STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LONG BEACH COMMUNITY COLLEGE DISTRICT POLICE OFFICERS ASSOCIATION, Charging Party, v. LONG BEACH COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-4532-E Interlocutory Appeal PERB Order No. Ad-379 June 22, 2009

Appearances: Lackie Dammeier McGill by Michael A. McGill, Attorney, for Long Beach Community College District Police Officers Association; Parker & Covert by Spencer E. Covert, Attorney, for Long Beach Community College District.

Before McKeag, Neuwald and Wesley, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of an administrative law judge's (ALJ) interlocutory order (attached) pursuant to PERB Regulation 32200.[1] At issue is the meaning of the Board's Order

[1] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32200 provides:

> A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself. The request shall be in writing to the Board agent and a copy shall be sent to the Board itself. Service and proof of service pursuant to Section 32140 are required. The Board agent may refuse the request, or may join in the request and certify the matter to the Board. The Board itself will not accept the request unless the Board agent joins in the request. The Board agent may join in the request only where all of the following applying:

in *Long Beach Community College District* (2008) PERB Decision No. 1941 (*Long Beach*) with regard to when the Long Beach Community College District's (District) monetary obligation to the laid off employees was to begin and whether the District was ordered to pay traditional back pay. The ALJ found that the District complied with the Board's Order in *Long Beach*.[2] Specifically, that the Board did not order a traditional back pay remedy but rather ordered a limited *Transmarine Navigation Corporation* (1968) 170 NLRB 389, enf'd *NLRB v. Transmarine Navigation Corporation* (9th Cir. 1967) 380 F.2d 933 style remedy, requiring the payment of wages and benefits, at pre-layoff rates, starting on March 10, 2008, and continuing until one of its stated conditions was met.[3]

(a) The issue involved is one of law;

(b) The issue involved is controlling in the case;

(c) An immediate appeal will materially advance the resolution of the case.

[2] In *Long Beach*, the Board found that the District was not obligated to bargain with the Long Beach Community College District Police Officers Association (Association) regarding its decision to contract out police services to the City of Long Beach, but that the District violated the Educational Employment Relations Act (EERA), which is codified at Government Code section 3540 et seq., when it failed to bargain in good faith with the Association regarding the effects of its decision.

[3] The Order contained the following conditions:

> Beginning ten (10) days following the date the Decision is no longer subject to appeal, the District shall begin paying the Association members who were laid off effective August 1, 2003, their salary and benefits at the rate being paid prior to their layoff until either: (a) the date the District bargains to agreement with the Association regarding the effects of contracting out; (b) the date the parties meet and confer to bona fide impasse; (c) the failure of the Association to request bargaining . . . ; (d) the failure of the Association to commence negotiations within five (5) working days of the District's notice of its desire to meet and confer, unless through unavailability of the District; or (e) the subsequent failure of the Association to meet and confer in good faith.

The Association argues that the District should pay Association members their lost back pay and damages from the date of layoff until such time as they secured or refused equivalent employment. The Association contends that the language "[h]owever, in no event shall the sum paid to these employees exceed the amount they would have earned in wages and benefits from the date of their layoff to the time they secured or refused equivalent employment elsewhere," clearly demonstrates the Board's intent of the payment of back pay and benefits retroactive to the date of the unlawful act on the District's part, up through and until the District met and conferred and reached agreement.

The Board reviewed the entire record in this matter, including but not limited to *Long Beach*, the District's brief regarding interpretation of the Order to PERB Decision No. 1941, the Association's reply brief re: compliance, the request for interlocutory appeal, the ALJ's Order regarding remedy, the Association's brief in support of interlocutory appeal, and the District's brief in response to Association's interlocutory appeal of Order regarding remedy. The Board hereby finds the ALJ's Order regarding remedy to be correct and, therefore, adopts it as the decision of the Board itself.[4]

Additionally, the District argues that the Board should award attorneys fees because the "Association's attorneys continue to assert their aforementioned arguments for an improper purpose, to harass and cause unnecessary delay, as well as needlessly increase the cost of the compliance proceedings." As set forth in *City of Alhambra* (2009) PERB Decision

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> However, in no event shall the sum paid to these employees exceed the amount they would have earned in wages and benefits from the date of their layoff to the time they secured or refused equivalent employment elsewhere.

[4] The Board notes that on page 9 of the Order regarding remedy, the correct cite is *Placentia Unified School District* (1986) PERB Decision No. 595 and not *Placentia Unified School District* (1986) PERB Decision No. 1986.

No. 2036-M (*Alhambra*), in order for a party to obtain an award of attorneys fees the moving party must demonstrate that the charge was "without arguable merit" and pursued in "bad faith." (*Alhambra.*) Based on our review of the record, we find that the Association did not pursue the appeal in bad faith nor did the District demonstrate that the appeal was "without arguable merit." Therefore, the Board does not award attorneys fees.

ORDER

The Board hereby REMANDS Case No. LA-CE-4532-E to the Public Employment Relations Board (Board) General Counsel's office to take further proceedings to determine whether the Long Beach Community College District has complied with the Board's Order as set forth herein.

Members McKeag and Wesley joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LONG BEACH COMMUNITY COLLEGE DISTRICT POLICE OFFICERS ASSOCIATION, Charging Party, v. LONG BEACH COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-4532-E PERB Decision No. 1941 **ORDER REGARDING REMEDY**

PROCEDURAL HISTORY

On January 30, 2008, the Public Employment Relations Board (Board) issued a decision in the underlying unfair practice case. The Board concluded that the Long Beach Community College District (District) was not obligated to bargain with the Association regarding its decision to contract out police services to the City of Long Beach, which resulted in the layoffs of a bargaining unit of thirteen Safety and Police Officers represented by the Long Beach Community College District Police Officers Association (Association). However, the Board also held that the District violated the Educational Employment Relations Act (EERA) section 3543.5(c)[1] by failing to bargain in good faith with Association regarding the effects of its decision.

In its Order, the Board required the District to take the following affirmative action:

[1] The EERA is codified at Government Code section 3540 et seq. Section 3543.5(c) makes it unlawful for a public school employer to "(R)efuse or fail to meet and negotiate in good faith with an exclusive representative."

> Beginning ten (10) days following the date the Decision is no longer subject to appeal,[2] the District shall begin paying the Association members who were laid off effective August 1, 2003, their salary and benefits at the rate being paid prior to their layoff until either: (a) the date the District bargains to agreement with the Association regarding the effects of contracting out; (b) the date the parties meet and confer to bona fide impasse; (c) the failure of the Association to request bargaining within ten (10) days following the date that this Decision is no longer subject to appeal; (d) the failure of the Association to commence negotiations within five (5) working days of the District's notice of its desire to meet and confer, unless through the unavailability of the District; or (e) the subsequent failure of the Association to meet and confer in good faith.
> However, in no event shall the sum paid to these employees exceed the amount they would have earned in wages and benefits from the date of their layoff to the time they secured or refused equivalent employment elsewhere.

The case was assigned to the undersigned for the purpose of determining whether the District has complied with the Board's Order. In doubt as to the meaning of the Order, the undersigned directed the parties to submit pre-hearing briefs on the interpretation of the Order with regard to when the District's monetary obligation to the laid-off employees was to begin, and whether it was ordered to pay traditional back pay. Briefs were submitted on January 12, 2009.

FINDINGS OF FACT

Pursuant to the Board's Order, the parties negotiated a Memorandum of Agreement (MOU), executed on July 8, 2008, providing that the District pay to each of the laid-off employees the equivalent of five months' wages and that the parties would continue to negotiate any additional amounts due. The MOU also states:

[2] According to PERB Regulation 3542(c), the deadline for filing an appeal was February 29, 2008 (30 days after issuance of the Board order), and ten days thereafter was March 10, 2008.

> Accordingly, . . . the period of time that the POA members may be entitled to back pay and benefits, as set forth in PERB Decision No. 1941, is from the day of layoff until July 31, 2008.

Pursuant to the MOU, the District paid each employee five months' wages. However, the parties have been unable to reach agreement on additional amounts due. The District requested from the Association information regarding each employee's search for work and interim earnings. Although the Association has provided much information, the District contends that it does not have sufficiently complete data from which to calculate any remaining back pay or offset.

In its brief, the Association argues that the first paragraph of the Board's order, which requires payment "at the rate being paid prior to their layoff," and the last paragraph, which provides that this amount not exceed "the amount they would have earned in wages and benefits from the date of their layoff to the time they secure or refuse equivalent employment elsewhere," shows that the Board meant for the District to pay traditional back pay beginning on the date of layoff, August 1, 2003, until one of the conditions is met. The Association also cites cases, discussed below, for the proposition that an employer must engage in effects bargaining before unilaterally implementing its decision; therefore the District's failure to do so means that the unit employees were unlawfully laid off and should receive back pay from the time of layoff. Finally, the Association relies on the MOU, cited above, in which both parties agreed that the back pay period was to begin on the date of layoff.

The District argues that the plain reading of the Board's order is that its financial obligation was to begin on March 10, 2008: "Beginning ten (10) days following the date the Decision is no longer subject to appeal, the District shall begin paying..." The District contends that it is the Board's order, rather than the parties' MOU, which controls.

ISSUE

Does the Board's Order require the District to pay the laid off employees back pay from the time of their layoffs on August 1, 2003, or to pay wages and benefits, at pre-layoff levels, from March 10, 2008?

CONCLUSIONS OF LAW

The traditional remedy for an employer's failure to bargain its decision to lay off employees is to require the employer to pay them back pay from the date of the layoffs. Thus, in Tahoe-Truckee Unified School District (1988) PERB Decision No. 668, the Board, having found that the employer unlawfully subcontracted unit work, ordered a return to the full status quo ante, including back pay, plus interest, to make whole the laid-off employees:

> Reimburse [employee] for all wages and other benefits lost because of the District's decision to subcontract the printing of letterhead . . . The amount due to [employee] shall be augmented by interest at the rate of ten percent per annum dating from the first pay period after the subcontracting of each job.

However, where the employer is privileged to make a decision which results in the layoff of employees but fails to bargain the effects of that decision, the standard remedy has been a limited back pay order. In the seminal federal case, Transmarine Navigation Corp. (1968) 170 NLRB 389 (Transmarine), enf'd NLRB v. Transmarine Navigation Corp. (9th Cir. 1967) 380 F.2d 933 [65 LRRM 2861],[3] the employer lawfully closed its facility and laid off its employees but unlawfully failed to bargain with the union the effects of that decision. The National Labor Relations Board (NLRB) issued a bargaining order, but reasoned that bargaining alone was not sufficient for "easing the hardship on employees whose jobs were being terminated." It therefore fashioned the following "limited backpay" order:

> [w]e shall order the Respondent to bargain with the Union, upon request, upon the effects on its [former employees] and to pay these employees amounts at the rate of their normal wages when last in the Respondent's employ from 5 days after the date of this Supplemental Decision until the occurrence of [conditions similar to those in the instant case]; but in no event shall the sum paid to any of these employees exceed the amount he would have earned as wages from [plant closing] to the time he secured equivalent employment elsewhere . . .provided, however, that in no event shall this sum be less than these employees would have earned for a 2-week period at the rate of their normal wages when last in the Respondent's employ.

In Placentia Unified School District (1986) PERB Decision No. 1986, the employer had reduced employee work hours and laid off certain employees. The Board found the reduction of work hours unlawful and ordered a traditional back pay remedy requiring that the affected employees "be made whole for any loss of economic benefits . . . with interest . . ." As to the layoffs, the Board found the employer privileged to make that decision. However, its failure to negotiate the effects of the layoff was unlawful; for this violation, the Board provided "a limited back pay remedy in an effort to approximate the parties' bargaining positions had there been no violation," citing Transmarine. The Board ordered the employer to:

> [b]eginning 10 days after [the] Decision is no longer subject to reconsideration, pay the employees who were laid off in June and September 1982 their salary and benefits at the rate being paid prior to their layoff until . . . [conditions similar to those in the instant case are met] . . .
>
> However, in no event shall the sum paid to these employees exceed the amount they would have earned in wages and benefits from the date of their layoff . . .to the time they secured or refused equivalent employment elsewhere, provided, however, that in no event shall they be paid less than they would have earned for a two-week period at their normal rate of pay and benefits when last in the District's employ.

[3] It is appropriate for the Board to take guidance from federal labor law, where statutory principles are similar. (Firefighters v. City of Vallejo (1974) 12 Cal.3d 608.)

And in Regents of the University of California (Lawrence Livermore National Laboratory) (1997) PERB Decision No. 1221-H, where the university failed to bargain over the effects of a reduction in staff, the Board affirmed the Administrative Law Judge's Transmarine remedy and stated, at footnote 2:

> A Transmarine remedy is a limited backpay award that attempts to approximate the parties' bargaining positions had there been no violation. [citing Placentia] In short, the Transmarine backpay award *begins after the issuance of a decision and continues during the pendency of effects negotiations.* [Italics added.]

The Board order reads in part:

> Beginning 10 days following the date this Decision is no longer subject to reconsideration, pay to officers who, but for the University's decision to reduce staffing, would have worked in the Superblock and would have earned one-half hour of pay per workday, the additional pay they would have earned until . . . [conditions similar to those in the instant case are met].

In another effects-bargaining case, Mt. Diablo Unified School District (1983) PERB Decision No. 373 (Mt. Diablo), the Board specifically rejected the union's assertion that the laid-off employees were entitled to a full "make whole remedy." Rather, it issued a "limited back pay order" for the District to

> [p]ay to the employees laid off a sum equal to their wages at the time they were laid off from the first day the Association requests to bargain concerning the subjects of bargaining . . . until occurrence of the earliest of the following conditions . . . [similar to those in the instant case].

See also, Kern County Community College District (1983) PERB Decision No. 337, where the Board specifically rejected the union's argument that only "a full restoration of the status quo ante" would be sufficient, and instead issued an order similar to the above cases.

In the instant case, the Board found that the District had no obligation to bargain its subcontracting decision, but that it violated its duty to bargain the effects of the decision. Therefore, like the cases cited above, the appropriate remedy would not be a full "make whole" order, but rather a Transmarine remedy, to restore to CSEA its bargaining rights and give the laid-off employees a limited back pay award. The Board's language here is strikingly similar to the above-cited effects-bargaining cases: it orders payment of "salary and benefits"; which the District "shall begin paying" ten days after expiration of the appeals period; and nowhere does it mention back pay or interest.

The Association points to the last sentence of the Board's order, requiring that sums not exceed what the employees would have earned after layoff before they found or refused other employment, as evidence that the back pay was meant to begin on the date of layoff. However, the same language is found in Transmarine and Placentia. I therefore reject the Association's contention. I am aware that the Board did not order the last part of the Transmarine remedy, i.e., that the award should not be less than two weeks' pay. However, there is no reason why the Board could not eliminate this two-week guarantee, which it has done.

The Association also argues that an employer is not allowed to implement its decision until after it has negotiated with the union regarding effects; therefore, the layoffs, which were implemented prior to effects bargaining, were unlawful and the Board meant to remedy them. The Association cites Newman-Crows Landing Unified School District (1982) PERB Decision No. 223 (Newman-Crows Landing), Fremont Union High School District (1987) PERB Decision No. 651 (Fremont), and Mt. Diablo, supra. In those cases, like the instant case, the employers were privileged to make their decisions but failed their duty to bargain the effects of those decisions. However, in none of those cases did the Board find unlawful the layoffs

which resulted from the employer's lawful decisions, nor did it order full back pay from the time of layoff. In Newman-Crows Landing, the case was dismissed because the union failed to request effects bargaining. The Fremont case was also dismissed, because the layoffs were found not to be causally related to that conduct of the employer alleged in the complaint. In Mt. Diablo, as discussed above, the Board specifically denied a full make-whole remedy. And here, as discussed above, the Board used Transmarine language to order a limited back pay remedy. I therefore also reject the Association's argument in this regard.

I am of course aware of the parties' MOU, in which they agreed that the Board meant for the District to pay back pay from the date of the layoff, August 1, 2003. That agreement, however, is a matter between the parties, and it is not my responsibility to determine whether the District is complying with the MOU. Rather, it is my responsibility to determine whether the District is complying with the Board's Order.

Accordingly, based on all of the above, I find that the Board did not order a traditional back pay remedy but rather ordered a limited Transmarine-style remedy, requiring the payment of wages and benefits, at pre-layoff rates, starting on March 10, 2008, and continuing until one of its stated conditions is met.

DATED: January 27, 2009

By _____
Ann L. Weinman
Administrative Law Judge