STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ANTELOPE VALLEY COLLEGE FEDERATION OF CLASSIFIED EMPLOYEES, Charging Party, v. ANTELOPE VALLEY COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-5931-E Administrative Appeal PERB Order No. Ad-487 August 27, 2021

Appearances: Law Offices of Robert J. Bezemek by David Conway, Attorney, for Antelope Valley College Federation of Classified Employees; Atkinson, Andelson, Loya, Ruud & Romo by Mark R. Bresee, Attorney, for Antelope Valley Community College District.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

BANKS, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Antelope Valley College Federation of Classified Employees (Federation) of an administrative determination by PERB's Office of the General Counsel (OGC). In *Antelope Valley Community College District* (2018) PERB Decision No. 2618, the Board found that the Antelope Valley Community College District violated the Educational Employment Relations Act (EERA) by unilaterally modifying workweeks without obtaining approval from a majority of affected unit

employees represented by the Federation and by dealing directly with Federation-represented employees.[1]

Once the decision became final, OGC initiated compliance proceedings pursuant to PERB Regulation 32980.[2] After a seven-month investigation involving multiple submissions from the parties, OGC issued an administrative determination to narrow the compliance issues. OGC found, in relevant part, that the Board's order: (1) authorizes the District to compensate current employees with its choice of compensatory time off or backpay pursuant to the parties' collective bargaining agreement (CBA); and (2) does not require unit members who subsequently changed to a different alternate work schedule after February 2014, to be made whole for the period following the subsequent change.[3]

The Federation timely appealed, seeking reversal of these two findings. The District filed a response opposing the Federation's appeal. We have considered the parties' arguments in light of relevant law and the record as a whole. We partially grant the appeal and find that employees who subsequently changed to a different alternate work schedule are entitled to the decision's make-whole remedy until the District

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[1] EERA is codified at Government Code section 3540 et seq.

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

[3] Consistent with the language adopted by the underlying decision and used by the parties, we refer interchangeably to "modified workweeks" and "alternate work schedules." The parties' operative CBA defined alternate work schedules as any schedule other than a typical 8 hours per day, five days a week (referred to as "5/8"). Examples include, but are not limited to, 4 shifts of 9 hours, plus a half-day (referred to as "4/9 + .5"), or 4 shifts of 10 hours per week (referred to as "4/10").

restores the standard 5/8 workweek, except to the extent that the District proves in compliance proceedings that an employee successfully asked for a new schedule and would clearly have done so irrespective of the District's unfair labor practice. We affirm OGC's determination that the decision's make-whole order allows the District to choose whether to make affected employees whole by providing backpay or compensatory time off.

PROCEDURAL AND FACTUAL SUMMARY

On December 28, 2018, the Board issued *Antelope Valley Community College District*, *supra*, PERB Decision No. 2618. The remedial order requires the District, in relevant part, to take the following affirmative actions:

> "[B.]1. Within 45 days after this decision is no longer subject to appeal, meet and negotiate upon demand from the Federation regarding whether to rescind in whole or in part the modified workweeks established unilaterally on or around February 2014, as well as the process for conducting new votes or polls of affected members. Once negotiations begin, the parties will have 90 days to conclude an agreement. If no agreement is reached in that time, or if the Federation does not request to meet and negotiate, then the District shall rescind the modified workweeks in their entirety and restore the work schedules in effect before February 2014.
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> "[B.]2. Furnish a list of the names of bargaining unit members affected by the modified workweeks established on or around February 2014.
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> "[B.]3. Make whole for any financial losses suffered, including overtime wages or overtime leave in a manner consistent with the decision in this matter, all unit employees affected by the establishment of modified workweeks on or around February 2014. The backpay period shall run from the date of the implementation of the

> modified workweeks through the earliest of the following: the date the Federation declines to negotiate over the rescission of the modified workweeks, the date of any agreement reached by the parties pursuant to paragraph B.1, or, if no agreement is reached within 90 days of the start of negotiations, the date on which the District fully rescinds the unilateral changes to employee work schedules. All monetary amounts owed shall be augmented by interest at a rate of 7 percent per annum."

In December 2019, OGC initiated compliance proceedings. Pursuant to paragraph B.1 of the remedial order, the parties negotiated for 90 days, but were unable to reach an agreement. Thereafter, OGC worked with the parties to narrow the compliance issues. On March 22, 2021, the parties stipulated to four different employee lists and identified four compliance issues requiring resolution, including the following two issues subject to this appeal:

> "1. Whether the District has the authority to implement the remedy of compensatory time for 'affected employees' who are still employed by the District.
>
> [¶] . . . [¶]
>
> "3. Whether PERB's Order requires that unit members who changed to a 4/9+.5 schedule 'on or around February 2014,' but who subsequently moved to a modified schedule other than a 4/9+.5, are entitled to a make whole remedy after changing to a different modified schedule. The Federation contends they are, and the District contends they are not . . ."

On June 3, 2021, OGC issued an administrative determination addressing the issues identified by the parties.[4] The administrative determination noted that further compliance proceedings were necessary to ensure that all affected employees are made whole and that the District has returned to the status quo ante in accordance with the Board's Order. The Federation timely appealed the administrative determination's findings on the two issues identified above.

DISCUSSION

"Compliance proceedings are governed by PERB Regulation 32980, subdivision (a), which provides in relevant part that '[t]he General Counsel or his/her designate may conduct an inquiry, informal conference, investigation, or hearing, as appropriate, concerning any compliance matter.'" (*Bellflower Unified School District* (2019) PERB Order No. Ad-475, p. 8.) Compliance proceedings are not a venue for relitigating the merits of the underlying decision and order. (*Id*. at p. 9, citing *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 14; *County of Riverside* (2013) PERB Decision No. 2336-M, p. 8.)

I. The remedial order allows the District to choose whether to compensate employees through backpay or compensatory time off

The make-whole order requires the District to:

> "Make whole for any financial losses suffered, including overtime wages or overtime leave in a manner consistent with the decision in this matter, all unit employees affected by the establishment of modified workweeks on or around February 2014. . . . All monetary amounts owed shall be augmented by interest at a rate of 7 percent per annum."

[4] The compliance officer found it unnecessary to hold a hearing in light of the extensive correspondence exchanged and evidence gathered during the investigation. Neither party objected to this determination.

(*Antelope Valley Community College District*, *supra*, PERB Decision No. 2618, pp. 28-29.) We explained:

> "[b]ut for the District's unilateral change, the employee's ninth hour of work on the first four days of the week would earn either wages or compensatory time off at a premium time-and-a-half rate, per the contract; the District would have a choice between those two options, also per the contract. Thus, such an employee should earn either 42 hours of pay for the week, or should receive 40 hours of pay plus two hours of compensatory time off, at the District's option."

(*Id*. at pp. 25-26, footnote omitted.) In a footnote to the above explanation, we added that "Article 11.5.1 of the parties' contract provides that overtime is calculated on a daily basis, after 8 hours a day, and that *the District may choose to pay this overtime in wages* 'equal to one and one-half the regular rate of pay' *or in compensatory time-off at that rate*." (*Id*. at p. 26, fn. 9, italics added.)

Based on the decision's analysis and the parties' contractual provisions, we agree with OGC's determination that for individuals who are still employed with the District, the District may choose to provide either backpay or compensatory time pursuant to the contract.[5]

The Federation argues on appeal, as it has throughout compliance proceedings, that the District should not be allowed to choose to provide compensatory time in lieu of backpay. The Federation advances several arguments in

[5] OGC correctly determined that individuals who are no longer working for the District can only be made whole if they receive backpay. We agree with OGC that regardless of whether employees receive backpay or compensatory time, the amount owed must be augmented by interest at the rate of 7 percent per annum.

support of its position. First, the Federation argues that the language of the remedial order itself requires backpay. Based on our discussion above, we cannot read into the remedial order a requirement that the District make affected employees whole with backpay alone.

Second, the Federation argues that compensatory time is much less valuable now, many years after it was earned, as employees were deprived of past opportunities to use the time off. Although our make-whole remedies are designed to restore the status quo and put aggrieved employees in the place they would have been but for the employer's unilateral change, we adjust for the inevitable passage of time by awarding interest. In this case, because of the passage of time, the interest awarded will be substantial. Moreover, allowing the District to choose the method of compensation effectuates the parties' CBA.

The Federation also points to several decisions where the Board required an employer to provide backpay in the absence of an agreement with the union to substitute compensatory time off. (See *Mark Twain Union Elementary School District* (2003) PERB Decision No. 1548; *Corning Union High School District* (1984) PERB Decision No. 399; *Cloverdale Unified School District* (1991) PERB Decision No. 911.) The cases cited by the Federation are inapposite because the parties to those cases did not have contractual provisions allowing the employer to decide whether to compensate overtime via wages or compensatory time. Here, on the other hand, Article 11.5.1 of the parties' CBA provides that "[t]he District may provide for compensatory time off at the appropriate rate in lieu of payment for authorized over time service."

Finally, the Federation argues that if the District chooses to make employees whole with compensatory time off, in some instances it will violate the federal Fair Labor Standards Act (FLSA) and the Education Code.[6] As a threshold matter, PERB's jurisdiction is limited to enforcing California public sector labor relations statutes, and thus we cannot enforce either the Education Code or the FLSA. (*Lake Elsinore Unified School District* (2018) PERB Decision No. 2548, p. 11.) PERB can, however, harmonize our interpretations of the statutes we administer with other statutory schemes. (See *Fremont Unified School District* (1997) PERB Decision No. 1240, pp. 5-6 [finding that the parties' contractual provisions did not conflict with the Education Code and were therefore not preempted by it].) With these considerations in mind, we address the parties' arguments.

The Federation argues that if the District were to comply with the remedial order by providing compensatory time, it would violate Education Code section 88028, which provides that "[w]hen compensatory time off is authorized in lieu of cash compensation, such compensatory time off shall be granted within 12 calendar months following the month in which the overtime was worked and without impairing the services rendered by the employing district." The District, in contrast, argues that the parties' CBA overrides section 88028. Because PERB does not enforce the Education Code, we need not decide whether the District or the Federation has the correct view

[6] The FLSA is codified at title 29 United States Code section 201 et seq. The FLSA and accompanying regulations permit public employees to receive compensatory time off in lieu of overtime compensation, under specified conditions. The statutory and regulatory framework includes extensive requirements regarding such time off in lieu of extra pay. For the reasons outlined below, we express no opinion as to whether the District may be in danger of violating any such requirements.

as to whether and how section 88028 may impact the District's choice to comply with our remedial order via cash payments or compensatory time off. If the District chooses to make affected employees whole with compensatory time, it does so at its peril based on its interpretation of the CBA and the Education Code, but PERB is not the appropriate venue for the Federation to address any potential Education Code violation.

Likewise, we decline to adjust our order based upon the Federation's argument that the District will run afoul of the FLSA if it makes affected employees whole via compensatory time. As with potential Education Code complications, we need not decide whether the District or the Federation has the correct view of the FLSA, which PERB also lacks jurisdiction to enforce. The District may choose to comply with the remedial order via cash payments, and it acts at its peril if chooses instead to provide compensatory time off, based on its FLSA interpretation.[7]

[7] By e-mail dated April 27, 2020, the District informed affected employees that it "will grant compensatory time off on Friday afternoons or at other times with the approval of a supervisor." It is unclear whether this statement is consistent with the FLSA and the parties' agreement and/or past practice regarding use of compensatory time. If the Federation believes that the District's compliance would treat compensatory time differently from the status quo ante, the Federation may raise that in compliance proceedings. OGC should strive to restore the status quo ante by directing that compensatory time off provided pursuant to the remedial order shall be equivalent in all respects to compensatory time off under pre-existing agreements and practices or any new practices the parties may negotiate.

II. Employees who changed to a different alternate work schedule after February 2014 are presumptively entitled to be made whole until reverted to the 5/8 schedule

The administrative determination found that "[t]he Board's Order does not require that unit members who changed to a 4/9+.5 schedule 'on or around February 2014,' but who subsequently moved to a modified schedule other than a 4/9+.5, are entitled to a make whole remedy after changing to a different modified schedule." The Federation argues that this is incorrect, citing to the following language in the Board's order:

> "The backpay period shall run from the date of the implementation of the modified workweeks through the earliest of the following: the date the Federation declines to negotiate over the rescission of the modified workweeks, the date of any agreement reached by the parties pursuant to paragraph B.1, or, if no agreement is reached within 90 days of the start of negotiations, *the date on which the District fully rescinds the unilateral changes to employee work schedules*."

(*Antelope Valley Community College District*, *supra*, PERB Decision No. 2618, pp. 28-29, italics added.) The Federation further argues that an employee's subsequent change to a different alternate work schedule presumptively flowed from the District's 2014 unilateral change.

To resolve this dispute, we first review the applicable burden of proof. It is the respondent's burden to demonstrate its compliance with PERB's remedial order. (*Hacienda La Puente Unified School District* (1998) PERB Decision No. 1280, adopting proposed decision at pp. 8-9; *City & County of San Francisco* (2021) PERB Decision No. 2757-M, p. 15, fn. 10.) The Board's finding "that an unfair labor practice

was committed is presumptive proof that at least some backpay is owed." (*Bellflower Unified School District*, *supra*, PERB Order No. Ad-475, p. 10, citing *Arlington Hotel Co*., *Inc*. (1987) 287 NLRB 851, 855.) "'[A]ny uncertainty [as to backpay] must be resolved against the wrongdoer whose conduct made certainty impossible.'" (*Id*., quoting *Fibreboard Paper Products Corp*. (1969) 180 NLRB 142, 143; *City of Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 14; *Fresno County Office of Education* (1996) PERB Decision No. 1171, p. 2 & adopting proposed decision at p. 4.)

We agree with the Federation that: (1) affected employees who later changed to a different modified work schedule may very well have done so at least in part because of the District's unilateral change; and (2) any uncertainty on that question is a direct result of both the District's initial unlawful conduct and its failure to undo its unilateral change as the order requires. Had the District complied with our order in the last 33 months since the order was issued, it would have immediately cut off its liability. Nonetheless, we recognize that there could be instances in which the District can prove that an employee requested, for instance, a 4/10 schedule due to new childcare responsibilities, and would have done so irrespective of the District's 2014 unilateral change. Accordingly, we direct OGC to afford the District the opportunity to prove by competent evidence that certain employees' compensation should be cut off because they successfully asked for new schedules and would clearly have done so irrespective of the District's unfair labor practice. Any uncertainty is to be construed against the District.

ORDER

This matter is remanded to PERB's Office of the General Counsel where additional evidence will be collected to determine whether the District has complied with the remedial order in *Antelope Valley Community College District* (2018) PERB Decision No. 2618, in accordance with this Order.

Members Krantz and Paulson joined in this Decision.