

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

Request for Reconsideration
PERB Decision No. 1682

PERB Decision No. 1682a

November 30, 2004

Appearances: Madalyn J. Frazzini, Attorney, for California School Employees Association; Miller, Brown & Dannis by Meredith B. Reynolds, Attorney, 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 a request for reconsideration by the California School Employees Association (CSEA) of the remedy ordered by the Board in Desert Sands Unified School District (2004) PERB Decision No. 1682 (Desert Sands). In that case, the Board found that the Desert Sands Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by unilaterally transferring covert camera installation work from the Electronic Repair Technicians (ERT) to Security Agents (SA).

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

The Board has reviewed the record in this matter, including the request for reconsideration and the District's response to the request for reconsideration, and finds that the request for reconsideration should be granted.

POSITIONS OF THE PARTIES

The request for reconsideration notes that the opinion states at page 11:

The appropriate remedy in this instance is to order the status quo and to negotiate with CSEA regarding transfer of unit work.

The request for reconsideration states that the Order omits the affirmative action of restoring the status quo ante, which would have existed but for the District's unlawful refusal to bargain, by transferring the work at issue back to the ERT classification. Indeed, the Board found that at least 12 hours of overtime were transferred from an ERT to an SA as of the date of the hearing.

CSEA argues that the Board has previously amended orders in response to a motion for reconsideration in order to effectuate the purposes of EERA. (San Mateo City School District (1984) PERB Decision No. 375a at p. 3 (San Mateo).) CSEA states that in Mt. Diablo Unified School District (1984) PERB Decision No. 373b, on reconsideration, the Board amended an order to include an additional cease and desist element and affirmative relief requiring return to the status quo ante in light of its ruling that the employer had unilaterally changed the workload of counselors and librarians. In San Mateo, the Board granted reconsideration for purposes of clarifying the Order and revised the Order to include a backpay remedy.

CSEA argues that the Board has recognized that an order to negotiate is meaningless in the absence of an order to require the employer to rescind its unilateral act. Only in this way can the union be placed in the position that it would have been in but for the employer's unlawful conduct. (Corning Union High School District (1984) PERB Decision No. 399, pp.

7-10.) The Board has previously ordered restoration of the status quo ante in cases involving an illegal unilateral transfer of work, including making employees adversely impacted by the illegal transfer whole. (Alum Rock Union Elementary School District (1983) PERB Decision No. 322; Calistoga Joint Unified School District (1989) PERB Decision No. 744 (Calistoga).)

The District argues that CSEA's motion for reconsideration was served on the District on September 16, 2004, two days after the 20-day filing period under PERB Regulation 32410(a) and so is untimely.² The District further contends that the request does not meet the requirements for reconsideration under Section 32410(a). Finally, the District argues that the remedy is appropriate given the Board's finding of no economic damage. The Board has held that the purpose of the remedy in an illegal transfer of work case is "to reestablish a situation equivalent to that which would have prevailed had the District more timely fulfilled its statutory bargaining obligation." (Solano County Community College District (1982) PERB Decision No. 219.) According to the District, in Rialto Unified School District (1982) PERB Decision No. 209 (Rialto), the Board indicated its reluctance to restore the status quo ante and applied a balancing test weighing the harm to the union with disruption to the District. In Rialto, the Board ordered compensation lost as a result of the transfer subject to proof at a subsequent hearing. In this case, the District asserts that such loss of compensation is nonexistent and speculative.

DISCUSSION

PERB Regulation 32410(a) sets forth the requirements for granting reconsideration:

- (a) Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. An original and five copies of the request for

²PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. Service and proof of service of the request pursuant to Section 32140 are required. The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

CSEA simply asks that the remedy correspond with the Board's decision and analysis.

In Desert Sands, in concert with earlier decisions, the Board clearly intended to restore the status quo ante. The Board however erred in not ordering the District to transfer the work back to the ERTs. This error fits under the second basis for granting reconsideration. First, this error did not exist and could not have been discovered until the issuance of Desert Sands on August 25, 2004.

Second, this request was timely filed less than a month after the evidence was discovered. Under PERB Regulation 32130³ and 32410 combined, CSEA had 20 plus five

³PERB Regulation 32130 provides, in pertinent part:

(a) In computing any period of time under these regulations, except under Section 32776(c), (d), (e) and (f), the period of time begins to run the day after the act or occurrence referred to.

(c) A five day extension of time shall apply to any filing made in response to documents served by mail if the place of address is within the State of California, ten days if the place of address is outside the State of California but within the United States, and twenty days if the place of address is outside the United States.

days to file its request since Board decisions are served by mail. The request for reconsideration was timely filed with the Board on September 17, 2004.

Third, the error found by CSEA is relevant to the remedy sought to be reconsidered, i.e., to conform the remedy to the Board's decision and analysis.

Finally, the error identified by CSEA impacts the decision and points to the need for the remedy to correspond with the Board's intent in Desert Sands.

The District contends that in CSEA's request for reconsideration, CSEA asked for reimbursement for lost wages. On the contrary, CSEA only asked that the work be returned to the ERTs pending negotiations over the issue. The Board acknowledges that CSEA can only negotiate from a fair position if it is placed where it would have been but for the District's unlawful acts. This is an appropriate element of a make whole remedy for unlawful transfer of work. (Calistoga.) Accordingly, the Board grants CSEA's request for reconsideration and modifies the Order to conform to this decision.

ORDER

The request for reconsideration of Desert Sands Unified School District (2004) PERB Decision No. 1682 is GRANTED and the Order is hereby AMENDED to read as follows:

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 (ERT) classification to the Security Agent (SA) classification.

i 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 ERT classification to the SA 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 ERT classification to the SA classification.

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

1. Return covert camera installation work to the ERT classification.

2. 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 ERT classification to the SA classification.

3. 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 hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General

Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order 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.



**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 (ERT) classification to the Security Agent (SA) 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 ERT classification to the SA 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 ERT classification to the SA classification.

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

1. Return covert camera installation work to the ERT classification.

2. Upon request, meet and negotiate with CSEA regarding the transfer of covert camera installation work from the ERT classification to the SA 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.