STATE OP CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER #187,	)	
Charging Party,	)	Case No. SF-CE-1946
v.	)	PERB Decision No. 1353
EAST SIDE UNION HIGH SCHOOL DISTRICT,	)	September 30, 1999
Respondent.	)	

Appearances: California School Employees Association by Maureen C. Whelan, Attorney, for California School Employees Association and its Chapter #187; Office of the General Counsel by Rodney G. Moore, General Counsel, for East Side Union High School District.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to a proposed decision by a PERB administrative law judge (ALJ) filed by the East Side Union High School District (District). In the proposed decision, the ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] when it changed the hours of bargaining

[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

unit positions without providing the California School Employees Association and its Chapter #187 (CSEA) with notice or the opportunity to negotiate.

BACKGROUND

The District is an employer within the meaning of EERA. CSEA is an employee organization within the meaning of EERA and the exclusive representative of a wall-to-wall classified bargaining unit within the District.

The District's Child Nutritional Services (CNS) program operates 10 kitchens providing food service to students at 11 District high schools. Historically, CNS has cost more to operate than it earns, and has been subsidized by the District's general fund budget.

Diane Wegner (Wegner) was hired in January 1996 as the District's director of CNS. One of her primary responsibilities was to reduce the general fund subsidy of the program. Wegner sought to do this by reducing CNS expenses and increasing CNS revenue. To reduce expenses, Wegner instituted changes such as purchasing food and supplies centrally through the District

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> discriminate against employees, or otherwise to interfere with, restrain, or coerce 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.

office, and changing the menu to include items such as pre-packaged cookies instead of cookies baked by CNS employees. Other menu changes reduced the number of entrees offered.

To increase revenue, Wegner sought to increase sales to students during the peak service hours of 10:00 a.m. to 1:00 p.m. Her plan was to make more staff available to work at food service sales windows and food vendor carts during this peak service period in order to sell more food to students. Because she was working with a fixed budget for staff costs, Wegner could not simply hire additional employees to increase staffing during the peak service hours. As a result, she decided to free up existing resources which could be used to support additional part-time CNS employees. Specifically, Wegner planned to convert several 8-hour positions to two 3.5-hour positions and to reduce the hours of approximately 30 other full-time positions by amounts varying from 30 minutes to 3 hours per day. She would then redirect the savings from these hour reductions to support the additional part-time positions. To avoid creating a hardship for current employees, Wegner planned to implement her new staffing arrangement gradually as positions became vacant. Due to the turnover rate within CNS, Wegner anticipated that it would take several years to fully implement her plan.

Wegner holds monthly meetings with CNS kitchen managers who are members of the bargaining unit. At these meetings, she regularly reviews sales revenue and expense issues. At some of these meetings, Wegner discussed her plans to save money by

splitting vacant 8-hour positions into two 3.5-hour positions and reducing the hours of other vacant positions. Aletha Gilliland, a kitchen manager, testified that reducing labor costs was a recurring issue at the staff meetings she attended. Unit member Doris Silva testified that at the December 13, 1996, staff meeting, Wegner discussed how reducing the hours of cafeteria worker positions could result in budget savings. During the discussions, Wegner detailed the amount saved by converting one 8-hour position to two 3.5-hour positions.

Converting an 8-hour position to two 3.5-hour positions results in significant labor cost savings. While the hourly rate of pay may be unchanged, there is a dramatic impact on the District's cost of benefits. District employees working 4 hours or more receive health benefits at an employee cost of only one dollar per month. The District's contribution is $387.61 per month. Employees working less than 4 hours are eligible for health benefits, but the District's share of the benefit cost is significantly reduced. If a 3.5-hour employee elects to take health benefits, the District contributes $170.55 toward the benefit premiums. The difference of $217.06 in the District's contribution must be paid by the employee. Since this represents a substantial percentage of a 3.5-hour employee's monthly gross salary, no 3.5-hour employee has elected to obtain health benefits through the District. It is this fact which results in the significant labor cost savings associated with Wegner's plan to convert full-time positions to 3.5 hour positions.

Wegner testified that her CNS staffing plan was based on the need to change staffing in order to increase sales. She indicated that the plan was an attempt to allocate CNS resources in a way which provided the best food service to students while increasing revenues. According to Wegner, the potential labor cost savings were not a significant consideration in her decision to establish 3.5-hour positions. Instead, the 3.5-hour time base was chosen because the peak service period was from 10:00 a.m. to 1:00 p.m., and it was appropriate to allow 15 minutes before and after the service period for employee preparation and clean up.

In December 1996, CSEA received a document from Wegner detailing her CNS staffing plan, including the planned reduction in hours of many positions. Denise Jensen, CSEA's labor relations representative, wrote to the District demanding to negotiate the proposed changes. She also demanded that the District cease and desist from unilaterally implementing any of the proposed changes.

On February 18, 1997, the parties met and CSEA learned that a number of the changes in Wegner's plan had already taken place, including the conversion of vacant 8-hour positions into two 3.5-hour positions and the filling of some of the resulting part-time positions. Although the District met with CSEA to discuss the changes, the District took the consistent position that it was not required to negotiate its decision to reduce the hours of vacant positions in order to implement Wegner's CNS staffing plan.

On May 5, 1997, CSEA filed the instant unfair practice charge alleging that the District had unilaterally reduced the hours of bargaining unit positions in violation of EERA. On July 29, 1997, PERB's Office of the General Counsel issued a complaint alleging that the District unlawfully failed to provide CSEA with notice or the opportunity to bargain over the decision to reduce the hours of bargaining unit positions, and the effects of that decision.

DISCUSSION

An employer's pre-impasse unilateral change in a policy or established practice which falls within the scope of representation violates its duty to meet and negotiate in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Unilateral changes are inherently destructive of employee rights and can constitute a per se violation of the bargaining obligation. (Davis Unified School District, et al. (1980) PERB Decision No. 116.)

In order to prevail in a unilateral change case, the charging party must prove that the employer altered the status quo on a matter within the scope of representation without providing the exclusive representative with notice or the opportunity to bargain, and the change had a generalized and continuing effect on bargaining unit members. (Grant Joint Union High School District (1982) PERB Decision No. 196.)

The dispute in this case involves the issue of whether the District's action to change the hours of vacant positions was a

matter within the scope of representation and subject to negotiations, or a matter of management prerogative which was not negotiable. In Anaheim Union High School District (1981) PERB Decision No. 177, the Board adopted the standard by which it determines whether a subject is within the scope of representation.[2] Under this balancing test a subject is within the scope of representation 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 its freedom to exercise those managerial prerogatives essential to the achievement of its mission.

In applying this standard, the Board has recognized as within the management prerogative, the employer's decisions involving the level of services to be provided. This prerogative includes decisions to create new positions, to determine the number of hours to be assigned to new positions, to discontinue a service by abolishing positions, and to lay off employees. (Mt. San Antonio Community College District (1983) PERB Decision No. 297; Davis Joint Unified School District (1984) PERB Decision No. 393; Alum Rock Union Elementary School District (1983) PERB

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

Decision No. 322; Newman-Crows Landing Unified School District (1982) PERB Decision No. 223; Stanislaus County Department of Education (1985) PERB Decision No. 556; San Diego Unified School District (1982) PERB Decision No. 234.)

The Board has dealt with the issue of employer changes in the hours of vacant positions in several recent cases. In San Jacinto Unified School District (1994) PERB Decision No. 1078 and Cajon Valley Union School District (1995) PERB Decision No. 1085, the Board found the employer's change in the hours of a vacant position to be negotiable. In Arcata Elementary School District (1996) PERB Decision No. 1163 (Arcata), the Board refined these rulings, and attempted to balance the rights of employees and employee organizations to negotiate over matters relating to hours of employment, an enumerated subject of bargaining within EERA section 3543.2(a), with management's right to make decisions involving the level of services to be provided. In Arcata. the Board cited and followed the guidance of the National Labor Relations Board (NLRB) which excludes from the scope of representation those management decisions "which lie at the core of entrepreneurial control" unless the decision is based primarily on labor costs. (Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609, 2617]; Otis Elevator Co. (1984) 269 NLRB 891 [116 LRRM 1075]; and First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705].) In Arcata. the following rule was adopted with regard to the

negotiability of an employer's decision to change the hours of a vacant position:

> 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 noted in Arcata that the effects of a non-negotiable decision to change the hours of a vacant position are negotiable to the extent that they affect terms and conditions of employment.

This case provides the Board with the opportunity to clarify the rule it adopted in Arcata.

It is axiomatic that any change in the hours of any vacant position changes the level of service to be provided by that position. This mere fact does not allow the employer, pursuant to Arcata. unilaterally to change the hours of bargaining unit positions as they become vacant. The Board's intent in Arcata was to permit employers to adjust the hours of vacant positions unilaterally in those circumstances in which legitimate changes in the nature, direction or level of services have occurred, changes which are not based primarily on wage and benefit cost considerations.

The Arcata rule was not intended, and will not be applied, to grant carte blanche authority to employers to change the hours

of vacant bargaining unit positions unilaterally. The employer may not unilaterally convert a vacant full-time, full-benefit position to multiple part-time, reduced-benefit positions at substantial labor cost savings, and justify the action simply because the resulting part-time positions will provide a changed level of service. Similarly, the Arcata rule does not permit employers unilaterally to reallocate labor cost resources by changing the hours of multiple bargaining unit positions as they become vacant, based on the assertion that the nature of service delivery is being changed. These employer actions are based primarily on labor cost considerations, relate directly to the terms and conditions of employment of bargaining unit members and are negotiable.

Applying this rule for the first time in Arcata, the Board found that the employer's decision to convert a vacant, full-time custodian position into two 3-3/4-hour custodian positions was negotiable. The Board noted that employees working less than 4 hours did not qualify for employer-provided benefits, and concluded that it was that labor cost consideration, rather than a change in the level of service, which formed the primary basis of the employer's action. Under similar circumstances in San Ysidro School District (1997) PERB Decision No. 1206, the Board found the employer's conversion of a vacant instructional aide position to two 3.5-hour, no-benefit positions, to be based primarily on labor cost considerations and negotiable.

In the instant case, while the District sought to increase food service during the peak hours, it is clear that the 3.5-hour time base for the part-time CNS positions, established by converting vacant full-time positions, reflects the fact that employees working less than 4 hours receive substantially reduced employer-provided benefits. Converting a full-time position into two 4-hour positions actually would increase labor costs because the 4-hour employees would be entitled to employer-provided benefits. The record reveals that labor cost considerations, rather than a change in the nature, direction or level of service, formed the primary basis of the District's decision to convert vacant full-time positions to multiple 3.5-hour positions. Therefore, pursuant to Arcata. the District's decision to change the hours of those vacant CNS positions was negotiable. Similarly, Wegner's CNS staffing plan to reduce the hours of dozens of other CNS positions as they became vacant, was devised to achieve labor cost savings sufficient to support the addition of other positions. Rather than reflecting a change in service which would permit the District to proceed unilaterally under Arcata. the District's plan represents a cost-driven redeployment of its labor resources which has the effect of converting CNS to a largely less-than-full-time workforce. Clearly, that action is so intimately related to the terms and

conditions of employment of bargaining unit members that it is subject to negotiations.[3]

It is undisputed that the District consistently maintained that the decisions embodied in Wegner's CNS staffing plan were matters of management prerogative. Since it has been determined that those decisions were subject to bargaining, the District violated EERA section 3543.5 (c) when it failed to provide CSEA with the opportunity to negotiate over them and their effects. Because that same conduct denied CSEA its right to represent bargaining unit members, and deprived employees of their right to be represented by CSEA, the District also violated EERA section 3543.5(b) and (a).

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the East Side Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c). The District violated EERA by unilaterally converting full-time positions into multiple part-time positions, and by unilaterally changing the hours of numerous other bargaining unit positions. Because this action had the additional effect of interfering with the right of the California School Employees Association and its Chapter #187 (CSEA) to

[3]The Board wishes to emphasize that the efficacy or advisability of Wegner's CNS staffing plan is not a matter within PERB's purview. This case involves the question of the negotiability of aspects of that plan under EERA.

represent its members, and the right of employees to be represented by CSEA, the unilateral change also was a violation of EERA section 3543.5(b) and (a).

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

A. CEASE AND DESIST FROM:

1. Unilaterally converting full-time Child Nutritional Services (CNS) positions into multiple part-time positions, and unilaterally changing the hours of other bargaining unit positions without providing CSEA with notice and the opportunity to negotiate over the changes and their effects on the terms and conditions of employment of bargaining unit members.

2. Interfering with the right of CSEA to represent its members.

3. Interfering with the right of employees to be represented by CSEA.

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

1. Immediately upon request by CSEA, enter into negotiations over these unilateral changes.

2. Within thirty (30) workdays following the date that this decision is no longer subject to appeal, rescind the actions of unilaterally converting full-time bargaining CNS positions into multiple part-time positions and unilaterally changing the hours of other bargaining unit positions.

3. Within ten (10) workdays following the date that this Decision is no longer subject to appeal, post at all work locations where notices to classified employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. 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.

Member Dyer joined in this Decision.

Member Amador's dissent begins on page 15.

AMADOR, Member, dissenting: I dissent and I would dismiss the unfair practice charge and complaint. My reasoning is as follows.

In Arcata Elementary School District (1996) PERB Decision No. 1163 (Arcata), the Public Employment Relations Board (PERB or Board) followed the guidance of the National Labor Relations Board (NLRB) by excluding from the scope of representation those management decisions "which lie at the core of entrepreneurial control" unless the decision is based on labor costs. (Id. at p. 4, citing Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609, 2617] (Fibreboard); Otis Elevator Co. (1984) 269 NLRB 891 [116 LRRM 1075]; and First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705].)[1] The Board has long recognized as within management prerogative, the employer's decisions involving the level of services to be provided, including the decision to create new positions, to determine the number of hours to be assigned to new positions, to discontinue a service by abolishing a position, and to lay off employees. (Arcata at p. 5, citing Mt. San Antonio Community College District (1983) PERB Decision No. 297; Davis Joint Unified School District (1984) PERB Decision No. 393; Alum Rock

[1]PERB has specifically applied the Fibreboard standard to conclude that various employer decisions fall within management prerogative and are outside the scope of representation, including the creation and abolition of job classifications; contracting out; assignment of non-unit work to volunteers; the decision to cease operation of child care center; and the decision to create an Employee Assistance Program. (Arcata at p. 5, fn. 4.)

Union Elementary School District (1983) PERB Decision No. 322; Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.)

In attempting to define the boundary between management prerogative and the scope of representation, the focus should be on whether the employer needs unencumbered decision-making or whether the subject is amenable to resolution through the collective bargaining process. (Arcata at p. 7.) The Board's reasoning is instructive:

> If the decision to be made by this employer . . . is based upon considerations other than labor costs, it is difficult to see how the decision would be amenable to collective bargaining. The unions would, of necessity, be involved in decision making beyond their own interests of employee wages and hours. But such is not the function of an exclusive representative, it is the function of management to be concerned with the running of the business. [Id. at pp. 7-8, citing State of California (Department of Personnel Administration) (1987) PERB Decision No. 648-S (DPA).]

In Arcata, the Board set forth the approach to be used in determining the negotiability of an employer's decision to change the hours of a vacant position:

> . . . 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.
> (Arcata at p. 8; fn. omitted.)

As I read the cited language, the Board uses a two-part approach in determining negotiability of a decision: (1) Has the charging party proven by a preponderance of the evidence that the District's decision does not reflect a change in the nature, direction or level of service? If the charging party cannot meet this burden, the decision is nonnegotiable. (2) If a decision to change the hours of a vacant position does not reflect a change in the nature, direction or level of service, the decision is negotiable if the charging party can prove that the decision is based on labor cost considerations.

In weighing these questions, the Board must rely on objective evidence and refrain from engaging in speculation as to the legitimacy of the employer's motive. This approach is necessary to avoid undermining the Board's longstanding recognition that the employer's decisions involving the level of services are outside the scope of representation. (Arcata, supra, at p. 5.)

In applying the Arcata approach I reach the following conclusions. Although there is conflicting testimony, the record supports a finding that a legitimate change in the level of service did occur. The California School Employees Association and its Chapter #187 (CSEA) has failed to meet its burden of proof and the charge should be dismissed on that ground.[2]

[2]Even if CSEA had established that there was no change in the level of service, I do not share the majority's view that the East Side Union High School District's plan represents a "cost-driven redeployment of its labor resources."

This case provides a good example of the Board's reminder in DPA that "it is the function of management to be concerned with the running of the business." Neither the Board nor the exclusive representative should become involved in the detailed type of staffing decisions at issue here.

In conclusion, I find that no change to a negotiable subject occurred and I would dismiss the charge.

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. SF-CE-1946, California School Employees Association and its Chapter #187 v. East Side Union High School District, in which all parties had the right to participate, it has been found that the East Side Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c). The District violated EERA by unilaterally converting full-time Child Nutritional Services (CNS) positions into multiple part-time positions, and unilaterally changing the hours of numerous other bargaining unit positions. The District took this action without providing the California School Employees Association and its Chapter #187 (CSEA) with notice or the opportunity to negotiate, and without first exhausting the statutory impasse procedure.

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

A. CEASE AND DESIST FROM:

1. Unilaterally converting full-time CNS positions into multiple part-time positions, and unilaterally changing the hours of other bargaining positions without providing CSEA with notice and the opportunity to negotiate over the changes and their effects on the terms and conditions of employment of bargaining unit members.

2. Interfering with the right of CSEA to represent its members.

3. Interfering with the right of employees to be represented by CSEA.

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

1. Immediately upon request by CSEA, enter into negotiations over these unilateral changes.

2. Within thirty (30) workdays following the date that this decision is no longer subject to appeal, rescind the

actions of unilaterally converting full-time CNS positions into multiple part-time positions and unilaterally changing the hours of other bargaining unit positions.

Dated: _____ EAST SIDE UNION HIGH 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.