STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MORENO VALLEY EDUCATORS ASSOCIATION,	)	
Charging Party,	)	Case No. LA-CE-398
v.	)	PERB DECISION NO. 206
MORENO VALLEY UNIFIED SCHOOL DISTRICT,	)	April 30, 1982
Respondent.	)	

Appearances; Kenneth D. Hoffman (Gibson, Dunn & Crutcher) Attorney for Moreno Valley Unified School District.

Before Gluck, Chairperson; Tovar and Jaeger, Members,

DECISION

This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by respondent, Moreno Valley Unified School District (District) to the hearing officer's proposed decision.

The hearing officer determined that the District violated subsections 3543.5(a), (b), (c) and (e) of the Educational Employment Relations act (EERA or Act)[1] by making certain

[1]The EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise specified.

Section 3543.5 states:

> It shall be unlawful for a public school employer to:

unilateral changes in the terms and conditions of employment prior to exhaustion of the Act's statutory impasse procedures.[2]

The parties to the instant case stipulated to the facts prior to hearing. After considering the entire record in this matter, including the attached proposed decision and the exceptions, the Board concludes that the hearing officer's recitation of the stipulated facts is free from prejudicial -error and, on that basis, adopts that recitation as the findings of the Board itself.

The Board affirms the hearing officer's conclusions of law and remedy insofar as they are consistent with the modifications discussed below.

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
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> . . . . . .
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

[2]EERA's impasse procedures are set forth at section 3548-3548.3.

DISCUSSION

The District argues on exception that the implementation of its last best offer following the parties' mutual declaration of impasse on September 15, 1978, but prior to exhaustion of the EERA's statutory impasse procedures, was not an unfair practice proscribed by the EERA. The District's argument, however, ignores a principal purpose of the Act.

The very essence of the collective bargaining system codified in the EERA is that the terms and conditions of employment, as defined by the Act,[3] should be mutually determined by the parties, pursuant to a process of negotiation which is designed to produce a voluntary agreement. To this end the Act provides initially that the employer and the representative of the employees must meet and negotiate in good faith whenever terms and conditions of employment are to be determined, in an effort to reach mutual agreement. The Act further provides that, where that initial step fails to produce the sought-after agreement and the parties are at impasse, pursuit of that goal may continue according to statutorily prescribed procedures involving mediation and factfinding.[4]

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[3]The scope of representation is defined at section 3543.2.

[4]The specific guidelines of these procedures are set forth at sections 3548-3548.3.

Decisions of this Board have firmly established that an employer commits an unfair practice when it unilaterally establishes any term or condition of employment within the scope of representation prior to the conclusion of the bilateral negotiations process. See Pajaro Valley Unified School District (5/22/78), PERB Decision No. 51; San Francisco Community College District (10/12/79), PERB Decision No. 105; accord, NLRB v. Katz (1962), 369 U.S. 739 [50 LRRM 2177]. In the face of this decisional law, the District argues that while a unilateral change in terms and conditions may be proscribed during the time the parties are pursuing voluntary agreement via bilateral negotiations, the same unilateral change should be lawful when efforts toward voluntary agreement shift to the impasse procedure. We are unpersuaded by this argument.[5]

The assumption of unilateral control over the employment relationship prior to exhaustion of the impasse procedures frustrates the EERA's purpose of achieving mutual agreement in exactly the same ways that such conduct frustrates that

[5]In defending its action, the District relies on private sector law which allows the employer to unilaterally implement its best offer made in negotiations after impasse is reached. NLRB v. Crompton-Highland Mills (1949) 337 U.S. 217 [24 LRRM 2088]. Unlike the National Labor Relations Act, however, the EERA's impasse procedures are statutorily prescribed. Failure to participate in good faith in the impasse procedures is a violation of section 3543.5(e).

purpose when it occurs at any earlier point. See San Mateo County Community College District, (6/8/79) PERB Decision No. 94. The impasse procedures of EERA contemplate a continuation of the bilateral negotiations process. Mediation remains fundamentally a bargaining process, albeit with the assistance of a neutral third party. For the reasons set forth in San Mateo County Community College District, supra, we find that following a declaration of impasse, a unilateral change regarding a subject within the scope of negotiations prior to exhaustion of the impasse procedure is, absent a valid affirmative defense, per se an unfair practice.[6]

The Elimination of Flexible Scheduling

The District argues on exception that its elimination of flexible scheduling was a matter outside the scope of representation. In support of its position the District argues that: (1) the decision as to whether or not to use a flexible scheduling system is exclusively a matter of managerial prerogative, and; (2) the implementation of their decision had no effect on any terms or conditions of employment within the scope of representation.

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[6]In reaching this conclusion, we do not rely on the rationale proffered by the hearing officer in the attached proposed decision. He found that because an employee organization is prohibited from using "self-help" before the exhaustion of impasse, the employer should also be prohibited from making unilateral changes.

Accepting, for purposes of this discussion only, that the District is correct in its first point, we find that the District's elimination of that system had an impact on matters within the scope of representation which must lawfully have been negotiated in good faith.

In Anaheim Union High School District (10/28/81), PERB Decision No. 177, we held that the scope of representation encompasses not alone those subjects specifically enumerated in section 3543.2;[7] rather, subjects are within the scope of representation and therefore negotiable if (1) the subject 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

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[7]Section 3543.2 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 employment, 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, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. . . .

negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

The District's unilateral elimination of flexible scheduling in the Fall of 1978 had the effect of increasing class size, a specifically enumerated subject of negotiation. The stipulated facts show that prior to the 1978-79 school year, teachers of grades 1-3 taught for a total instructional classroom time of approximately 285 minutes. Of this time, the first and last hours were with half the number of students as were instructed during the interim class time. Thus, using the hypothetical advanced by the District in its exceptions brief, a teacher might instruct a class of 25 students for the first and last 60 minute periods, while instructing 50 students during the intervening 165 minutes. Commencing with the 1978-79 school year, the District shortened the daily class time to 250 minutes, but eliminated the flexible scheduling program, requiring that all of a teacher's students (in the instant hypothetical, 50) attend for the entire 250 minutes. Thus, teachers were required to teach a class of 50 students not merely for 165 minutes, but for 250 minutes. The effect of this change was that for an 85 minute period which teachers had previously spent with a class of 25 students, teachers now were

required to spend with a class of 50 students. That this change constitutes a significant increase in class size within the meaning of section 3543.2 is, in our view, indisputable.

The District argues that the total number of students which each teacher is charged with educating remains the same after the elimination of flexible scheduling and therefore nothing more of any substance has been demanded of them. This is not accurate. Class size means the total number of students in a classroom. It is obvious that the size of a given class affects the teacher's ability to communicate with students, to provide specialized attention that may be required and maintain class discipline. These are the underlying considerations in the legislative decision to make class size negotiable. Had the District altered a class by flatly doubling the number of students for the entire day, the District would no doubt acknowledge that this would constitute a change in class size that must be negotiated. That the actual change doubled class size for an 85 minute portion of the teaching day rather than the entire day does not lessen the negotiability of the District's unilateral action. Whether or not the reduction in total class time from 285 minutes to 250 is fair compensation for the 85 minute increase in class size is not for us, nor for the District, to declare. Rather, it is a question to be resolved via the process of good faith negotiations.

Preparation Time

The District acknowledges that changes in preparation time are negotiable to the extent that they affect the number of hours worked. The District argues, however, that the elimination of five minutes from the 50 minute preparation period previously available to teachers of grades 4-6 was not shown to have any discernible impact on the amount of time teachers are required to spend in doing their jobs and, therefore, that this change did not affect hours, or any other subject within the scope of representation. We find the impact on teachers' hours to be apparent.

The elimination of five minutes from the preparation period means that five minutes of work previously allocated for accomplishment during the preparation period must either be done outside of regular work hours or not done at all. There is nothing in the record which indicates that the District has agreed to accept a reduced amount of preparation from the teachers. The conclusion is required, therefore, that teachers, as a result of the reduction in the preparation period, must accomplish the remainder of their preparation outside of regular work hours. If we were to find that a five minute reduction is so negligible that its effect on hours is insignificant, the District would be free to take the same action again when the employment contract is next negotiated, and again after that. Clearly, the cumulative effects of such

actions would grossly alter hours.

The Act provides that a change in terms and conditions of employment within the scope of representation are to be negotiated. That the proposed change in this instance is without doubt only a small one may be a sensible bargaining position to be taken in negotiations over the change. It is not, however, a basis for exempting the District from the obligation to bargain. The hearing officer's conclusion that the District's unilateral reduction in preparation time for teachers of grades 4-6 was an unfair practice is affirmed.

The hearing officer concluded also that the District's unilateral increase in preparation time for grades 1-3 was an unfair practice. We note that the charging party made no such allegation in its statement of the charge, nor did it raise such a claim at any time. In light of these facts, the hearing officer improperly considered it.

Changes in Lunch Duty and Mileage Reimbursement

The hearing officer's conclusion that any changes which occurred in teacher lunch duty or in the District's mileage reimbursement procedures have not been shown to be unfair practices is affirmed. In rejecting the Association's claim regarding lunch duty, however, we do not rely on the hearing officer's finding that the alleged change was de minimus. The evidence indicates that the District did not change teacher

lunch duty obligations. Only a single administrative error, immediately retracted by the District upon discovery, but which resulted in some teachers working noon-time duty on one day, was shown. Rather than characterizing this event as de minimus, we believe this conduct simply does not demonstrate that the District failed or refused to negotiate changes in good faith.

As to the charge alleging a change in the District's mileage reimbursement procedure, the evidence does not support a finding that the change affected a subject within the scope of representation. We believe this conduct simply does not constitute a prohibited unilateral change.

The District's Unilateral Actions Violated subsection 3543.5(e), (c), (a) and (b)

Based on the foregoing discussion and the entire record in this case, it is found that the District violated subsection 3543.5(e) by making unilateral changes in terms and conditions of employment within the scope of representation at a time when its lawful obligation was to negotiate those matters via the impasse procedure.[8] Specifically, the unilateral actions found violative are: (1) elimination of stipends for counselors, for Reading Resource, Educationally

[8]Section 3543.5 is set forth in relevant part herein at footnote 1.

Handicapped (EH) and Educable Mentally Retarded (EMR) teachers, and for high school special education and reading teachers; (2) elimination of extra duty stipends at the junior high school for sports supervision, special education, journalism, year book, drama, reading, vocal music and band; (3) increase in class size for grades 1-3; (4) reduction in preparation time for grades 4-6, and (5) failure to bargain over the negotiable effects of the District's decision to eliminate the Miller-Unruh teaching positions and the positions of assistant football coach (2 positions).

It is also found that the above-identified unilateral actions violated subsection 3543.5(c). That subsection makes unlawful the refusal or failure of a public school employer to "meet and negotiate in good faith with an exclusive representative." While mediation, as provided by the Act's impasse procedure, involves the introduction of a neutral third party to facilitate negotiations of the primary parties, it remains fundamentally a continuation of the negotiations process. The action of an employer which frustrates the mediation process, therefore, violates subsection 3543.5(c).

As we stated in San Francisco Community College District, supra, an employer's failure or refusal to meet and negotiate in good faith with an exclusive representative, when it has the obligation to do so, violates the rights of both the exclusive

representative and the employees it represents. On this basis we find that the District concurrently violated subsections 3543.5(b) and (a).

REMEDY

The hearing officer's proposed remedy is inappropriate to the extent that it would order the District to return to the status quo ante by restoring positions and programs which the District has eliminated. The decision to make such changes, as the hearing officer acknowledges in his discussion, is a matter reserved to the prerogative of management. It is only the effects of such decisions, to the extent that they are within the scope of representation, which must be negotiated. The Board's order of affirmative action, therefore, with regard to the elimination of positions and programs, will be limited to requiring the District to bargain over the effects of these decisions.

As to the unilateral elimination of stipends from positions which continue into the 1978-79 school year, a make whole remedy is appropriate. Thus, the District will be ordered to repay the withheld stipends to the appropriate employees for a period from the commencement of the 1978-79 employment year until the parties reach agreement on wages.

As to the reduction of preparation time and the increase in class size, the return to the status quo ante is appropriate, unless in the interim a different arrangement has been agreed

upon by the parties. If a return to the status quo in this regard is required, such restoration shall be deferred until the next semester following service of this decision.

The Board further orders that the District cease and desist from making unilateral changes regarding matters within the scope of representation and that the parties return to the bargaining table, should the Association so request, to negotiate with respect to those matters identified in the Order below.

The District shall also be required to post the Notice to Employees attached as an Appendix to this Decision and Order.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record, it is found that the Moreno Valley Unified School District has violated subsections 3543.5(a), (b), (c) and (e) of the Educational Employment Relations Act. It is hereby ORDERED that the Moreno Valley Unified School District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Violating subsection 3543.5(c) and (e) by refusing or failing to participate in good faith in the impasse procedure set forth in the Educational Employment Relations Act by taking unilateral action affecting subjects within the scope of representation prior to exhaustion of the impasse procedure,

and specifically with respect to the following actions:

a. Elimination of stipends for counselors, for Reading Resource, EH and EMR teachers, and for high school special education and reading teachers;

b. Elimination of extra duty stipends at the junior high school for sports supervision, special education, journalism, yearbook, drama, reading, vocal music and band;

c. Alteration in teacher preparation time for grades 4-6 and class size for grades 1-3;

d. Failure to negotiate the negotiable effects of its decisions to eliminate Miller-Unruh teacher positions and the positions of assistant volleyball coach, freshman baseball coach and assistant football coach (2 positions).

2. Violating subsection 3543.5(a) by interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation prior to exhaustion of the impasse procedure set forth in the EERA.

3. Violating subsection 3543.5(b) by denying the Association its right to represent unit members by unilaterally changing matters within the scope of representation prior to

exhaustion of the impasse procedure set forth in the EERA.

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

1. Make whole all employees who have occupied the positions identified herein above in paragraph A-l-a and all employees who have rendered the services identified herein above in paragraph A-l-b, since September 15, 1978, and from whom stipends or extra duty stipends have been withheld by the District as a result of the District's unilateral actions identified herein above at paragraphs A-l-a and b. The District is to pay to these employees the stipends they would have received had the unilateral changes identified herein above at paragraphs A-l-a and b not been made, plus interest at the rate of 7 percent per annum, from September 15, 1978, until the parties reach agreement on wages.

2. Unless a different arrangement has been agreed upon by the parties, restore teacher preparation schedules for grades 4-6, and class size for grades 1-3, to levels in existence prior to implementation of the unilateral changes referred to herein above at paragraph A-l, and return to the bargaining table to negotiate with respect to these matters. If no different arrangement has been agreed upon by the parties, and restoration of the status quo in this regard is requested, implementation of this portion of the Order may be

delayed until the next semester break following service of this decision.

3. Within five workdays following the date of service of this decision, post at all work locations where notices to employees customarily are placed, copies of the notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material or reduced in size.

4. Within five workdays following service of this decision, notify the Los Angeles regional director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this decision. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on Charging Party herein.

C. The charges that the Moreno Valley Unified School District committed an unfair practice by imposing lunch duty upon certain of its certified employees and by changing procedures for mileage reimbursement are hereby DISMISSED.

This order shall become effective immediately upon service of a true copy thereof on the Moreno Valley Unified School District.

By: Irene Tovar, Member

Ha'rry Gluck, Chairperson

John W. Jaeger, Member

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-398 in which all parties had the right to participate, it has been found that the Moreno Valley Unified School District violated section 3543.5(c) and (e) of the Educational Employment Relations Act (EERA) by refusing to participate in good faith in the impasse procedure set forth in the EERA by taking unilateral action in September 1978 with respect to the elimination of certain positions and programs without bargaining over impact; the elimination of certain stipends, the alteration of class sizes in grades 1-3 and the alteration in preparation time for grades 4-6 prior to the completion of the impasse procedures established by the Educational Employment Relations Act.

It has also been found that this same conduct violated section 3543.5 (b) of the EERA since it interfered with the right of the Association to represent its members.

It has also been found that this same conduct interfered with negotiating unit members' right to be represented by their exclusive representative, thus constituting a violation of section 3543.5(a) of the EERA.

As a result of this conduct, we have been ordered to post this Notice, and we will abide by the following:

A. CEASE AND DESIST FROM:

1. Refusing to participate in good faith in the impasse procedure set forth in the EERA by taking unilateral action on matters within the scope of representation, as defined by section 3543.2 and specifically with respect to the following subjects:

   a. Elimination of stipends for counselors, for Reading Resource, EH and EMR teachers, and for high school special education and reading teachers;

b. Elimination of extra duty stipends at the junior high school for sports supervision, special education, journalism, yearbook, drama, reading, vocal music and band;

c. Alteration in preparation time for teachers teaching grades 4-6 and alteration in class size for teachers in grades 1-3;

d. Failure to negotiate the negotiable effects of its decisions to eliminate Miller-Unruh teacher positions and the positions of assistant volleyball coach, freshman baseball coach and assistant football coach (2 positions).

2. Denying the Association its right to represent unit members by refusing to participate in good faith in the impasse procedure set forth in the EERA.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation prior to exhaustion of the impasse procedure set forth in the EERA.

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

1. Make whole all employees who have occupied the positions identified herein above in paragraph A-l-a and all employees who have rendered the services identified herein above in paragraph A-l-b, since September 15, 1978, and from whom stipends or extra duty stipends have been withheld by the District as a result of the District's unilateral actions identified herein above at paragraph A-l-a and b. The District is to pay to these employees the stipends they would have received had the unilateral changes identified herein above at paragraph A-l-a and b not been made, plus the lawful rate of interest at the rate of 7 percent per annum, from September 15, 1978, until the parties reach agreement on wages.

2. Unless a different arrangement has been agreed upon by the parties, restore teacher preparation time for grades 4-6 and class size levels for grades 1-3 to levels in existence prior to the implementation of the unilateral changes referred to herein above at paragraph A-l, and return to the bargaining table to negotiate with respect to these matters. If

restoration of the status quo is requested, such restoration may be delayed until the next semester break following service of this decision.

Dated:

MORENO VALLEY UNIFIED SCHOOL DISTRICT

By _____
Superintendent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.