STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS SAN YSIDRO CHAPTER #154,	)	
Charging Party,	)	Case No. LA-CE-3654
v.	)	PERB Decision No. 1206
SAN YSIDRO SCHOOL DISTRICT,	)	June 23, 1997
Respondent.	)	

Appearances; California School Employees Association by Kent Buchholz, Labor Relations Representative, for California School Employees Association and its San Ysidro Chapter #154; Wagner & Wagner by John J. Wagner, Attorney, for San Ysidro School District.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Ysidro School District (District) to a PERB administrative law judge's (ALJ) proposed decision (attached). In his proposed decision, the ALJ held that the District violated section 3543.5(b) and (c) of the Educational Employment Relations Act (EERA)[1] when it unilaterally replaced a vacant 7-hour

[1]EERA is codified at Government Code section 3540 et seq. EERA section 3543.5 reads, in relevant 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

instructional aide (IA) position with two 3.5-hour IA positions without giving the California School Employees Association and its San Ysidro Chapter #154 (Association) notice or an opportunity to bargain over the change.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, the District's exceptions and the Association's response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free from prejudicial error and adopts them as the decision of the Board itself.

ORDER

Upon the findings of fact, conclusions of law, and the entire record in this case, it is found that the San Ysidro School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(b) and (c).

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its administrators and representatives shall:

> employees because of their exercise of rights 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.

A. CEASE AND DESIST FROM:

1. Converting the vacant 7-hour instructional aide (IA) position into two 3.5-hour IA positions, prior to the completion of negotiations.

2. Denying the California School Employees Association and its San Ysidro Chapter #154 (Association) the right to represent its unit members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Rescind the action of converting the vacant 7-hour IA position into two 3.5-hour IA positions.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. 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.

3. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions. All reports to the regional director shall be concurrently served on the Association.

All other aspects of the charge and complaint are hereby DISMISSED.

Member Johnson joined in this Decision.

Chairman Caffrey's concurrence begins on page 5.

CAFFREY, Chairman, concurring: I concur in the finding that the San Ysidro School District (District) violated section 3543.5(b) and (c) of the Educational Employment Relations Act (EERA) when it unilaterally converted a vacant 7-hour instructional aide position into two 3.5-hour instructional aide positions without giving the California School Employees Association and its San Ysidro Chapter #154 (Association) notice and an opportunity to bargain over the change.

In Arcata Elementary School District (1996) PERB Decision No. 1163 (Arcata), the Board refined its rulings with regard to the negotiability of an employer's decision to change the hours of a vacant position, stating:

> Such a decision which reflects a change in the nature, direction or level of service falls within management's prerogative and is outside the scope of representation. Conversely, a decision to change the hours of a vacant position which is based on labor cost considerations and does not reflect a change in the nature, direction or level of service, is directly related to issues of employee wages and hours and is within the scope of representation. (Fn. omitted.)

The Board balanced the employer's exercise of management prerogative and the right of employees to be represented in matters relating to terms and conditions of employment when it adopted this approach.

In this case, it is clear that the District increased the level of instructional aide service from 7 to 14 hours. The change in the level of service, embodied in the establishment of

two new 3.5-hour positions, is a matter of management prerogative and outside the scope of representation.

Simultaneously, the District decided to replace the vacant 7-hour instructional aide position with two 3.5-hour positions. Under Arcata, if this decision was based on labor cost considerations and did not reflect a change in the nature, direction or level of service, it was negotiable. It is clear that labor cost considerations were involved in this decision, as they often are in today's fiscal environment, since the record indicates that employees of the District who work less than 4 hours per day do not qualify for the employee benefit package offered by the District. The crucial question, therefore, is whether the decision also reflected a change in the nature, direction or level of service.[1]

I conclude that the circumstances here are analogous to those the Board considered in Arcata. The two 3.5-hour instructional aide positions perform the same duties and services previously performed by the 7-hour position they replaced. The District failed to establish that its decision to change the hours of the vacant 7-hour instructional aide position to two 3.5-hour positions without benefits reflected a decision to change the nature, direction or level of service. Accordingly, that decision was within the scope of representation and the

[1]Pursuant to Arcata, a decision to change the hours of a vacant position which reflects a change in the nature, direction or level of service may be outside the scope of representation even if labor cost considerations are involved.

District was required to provide the Association with notice and the opportunity to negotiate. When it failed to do so, and unilaterally converted the 7-hour position to two 3.5-hour positions, the District violated the EERA.

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-3654, California School Employees Association and its San Ysidro Chapter #154 v. San Ysidro School District, in which all parties had the right to participate, it has been found that the San Ysidro School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(b) and (c).

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

A. CEASE AND DESIST FROM:

1. Converting the vacant 7-hour instructional aide (IA) position into two 3.5-hour IA positions, prior to the completion of negotiations.

2. Denying the California School Employees Association and its San Ysidro Chapter #154 the right to represent its unit members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

1. Rescind the action of converting the vacant 7-hour IA position into two 3.5-hour IA positions.

Dated:_____ SAN YSIDRO 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

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and its SAN YSIDRO CHAPTER #154,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-3654
v.	)	
SAN YSIDRO SCHOOL DISTRICT,	)	PROPOSED DECISION (1/21/97)
Respondent.	)	

Appearances: Kent Buchholz, Labor Relations Representative, for California School Employees Association and its San Ysidro Chapter #154; Wagner and Wagner, by John J. Wagner, Attorney, for San Ysidro School District.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On March 12, 1996, the California School Employees Association and its San Ysidro Chapter #154 (CSEA) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the San Ysidro School District (District). The charge alleged violations of subdivisions (a), (b) and (c) of section 3543.5, which is a part of the Educational Employment Relations Act (EERA or Act).[1]

[1]EERA is codified at Government Code section 3540 et seq. All section references, unless otherwise noted, are to the Government Code. Subdivisions (a), (b) and (c) of section 3543.5 state:

> 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

On May 31, 1996, the Office of the General Counsel of PERB, after an investigation of the charge, issued a complaint against the District alleging violations of subdivisions (a), (b) and (c) of section 3543.5. On June 20, 1996, the District answered the complaint, denying all material allegations.

A formal hearing was held before the undersigned on October 4, 1996. With the filing of the briefs by each side, the matter was submitted for decision on December 9, 1996.

INTRODUCTION

CSEA accuses the District of unilaterally reducing the hours of a seven hour a day instructional aide (IA) position. The District insists there was no such reduction, but rather the position has remained vacant. The District also insists it has both statutory and contractual justification for its actions.

FINDINGS OF FACT

Jurisdiction

The parties stipulated, and it is therefore found, that CSEA is both an employee organization and an exclusive representative, and the District is a public school employer within the meaning of the Act.

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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.

Relevant Circumstances

There is presently a collective bargaining agreement (CBA) between the parties, which is due to expire, by its terms, on June 30, 1997. The District operates a number of elementary schools, one of which is Sunset School. At that site it operates a preschool program which utilizes IAs.

On September 15, 1995, Norma Medina (Medina) retired from employment with the District after 23 years. Immediately prior to her retirement, she had a seven hour per day IA position in Belinda Meza's (Meza) preschool classroom at Sunset School.

Lorraine Ramirez (Ramirez), the CSEA chapter president, was informed that Medina's position was being performed by substitute employees. During the week of September 18, 1995, Ramirez spoke to Personnel Director Arthur La Cues (La Cues) about the matter. He confirmed that Medina's duties were being performed by substitute employees. Ramirez objected to what she believed was a unilateral reduction in hours of Medina's position.

Shortly after Medina's retirement four new three and one-half (3-1/2) hour IA positions were created by the District and assigned to Meza's classroom. The net effect was that Meza had two full-time equivalent aides in her classroom in the 1995-96 school year, one more than the previous year.

La Cues admitted that the employees filling the four new positions were doing the same duties that had been performed by

Medina.[2] On cross-examination he admitted that he had never observed Medina perform her duties, but he had observed the new employees in Meza's classroom. There was little evidence regarding the specific nature of Medina's classroom duties. It was, however, acknowledged that she performed those duties normally associated with an instructional aide in a classroom.

The District states that Medina's position has not been eliminated and is still vacant. It insists that it has not been filled with the newly hired employees.

There was no evidence showing that the governing board, at the time the new positions were created, offered any rationale reflecting a change in the nature or direction of service with regard to Meza's classroom. The fact that Medina's seven hours were replaced with fourteen hours does show an increased level of service. However, no evidence was offered to show that the increase required or justified the elimination, conversion or reduction of Medina's position.

Employee Benefits

CBA Article XIV section B states that the District will provide benefits only for employees who work half-time (four hours per day) or more.

[2]There was no evidence proffered regarding the quantum of support provided other than the number of hours the IAs spent in Meza's classroom.

ISSUE

Did the District unilaterally convert a vacant seven hour position to two three and one-half hour positions, thereby violating subdivisions (a), (b) or (c) of section 3543.5?

CONCLUSIONS OF LAW

A unilateral modification in terms and conditions of employment within the scope or representation is a per se refusal to negotiate. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) PERB has long recognized this principle. (San Mateo County Community College District (1979) PERB Decision No. 94.) The modification can be to a provision of the parties' CBA, a side agreement or an established past practice, but must have a "generalized effect" or a "continuing impact" on bargaining unit members. (Grant Joint Union High School District (1982) PERB Decision No. 196.)

Under subdivision (c) of section 3543.5 a public school employer is obligated to meet and negotiate in good faith with its recognized employee organization about matters within the scope of representation.

Section 3543.2 sets forth the Act's scope of representation. It is, in pertinent part, as follows:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment....

A reduction in the hours of bargaining unit members is a matter within the scope of representation. (North Sacramento School District (1981) PERB Decision No. 193.) Therefore, as a

general rule, if a school district reduces the hours of an employee, it must negotiate both the decision and the effects of such reduction. A reduction in the hours of a vacant position is also a negotiable matter as it impacts "the number of hours which have been regularly assigned. . ."to the bargaining unit. (Cajon Valley Union School District (1995) PERB Decision No. 1085.) However, a later decision, Arcata Elementary School District (1996) PERB Decision No. 1163, modified this rule, as follows:

> . . . a decision which reflects a change in the nature, direction or level of service falls within management's prerogative and is outside the scope of representation. Conversely, a decision to chancre the hours of a vacant position which is based on labor cost considerations and does not reflect a change in the nature, direction or level of service, is directly related to issues of employee wages and hours and is within the scope of representation. [Emphasis added; fn. omitted.]

In this case, the facts are not in dispute. Medina, in her prior position, performed IA duties in Meza's classroom for seven hours each day. Shortly after she retired, the District created four three and one-half hour positions and used those employees to provide the same classroom support Medina had supplied in the past.

In its opening argument, as well as in its brief, the District insists that its decision to create four new positions was a decision "to change the nature and level of preschool instructional aide service."

The District has a management right to change "the nature and level of preschool instructional aide service." The evidence shows that it made a decision to increase the level of hours of IA support in Meza's classroom. There is no dispute that the District had the right to unilaterally increase the level of IA support in Meza's classroom from seven to fourteen hours by hiring two additional three and one-half hour IAs. However, this decision does not justify the conversion of Medina's seven hour position into the other two three and one-half hour positions. The crucial question is whether the conversion of Medina's position was effected for labor cost considerations.

There was no reason proffered for the conversion of Medina's position, other than a general statement at the formal hearing that it was done to "change the nature and level of . . . IA service" in some unspecified manner. The CBA states that only those employees that work a minimum of half-time, are eligible for benefits. These two facts support an inference that the reason for the conversion was labor cost considerations.[3] As such conversion was due to labor costs, it is within the scope of representation and should have been negotiated.

However, the District also insists it has statutory and CBA authority to take such actions. It cites CBA Article XV,

[3]The fact that the District, at the same time, increased the level of IA support, does not negate this inference. The savings in the cost of benefits made more resources available for the additional salaries.

Classification, Reclassification and Abolition of Positions, as support for its position, as follows:

> A. The District may classify, reclassify or abolish positions as long as any such action is not inconsistent with any other provision in this Article or Agreement.
>
> B. The District shall notify CSEA in writing prior to the creation of any new classification, reclassification of an existing classification or the abolition of classifications.
>
> C. Upon receipt by CSEA of the District's written notice of its intent to classify, reclassify or abolish classification, CSEA shall notify the District in writing, within 10 working days, CSEA's intent to consult on this subject. CSEA also may determine to demand to negotiate a change in any new salary granted because of a classification, reclassification or abolition of position. (Emphasis added.)

The District contends that when it notified CSEA of the creation of the four new IA positions, its failure to request a consultation somehow precluded it from objecting to the use of these employees to perform the duties of Medina's position.

The District's reliance on CBA Article XV section A is without merit. The District's contractual right to classify, reclassify or abolish positions is not at issue. In addition, the Board has adopted the National Labor Relations Board's standard which requires a waiver of statutory rights be "clear and unmistakable." It has held that a party waives its rights to negotiate a subject only if it was "fully discussed" or "consciously explored" and the union "consciously yielded" its interest in the matter. (Los Angeles Community College District

(1982) PERB Decision No. 252; Placentia Unified School District (1986) PERB Decision No. 595.) It is clear the language in CBA Article XV section A is not a clear and unmistakable relinquishment of any CSEA rights. Nor was there any evidence the subject issue was "fully discussed" or "consciously explored." Therefore, it does not constitute a waiver of CSEA's right to negotiate a reduction of hours of a bargaining unit position.

The District's reliance on CBA Article XV sections B and C is also without merit. When it created the four new positions, it did not create, classify, reclassify or abolish any classifications. As CSEA was under no obligation to request consultation, its failure to do so did not preclude it from objecting to the subject reduction in hours.

The District also cites Education Code provisions which vest, in its governing board, the exclusive authority to create classified positions and to assign persons to those classified positions. Its argument seems to be that because it has such statutory authority, CSEA may not object to its attempt to implement a "change in the nature and level of preschool instructional aide service" by effectively reducing the hours of a bargaining unit position. This argument is not persuasive. Its authority to "create and assign" does not give it the right to violate the Act, i.e., modifying working conditions by a unilateral reduction in the hours of a bargaining unit position.

CSEA's Rights Were Violated

When the District unilaterally converted, and thereby reduced, the hours of a bargaining unit position, it effectively diminished CSEA's ability to represent the members of the bargaining unit. Therefore, when the District took the charged action, it interfered with CSEA's ability to properly represent its members in their labor relations with the District, a violation of subdivision (b) of section 3543.5.

Individual Employees' Rights Were Not Violated

The evidence shows that the unilateral reduction occurred with regard to a vacant position. The effect of such action on employees that may have wished to transfer into such position is too remote to support a violation of subdivision (a) of section 3543.5.

SUMMARY

Based on all of the foregoing, it has been concluded that the District has violated subdivision (b) and (c) of section 3543.5 when it (1) unilaterally reduced a vacant seven hour position to two three and one-half hour positions and (2) denied to CSEA rights guaranteed it by the Act.

REMEDY

The PERB, in section 3541.5(c), is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In order to remedy the unfair practice of the District and prevent it from benefitting from its unfair labor practices, and to effectuate the purposes of the Act, it is appropriate to order it to cease and desist from (1) reducing a vacant seven hour position to two three and one-half hour positions, and (2) denying to CSEA rights guaranteed to it by the Act.

It is also appropriate that the District be required to post a notice incorporating the terms of this Order at all sites where notices are customarily placed for classified employees of the District. This notice should be subscribed by an authorized agent of the District, indicating that it will comply with the terms therein. The notice shall not be reduced in size, defaced, altered or covered by any other material. Posting such a notice will provide employees with notice 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 Act that employees be informed of the resolution of the controversy and 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 Appeals approved a similar posting requirement. (See also National Labor Relations Board v. Express Publishing Co. (1941) 312 U.S. 425 [8 LRRM 415].)

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the San Ysidro School District (District) violated subdivisions (b) and (c) of Government Code section 3543.5 of the Educational Employment Relations Act (Act). Therefore, it is hereby ORDERED that the District, its administrators, and representatives shall:

A. CEASE AND DESIST FROM:

1. Converting the vacant seven hour preschool instructional aide (IA) position into two three and one-half hour positions, prior to the completion of negotiations.

2. Denying to the California School Employees Association and its San Ysidro Chapter #154 (CSEA) the right to represent its unit members.

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

1. Within thirty (30) workdays of the service of this decision, rescind the action of converting the vacant seven hour IA position into two three and one-half hour positions.

2. Within ten (10) workdays of service of a final decision in this matter, post at all sites where notices are customarily placed for classified employees, copies of the notice attached hereto as an Appendix. The notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable

steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the charging party herein.

It is further Ordered that all other aspects of the charge and complaint are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, 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 Cal. Code Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5 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 Cal. Code Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 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 Cal. Code Regs., tit. 8, secs, 32300, 32305 and 32140.)

ALLEN R. LINK
Administrative Law Judge