB Decision No. 367 applicable to subcontracting situations. (See also Unit Determination for the State of California (1980) PERB Decision No. 110c-S, foster grandparents who receive only tax-free stipend for work are akin to volunteers and are not employees under the Ralph C. Dills Act (Dills Act).[6])

In San Diego II, the Court of Appeal reviewed a decision of the Board (San Diego Community College District (1988) PERB Decision No. 662 (San Diego I)). wherein the Board determined

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[5]Justice Stewart's concurring opinion in Fibreboard Paper Products Corporation v. National Labor Relations Board (1964) 379 U.S. 203 is instructive, as it sets out the following definition of subcontracting:

> . . . 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. . . . (Id. at p. 224.)

In Fremont, the Board applied this definition to conclude that, because the district did not retain ultimate control over a summer school program run by the University of La Verne on the district's premises, no subcontracting occurred.

[6]The Dills Act was formerly known as the State Employer-Employee Relations Act.

that the San Diego Community College District (College District) violated EERA section 3543.5(c) when it contracted with an independent foundation to provide language instruction on its campus without first bargaining with the San Diego Adult Educators, Local 4289 (Union).

The College District had offered noncredit, fee-based language courses in French, Spanish and German (major languages); and in Farsi, Swedish and Tagalog (minor languages) prior to March 1983. The major language courses were taught by tenured instructors who were paid on a monthly basis. In contrast, minor language courses were taught by instructors who were paid on an hourly basis. On March 9, 1983, the College District decided to discontinue its offering of the major language classes. The reason for this decision was purely economic; fees which were paid by students in these classes did not cover the cost of the instructors' salaries. Teachers of these subjects were advised of the termination of their employment.

Subsequent to this decision, members of the public pressured the College District to reinstate the major language classes. After reviewing several options proposed to accomplish this objective, the College District entered into a contract in June 1983 with the San Diego Community College Foundation (Foundation) to provide the major language classes. The Foundation is a nonprofit corporation established to assist the College District in its educational endeavors; it was found by the Board to be an

entity separate and apart from the College District and this finding was not disputed on appeal.[7]

The Union filed an unfair practice charge against the College District wherein it contended that the College District violated EERA section 3543.5(c) by failing to negotiate in good faith prior to contracting with the Foundation to perform work which had previously been performed by its members. The Board determined that, although the College District had the right to discontinue the major language classes (Stanislaus County Department of Education (1985) PERB Decision No. 556), its conduct in contracting with the Foundation constituted a unilateral change in the form of subcontracting. The majority stated:

> By contracting with the Foundation, the District continued to offer this service, albeit by using instructors supplied by the Foundation. If the District had truly ceased to offer the language instruction service, it would not have contracted with the Foundation at all, and the Foundation would have been

[7]At the time of the discontinuance of the major languages, the College District intended to continue to offer the minor languages, primarily because fees paid by students in these subjects covered the costs of the instructors' wages. After the announcement of the assumption by the Foundation of the major language classes, members of the public exerted pressure on the College District to transfer the minor language classes to the Foundation as well. Consequently, the College District made the decision to transfer these classes to the Foundation and entered into a contract with the Foundation for this purpose. Minor language instructors' employment was also terminated by the College District. The Union contended that this conduct violated EERA section 3543.5(c) because the College District failed to bargain in good faith prior to implementing this decision. The Board found a violation of EERA based on this conduct, and this finding was affirmed by the Court of Appeal. (San Diego II, p. 1135.)

> free to decide for itself to offer the language classes if it so desired. But because the District contracted with the Foundation, it tacitly admitted that it wished to continue to offer certain classes, despite its earlier position that it was discontinuing those services. . . . (San Diego I, pp. 14-15; fn. omitted.)

Member Porter dissented from the result reached by the majority in San Diego I. He reasoned that the College District could lawfully discontinue the language classes, and that merely by arranging for the Foundation to offer the classes, without paying the Foundation to do so, the College District did not unilaterally subcontract the work to the Foundation.

The Court of Appeal, in San Diego II, rejected the result reached by the majority of the Board in regard to the discontinuance of the major language classes. Emphasizing that the most important factor in determining whether an employer's decision to have work performed by outside workers rather than regular employees is the impact of the subcontracting on the regular employees, the court determined that the decision to discontinue the classes and the decision to contract with the Foundation were separate decisions, and that, as such, the later decision to contract with the Foundation had no adverse effect on the unit members. As stated in the opinion:

> Absent some showing that union members were terminated because of the decision to contract out their jobs, we decline to hold that the decision to contract out was a subject of mandatory negotiation. (San Diego II, p. 1134.)

In reaching this conclusion, the court cited, with approval, Member Porter's dissenting opinion in San Diego I[f] as well as Fremont. The only difference between the factual situation in the San Diego cases and Fremont, reasoned the court, was one of time. While there was no connection in either case between the termination of the respective programs and the later renewal of similar programs, in Fremont the termination and the renewal of the program were separated by a four-year period. In San Diego II, the court concluded that the amount of time expiring between the two decisions was not consequential to the analysis.

The analysis employed by the Court of Appeal in San Diego II is equally applicable in the present case. In addressing this case, the court in San Diego II commented:

> We recognize that two recent PERB decisions addressing analogous situations, Whisman Elementary School District (Apr. 20, 1990) PERB Decision No._____. . . and Beverly Hills Unified School District (Jan. 19, 1990) PERB Decision No. 789 . . ., reached conclusions which may appear contrary to the conclusions reached herein. However, Whisman is distinguishable because the administrative law judge there took great pains to contrast its facts from Fremont Union High School District, supra, PERB Decision No. 651, pointing out (1) the Fremont program was terminated without any intent to ever resume the program and (2) the lack of connection between the school district and the outside entity which ran the new program. (San Diego II, p. 1135, fn. 7.)

The Board finds that this case is not as factually distinguishable from Fremont as was stated by the ALJ in the

proposed decision. First, as discussed below, here, as in Fremont, the District had no intention of resuming the Center at its termination in 1982. Second, the connection between the school district and the entity running the program in Fremont is not dissimilar from the present situation in that, here, an outside entity coordinates the Club and supplies all labor utilized therein. Third, as was noted by Member Porter in Fremont, as well as in his dissent in San Diego I, the District herein sought out the labor for the program, but did not pay Moffett Field to offer the Club. Finally, although there are some indicia of control by the District over the Club, this control does not rise to the level of ultimate control. (San Diego I, p. 32; see also Fremont, p. 19; and fn. 5 herein.)

The District lawfully discontinued the Tutorial Center in 1982. Public school employers maintain the managerial prerogative to determine what curriculum and programs will be offered within their facilities. (Stanislaus County Department of Education, supra, PERB Decision No. 556.) As in San Diego II, the District here had no intention of reinstating this type of after school program at that point in 1982 when it terminated the program and laid off the personnel associated with it. Some six years later, at the direction of Boterenbrood, the District made the decision to institute the Homework Club. This decision had no effect on the unit employees, as at the time the Club was formed the unit members were not performing the work of the Club. Additionally, although the court in San Diego II suggested that

the amount of time elapsing between a decision to terminate a program and the decision to create a new similar program is not determinative, the fact that approximately six years elapsed between the two actions strongly supports the lack of connection between the two decisions. After termination of the Center, and for six years afterward, the past practice regarding homework assistance work was that it was not performed within the District.[8] Therefore, because this Board is bound by the pronouncement of the appellate court in San Diego II, when the Club was formed the District did not unilaterally subcontract unit work in violation of EERA section 3543.5(b) and (c). (See Bodinson Manufacturing Company v. California Employment Commission (1941) 17 Cal.2d 321, 326.) In view of our disposition of this case, we decline to address the District's remaining exceptions.

The unfair practice charge in Case No. SF-CE-1316 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Shank and Carlyle joined in this Decision.

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[8]CSEA argues, for the first time on appeal, that Article 16 of the parties' collective bargaining agreement prevents the action taken by the District. Because this matter was not addressed by the parties before the ALJ, the Board will not address it herein. (State of California (Department of Transportation) (1983) PERB Decision No. 361-S.)