STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED EDUCATORS OF SAN FRANCISCO, Charging Party, v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2690-E PERB Decision No. 2048 June 30, 2009

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for United Educators of San Francisco; Fagen Friedman & Fulfrost by Joshua A. Stevens, Attorney, for San Francisco Unified School District.

Before Dowdin Calvillo, Acting Chair; Neuwald and Wesley, Members.

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by United Educators of San Francisco (UESF) of a Board agent's dismissal of its unfair practice charge. The charge alleged that the San Francisco Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing the location to which special education aides report for duty each day. The Board agent dismissed the charge for failure to state a prima facie case of an unlawful unilateral change by the District.

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

The Board has reviewed the dismissal and the record in light of UESF's appeal, the District's response to the appeal and the relevant law.[2] Based on this review, the Board affirms the dismissal of the charge for the reasons discussed below.

BACKGROUND

UESF's unfair practice charge stated in its entirety:

> The Charging Party is the recognized representative of paraprofessional employees of the San Francisco Unified School District and specifically Classification S10 Special Education Paraprofessional. Up until August 21, 2007, paraprofessional employees employed as Special Education Aides were directed to begin their duty day at the bus yard by getting on a bus at that point in order to pick up the individuals to whom they are assigned as aides. On August 27, 2007, employees in the position of Classification S10 were instructed that beginning on that date employees were to report at the location where the first student to whom they are assigned was to be picked up. This change in practice was made unilaterally and without notice to the Charging Party. The change in practice caused a hardship for employees because it changed the length of their workday and workweek, it also caused and [sic] inconvenience or in some cases financial impossibility. For instance, one employee, Trista Duran, had a first pickup in Chinatown where parking was limited and prohibitively expensive, and not accessible by bus because of her home address. Following the Employer's instructions would have meant a nine-hour day for which Duran would be paid for seven hours.

The Board agent sent UESF a warning letter indicating that these allegations failed to state a prima facie case. In a subsequent phone conversation with the Board agent, UESF's counsel stated UESF would not amend the charge to allege additional facts. As a result, the Board agent dismissed the charge for failure to state a prima facie case of an unlawful unilateral change by the District.

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[2] In its response, the District contends that abuse of discretion is the proper standard of review for this appeal. In *Beverly Hills Unified School District* (2008) PERB Decision No. 1969, the Board reaffirmed that "the Board applies a de novo standard when reviewing a Board agent's dismissal of an unfair practice charge." Accordingly, we have conducted a de novo review in this matter.

DISCUSSION

1. Late Filed Response to Appeal

PERB Regulation 32635(c)[3] provides that any party may file a statement in opposition to an appeal of a dismissal within 20 days after the date the appeal is served. PERB Regulation 32130(c) provides a five day extension to file a response to documents served by mail.

UESF served its appeal by mail on October 1, 2008. Pursuant to the above regulations, the District had until October 26, 2008, to file a response to the appeal. Having received no response by that date, the PERB Appeals Assistant notified the parties by letter of October 30, 2008, that the filings were complete and the case had been placed on the Board's docket.

On November 7, 2008, the District filed its response along with a cover letter asking the Board to excuse the late filing. The letter stated that the District's counsel had been on paternity leave from October 1 through October 20, 2008. During that time, his office received the appeal but it was mistakenly filed away without anyone notifying him of its receipt. Upon receiving the Appeals Assistant's letter on November 3, 2008, counsel found the appeal and prepared a response, which was served on the Board and UESF four days later.

PERB Regulation 32136 provides that the Board may excuse a late filing for good cause. The Board has found good cause when the explanation for the late filing was "reasonable and credible" and the delay did not cause prejudice to any party. (*Barstow Unified School District* (1996) PERB Order No. Ad-277.) The Board has historically excused late filings caused by "honest mistakes" such as mailing or clerical errors. (E.g., *Kern Community College District* (2008) PERB Order No. Ad-372 [clerical employee served appeal on respondent but did not file appeal with PERB]; *Trustees of the California State University* (1989) PERB Order

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

No. Ad-192-H [mailroom employees incorrectly set postage meter causing exceptions to be filed late].)

The letter from the District's counsel indicates that the late filing was the result of a clerical error in counsel's office. Counsel filed the District's response to the appeal four days after he discovered the error. Based on the facts stated in District counsel's letter and counsel's conscientious effort to file the District's response soon after the error was discovered, we find the District has provided a "reasonable and credible" explanation for its late filing. Further, there is no indication that the late filing prejudiced UESF in any way, particularly as PERB regulations do not provide for a party to file a reply to another party's response to an appeal of a dismissal. (*University of California, Los Angeles* (1992) PERB Decision No. 961-H.) Accordingly, we find the District has demonstrated good cause for the Board to accept its late filed response to UESF's appeal.

2. Unilateral Change

A public school employer's unilateral change in terms and conditions of employment constitutes a "per se" violation of EERA section 3543.5, subdivision (c)[4] if: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

[4] EERA section 3543.5, subdivision (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."

UESF's charge failed to state a prima facie case of an unlawful unilateral change because the alleged change in special education aides' reporting location does not concern a matter within the scope of representation and the charge does not sufficiently allege any negotiable effects of the change on bargaining unit members.

a. Negotiability of Decision

In *Anaheim Union High School District* (1981) PERB Decision No. 177, the Board articulated the following test for determining when a subject not specifically enumerated in EERA section 3543.2, subdivision (a)[5] falls within the scope of representation:

> [A] subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

[5] EERA section 3543.2, subdivision (a) provides, in relevant part:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employees, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22316 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code.

In *Moreno Valley Unified School District* (1982) PERB Decision No. 206, the Board applied this test to an employer's unilateral change in employees' reporting location. Certain employees of the district, such as nurses, psychologists, speech therapists and counselors, worked at different campuses on different days of the week. Each day these employees would report to the district headquarters before traveling to their assigned campus. Without prior notification to the union, the district directed employees to report directly to the campus to which the employee was assigned on a given day. The Board ruled this did not constitute an unlawful unilateral change because "the evidence does not support a finding that the change affected a subject within the scope of representation."

Though its meaning is less than clear, this language could be read to mean that the district's decision itself, and not just the effects of the decision, would be negotiable if the decision had an impact on wages, hours, or other terms and conditions of employment. The Board appears to have adopted this view in later decisions where it held that requiring employees to check in and/or out at a particular location at a particular time is negotiable if the requirement has an impact on employees' hours of employment. (*State of California (Department of Youth Authority)* (1998) PERB Decision No. 1293-S; *Inglewood Unified School District* (1987) PERB Decision No. 624.) Similarly, PERB has held that while the length of the instructional day is outside the scope of representation, "the subject is negotiable" when the change to the instructional day affects the length of employees' workday. (*Imperial Unified School District* (1990) PERB Decision No. 825; *Victor Valley Union High School District* (1986) PERB Decision No. 565.)

Just a few months after its decision in *Moreno Valley Unified School District*, *supra*, the Board held in *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223, that an employer's decision on a subject outside the scope of representation does not

become negotiable merely because it has an impact on wages, hours, or other terms and conditions of employment. In such cases, the employer is not obligated to bargain over the decision itself but must bargain upon proper request over any identifiable effects of the decision on subjects within the scope of representation. Though PERB first recognized this distinction between decision and effects bargaining in cases involving layoffs, it has since expanded the rule to other contexts. (E.g., *Trustees of the California State University* (2007) PERB Decision No. 1926-H [computer resource policy]; *State of California (Department of Motor Vehicles)* (1999) PERB Decision No. 1347-S [alternate work schedule]; *Eureka City School District* (1992) PERB Decision No. 955 [smoking policy].)

To harmonize the line of cases involving reporting location, check in/out requirements and length of instructional day with the cases that clearly recognize a distinction between bargaining over a decision and bargaining over the effects of the decision, we interpret the ambiguous language in the former line of cases as requiring bargaining only over negotiable effects of the employer's nonnegotiable decision. This interpretation is consistent with the Board's focus in those cases on whether the charging party established an actual impact on matters within the scope of representation. Consequently, we read *Moreno Valley Unified School District*, *supra*, as holding that the district's decision to change employees' reporting location was not negotiable and that the union failed to establish any negotiable effects of the decision which would have triggered the district's duty to bargain over those effects.

In its appeal, UESF argues that the change in reporting location is "essentially a transfer or reassignment" and therefore an enumerated subject of bargaining under EERA section 3543.2, subdivision (a). A transfer typically involves either a change in job duties or a change in the location where those duties are performed. The change in reporting location has not altered either for special education aides; they still perform the same duties for the same

students on the same bus as before the change. Nor did the charge allege that UESF and the District have agreed to any other definition of "transfer" that would govern this matter. Accordingly, the change in reporting location is not a transfer subject to bargaining pursuant to EERA section 3543.2, subdivision (a).

b. Negotiable Effects of Decision

Having determined that employees' reporting location is not within the scope of representation, we turn to whether UESF's charge sufficiently alleged any negotiable effects over which the District was obligated to bargain. (See *Beverly Hills Unified School District* (2008) PERB Decision No. 1969 [no prima facie case of unlawful unilateral change when charge failed to allege negotiable effects resulting from implementation of nonnegotiable decision].) When claiming that an employer's nonnegotiable decision has an effect on a subject within the scope of representation, the charging party bears the burden of alleging facts establishing an actual impact on employees' terms and conditions of employment. (*Salinas Union High School District* (2004) PERB Decision No. 1639.) The impact must be "reasonably certain to occur and causally related to the nonnegotiable decision." (*Fremont Union High School District* (1987) PERB Decision No. 651.) PERB will not find an unlawful unilateral change when the alleged effect on terms and conditions of employment is "indirect and speculative." (*Lake Elsinore School District* (1987) PERB Decision No. 646.)

UESF alleged that the District's decision to change special education aides' reporting location extended the aides' workday. The length of the workday is within the scope of representation. (*Anaheim City School District* (1983) PERB Decision No. 364.) However, the charge did not allege facts to show that any District special education aide worked a longer workday as a result of the District's decision. The charge stated that "[f]ollowing the Employer's instructions would have meant a nine-hour day for which Duran would be paid for

seven hours," implying that it would take Duran two hours to commute to and from the new reporting location. UESF has not provided any authority, nor has the Board found any, for the proposition that an employee's commute time is considered part of the employee's workday. Thus, the charge failed to establish that the change in reporting location resulted in an increased workday for bargaining unit members.

On appeal, UESF asserts that as a result of the District's decision Duran was required to pay for parking near her new reporting location. PERB has defined "wages" to include emoluments of value gained in the course of employment, such as employer-provided tools. (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375.) The elimination of such "wages" is negotiable. (*Id.*) Thus, if the District had previously provided parking for special education aides, the elimination of that parking would be negotiable. However, the charge did not allege that the District previously provided parking for special education aides.[6] Additionally, while the charge alleged that Duran "had a first pickup in Chinatown where parking was limited and prohibitively expensive, and not accessible by bus because of her home address," it alleged no facts showing that Duran ever actually parked in Chinatown. In fact, the charge did not allege what Duran actually did in response to the change in her reporting location. Consequently, the charge failed to establish that the change in reporting location had an actual impact on bargaining unit members' wages.

[6] UESF alleges for the first time in its appeal that special education aides were previously allowed to park at the bus yard. PERB Regulation 32635(b) provides that a party may not present new allegations on appeal unless good cause is shown. Because UESF has failed to show it could not have obtained this information through reasonable diligence prior to the dismissal of its charge, we find no good cause to consider this allegation on appeal. (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.)

In sum, the charge failed to allege facts establishing that the District's change in special education aides' reporting location concerned a matter within the scope of representation or had an actual effect on employees' wages, hours, or other terms or conditions of employment over which the District was obligated to negotiate. For these reasons, the charge failed to state a prima facie case of unlawful unilateral change.

ORDER

The unfair practice charge in Case No. SF-CE-2690-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Neuwald and Wesley joined in this Decision.