STATE OP CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EUREKA TEACHERS ASSOCIATION, Charging Party, v. EUREKA CITY SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-1467 PERB Decision No. 955 October 27, 1992

Appearances: California Teachers Association, by Ramon E. Romero, Attorney, for Eureka Teachers Association; School and College Legal Services, by Robert J. Henry, General Counsel, for Eureka City School District.

Before Hesse, Chairperson; Caffrey and Carlyle, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Eureka City School District (District) to a PERB administrative law judge's (ALJ) proposed decision. The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by making a unilateral change in

[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 do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights

the smoking policy without affording the Eureka Teachers Association (Association) an opportunity to meet and negotiate.

The Board has reviewed the entire record in this case, including the proposed decision, transcript, exhibits, the District's exceptions and the Association's responses thereto. Based upon this review, we hereby reverse the ALJ's decision for the reasons set forth below.

FACTS

The Association and the District were parties to a collective bargaining agreement (CBA), effective July 1, 1988 through June 30, 1991. The CBA contained Article 27, Paragraph 8 (Paragraph 8), which provides:

> Where unused space is available, the District will, upon the request of the teacher(s) at that school site, provide separate smoking and non-smoking areas at that facility; or some alternative shall be mutually agreed to by the staff.

The District consists of eight elementary schools, two junior high schools, a high school, an adult school, a continuation school and the District headquarters office. The various school sites differed in the manner in which they implemented Paragraph 8.

> guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

For example, at Winship Junior High School several teachers purchased a portable building and the District allowed them to place it on the school grounds for the nominal cost of one dollar per year. The faculty members who smoked used this building.

The District also participates in a state sponsored grant program which provides education and related activities to encourage students to reject the use of drugs, alcohol and tobacco products. Participation in this program required the District to assure the State that it would adopt a tobacco-free policy by June 1996.

In the spring of 1990, the District school board asked the superintendent to develop a policy on tobacco use. An 18-member committee comprised of both administrators and rank-and-file employees was created to draft a proposed tobacco-free schools policy. The Association also provided a representative to the committee. The committee met three times during the Fall of 1990. It discussed at length whether the policy should affect the District office as there were rarely students at that location. The committee's consensus was that the policy should be universally applied. The committee also considered whether to allow smoking on campus out of view of students. The committee decided that it should create a policy that would provide a consistent anti-smoking message for students; concluding that students would be aware of the inconsistencies of a policy which prohibited smoking in the vicinity of students, but allowed it when students were not present. They eventually produced a

proposed policy and forwarded it to the school board.

On November 5, 1990, the school board first reviewed the committee's "Proposed Policy on Tobacco." The policy cited Education Code section 48901[2] as its authority. The proposed policy was considered at five board meetings from November 5, 1990 to February 4, 1991. The Association attended and expressed its concerns about the proposed policy. On February 4, 1991, the school board adopted the Tobacco-Free Schools Policy as District Policy No. 1335. The policy states:

> The Board of Education is committed to promoting a healthy lifestyle for its students and staff. Tobacco use is identified as a major health risk for both users and non users. Education Code 48901 mandates districts take all steps deemed practical to discourage students from smoking. The Board has a responsibility to promote a safe and healthy environment for students, staff and other citizens. It is the intention of the Board to provide a school district that is tobacco free and, therefore, model for students acceptable health principles taught in school.
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> This policy is not a punitive measure, nor does it try to dictate whether adults may or may not smoke. However, the policy does tell

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[2]Education Code section 48901 states:

> (a) No school shall permit the smoking or use of tobacco, or any product containing tobacco or nicotine products, by pupils of the school while the pupils are on campus, or while attending school-sponsored activities or while under the supervision and control of school district employees.
>
> (b) The governing board of any school district maintaining a high school shall take all steps it deems practical to discourage high school students from smoking.

adults they do not have the district's permission to smoke or use tobacco products on district property.

Beginning July 1, 1991, smoking and the use of tobacco products shall be prohibited on sites and in vehicles owned and/or operated by Eureka City Schools. The tobacco-free policy includes buildings, grounds and services provided by employees off campus.

Policy Implementation

1. The Superintendent shall take steps to inform all employees, visitors and the community of the no tobacco policy.

A. "Tobacco-Free Environment" signs shall be placed so as to be readily visible on grounds, in facilities and vehicles owned and/or operated by Eureka City Schools.

B. All employees shall receive a copy of the policy and applicants for employment shall be made aware of the tobacco-free policy.

C. Community groups wishing to use school facilities and contractors shall be advised of the policy and required to sign contracts indicating they will abide by the tobacco-free policy.

2. The district shall assist employees who desire to stop smoking. When practical, the district shall attempt to arrange smoking cessation activities at times and locations convenient to the employee.

Legal Reference: Education Code 48901

The District's policy statement also provided the following rationale for the adoption and implementation of the tobacco-free policy by the school board:

> The Surgeon General has declared tobacco use to be the number one preventable health hazard. Some 390,000 people die annually directly due to the effects of tobacco. The State has encouraged school districts to adopt a smoke-free policy. Locally, some 14

> school districts and the Humboldt County Office of Education have adopted smoke-free policies. The policies are based upon the recognition that we all serve as role models for students and that school districts should send a consistent no-use message to youth.
>
> The policy is meant to express the district's support in providing a positive and consistent message to our youth in regard to tobacco use.

The policy applies to all District employees, as well as members of the public while on District grounds, regardless of the presence of students. Effective June 30, 1991, the District refused to renew the lease on the portable (smoking) building at Winship Junior High School. It was removed by the teachers prior to that date. The District has provided access for employees to smoking cessation programs and insists it will continue to do so in the future.

Prior to adoption of the policy, the school board deleted reference to possible disciplinary action resulting from violation of the tobacco policy. Superintendent Watkins testified, however, that violation of any school policy would lead to some consequences.

ALJ's PROPOSED DECISION

The ALJ initially reviewed the Board's decision in Riverside Unified School District (1989) PERB Decision No. 750 (Riverside), which held that the district's smoking policy was not a working condition. The Riverside smoking policy prohibited smoking in district facilities and on school grounds when students were in the general vicinity. The Board held in Riverside that the

policy's educational objectives outweighed any potential impact it could have on the employees' interests.

The ALJ applied the limitations in the Riverside policy pertaining to times and locations where students are present, to the Eureka tobacco-free policy. He concluded that the District may establish policies which control behavior on its property. However, he found that if the policy impacts rights guaranteed to employees by EERA, the District must first negotiate the policy. The ALJ determined that Education Code section 48901, relied on by the District in adopting the tobacco-free policy, places its emphasis on prohibiting the use of tobacco products by students. He concluded that because the provisions of the Education Code target tobacco use by students, the District is not excused from negotiating the broader application of its smoking policy to certificated employees. Therefore, the ALJ found those provisions of Eureka's tobacco-free policy which banned the use of tobacco products regardless of the presence of students, to be a mandatory subject of bargaining within the scope of representation. As a result, he concluded that the District had violated EERA when it refused to negotiate those portions of its tobacco-free policy.

DISTRICT'S EXCEPTIONS

The District excepted to the ALJ's findings and conclusions. Specifically, the District contends the ALJ misinterpreted the Board's decision in Riverside by finding that the decision in that case was premised on the fact that the smoking policy in

question addressed "circumstances in which students are in the general vicinity." The District also claims the ALJ erred in concluding that the general language of Education Code section 48901 "must be interpreted in a very restrictive manner" which does not justify a "disregard of explicit EERA negotiations mandates."

DISCUSSION

EERA section 3543.5(c) requires an employer to meet and negotiate in good faith with an exclusive representative. A unilateral change in terms and conditions of employment within the scope of representation is a per se refusal to negotiate. (NLRV v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94.)

To establish a unilateral change, the charging party must show that (1) the employer breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment; and (4) the change in policy concerns a matter within the scope of representation. (Glendora Unified School District (1991) PERB Decision No. 876.)

The parties' CBA provides for separate smoking areas upon request of the teachers at the particular school sites, under certain circumstances. To the extent that the District's Tobacco-Free Schools Policy alters the terms of the CBA, an unlawful unilateral change may have occurred. However, it must first be determined whether the implementation of the smoking policy is within the scope of representation as established by EERA section 3543.2.[3]

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[3]EERA section 3543.2 states, in pertinent part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations . . . All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.
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> (b) . . . the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding causes and procedures for disciplinary action, other than dismissal, including a suspension of pay for up to 15 days,

EERA section 3543.2 also provides that matters not specifically enumerated in the statute are reserved to the employer. In addition, Article 2 of the parties' CBA states:

> . . . the District retains all authority to direct, maintain and operate the District to the full extent of the law, except as limited by the specific and express terms of this Agreement, and then only to the extent such terms are in conformity with law.

In Riverside, the district, which previously maintained smoking areas for employees within district facilities, adopted a policy which provides, in pertinent part:

> Effective July 1, 1987, smoking and the use of tobacco products is prohibited within any District building or facility. In addition, smoking or the use of tobacco products by District employees is prohibited on school grounds when pupils are in the general vicinity.

In enacting this policy, the district relied, in part, on provisions of the Education Code[4] which required each school

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> affecting certificated employees. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Section 44944 of the Education Code shall apply.

[4]Education Code section 35176.5 states:

> The governing board of every school district shall adopt policies regarding the designation of employee smoking areas or lounges at each school site. These policies may include, but not be limited to, the establishment of procedures for the determination of employee smoking areas by a majority vote of the teachers and other school employees at each school. (Repealed January 1, 198 9.)

district to adopt policies regarding employee smoking areas.

In Riverside, the Board found that the district exercised the management authority reserved to itself to implement a smoking policy "designed to further a legislatively mandated goal of discouraging students from smoking and to provide a smoke-free environment for the students and the general public." The Board in Riverside relied on the analysis in Chambersburg Area School District v. Pennsylvania Labor Relations Board, et al. (1981) 430 A.2d 740 [110 LRRM 2251] in concluding that a smoking policy was not a mandatory subject of bargaining, but rather a management prerogative. The court concluded in Chambersburg, after balancing mandatory subjects of bargaining and basic educational policy that "the educational motive behind the [smoking] policy outweighs any impact on the employees' interests. . . . [T]he paramount consideration in reaching this balance is the public interest in providing effective and efficient education for the School District's students."

In the present case, the Eureka District adopted a similar smoking policy which prohibits students, employees and the general public from using tobacco products in District buildings and on District property. The Eureka policy goes farther than

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Education Code section 35176.6 states:

> A teacher or other school employee shall not smoke on the grounds of any public school except in the areas designated for employee smoking by the governing board of the district.
> (Repealed January 1, 1989.)

the Riverside policy and also prohibits smoking in District vehicles and applies to services provided by employees off-campus. The policy does not distinguish time periods or locations at which students might be present.

In adopting this policy, the District relied on the legislative mandate in Education Code section 48901.[5] The District also has an obligation to establish a tobacco-free policy by June 1996 which prohibits the use of tobacco products at anytime on District property and in District vehicles, in order to comply with the provisions of a State Drug, Alcohol and Tobacco Education grant program.

Eureka's policy identifies smoking as a major health risk and proposes to teach "acceptable health principles" by requiring employees and the general public to serve as role models for the students. The policy is designed to educate students by example, by banning tobacco use from District property and vehicles at all times. The District decided that a policy which allows employee and general public smoking, even at times and places where students are not likely to be present, confuses the District's educational message and makes it more difficult to achieve the educational mission of the policy.

In reaching his decision in this case, the ALJ misinterprets the gravamen of the Board's decision in Riverside. The Board's fundamental finding in Riverside is that the "implementation of the District's smoking policy was a direct response to the

[5]See footnote 2.

Legislature's clear message regarding the health hazards of smoking" and the Legislature's direction to do everything practical to discourage student smoking. The Board clearly stated its conclusion that "negotiations regarding implementation of the policy would abridge the District's rights to accomplish this legislatively mandated mission and its rights to determine general educational policy." This fundamental finding does not turn on the issue of whether the district has prohibited smoking when students are not present.

Although the Eureka smoking policy contains a broader smoking prohibition, it, like Riverside's policy, constitutes a direct response to the Legislature's direction. Eureka exercised its management prerogative in adopting a policy which it concluded best implements the Legislature's mandate and achieves its educational objectives.

Therefore, we conclude that the District did not violate subsections (a), (b) and (c) of EERA section 3543.5 when it adopted its Tobacco-Free Schools Policy.

As the Board has previously determined that establishment of a smoking policy is a management prerogative designed to further basic educational goals, it may be unnecessary to apply the test set out in Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim), to determine whether it falls within the scope of representation. But doing so further confirms that the District smoking policy does not constitute a mandatory subject of bargaining.

In Anaheim, the Board established a three-prong test to determine whether matters not specifically enumerated are in fact negotiable under EERA section 3543.2. In the Anaheim decision, the Board stated:

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

The California Supreme Court approved this test in San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800].

While the District's smoking policy may arguably satisfy the first prong of the Anaheim test, the second and third prongs are not met.

The District adopted the smoking policy in compliance with the legislative mandate to provide a tobacco-free environment for the students. All District employees and members of the general public entering District grounds serve as role models for the students in the use of tobacco products. The policy is designed to educate students. However, the District's rationale in adopting the policy also includes a statement that tobacco use is a health hazard. Such a statement could be interpreted to

involve health and safety issues which would arguably satisfy the first prong of the Anaheim test.

Further, tobacco use is a subject which is generally an issue between smokers and non-smokers, and not necessarily an issue between management and employee organizations. Judith Geppert, a District teacher, testified that the conflict between smoking and non-smoking faculty resulted in the language of Paragraph 8 being included in the CBA to provide non-smokers with a smoke-free environment. Although the issue originated from a conflict among smokers and non-smokers, the issue was addressed through the collective negotiation process. While parties are free to negotiate and incorporate nonmandatory subjects of bargaining into their collective bargaining agreements, that action does not transform a permissive subject into a mandatory subject. (Chula Vista City School District (1990) PERB Decision No. 834; Poway Unified School District (1988) PERB Decision No. 680.)

The second prong of the Anaheim test requires that "the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict." Although the Association and the District included language in their CBA to establish a smoking policy to satisfy the concerns of smoking and non-smoking employees, the subject does not satisfy the second prong of the Anaheim test. The issue of smoking in the workplace does not rise to such a level of

of smoking in the workplace does not rise to such a level of concern between management and employees that collective negotiations between them is the appropriate means for resolving any conflict resulting from that issue. Thus, it fails the second prong of the test.

Finally, requiring the District to negotiate this subject would significantly abridge its freedom to exercise its managerial prerogatives. The District, in reliance on legislative mandates, is implementing the basic educational goals set by the Legislature by establishing a policy designed to discourage students from smoking. This fundamental policy is dictated by the Education Code and to require the District to negotiate its implementation would limit the managerial prerogative needed by the District to achieve its educational mission. Thus, we conclude that the third prong of the Anaheim test is not satisfied and the Board finds that the smoking policy is not a mandatory subject of bargaining within the scope of representation under EERA section 3543.2.

Although the smoking policy is not a mandatory subject of bargaining, the effects of such a policy are negotiable. In Mt. Diablo Unified School District (1983) PERB Decision No. 373, the Board noted that the decision to layoff employees is a managerial prerogative. However, the district was obligated to negotiate the effects of its layoff decision. Similarly, the Eureka District is required to negotiate the effects of its tobacco-free policy upon request of the Association, including any

disciplinary action resulting from enforcement of the policy.

Finally, although we have concluded that this smoking policy is a permissive subject of bargaining, we note that the parties have previously reached agreement on designating employee smoking areas. This agreement was incorporated into the parties' CBA which was effective July 1, 1988 through June 30, 1991. After preparation of the tobacco-free policy by the committee and several hearings before the District school board, the board adopted the policy on February 4, 1991. The policy was to be effective July 1, 1991, upon expiration of the CBA. The Board has previously held that a unilateral change occurs when official action has been taken, not when it becomes effective. (Anaheim Union High School District (1982) PERB Decision No. 201.)

In Anaheim Union High School District, supra. PERB Decision No. 201, the District adopted a resolution on June 29 to reduce employee wages effective July 1, the expiration date of the parties' CBA. However, in that case, the unilateral change affected the subject of wages, clearly a mandatory subject of bargaining. The Board has not, however, ruled on when the unilateral change of a permissive subject of bargaining occurs.

Matters not within the scope of representation are reserved to the employer and may not be subject to meeting and conferring.[6] Although employers retain the right to meet and consult with employee organizations on any subject outside the scope of representation, the parties are not required to bargain

[6]EERA section 3543.2, see Footnote 3.

over a permissive subject. However, once agreement is reached concerning a permissive subject and it is embodied in the parties' CBA, the parties are bound by the terms of the agreement until its expiration or unless modified by the parties.

The employer retains its management prerogative over subjects outside the scope of representation. Further, by once bargaining and agreeing on a permissive subject, the parties do not make the subject a mandatory topic for future bargaining. (Chula Vista City School District, supra, PERB Decision No. 834; Poway Unified School District, supra, PERB Decision No. 680.) The nature of a permissive subject of bargaining permits an employer or an employee organization to indicate prior to the expiration of the agreement that it does not intend to bargain the nonmandatory subject. Thus, the District did not violate EERA when it acted prior to the expiration of the CBA to adopt the tobacco-free policy.

ORDER

The unfair practice charge and complaint in Case No. SF-CE-1467 is hereby DISMISSED.

Member Carlyle joined in this Decision.

Chairperson Hesse's concurrence begins on page 19.

Hesse, Chairperson, concurring: While I agree with the majority's conclusion that the Eureka City School District's (District) smoking policy is a nonmandatory subject of bargaining, I wish to distance myself from the analysis and discussion. I concur in the result. I write separately with regard to the application of the three-prong test set forth in Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim).

In Anaheim, the Public Employment Relations Board (Board) established a three-pronged test for determining whether matters not specifically enumerated are in fact negotiable under section 3543.2 of the Educational Employment Relations Act (EERA).[1] In that decision, the Board stated:

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

This test was approved by the California Supreme Court in San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850 [191 Cal.Rptr 800].

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

In applying the Anaheim test, I find that even if the smoking policy met the first and second prongs of the Anaheim test, the third prong is not satisfied. For example, the District's rationale for the smoking policy includes a statement that tobacco use is a health hazard. Such a statement could be interpreted to involve health and safety issues which would arguably satisfy the first prong of the Anaheim test. With regard to the second prong, tobacco use could be an issue between smokers and non-smokers as well as an issue between management and employee organizations. However, I think it is clear that the District's smoking policy involves a managerial prerogative to promote and attain a smoke-free school environment. Accordingly, I would find that the District's smoking policy does not satisfy the third prong of the Anaheim test. Therefore, the District's smoking policy is a nonmandatory subject of bargaining.

As the District's smoking policy is a nonmandatory subject of bargaining, and the new smoking policy was not effective until after the collective bargaining agreement had expired, I find that the District's conduct did not constitute a unilateral change in violation of EERA section 3543.5(a), (b) and (c).