STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. DESERT SANDS UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4273-E PERB Decision No. 1682 August 25, 2004

Appearances: Madalyn J. Frazzini, Attorney, for California School Employees Association; Miller Brown & Dannis by David G. Miller and Tam B. Tran, Attorneys, for Desert Sands Unified School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California School Employees Association (CSEA) and Desert Sands Unified School District (District) to an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge alleged that the District violated the Educational Employment Relations Act (EERA)[1] by unilaterally transferring certain job duties from one unit classification to another without giving CSEA prior notice or the opportunity to bargain.

In its post-hearing brief, CSEA moved to amend the charge to include an allegation that the transfer of work was discriminatory, in retaliation for the union activities of the employee

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

who previously had performed the work. This conduct is alleged to constitute a violation of EERA section 3543.5(a), (b) and (c).

We have reviewed the entire record, including the hearing transcripts, the hearing exhibits, the ALJ's proposed decision, the parties' exceptions and responses to exceptions. In light of our review, the Board finds the ALJ's findings of fact to be free of prejudicial error and adopts them as findings of the Board itself. The Board affirms in part and reverses in part the ALJ's conclusions of law, as discussed below.

BACKGROUND

CSEA represents approximately 800 classified District employees including 4 Electronic Repair Technicians (ERT) in the Maintenance Department (Maintenance) and 25 Security Agents (SA) in the Security Department (Security). CSEA and the District are parties to a collective bargaining agreement (CBA) effective from November 1, 2000 through June 30, 2003. CBA Article 6, District Rights provides, in pertinent part:

> It is understood and agreed that the District retains all of its powers and authority to direct, manage and control to the full extent of the law. Included in, but not limited to, those duties and powers are the right to: determine its organization; direct the work of its employees; determine the kinds and levels of services to be provided, and the methods and means of providing them; . . hire, classify, <u>assign</u>, transfer, evaluate, promote, terminate and discipline unit members. [Emphasis added.]

The job description for ERTs reads, in pertinent part:

> Installs fire alarms, security systems, intercoms, etc. for the purpose of providing security of facilities, equipment and supplies.

SAs are responsible for general District law enforcement services and administration of first aid. The job description for SA reads, in pertinent part:

> Investigates campus crimes and/or student related community incidents for the purpose of resolving conflicts and/or pursuing further action.

ERT David Hinojosa (Hinojosa) had been the chief job steward since January 1, 2000. In February, Hinojosa installed a covert camera in the kitchen of the Adams School for surveillance of a unit employee suspected of food theft. Hinojosa talked to John Gaffney (Gaffney), assistant superintendent for personnel services, about possible alternative locations and informed Gaffney that he may need to defend the accused employee. After this conversation, Gaffney still wanted Hinojosa to install the camera, which was done. The suspect was caught on camera, confessed and was discharged. Hinojosa represented the suspect during the investigation and at the Skelly[2] hearing in April. Gaffney was the Skelly officer. Hinojosa complained to Personnel Manager, Carrie Grence (Grence) that Gaffney had a conflict of interest in serving as the Skelly officer and as a result, Gaffney recused himself and another individual was appointed.

Grence and Chief of Security, Michael Bergman (Bergman) talked about revamping the Security Department to make it more "professional." They discussed Security taking over camera installation in order to: (1) preserve evidence and increase confidentiality; (2) use improved and smaller cameras that were easier to install; and (3) eliminate a potential conflict of interest for Hinojosa in installing cameras and then representing accused employees caught on camera. Gaffney was also in favor of the proposal because of the Adams School incident and his desire to serve as a Skelly officer in the future. By work order dated June 12, 2000 from management to Maintenance Supervisor, John Loerke (Loerke), Maintenance was

[2]Skelly refers to Skelly v. State Personnel Board (1975) 15 Cal. 3d 194 [124 Cal. Rptr. 14], in which the court enunciated certain due process rights for public employees facing disciplinary action.

ordered to collect all surveillance equipment and transfer it to the Security Department. Since that time, covert camera installation has been performed by SA, Art Enderle (Enderle), chosen because of his mechanical skills.[3]

When Hinojosa received a copy of the work order, he talked to Bergman and then, in his role as a CSEA representative, met several times with Grence and other District managers. CSEA claimed that the work belonged to the ERTs. The District believed that under the District Rights clause, the District had the right to assign work and the installation of the cameras was encompassed within the SA job description. Hinojosa first learned that the District had actually implemented the transfer of work when Enderle installed a covert camera at Amistad School on August 24.

When the District had assigned ERT work to non-unit employees in the past, CSEA and the District had discussed and resolved the matter. However, since informal discussions were not fruitful, CSEA filed a grievance on September 21 stating that the work belonged to the ERTs and not SA's, and therefore, the District violated the CBA District Rights and Safety clauses. CSEA did not pursue the grievance beyond Step 3 and instead filed the instant charge.

Enderle was the only SA to install covert cameras. In two years, he installed 5 cameras in a total of 12 to 20 hours of work. Enderle earned overtime due to working off-hours to ensure that suspects were not on campus during installation. He earned $17.89 straight time and $26.84 overtime.

Hinojosa installed approximately 5 cameras at an average of 30 hours time for each camera. The newer cameras installed by Enderle were easier and took much less time to install. Hinojosa earned $20.76 straight time and $31.14 overtime.

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[3]However, covert camera repair work has remained a responsibility of the ERTs.

ALJ PROPOSED DECISION

Motion to Amend

The ALJ found that the charge was filed February 28, 2001, alleging unilateral transfer of work in June 2000. CSEA had filed a grievance in September 2001 thus tolling the statute of limitations pending resolution of the grievance. At the hearing in June 2002, CSEA sought to amend the charge to allege that the transfer of work was retaliation against Hinojosa because of his role as job steward and his perceived conflict of interest in installing covert cameras and duty to represent the accused employees recorded by those cameras. Neither the charge, the complaint nor the grievance alleged discrimination. Thus, without tolling, the ALJ found this allegation to be untimely.

In its post-hearing brief, CSEA requested that the Board reexamine the idea that the six-month limitation period is a jurisdictional bar to presenting claims. Under existing Board precedent, the limitations period was a jurisdictional bar and the ALJ thus rejected this argument. The ALJ also evaluated whether the proposed amendment fell within an exception to the limitations provision, that the untimely unalleged violation is intimately related to the subject matter of the complaint, is part of the respondent's same course of conduct, and was fully litigated at the hearing. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.) The ALJ found that the proposed amendment met the first two elements but not the third; i.e., the allegation was not fully litigated at the hearing because there was insufficient evidence of nexus and because of the District's contention that it was not prepared to defend a discrimination allegation at the hearing. CSEA alleged nexus as the perceived conflict of interest by the District between Hinojosa's duties as a covert camera installer and his role in representing employees recorded by the camera. But the ALJ concluded that the transfer of

unit work would have occurred despite that perceived conflict and so would have dismissed the allegation of discrimination under EERA section 3543.5(a).

Transfer of Work

The ALJ found some but not all of the elements of a unilateral change. The task of installing covert cameras was specifically within the ERT job description but not in the SA description, although a reasonable interpretation of the SA job description could include such work. Therefore, the ALJ found a change in policy. The ALJ also found that transfer of unit work from one bargaining unit classification to another is within the scope of representation.

The ALJ further found that there was no proper notice to CSEA. Under Board precedent, notice must be provided directly to the union, not to an employee. The June 12 work order was addressed to Loerke. A CSEA member's first awareness of the transfer occurred when Hinojosa received the work order and on August 24, when an SA first installed a covert camera. The District contends that CSEA waived its right to bargain by the word "assign" in the CBA District Rights clause. However, the ALJ did not find that the CBA language did not constitute a "clear and unmistakable" waiver because it did not clearly convey the right to assign work outside of a job classification. Such a construction of the CBA language would render the job descriptions meaningless.

The ALJ found however that the transfer of ERT work did not have a "generalized effect or continuing impact." CSEA argues that the change impacts the overtime hours of ERTs. But in more than two years since the transfer of work, surveillance cameras were installed on only five occasions for a total of 12 to 20 hours time. Even if this work were returned to the ERTs, the District would be able to utilize the small, easier and faster to install cameras. So, the ALJ concluded that CSEA's contention about overtime hours was speculative. Neither work hours nor wages of either ERTs or SAs have changed because of the

transfer. The ERTs are actually busier than they were before the transfer, so that the impact on the two classifications is insignificant and de minimis. Although camera installation is listed as an essential job function, all duties on the ERT job description are so listed. Therefore, the ALJ concluded that the District did not violate EERA section 3543.5(a), (b) or (c).

DISCUSSION

Motion to Amend Charge

In its motion to amend the charge, CSEA argued that the Board should revisit precedent that the statute of limitations in EERA is a jurisdictional bar. It is important to note that since the issuance of the proposed decision and the submission of exceptions and responses, in Long Beach Community College District (2003) PERB Decision No. 1564, the Board reexamined this issue and found the six-month limitation period not to be a jurisdictional bar, but rather an affirmative defense to a charge. In that decision, the Board also reinstated the doctrine of equitable tolling pending completion of a grievance process. As neither party challenged the ALJ's ruling denying the motion to amend the charge, we need not address the merits here and except as noted above, adopt the ALJ's findings.

Transfer of Unit Work

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request

negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant).)

Under Board precedent, "[a] change in policy has, by definition, a generalized effect or continuing impact upon terms and conditions of employment of bargaining unit members." (Grant, at p. 9.) In Grant, the Board opined:

> The evil of the employer's conduct . . . is . . .the altering of an established policy mutually agreed upon by the parties during the negotiation process. [Citations.] By unilaterally altering or reversing a negotiated policy, the employer effectively repudiates the agreement. [Citation.]
> (Grant, at p. 9.)

The Board has long held the transfer of unit work from one group of employees to another to be within the scope of representation. (Alum Rock Union Elementary School District (1983) PERB Decision No. 322, p. 11.) This case can be distinguished from San Benito High School District (1994) PERB Decision No. 1076 (San Benito) in which the Board deemed a new assignment to campus supervisors to identify the location of weeds on a form and to turn the form into their supervisors a "function not previously performed" and thereby within managerial prerogative.[4] Here, the installation of covert cameras was identified as an essential job function on the ERT job description, a document negotiated by the parties and approved by the District's board and personnel commission.

[4]The dismissal letter in San Benito stated that even if the work had been technically transferred to the campus supervisor, it is not significant enough to make the matter negotiable. The Board agent cited Rio Hondo Community College District (1982) PERB Decision No. 279 (Rio Hondo) and Mt. San Antonio Community College District (1983) PERB Decision No. 297 (Mt. San Antonio) in support of this concept of "significance." Those cases however are inapposite in their holding that new teaching assignments "'reasonably comprehended' to be within the scope of their existing job duties" do not constitute an unlawful deviation from existing policy. (Mt. San Antonio, at p. 11, citing Rio Hondo.) To the extent that this dicta in San Benito holds to the contrary, it is overturned.

CSEA excepts to the ALJ's finding that the District's unilateral transfer of unit work did not have such a "generalized effect or continuing impact." It reasons that the transfer of covert camera installation affects wages and hours of unit members. Testimony showed that these installations involve, in part, some overtime work. CSEA asserts that such an impact is neither de minimis nor insignificant as the ALJ argues. Alternatively, CSEA argues that the transfer itself is negotiable and the "generalized effect/continuing impact" analysis is inapplicable.

Under Eureka City School District (1985) PERB Decision No. 481 (Eureka), the Board set forth precedent for analyzing the negotiability of transfers of work. Generally transfers of work are negotiable. In Eureka, the Board held that where unit and non-unit employees perform overlapping duties, "an employer does not violate its duty to negotiate in good faith merely by increasing the quantity of work which non-unit employees perform and decreasing the quantity of work which unit employees perform." However, the above test does not apply where, as a result of the transfer: (1) unit employees cease performing duties that they previously performed, or (2) non-unit employees begin to perform duties that were previously exclusively performed by unit employees. (Eureka, at p. 15; Calistoga Joint Unified School District (1989) PERB Decision No. 744 (Calistoga).)[5]

The facts in this case are similar to those in Calistoga, in which the employer eliminated yard duty work from the classified unit and permanently reassigned it to the certificated unit. The Board found a violation despite the fact that the certificated and

[5]Eureka and Calistoga involved transfer of work out of the bargaining unit. Here, the transfer occurred within the same unit. While these situations are somewhat different, when this case first came to the Board on appeal, the Board held that these two situations should be analyzed in the same way. (Desert Sands Unified School District (2001) PERB Decision No. 1468.)

classified units both performed yard supervision duties, finding that these facts fit within the first prong of Eureka. While it is true that, in the past, non-ERTs had occasionally installed covert cameras, CSEA and the District had always discussed and resolved the disputes over this work. In this case, the District has now completely removed this function from the ERTs. Therefore, under Eureka and Calistoga, the transfer of the covert camera installation work is negotiable.

The District next argues that even if there were a significant change in policy, CSEA waived its right to negotiate the policy under the CBA District Rights and Higher Classification clauses. The Board has long held that a waiver of the right to bargain must be "clear and unmistakable." (Fall River Joint Unified School District (1998) PERB Decision No. 1259, citing Placentia Unified School District (1986) PERB Decision No. 595.) The District argues that it can make this assignment because, like Rio Hondo, the installation work can be "reasonably comprehended" to be within the scope of an SA's duties. However, Rio Hondo does not involve the permanent transfer of unit work, but rather the assignment of new courses to teachers. With regard to the District Rights clause, we agree with the ALJ that the word "assign" does not clearly convey the right to permanently transfer work outside of the ERT classification, in which covert camera installation was an "essential job function," without first negotiating with CSEA. (State of California (Department of Corrections) (2000) PERB Decision No. 1392-S.) We also find that the Higher Classification provision also does not constitute a waiver by CSEA of the right to negotiate transfer of covert camera installation work. That provision merely allows higher pay for an employee temporarily assigned to work in a higher classification. The SA installing the cameras in this case did not receive higher pay and the SA job description has not been modified to specify camera installation duties as an

essential job function. It is undisputed that the transfer of installation work is a permanent change in policy. This change in policy must be negotiated by the District.

We therefore find a violation of EERA section 3543.5(c), and concurrently, (a) and (b). We consequently reverse this portion of the ALJ's proposed decision. The appropriate remedy in this instance is to order the status quo and to negotiate with CSEA regarding transfer of unit work. (Mt. Diablo Unified School District (1984) PERB Decision No. 373b; Calistoga.)

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that Desert Sands Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c), and concurrently, Section 3543.5(a) and (b).

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

A. CEASE AND DESIST FROM:

1. Failing to meet and negotiate with the California School Employees Association (CSEA) concerning the transfer of covert camera installation work from the Electronic Repair Technician classification to the Security Agent classification.

2. Denying CSEA the right to represent its members by failing and refusing to meet and negotiate in good faith over the transfer of covert camera installation work from the Electronic Repair Technician classification to the Security Agent classification.

3. Interfering with employees in the exercise of rights guaranteed to them by failing and refusing to meet and negotiate in good faith over the transfer of covert camera installation work from the Electronic Repair Technician classification to the Security Agent classification.

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

1. Upon request, meet and negotiate with CSEA within thirty-five (35) days after this Decision is no longer subject to appeal, regarding the transfer of covert camera installation work from the Electronic Repair Technician classification to the Security Agent classification.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

3. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on CSEA.

It is further Ordered that the administrative law judge's proposed decision in Case No. LA-CE-4273-E is hereby AFFIRMED IN PART and REVERSED IN PART as discussed herein.

This order shall become effective immediately upon service of a true copy thereof on the parties.

Chairman Duncan and Member Neima joined in this Decision.

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-4273-E, California School Employees Association v. Desert Sands Unified School District in which all parties had the right to participate, it has been found that the Desert Sands Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (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. Failing to meet and negotiate with the California School Employees Association (CSEA) concerning the transfer of covert camera installation work from the Electronic Repair Technician classification to the Security Agent classification.

2. Denying CSEA the right to represent its members by failing and refusing to meet and negotiate in good faith over the transfer of covert camera installation work from the Electronic Repair Technician classification to the Security Agent classification.

3. Interfering with employees in the exercise of rights guaranteed to them by failing and refusing to meet and negotiate in good faith over the transfer of covert camera installation work from the Electronic Repair Technician classification to the Security Agent classification.

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

1. Upon request, meet and negotiate with CSEA regarding the transfer of covert camera installation work from the Electronic Repair Technician classification to the Security Agent classification.

Dated: _____ Desert Sands Unified 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 WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. DESERT SANDS UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-4273-E PROPOSED DECISION (9/23/02)

Appearances: Tim Taggart, Labor Relations Representative, for California School Employees Association; Miller, Brown & Dannis by David G. Miller, Attorney, for Desert Sands Unified School District.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

A union representing a unit of classified employees claims that the employer, a school district, unilaterally transferred certain job duties from one unit classification to another without giving the union prior notice or opportunity to bargain. The district contends that it was privileged to make the transfer under both the terms of the parties' collective-bargaining agreement and the job description of the classification to which the work was transferred.

On February 28, 2001, the California School Employees Association (CSEA or Union) filed an unfair practice charge against the Desert Sands Unified School District (District) alleging the District's unlawful transfer of bargaining unit work. The San Francisco office of the Public Employment Relations Board (PERB or Board) dismissed the charge. CSEA appealed the dismissal, and PERB granted the appeal (Desert Sands Unified School District (2001) PERB Decision No. 1468). On January 16, 2002, the Office of the General Counsel of PERB issued a complaint alleging that by unilaterally transferring bargaining unit work, the

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

An informal settlement conference was held in the PERB Los Angeles office on March 28, 2002, but the matter was not resolved.

A formal hearing was conducted in La Quinta on June 20 and 21, 2002, before Administrative Law Judge Ann L. Weinman. At the hearing, CSEA moved to amend the charge to include an allegation that the transfer of work was discriminatory, in retaliation for the Union activities of an employee who formerly performed the work. CSEA claimed it had raised its intent to amend at the settlement conference. The District contended it had no prior understanding of CSEA's intent to amend, and was not prepared to defend against the new allegation. The motion to amend was denied as untimely. In its post-hearing brief, CSEA presents a motion to amend to conform to proof, and requests that the motion it presented at the hearing be reconsidered.

After the filing of post-hearing briefs, the matter was submitted for decision on September 13, 2002.

FINDINGS OF FACT

The District is a public school employer as defined in EERA section 3540.1(k). CSEA is an employee organization as defined in section 3540.1(d) and at all times relevant has been the exclusive representative, as defined in section 3540.1(e), of an appropriate unit of the District's classified employees.

Since 1977, CSEA has represented a unit of approximately 800 employees in various classifications, including approximately 4 Electronic Repair Technicians (ERT) in the

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

Maintenance Department and approximately 25 Security Agents (SA) in the Security Department (Security). The most recent collective bargaining agreement (Agreement) is effective November 1, 2000, through June 30, 2003. Article 6 of the Agreement, entitled "District Rights," reads in part:

> It is understood and agreed that the District retains all of its powers and authority to direct, manage and control to the full extent of the law. Included in, but not limited to, those duties and powers are the right to: determine its organization; direct the work of its employees; . . . hire, classify, assign, transfer, evaluate, promote, terminate and discipline unit members. (Emphasis added.)

The parties have also negotiated job descriptions for the various unit classifications, and unless required by a change in the Education Code or some other statute, the District may not change a job description unilaterally without first notifying CSEA. The current job description for ERTs reads in part:

> Essential Job Functions:[2]
>
> - Installs fire alarms, security systems, intercoms etc. for the purpose of providing security of facilities, equipment and supplies.
> - Maintains fire alarms, security systems, video systems, intercoms, and other electronic equipment for the purpose of ensuring proper, safe and efficient operation of equipment.
>
> (Emphasis added)

The current job description for SAs reads in pertinent part:

> Essential Job Functions:
>
> - Investigates campus crimes . . . for the purpose of resolving conflicts and/or pursuing further action.

[2] In the ERT job description, all duties are listed as "Essential Job Functions" except for providing support to other staff, completing work efficiently, and attending training programs, etc., which are listed as "Other Job Functions." In the SA job description, all duties are listed as "Essential Job Functions."

- Monitors student conduct during school activities . . . for the purpose of ensuring safety of students, personnel and property.

On occasion, the District uses a covert surveillance camera to investigate suspected wrongdoing or criminal behavior by students or employees. Historically, until approximately June 2000,[3] installation of these cameras was authorized by John Gaffney (Gaffney), assistant superintendent, personnel services, and performed by an ERT.

ERT David Hinojosa (Hinojosa) testified on behalf of CSEA. He had been chief job steward since January 1, and described his union duties as "protect[ing] the rights of members [of the] bargaining unit," participating in investigations, and intervening on behalf of unit employees in potential disciplinary actions. As to his ERT duties, Hinojosa had, inter alia, installed 5 or 6 covert cameras and assisted in the installation of approximately 10. Each installation took approximately 30 hours. In early February, Hinojosa was assigned to install a covert camera in the kitchen of Adams School because the District suspected a unit employee of food theft. Hinojosa testified that he met with Gaffney to discuss possible alternatives to the camera, and told Gaffney that as job steward, he might have to defend the accused. Gaffney, in his testimony, concurred that he and Hinojosa discussed alternatives, but did not recall whether Hinojosa spoke of having a possible conflict. Accordingly, I credit Hinojosa's clear recollection over Gaffney's failure to recall the entire conversation. After discussing alternatives, Gaffney still wanted Hinojosa to install the camera, which was done. The suspect was caught on camera, confessed, and was discharged. Hinojosa represented the suspect

[3] All references are to the year 2000, unless otherwise specified.

during the investigation, and also at the Skelly hearing[4] in April. Hinojosa did not believe he had a conflict of interest by serving as both the camera installer and the employee's representative. However, he believed that Gaffney had a conflict of interest, as Gaffney gave the order for the camera installation and was also appointed to serve as the Skelly hearing officer. Hinojosa expressed his concern to Personnel Manager Carrie Grence (Grence); as a result, Gaffney recused himself as Skelly hearing officer and another individual was appointed.

For some time prior to the Adams School incident, Grence had been talking with Chief of Security Michael Bergman (Bergman) about revamping and upgrading the Security Department. Bergman, who had served with the Los Angeles Police Department for 23 years and then operated a private investigation agency, came to the District in late 1998. From the beginning, he felt the need to make the Security Department more "professional." Among other possibilities, he and Grence discussed Security taking over installation of the covert cameras. Bergman testified that he advocated this for the following reasons:

(1) To preserve evidence and increase confidentiality. Bergman testified this was his principal concern, although he was not aware of any previous problems in that regard. He explained that in the then-current system, the chain of command went from Gaffney to the maintenance manager to the ERT supervisor to an ERT; four individuals were involved. If Security handled the installation, only Bergman and one SA would be involved, thereby enhancing the covertness of the operation;

(2) Technology. Bergman noted that by the year 2000, smaller cameras which were easier to install became available. While Bergman did not doubt the ERTs' ability

[4] Discharge hearings are named with reference to Skelly v. State Personnel Board (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14], wherein the court declared that public employees facing discipline or discharge are entitled to due process.

to install the new cameras,[5] he knew that technology now made it possible for SAs to install them as well;

(3) Conflict of interest. Bergman acknowledged that he was concerned about Hinojosa's potential conflict of interest if he should again install a covert camera and then represent the accused employee; Bergman believed this was not a professional way to conduct a covert operation. He testified that this was not his principal concern, however.

Grence and Berman brought to Gaffney a proposal to transfer the covert camera installation and he agreed. Gaffney testified that, because of the Adams School incident, and given his desire to serve as a Skelly hearing officer in the future, he decided he should not be involved at all with covert camera installation. Rather, authority for this work should come directly from Bergman, on his own judgment that such an operation was needed. By work order dated June 12 from management to Maintenance Supervisor John Loerke (Loerke), the Maintenance Department was ordered to collect all surveillance equipment and transfer it to the Security Department. Since that time, covert camera installation throughout the District has been performed by SA Art Enderle (Enderle), chosen by Bergman because of his prior mechanical experience and skills.

CSEA first learned of the transfer of work when Loerke gave Hinojosa a copy of the June 12 work order and instructed him to comply with it. Shortly thereafter, Hinojosa went to Bergman's office to find out why this was happening. Bergman said it was to avoid Hinojosa's conflict of interest, to have a smaller number of individuals involved, and to take

[5] Bergman testified that if a covert camera installed by one of his SAs were to fail, he would take it to the ERT department for repair.

advantage of new technology.[6] Subsequently, Hinojosa, on behalf of CSEA, had a number of meetings with Grence and other District personnel to discuss the issue. In these meetings, CSEA claimed the work belonged to the ERTs and should not have been transferred. The District argued that it was privileged by the word "assign" in the District Rights clause of the Agreement, and that the work was encompassed by the SA job description. Hinojosa characterized these discussions as "negotiations," but the parties never changed their respective positions. Hinojosa first learned of the implementation of the transfer when Enderle installed a covert camera at Amistad School on August 24.

In the past, the District had occasionally assigned unit work to non-unit employees, CSEA had objected, the District argued its right to make the assignment, negotiations took place, and the matters were resolved. After months of discussion, however, the instant matter showed no sign of moving toward resolution. CSEA, then opting for a more "formal" procedure, filed a grievance on September 21, complaining that the work properly belonged to the ERTs rather than the SAs, and alleging violations of the District Rights clause and the Safety clause. CSEA did not pursue the grievance beyond Step 3, where it was denied.[7] Instead, CSEA filed the instant charge.

Enderle, the only SA to have installed covert cameras, testified that in the two years since the transfer, he installed approximately 5 cameras in a total of approximately

[6] Hinojosa testified that Bergman's secretary told him the transfer was because of his conflict of interest and that other ERTs could do the work. However, there is no evidence that the secretary participated in the transfer decision. Accordingly, I place no weight on her opinion.

[7] More recently, CSEA filed a grievance objecting to the assignment of covert camera installation on school buses to Security; at the time of the hearing, that grievance was pending.

12-20 hours' work.[8] Some of this work was done during off-hours to ensure that suspects were not on campus, thus Enderle earned overtime wages.

The parties stipulated, and I find, that Hinojosa's current salary grade is 83, Step E, and his hourly wages are $20.76 straight time, $31.14 overtime; Enderle's salary grade is 75, Step F, and his hourly wages are $17.89 straight time, $26.84 overtime. There was no evidence that Hinojosa or any other ERT lost any wages or hours since the transfer.[9] To the contrary, ERTs have continued to perform all of their other functions, including maintenance of surveillance cameras and installation of non-surveillance cameras, and they have more work now due to the construction and opening of new District schools.

ISSUES

1. Should the motion to amend be granted?

2. Did the District unlawfully transfer the installation of covert surveillance cameras from the classification of Electronic Repair Technician to the classification of Security Agent?

CONCLUSIONS OF LAW

Motion to Amend

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College

[8] As noted above, Hinojosa testified that he spent an average of 30 hours' work on each installation. Noting that the new cameras are smaller, easier, and take less time to install, I credit the testimony of both witnesses.

[9] CSEA claims that Hinojosa may have lost overtime hours. As this is speculative, I do not credit it.

District (1996) PERB Decision No. 1177.) However, the limitations period is "tolled during the time it takes the charging party to exhaust the grievance machinery." (Sacramento City Unified School District (2001) PERB Decision No. 1461.)

The instant charge was filed on February 28, 2001, alleging the District's unilateral transfer of unit work in June 2000. CSEA had filed a grievance raising this issue in September 2000; thus, the limitations period was tolled during the processing of the grievance, and the charge was timely filed. CSEA now alleges that the transfer of work was also discriminatory, motivated by the District's desire to retaliate against Hinojosa because of his CSEA stewardship and the perceived conflict of interest between his installation of covert cameras and his duty to represent accused employees recorded by those cameras. Discrimination was not alleged in the charge or the complaint, however, nor was it part of CSEA's grievance. Thus, the limitations period cannot be tolled for this allegation, and it is untimely.

CSEA does not dispute that the discrimination allegation is statutorily untimely. Rather, in its post-hearing brief, CSEA argues that "it is time to re-examine the idea that the six-month statute of limitation . . . is a jurisdictional bar to presenting any claim." In support, CSEA cites the absence of limitations language in the Meyers-Milias-Brown Act, as well as the requirement in the various statutes of limitations set forth in the California Code of Civil Procedure that they be raised as affirmative defenses. CSEA also contends that the parties "agreed to hold the timelines" during the District's summer vacation. However, I am without authority to defy the precedent set forth in The Regents of the University of California (1990) PERB Decision No. 826-H. In that case, PERB held that "all three of the statutes which it administers," including EERA, contain statutes of limitations which cannot be waived by the parties and need not be raised by affirmative defense; if a charge is untimely, the Board "has

no subject matter jurisdiction over the case and may not issue a complaint under any circumstances." (Emphasis added.) Accordingly, I reject CSEA's arguments in this regard.

However, there is an exception to the six-month limitation which must be considered, i.e., an untimely, unalleged violation may be found provided it is intimately related to the subject matter of the complaint, part of the respondent's same course of conduct, and was fully litigated at the hearing. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.)

The instant discrimination allegation is certainly intimately related to, and part of the same course of conduct as, the original allegation of unilateral transfer of work. As to whether the new allegation was fully litigated, PERB has held that the elements of a discrimination claim are that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer discriminated or threatened to discriminate against the employee because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.) One important factor in showing unlawful motivation is the timing of the employer's conduct in relation to the employee's protected activity. (North Sacramento School District (1982) PERB Decision No. 264.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459.); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S.); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to

offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Although Hinojosa testified generally regarding his duties as chief job steward for CSEA, there is no evidence of when or how often he engaged in Union activities, whether the District ever attempted to limit those activities, whether the District had ever expressed any anti-union sentiments with regard to those activities, or whether the District had treated non-Union employees differently. Further, the District contended at the hearing that it was not prepared to defend against an allegation of discrimination. Thus, I do not find that the issue was fully litigated, and I deny the motion to amend .

Even if the motion were granted and the complaint amended, however, I would not find a violation based on the new allegation, for the following reasons: CSEA contends that the District's concern over Hinojosa's dual role as camera installer and accused-employee representative in the Adams School incident is evidence of its anti-union motivation. However, it was Hinojosa who first raised a "conflict of interest" claim against Gaffney, with which both Gaffney and the District agreed. Thus, I find the District holding Hinojosa to the same standard was not an expression of anti-union animus, but was rather a legitimate business effort to sanitize the covert surveillance process. CSEA also points to Bergman's testimony that his prior negotiations with CSEA had been "difficult" because the Union disagreed with every point he raised. But there is no evidence showing a causal connection between

Bergman's opinion of Union negotiations and his desire for SAs to perform covert camera installations rather than ERTs. Bergman's principal motivation, which he had consistently expressed in conversations with Grence, Gaffney, and Hinojosa, as well as at the hearing, and which I credit, was to protect confidentiality.

I do not find that the transfer of work would not have occurred "but for" Hinojosa's perceived conflict of interest, but rather that it "would have occurred in any event," notwithstanding the conflict. (Novato; Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169], enf. in rel. part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].) Accordingly, I would find insufficient evidence of discrimination in violation of EERA section 3543.5(a).

Transfer of Work

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if the following criteria are met: (1) the employer implemented a change in policy; (2) the change concerns a matter within the scope of representation; (3) the change was implemented without giving the exclusive representative prior notice and an opportunity to bargain; and (4) the change was not merely an isolated breach of the parties' agreement, but has a "generalized effect or continuing impact" on the terms and conditions of employment of bargaining unit members. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196; Klamath-Trinity Joint Unified School District (1993) PERB Decision No. 1003.)

As to the first criteria, a change in policy, the Board stated in Rio Hondo Community College District (1982) PERB Decision No. 279, at p. 17:

> . . . The nature of existing policy is a question of fact to be determined from an examination of the record as a whole. It may be embodied in the terms of a collective [bargaining] agreement [citation]. In the absence of such a contract provision, existing policy may be ascertained by examining past practice [citation] or such other evidence as the job description . . . .

The District contends that it did not change any existing policy, as covert camera installation is reasonably contemplated within the job descriptions of either classification. In San Benito High School District (1994) PERB Decision No. 1076 (San Benito), at issue was the assignment of identifying weeds on school lawns. PERB upheld the dismissal of an unfair practice charge on the basis that this task was not specified in the job description of either classification involved, but could have been contemplated by both. Here, I do not dispute that covert camera installation could be considered part of the SAs' job to "investigate campus crimes" and "monitor student conduct." However, unlike San Benito, the ERT job description specifically assigns the installation of security systems to them, and it is they alone who performed this work until June 2000. Thus, I do not find that transferring this work away from them is a reasonable interpretation of the negotiated job descriptions. I reject the District's contention in this regard, and find that the District did make a change in policy.

As to negotiability, PERB has held that a transfer of work from one bargaining unit classification to another is a negotiable subject within the scope of representation. (Desert Sands Unified School District, supra, PERB Decision No. 1468, citing Alum Rock Union Elementary School District (1983) PERB Decision No. 322 and Anaheim Union High School

District (1981) PERB Decision No. 177; Rialto Unified School District (1982) PERB Decision No. 209.)[10]

As to notice, PERB has consistently held that an employer must provide notice directly to the union, not merely to a unit member or other employee. (Fall River Joint Unified School District (1998) PERB Decision No. 1259 [letters to two teachers advising of a swap program does not constitute notice to the union].) Here, the first awareness by any CSEA member of the transfer decision was when Hinojosa saw the June 12 work order, and of its implementation on August 24 when Security performed its first installation. However, the June 12 work order was addressed to Maintenance Supervisor Loerke, not to the Union. Further, the District's decision had already been made by that time, and CSEA was not notified in advance of either the June 12 work order or the August 24 installation. Accordingly, I conclude that the District unilaterally transferred its covert camera installation without affording CSEA prior notice or opportunity to bargain.

The District contends that CSEA waived its right to negotiate by the word "assign" in the District Rights clause of the Agreement. However, it is well settled that a waiver must be "clear and unmistakable." (Fall River Joint Unified School District, supra, PERB Decision No. 1259, citing Placentia Unified School District (1986) PERB Decision No. 595.) Here, the

[10] In its post-hearing brief, the District contends that there is no duty to bargain where the decision is not based on labor cost, citing First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705]. However, that case as well as related decisions dealt with partial shutdowns, relocations, and subcontracting of unit work resulting in the layoffs of substantial numbers of unit employees. That is not the situation here. Further, in Fibreboard Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609], the Court held that where unit work was taken from one group of employees and given to another group, who performed the work under similar conditions of employment, there is a duty to bargain regardless of the basis for the employer's decision. Accordingly, I reject the District's argument in this regard.

District Rights clause appears to give the District the right to assign work specified in a job description to anyone in that classification. But I do not find it clear or unmistakable that the District may unilaterally assign work outside of the classification, notwithstanding that this has been done occasionally on a limited-time basis. If the District had this discretion, the job descriptions which the parties negotiated for the various classifications, including ERT and SA, would be meaningless. Thus, I cannot conclude that CSEA waived its right to bargain regarding the transfer of work.

As stated above, to be considered an unlawful change in policy, a change in job duties must have a "generalized effect or continuing impact" on unit employees. (Grant Joint Union High School District, supra, PERB Decision No. 196; Klamath-Trinity Joint Unified School District, supra, PERB Decision No. 1003.) PERB has held that there is no presumption in favor of the charging party in that regard. Rather, the charging party has the burden to substantiate this element of the violation. (Modesto City Schools (1983) PERB Decision No. 291 (Modesto).) In Modesto as well as in Imperial Unified School District (1990) PERB Decision No. 825, the Board refused to find a violation because charging parties had not sustained their burdens of showing that class schedule changes had an impact on teachers' working conditions. And in San Benito, PERB stated that, even assuming arguendo that work had been transferred from one unit classification to another, it was not "significant enough to make the matter negotiable."

Here, CSEA claims that ERTs have been impacted by the potential loss of overtime hours. However, in the two-plus years since the transfer, surveillance cameras were installed on only five occasions, in a total of only 12-20 hours' time. Even if this work were to be given back to the ERTs, the District would be privileged to continue using the smaller, faster

cameras.[11] I therefore find that CSEA's contention regarding overtime is unlikely as well as speculative.

Neither the work hours nor the wages of either the ERTs or the SAs have changed because of the transfer. To the contrary, the ERTs are busier than they were before the transfer, and there is no evidence that wages or any other working condition was impacted. Notwithstanding the permanency of the transfer, I find that its impact and effect on the two classifications of employees is de minimis and insignificant. The fact that the ERT job description lists the installation of security systems as "Essential Job Functions" does not alter this finding, as virtually all of the ERT duties are so listed.

I therefore conclude that CSEA has not sustained its burden of showing that the unilateral transfer of covert camera installation from the Maintenance Department to the Security Department was an unlawful change in policy. Accordingly, I find that the District did not violate EERA section 3543.5(a), (b) or (c).

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-4273-E, California School Employees Association v. Desert Sands Unified School District, 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 Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

[11] The District Rights clause of the Agreement gives the District the right to determine the "methods and means" of providing services, which would include the choice of camera used for surveillance.

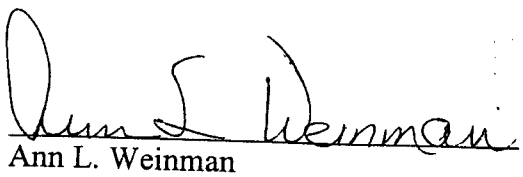
Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (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 mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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, 32140, and 32135(c).)



Ann L. Weinman
Administrative Law Judge