STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER #612,	)	
Charging Party,	)	Case No. LA-CE-3865
v.	)	PERB Decision No. 1402
ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT,	)	September 5, 2000
Respondent.	)	

Appearances: California School Employees Association by Maureen C. Whelan, Staff Attorney, for California School Employees Association and its Chapter #612; Anthony V. Leonis, Labor Relations Consultant, for Antelope Valley Union High School District.

Before Dyer, Amador and Baker, Members.

DECISION

AMADOR, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the Antelope Valley Union High School District (District) and the California School Employees Association and its Chapter #612 (CSEA) to a proposed decision (attached) of a PERB administrative law judge (ALJ). In the proposed decision, the ALJ dismissed CSEA's charge and complaint which alleged that the District unilaterally replaced a full-time vacant cafeteria helper position with two part-time cafeteria helper positions and refused to negotiate the decision or its effects, thereby

violating section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).[1]

After reviewing the entire record in this case, including the unfair practice charge and complaint, the hearing transcript, the proposed decision and the filings of the parties, the Board hereby dismisses the unfair practice charge and complaint in accordance with the following discussion.

FINDINGS OF FACT

The District is a public school employer and CSEA is the exclusive representative of an appropriate unit of employees, both within the meaning of EERA. The District operates six high schools: Antelope Valley, Quartz Hill, Palmdale, Lancaster, Desert Winds and Highlands.

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[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 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.

Prior to 1997, each school employed one 8-hour cafeteria worker, except for Quartz Hill, which had two 8-hour cafeteria workers. Melanie Dohn (Dohn), a CSEA job steward who was a longtime District employee, testified that the District had a past practice at Quartz Hill of employing workers in part-time cafeteria positions.

Since 1992, the food services department has lost a number of 8-hour employees. Dohn testified that the District has a past practice of not replacing or filling vacant positions.

Eight-hour positions enjoy health and welfare benefits. Employees with less than four hours do not receive such benefits.

Teri Narveson (Narveson) was employed as an 8-hour per day cafeteria helper at Quartz Hill. Narveson's duties included stocking the snackbar, operating a cash register, and doing personnel paper work for the food services manager. According to Bonita Mendonca (Mendonca), food services manager at Quartz Hill, Narveson was going to be transferred to Lancaster High School. When Narveson informed the District that she did not want to transfer to Lancaster and would be retiring soon, the District allowed her to stay at Quartz Hill until she retired on August 2 9, 1997.

Mendonca testified that Narveson's position is still in existence but remains vacant.

After learning about an automated pizza machine, the District decided to purchase one and brought it to Quartz Hill around the same time Narveson retired. According to testimony,

this type of pizza machine requires one person to attend to it constantly while it is being operated. At least one other person must be available to run a cash register while the pizza machine is running. Thus, in order to have adequate coverage during periods of peak demand when the pizza machine is running, two employees must be on duty from approximately one-half hour before snack until 20 minutes after lunch.

Mendonca testified that Food Service Director Terry Custer (Custer) reviewed the District's staffing and food service programs with its cafeteria managers. Custer determined that there was a need to employ several additional part-time cafeteria helpers to fill various positions within the District, including staffing the new pizza machine and cash register at Quartz Hill.

The District subsequently posted and filled two new three and one-half hour cafeteria helper positions for Quartz Hill.[2] The duties described were: prepare and serve foods in cafeteria or snackbar, prepare salads, pastries or other foods, act as cashier, wash dishes, dry, sort and put away silver, work at counter and steam tables and perform other duties in the cafeteria as required. The time slot for the two part-time positions at Quartz Hill was designed to cover the three and one-half hour peak demand time; i.e., from approximately 9:15 a.m. to 12:45 p.m.

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[2]It also posted two such positions at Lancaster High School, and one each at Antelope Valley High and Highland High Schools.

In response to questions from CSEA job steward Dohn, Mendonca told her that the postings were for two new part-time positions at Quartz Hill, and that the District was not filling the 8-hour position vacated by Narveson. On September 10, 1997, Dohn wrote to CSEA Labor Relations Representative Carol Finck (Finck) regarding the flyer she saw concerning the two three and one-half hour vacancies at Quartz Hill School.

Finck wrote to Director of Personnel Jan Medema (Medema) on September 12, 1997, asserting that the District was reducing the hours of an 8-hour position. Finck contended that the reduction in hours was within the scope of negotiations and demanded to bargain the reduction.

Medema responded on September 16, 1997. She stated that the District had not changed the hours of an existing position, but had decided not to fill the vacancy. She also stated that should an 8-hour position be needed, the District would fill it.

Mendonca, the food services manager at Quartz Hill, had worked as a three and one-half hour food service worker for several years prior to her 1993 promotion. During that time she also held the position of chief job steward for CSEA. Prior to receiving her promotion to the food services manager position, she investigated the District's practices with respect to food service workers. She found that the District had a past practice of eliminating bakers and cooks through attrition. Four to six positions were vacated and never filled. She also found that food inventories contained many pre-baked or prepackaged goods.

Because of these trends, she noted that the District needed more cashiers and fewer food preparers.

Mendonca also testified that the decision not to fill Narveson's position at Quartz Hill was not related to costs, but rather, because that site was overstaffed. In addition, Mendonca testified that when she became manager at Quartz Hill, it was the only school with two full-time food service workers.

Mendonca further testified that even if Narveson had not retired, the District would still have employed two three and one-half hour positions for the peak time slot due to the purchase of the pizza machine. This is because a cashier must be available at the same time the other worker is operating the pizza machine.

The parties' current collective bargaining agreement title page denotes the agreement as covering the period from January 1, 1997 to June 30, 1999.[3] Several provisions are relevant to this case.

Article XII, "Transfer Policy", provides as follows:

> 12.0 The District shall have the sole authority to determine when and where an opening exists within the unit of classified unit members described in Article I, Certification of Representative, of this agreement. The Superintendent, or his designee, shall have the power to transfer unit members from one work site to another work site, subject to the provisions set forth in this Article.

[3]However, the "Durations" language of the agreement (Article XXIII) provides that the agreement became effective upon board adoption on October 1, 1997.

Article XVII, "District Rights", provides:

> 17.0 All matters not specifically enumerated as within the scope of negotiations in Government Code Section 3543.2 are reserved to the District. It is agreed that such reserved rights include, but are not limited to, the exclusive right and power to determine, implement, supplement, change, modify, or discontinue, in whole or in part, temporarily or permanently, any of the following:

Among the sections is 17.6 which provides:

> The selection, classification, direction, promotion, demotion, discipline, and termination of all personnel of the District; affirmative action and equal employment policies and programs to improve the District's utilization of women and minorities; the assignment of unit members to any location (subject to the express terms of this agreement regarding transfers), and also to any facilities, classrooms, functions, activities, academic subject matters, grade levels, departments, tasks or equipment; and the determination as to whether, when and where there is a job opening.

Section 17.14 provides (in part):

> In addition to it's statutory reserve rights, the District also retains within its sole discretion all rights and powers not expressly limited by the clear and explicit language of this agreement, including but not limited to the exclusive right and power to determine, implement, supplement, change, modify, or discontinue in whole or in part, temporarily or permanently, any of the following:
>
> 17.14.1 The rate of pay for any classifications implemented during the term of this agreement.
>
> 17.14.2 Security and safety measures and rules for unit members.
>
> 17.14.3 The transfer of unit members District-wide.

17.14.4 Staffing patterns.

Finally, section 21.1 provides:

> It is agreed that during the term of this agreement, the parties waive and relinquish the right to meet and negotiate and agree that the parties shall not be obligated to meet and negotiate with respect to any subject or matter covered in this agreement even though such subjects or matters were proposed and later withdrawn.

Both parties filed exceptions to the ALJ's proposed decision.

ISSUE

Did the District fail to meet and negotiate in good faith when it posted and filled two part-time positions at Quartz Hill?

DISCUSSION

An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and violative of EERA section 3543.5 (c) . (Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro Valley.)

To prevail on a complaint of unilateral change, the charging party must establish by a preponderance of the evidence that (1) the employer breached or altered the party's 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., having 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. (Grant Joint Union High School District (1982) PERB Decision No. 196; Pajaro Valley; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

In Arcata Elementary School District (1996) PERB Decision No. 1163 (Arcata), PERB addressed the question of the negotiability of an employer's decision to change the hours of a vacant position. PERB's analysis included finding a balance between the right of management to "run the business" against the obligation of the employer to negotiate about matters within the scope of representation. Drawing on federal precedent[4] and PERB cases, the Board concluded that contracting out decisions based upon labor costs are subject to negotiation. Relating to changing vacant positions, the Board held that:

> Such a decision which reflects a change in the nature, direction or level of service falls within management's prerogative and is

[4]In Arcata, PERB relied on Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609] (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] in defining managerial decisions that "lie at the core of entrepreneurial control" and are excluded from the scope of representation, unless based upon labor costs. As the Board noted in Arcata, PERB has specifically applied the Fibreboard standard to conclude that various employer decisions fall within management prerogative and are outside the scope of representation. These included the employer's decisions to create and abolish job classifications; contracting out; assignment of non-unit work to volunteers; the decision to cease operation of a child care center; and the decision to create an employee assistance program. (Arcata at p. 5, fn. 4.)

> outside the scope of representation. [footnote omitted] 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. (Id. at p. 8.)

The Board also emphasized the following language from State of California (Department of Personnel Administration) (1987) PERB Decision No. 648-S:

> 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. [Arcata at pp. 7-8.]

Recently, in East Side Union High School District (1999) PERB Decision No. 1353 (East Side), the Board clarified that employers may adjust the hours of vacant positions unilaterally when "legitimate changes in the nature, direction or level of service have occurred, changes which are not based primarily on wage and benefit cost considerations." (East Side at p. 9.)

The Board continued:

> 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. (Id. at p. 10.)

The Board concluded that, based on the facts presented in East Side, the District's decision represented a "cost driven redeployment of its labor resources" and 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 three and one-half hour positions. (Id. at p. 11.) Thus, it concluded that the decision was negotiable.

Under this line of cases, the issue is whether the employer's decision not to fill a vacant full-time position and to create multiple new part-time positions constitutes a legitimate change in the nature, direction or level of service or whether the decision is primarily driven by labor cost considerations. This approach is necessary to avoid undermining the Board's longstanding recognition that the employer's decisions involving the level of services are within management prerogative and outside the scope of representation. (Arcata at p. 5.) In weighing these questions, the Board must rely on objective evidence.

Applying this line of precedent and comparing relevant facts to those in the case at bar, the Board is persuaded that the District's decision does represent a legitimate change in the nature, direction or level of service and is non-negotiable. Several factors lead us to this conclusion.

First, there is evidence that the District's decision to phase out the full-time position at Quartz Hill was made well

before its decision to create and fill part-time positions at that school. Having decided to transfer Narveson's full-time position to another school because of overstaffing at Quartz Hill, the District informed her of the impending transfer. However, once the District learned of Narveson's intention to retire in the near future, it refrained from implementing the transfer out of respect for a longtime employee's personal wishes and retirement timetable. There is no evidence whatsoever that the District intended to fill Narveson's position at Quartz Hill once she retired. In fact, the District's past practice is to the contrary, as there was a pattern of several years' duration of leaving full-time food service positions vacant when the incumbent retired.

Second, it is clear that the District made the decision not to fill the full-time position at Quartz Hill after Narveson's retirement independently of its decision to add a pizza machine and staff it appropriately. CSEA has not successfully rebutted the District's substantial testimony that its decision to create the two new part-time positions at Quartz Hill was made subsequent to and independently of its decision not to fill Narveson's former full-time position. This evidence supports a conclusion that the decision was not based on projected labor cost savings which would be achieved by converting a full-time full-benefit position to two part-time no-benefit positions.

Third, the decision to add the part-time positions was made in order to implement the District's non-negotiable decision to

provide a different type of service to patrons by opening a pizza parlor. Due to the operating requirements of the pizza machine, a particular staffing configuration was needed in order to appropriately serve customers, i.e., one person was needed to run the machine and another to run the cash register for the same three and one-half hour time slot.

Both parties offer compelling arguments, but CSEA has failed to support its allegations with convincing evidence. The District, by contrast, as discussed above, offers several forms of evidence in support of its position which were not successfully rebutted by CSEA.

After careful consideration of the facts in this case, we conclude that when the District decided to begin selling freshly-made pizza to cafeteria diners and made related hiring decisions, it made a legitimate, actual change in the existing nature and level of service. Under the Arcata line of cases discussed above, this decision falls within management prerogative and is not negotiable.[5]

Since there was no duty to negotiate, CSEA's allegation that the District's action constituted an unlawful unilateral change fails under the Board's Grant standard.[6]

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[5]Since the Board finds that the District acted within its management prerogative, it is unnecessary to deal with the District's waiver by contract argument or any of the District's other legal theories.

[6]With regard to the allegation that the District failed to bargain over the negotiable effects of its decision, the record contains very little evidence or argument from CSEA to support that claim. Consequently, any effects resulting from the

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the unfair practice charge and complaint in Case No. LA-CE-3865, California School Employees Association and its Chapter #612 v. Antelope Unified School District is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Baker joined in this Decision.

District's action are largely speculative and the evidence is insufficient to sustain a finding of an unlawful refusal to negotiate effects.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-3865 PROPOSED DECISION (6/8/99)

Appearances: Keith Pace, Senior Labor Relations Representative, and Melanie Shafer, Labor Relations Representative, for California School Employees Association; Schools Legal Service, by Anthony V. Leonis, Labor Relations Consultant, for Antelope Valley Union High School District.

Before Gary M. Gallery, Administrative Law Judge.

PROCEDURAL HISTORY

A union representing cafeteria workers contends the employer split an existing 8-hour position and reduced the hours to two 3 1/2-hour positions without giving the union an opportunity to negotiate the change.

This case commenced on November 19, 1997, when the California School Employees Association (CSEA) filed an unfair practice charge against the Antelope Valley Union High School District (District). The matter was placed into abeyance until July 23, 1998. After investigation, and on October 29, 1998, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against the District. The complaint alleges that before September 5, 1997, the District's policy concerning the hours worked per day for a vacant Cafeteria

Helper I position at Quartz Hill High School (Quartz Hill) was that it was an 8-hour per day position held by Teri Narveson (Narveson) who had resigned. The complaint alleges that on September 5, 1997, the District changed this policy by splitting the Quartz Hill position into two positions and reducing the hours for the positions to 3 1/2 hours per day. It is further alleged that on or about September 5, 1997, the District advertised to fill these positions and subsequently filled the positions over CSEA's objections. This conduct is alleged to have been done without notice to CSEA or affording CSEA an opportunity to negotiate the decision or the effects of the change in policy. This action it is alleged, constitutes failure and refusal to bargain in good faith in violation of the Educational Employment Relations Act (EERA), section 3543.5(c) and further, denied CSEA its right to represent members in violation of section 3543.5 (b) and interfered with rights of unit employees to be represented by CSEA in violation of section 3543.5(a).[1] The complaint further alleges that on September 12,

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[1]Unless otherwise indicated, all statutory references are to the Government Code. EERA is codified at Government Code section 3540 et seq. In relevant part, section 3543.5 provides that it shall be unlawful for a public school employer to:

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

1997, CSEA objected to the reduction in hours in the cafeteria position and demanded to bargain the reduction. The District, on September 16, 1997, and again on September 19, 1997, denied it had reduced the hours of the position. This conduct was also alleged to violate section 3543.5(a), (b) and (c).

The District filed its answer on November 13, 1998, denying any violation of the EERA.

A settlement conference did not resolve the dispute. Formal hearing was held on February 19, 1999, in Los Angeles, California. The parties submitted post-hearing briefs on April 2, 1999. Thereafter, my review of the record led me to a concern about whether the part-time employees were in the unit represented by CSEA. On May 2, 1999, I wrote to the parties asking for their positions. They both responded on May 24, 1999, with opposite positions; CSEA asserting the position that part-time employees were in the unit, and the District contending they are not. Thus, as of May 24, 1999, the matter was submitted for decision.

I conclude the part-time positions are in the bargaining unit represented by CSEA. This is based upon the following: the original petition for certification and the certification by PERB in November of 1977 lists "all regular classified employees" and "other unclassified employees" as within the unit. The rather

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(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.

extensive list of excluded employees does not refer to the part-time employees.[2] Subsequent modifications of the unit description have not touched this description. Moreover, Bonita Mendonca (Mendonca), the District's own witness, testified that as a part-time employee prior to her appointment as a manager, she was in the unit. Indeed, she served as chief job steward, just prior to her appointment as a manager. It is clear, therefore, that the parties have treated part-time employees as being within the unit, consistent with the original unit description.

FINDINGS OF FACT

The District is a public school employer and CSEA is the exclusive representative of an appropriate unit of employees, both within the meaning of EERA.

The District operates six high schools, Antelope Valley, Quartz Hill, Palmdale, Lancaster, Dessert Winds and Highlands.

Prior to 1997, each school employed one 8-hour cafeteria worker except for Quartz Hill which had two 8-hour cafeteria workers. The District has also had part-time positions prior to 1997. There have been vacancy announcements in the past for part-time positions in the food service program.

Since 1992, the food services department has lost a number of 8-hour employees (pastry cook, cook and cafeteria helper)

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[2]PERB make take official notice of its own records. (El Monte Union High School District (1980) PERB Decision No. 142; San Ysidro School District (1997) PERB Decision No. 1198.

through retirement. The District has not replaced or filled the vacant positions.

Eight-hour positions enjoy health and welfare benefits. Employees with less than four hours do not receive such benefits.

Teri Narveson was employed as an 8-hour per day cafeteria helper at Quartz Hill. Narveson's duties included stocking the snackbar, operating a cash register, and doing personnel paper work for the food services manager. According to Mendonca, food services manager at Quartz Hill, Narveson was going to be transferred to Lancaster High School. She responded that she did not want to transfer to Lancaster and would be retiring soon. Thus, the District allowed her to stay at Quartz Hill until she retired on August 29, 1997.

CSEA job steward Melanie Dohn (Dohn) testified that CSEA looked for a posting of Narveson's vacant position as it was interested in having other less than full-time cafeteria workers realize an opportunity for full-time work. The position was never posted.[3] Rather, two 3 1/2-hour positions were posted for

[3]CSEA's curiosity about the 8-hour position is somewhat undercut by Mendonca's unrebutted testimony that Dohn knew that Narveson was to be transferred to another school well before September of 1997. Mendonca testified that she and Dohn had several conversations about the possible transfer. Under these circumstances, CSEA's anticipation of a posting of the 8-hour position at Quartz Hill was suspect. Why would the District post an 8-hour position at Quartz Hill when it had already determined to transfer the position to another school when it was filled by Narveson? Her retirement brought about the same profile of full-time cafeteria workers at Quartz Hill as existed at the other five schools.

Quartz Hill, along with two at Lancaster High School, and one each at Antelope Valley High and Highland High Schools.[4]

Dohn testified that she saw the posting for two 3 1/2-hour positions and went to Mendonca. Dohn testified that in response to her questions regarding the two posted positions, Mendonca told her that the District was not filling two existing positions but that they were new positions, and that the District was not filling the 8-hour position vacated by Narveson.[5]

On September 10, 1997, Dohn wrote to CSEA Labor Relations Representative Carol Finck (Finck) regarding the flyer she saw concerning the two 3 1/2-hour vacancies at Quartz Hill School. Dohn wrote that the cafeteria manager had told her that District Director of Food Services Terry Custer (Custer), had decided to split the Narveson 8-hour position into two.[6]

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[4]The duties described were: prepare and serve foods in cafeteria or snackbar, prepare salads, pastries or other foods, act as cashier, wash dishes, dry, sort and put away silver, work at counter and steam tables and perform other duties in the cafeteria as required.

[5]Dohn testified that Mendonca said the school only needed one 8-hour position. This is consistent with Mendonca's later testimony about the profile for each school having only one cafeteria worker, but for Quartz Hill, prior to Narveson's retirement, with two cafeteria workers.

[6]Dohn's testimony at hearing did not clarify her written statement in this memo to Finck, that she asked Mendonca if the positions posted were "2 old vacancies of hers she was filing".

On cross-examination, Dohn's response to use of the word "elimination" in reference to the Narveson position was that they would not be filling that position and were substituting it with the two 3 1/2-hour positions.

Dohn testified she could not find any board action reflecting elimination of the Narveson position.

Mendonca testified that she did not tell Dohn that the District used the 8-hour position to support the two 3 1/2-hour positions that were posted in 1997. The position is still in existence but remains vacant, she said.[7]

The school site opened up a pizza parlor and it needed one person to run the machine and the other to run the register. The time slot was from 9:15 a.m. to 12:45 p.m.

Finck wrote to Director of Personnel Jan Medema (Medema) on September 12, 1997, asserting that the District was reducing the hours of an 8-hour position. Finck contended the reduction in hours was within the scope of negotiations and demanded to bargain the reduction.

Medema responded on September 16, 1997. She stated that Custer had not changed the hours of an existing position but had decided not to fill the vacancy. She concluded that should an 8-hour position be needed, the District would fill it.

Mendonca was a 3 1/2-hour food service worker for eleven years prior to her appointment as food service manager. During this time she held the position of chief job steward for CSEA. In 1993, she was appointed food service manager at Quartz Hill. Prior to her appointment she had investigated the District's practices with respect to food service workers. Mendonca found

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[7]CSEA stipulated that the eight positions from which employees had retired still exist and remain vacant.

that the District, through attrition was eliminating bakers and cooks. Four to six positions were vacated and never filled. She found food inventories contained pre-baked or prepackaged goods. The District needed more cashiers because there were more students, but fewer food preparers.

Mendonca testified that the decision not to fill Narveson's position at Quartz Hill was not related to costs, but rather, because of lack of work. This is supported by the fact that Narveson was asked to transfer to Lancaster prior to her announcement of retirement plans.

Mendonca further testified that when she became manager at Quartz Hill, it was the only school with two full-time food service workers, the cook and Narveson, the cafeteria helper. Even if Narveson had not retired, the District would still have employed two 3 1/2-hour positions because the machine was run only at peak hours, about a half-hour before snack until 20 minutes after lunch.[8] It required the machine operator and the cashier.

The parties' current collective bargaining agreement title page denotes the agreement as covering the period January 1, 1997, to June 30, 1999. However, the "Durations" language of the

[8]Narveson had an "aversion" to machines said Mendonca. She would not have operated the machine. This does not explain why Narveson could not have operated the register, however. Nonetheless, the District had already, independent of the pizza enterprise, determined to shift Narveson's 8-hour position to another school.

agreement (Article XXIII) provides that the agreement became effective upon board adoption on October 1, 1997.

The District relies on several provisions in defense of its action.

Article XII, "Transfer Policy", provides as follows:

> 12.0 The District shall have the sole authority to determine when and where an opening exists within the unit of classified unit members described in Article I, Certification of Representative, of this Agreement. The Superintendent, or his designee, shall have the power to transfer unit members from one work site to another work site, subject to the provisions set forth in this Article.

Article XVII, "District Rights", provides:

> 17.0 All matters not specifically enumerated as within the scope of negotiations in Government Code Section 3543.2 are reserved to the District. It is agreed that such reserved rights include, but are not limited to, the exclusive right and power to determine, implement, supplement, change, modify, or discontinue, in whole or in part, temporarily or permanently, any of the following:

Among the sections is 17.6 which provides:

> The selection, classification, direction, promotion, demotion, discipline, and termination of all personnel of the District; affirmative action and equal employment policies and programs to improve the District's utilization of women and minorities; the assignment of unit members to any location (subject to the express terms of this agreement regarding transfers), and also to any facilities, classrooms, functions, activities, academic subject matters, grade levels, departments, tasks or equipment; and the determination as to whether, when and where there is a job opening.

Section 17.14 provides:

> In addition to its statutory reserve rights, the District also retains within its sole discretion all rights and powers not expressly limited by the clear and explicit language of this agreement, including but not limited to the exclusive right and power to determine, implement, supplement, change, modify, or discontinue in whole or in part, temporarily or permanently, any of the following:

and refers to, among others, subsection 17.14.4, "Staffing patterns."

Finally, section 21.1 provides:

> It is agreed that during the term of this agreement, the parties waive and relinquish the right to meet and negotiate and agree that the parties shall not be obligated to meet and negotiate with respect to any subject or matter covered in this agreement even though such subjects or matters were proposed and later withdrawn.

These provisions have been in agreements going back to 1990, without change. In negotiations between 1990 and 1997, these provisions were open for negotiations but no changes were made.

Apparently, there have been no grievances filed relating to the filing of the part-time positions.

ISSUE

Did the District fail to meet and negotiate in good faith when it posted and filled two part-time positions at Quartz Hill?

CONCLUSIONS OF LAW

An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and violative of EERA

section 3543.5 (c) . (Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

To prevail on a complaint of unilateral change, the charging party must establish by a preponderance of the evidence that (1) the employer breached or altered the party's 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., having 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. (Grant Joint Union High School District (1982) PERB Decision No. 196; Pajaro Valley Unified School District, supra, PERB Decision No. 51; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

In Arcata Elementary School District (1996) PERB Decision No. 1163 (Arcata), PERB visited the question of the negotiability of an employer's decision to change the hours of a vacant position. PERB's analysis included finding a balance between the right of management to "run the business"[9] against the obligation of the employer to negotiate about matters with the scope of representation. Drawing on federal precedent and PERB

[9]This means issues relating to level of services to be provided, decisions to create new positions, to determine the number of hours to be assigned to new positions or to discontinue a service by abolishing a position and to lay off employees.

cases dealing with contracting out decisions, PERB concluded that contracting out decisions based upon labor costs would be subject to negotiation responsibilities. Relating to changing vacant positions, PERB said:

> . . . 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.)[10]

CSEA recognizes that the level of services that an employer decides to provide is not a negotiable subject of bargaining. It contends, however, that the District created the two 3 1/2-hour positions out of the 8-hour position vacated by Narveson. It contends there was no change in the duties of the position, and hence, because of the reduction in costs, as the new positions do not enjoy benefits, the change was driven by labor costs.

CSEA rejects the proffered explanation that purchase of the pizza machine with the limited usage during the lunch period justified the new positions. It contends that the machine had been purchased the year before the creation of the new positions,

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[10]See also San Ysidro School District (1997) PERB Decision No. 1206.

and that the District waited until Narveson retired before filling the new positions.[11]

The District contends that it merely created new positions pursuant to its contractual authority and consistent with past practice. It contends CSEA failed to establish that the part-time positions were created out of the 8-hour position formerly held by Narveson.

In San Jacinto Unified School District (1994) PERB Decision No. 1078 (San Jacinto), the Board adopted an administrative law judge's (ALJ) decision which specifically held that the District did not carry its burden of showing that it established either a new librarian technician or a health clerk position. Rather, the ALJ found the district had unilaterally changed the hours of the positions which were temporarily vacant. The finding that the district had changed the hours of the vacant position was predicated upon findings that there was no change in the title, duties, or salaries of the employees appointed to the "new" positions. There was no District action (by the board or administration) indicating the creation of new positions. Finally, there was no corroboration of the district's witness's mere testimony of creation of a new position.

[11]In this regard, the record is not clear when the machine was purchased. Conversely, the part-time positions were clearly posted in September 1997, and filled sometime after that posting. CSEA did not establish when the machine was purchased.

In this case, there was no change in the title of the position. Narveson's title was cafeteria helper. The new positions were titled the same.

There was, at most, a partial change in the duties of the new positions. Narveson ran a cash register, and one of the new part-time positions was to run a cash register. Thus, here there was no change.

The other part-time position was to run the new pizza machine.[12] While the District considers this operation to be a new enterprise, thus a change in service, the operation certainly consists of food preparation, which duty was contained in Narveson's job description, and which was repeated in the new part-time cafeteria helper's job description. From this perspective, the District's argument has little credence. Food preparation is food preparation, whether by stocking pre-made sandwiches or operating a pizza machine, both of which provide for the delivery of food to students.

Finally, the District administration did not take any action other than promulgating the new job announcements for the part-time positions. The District's evidence consisted only of the testimony of Mendonca and Medema.

I think application of the burden of proof rule in San Jacinto, shows the District has failed to carry its burden of

[12]That Narveson had an "aversion" to running machines would not, in my judgment, preclude finding the operation of the pizza machine consistent with the duties of the cafeteria helper.

proof that it did not create the two new half-time positions out of Narveson's full-time, but vacant position.

Further, under Arcata, there is no showing of a change in the level of service, rendering the District's decision to start up a pizza operation and employ two part-time positions in lieu of a full-time position, to be outside the scope of negotiations.

The District clearly established that Narveson's 8-hour position was going to be eliminated at Quartz Hill. She was to be transferred to another school. This decision preceded any notion of two new part-time positions being created at Quartz Hill. Only because Narveson was retiring at the end of the next year, did the District allow her to remain at Quartz Hill. But the part-time positions were not posted until after Narveson's retirement. There is no evidence that Narveson's position was transferred to another school. There was not a decided change in the duties of the new positions versus what Narveson did. She performed cashiering functions just as one of the two new part-time employees was expected to do. As noted above, the level of service changed only in the manner of what food product the District was providing for students.

In Arcata, PERB relied on Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609] (Fibreboard), Otis Elevator Co. (1984) 269 NLRB 891 [116 LRRM 1075] (Otis Elevator), and First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705] (First National) in defining managerial decisions that "lie at the core of entrepreneurial control" and are

excluded from the scope of representation, unless based upon labor costs. Fibreboard was a decision to contract out services, Otis was a decision to relocate bargaining unit work and First National related to termination of a contract as a part of the employer's business. In Arcata, PERB further cited its own cases flowing from Fibreboard finding certain decisions outside the scope of negotiations. These included the employer's decisions to create and abolish job classifications, contracting out, non-unit work performed by volunteers, to cease operation of a child care center and to create an employee assistance program.

Adding a pizza machine to the food production is not a change in level of service akin to changes made by management in those cases cited by PERB in Arcata to justify removing the decision from the bargaining table.[13]

The District should have put CSEA on notice that it intended to replace the full-time position vacated by Narveson with two part-time positions and provided CSEA with an opportunity to negotiate the decision.

The parties dispute whether the contract authorizes the District's action. CSEA contends the contract contains no language that allows the District to split an existing vacant position. It further contends that the event complained of here, the splitting of the Narveson position and filing it with the two

[13]See also State of California (Department of Transportation) (1983) PERB Decision No. 361-S.

part-time positions, occurred at a time (September) preceding the operative date of the agreement (October).

I reject CSEA's contention as to the operative date of the agreement argument as all of the provisions in question were the same from at least 1990, and would have continued in force under status quo ante principles. (See Marysville Joint Unified School District (1983) PERB Decision No. 314 (Marysville) and State of California (Employment Development Department) (1998) PERB Decision No. 1247-S.)

The District contends that each of the cited provisions of the agreement give it authority to post and hire persons in the 3 1/2-hour positions.

PERB requires a showing of waiver by contract to be "clear and unmistakable,"[14] indicating "an intentional relinquishment of rights."[15] The employer's contention of contract authority will be sustained only when the contract expressly or by necessary implication confers such a right. (Los Angeles Community College District (1982) PERB Decision No. 252.)

Article XII relates to transfer rights. The District's action complained of here is not related to transfer. Nothing in the article implies the right to create two part-time positions out of a vacant full-time position.

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[14]Amador Valley Joint Union High School District (1978) PERB Decision No. 74.

[15]San Francisco Community College District (1979) PERB Decision No. 105.

Nor does Article XVII, section 17.6, District reserved rights, contain any reference by implication, to the District's action on conversion of a vacant position into two separate positions. A generally-worded management rights clause will not be construed as a waiver of statutory bargaining rights. (Norris School District (1995) PERB Decision No. 1090.)

However, within this same article, relied upon by the District, is section 17.14 which reserves to the District the "exclusive right and power to . . . change, modify, . . ." among others, "[s]taffing patterns" (sec. 17.14.4).

"Staffing patterns" includes the number of employees at a particular site, the number of shifts, and the number of employees on each shift. (Moreno Valley Unified School District (1995) PERB Decision No. 1106.) Thus, the parties had negotiated an agreement ceding to the District the power to change or modify the composition and number of employees at each school site.

Here, the District changed the profile of employees at Quartz Hill (no incumbent employee was affected) consistent with its authority to change staffing patterns. The action was also consistent with the District's past practice of not filling full-time positions of cooks and bakers because of the change in the production of foods stuffs for students. The workers were no longer preparing food, but rather selling pre-packaged foods prepared at another facility. Further, the District had a standing practice of hiring part-time employees with the cafeteria work force.

As the change in staffing pattern was authorized by the agreement (which authority carried forward despite the expiration of the agreement (Marysville)) and was consistent with past practice, the posting and filling of the part-time positions was not a violation of the EERA. The charge and complaint should therefore be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the unfair practice charge in Case No. LA-CE-3865, California School Employees Association v. Antelope Unified School District, and companion PERB 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.)

GARY M. GALLERY
Administrative Law Judge