STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Charging Party, V. STATE OF CALIFORNIA (Department of Transportation.), Respondent.	)	Case No. S-CE-107-S PERB Decision No. 361-S November 28, 1983

Appearances; Jeffrey Fine, Attorney for the California State Employees' Association; William M. McMillan, Attorney for the State of California (Department of Transportation).

Before Gluck, Chairperson; Tovar and Burt, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Department of Transportation) (Caltrans) and California State Employees' Association (CSEA) to the proposed decision of an administrative law judge (ALJ), attached hereto and incorporated by reference herein. The ALJ found that Caltrans violated subsections 3519(b) and (c) of the State Employer-Employee Relations Act (SEERA) by changing its manner of coverage of winter snow removal work without providing a notice and an opportunity to negotiate to CSEA, the exclusive representative of Caltrans[1] maintenance employees.

He dismissed the allegation that Caltrans violated subsection 3519(d) on the grounds that no evidence was presented to support that allegation. He further dismissed the allegation that Caltrans violated subsection 3518.5 by failing to grant release time to CSEA representatives for attending a negotiating meeting, on the grounds that the allegation was not fairly raised by the charge or litigated at the hearing, but was raised in that form for the first time in CSEA's brief.[1]

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[1]SEERA is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Subsections 3519(b), (c) and (d) provide as follows:

> It shall be unlawful for the state to:
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> . . . . . .
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

Section 3518.5 provides as follows:

> A reasonable number of employee representatives of recognized employee organizations shall be granted reasonable time off without loss of compensation or other benefits when formally meeting and

To remedy the violations found, the ALJ ordered that Caltrans restore its prior method of staffing of snow removal operations. He further ordered that Caltrans cease and desist from making unilateral changes in matters within the scope of representation and that it post an appropriate notice. He declined to order back pay on the grounds that it would be impossible to ascertain with specificity which employees were harmed by Caltrans[1] violations and that the amount of any back pay ordered would be speculative.

CSEA excepted to the ALJ's failure to find a section 3518.5 violation, as well as his refusal to order back pay. Caltrans excepted to the ALJ's finding that it violated subsections 3519(b) and (c). Caltrans did not except to the finding that it unilaterally modified its method of snow removal staffing. Rather, Caltrans contended that staffing decisions are not within the scope of representation under SEERA as a matter of law. Further, Caltrans contends that, as a matter of law, overtime opportunities are not a subject within scope under SEERA.

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conferring with representatives of the state on matters within the scope of representation.

This section shall apply only to state employees, as defined by subdivision (c) of section 3513, and only for periods when a memorandum of understanding is not in effect.

We have reviewed the record as a whole in light of the exceptions of the parties. For the reasons set forth below, we affirm the result reached by the ALJ.

FACTS

We find the ALJ's findings of fact to be complete and free of prejudical error. We further note that no party excepted to the factual findings of the ALJ. The pertinent facts may be briefly summarized as follows:[2]

Caltrans has the responsibility, among other things, to maintain the State's highway systems. This includes the responsibility to keep all winter highways clear of snow. During the winter months, workforce requirements increase significantly in areas in which snow falls. To deal with these seasonal snow removal requirements, Caltrans has established a practice over a number of years of transferring regular permanent equipment operators to the more mountainous locations from areas in which snow removal is not a normal function. Some employees thus transferred received an upgrade from the equipment operator classification to the heavy equipment operator classification, with a commensurate increase in pay. Transferees also received extensive overtime pay and experience

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[2]As noted by the ALJ, Caltrans is divided into various districts along geographic lines. The proof in this case was limited to the policies and practices of Caltrans in Districts 8 and 10. Thus, we limit our findings, conclusions, and Order to those districts.

in operating heavy snow removal equipment which enhanced their promotional opportunities. Pursuant to this past practice, Caltrans also used both temporary and permanent-intermittent employees to round out its snow removal staffing during the winter months.

Prior to the 1981-82 snow season, Caltrans management decided to staff the snow removal almost entirely with permanent-intermittent and temporary-intermittent employees, and thus to discontinue the temporary upgrade of its regular permanent employees. This decision resulted in a large savings to Caltrans, but deprived permanent unit employees of the increased wages, overtime, and promotional opportunities noted above.

Upon being alerted to the apparent change in staffing practice by employees, CSEA held a meeting of unit members from Caltrans District 10 in Modesto in October 1981. As a result of that meeting, CSEA requested a negotiating session with Caltrans management regarding snow removal staffing. A three-member committee, comprised of job steward Bob Hedrick and unit employees Paul Raggio and Pete Daniels, was named to meet with District 10 management along with CSEA Staff Representative William Dale. Caltrans District 10 Labor Relations Officer William Todd agreed to meet with CSEA on October 29, 1981. He informed Dale that he would meet only with Dale and one employee, and that the other two could not be

admitted to the meeting or released from their work duties to attend. Caltrans did not approach the October 29 meeting as a negotiating session. Rather, it considered it a meeting and discussion session at which it would inform CSEA of its decision regarding snow removal staffing and listen to CSEA's concerns. At the October 29 meeting, the CSEA representatives complained to Caltrans that the new staffing plan would deprive full-time regular permanent employees of wages in the form of limited-term salary upgrades as well as overtime pay. CSEA further contended that such employees would forfeit enhanced promotional opportunities. It also complained that safety would be compromised if intermittent employees were used rather than more fully trained permanent, regular employees. Caltrans representatives responded that no change had occurred because both temporary and permanent intermittents had been used in the past. They further noted that, in their view, the staffing matters involved were not within the scope of representation under SEERA.

Subsequently, at a November 6, 1981 negotiating meeting on statewide issues, CSEA leadership agreed that a written demand for negotiating regarding Caltrans[1] change in snow removal staffing policy would be made upon representatives of Caltrans District 10. Pursuant to that demand, a meeting was held on January 7, 1982 between CSEA's committee (comprised of Representative Carolyn Born and the three employees designated at the October meeting of CSEA) and a Caltrans District 10

committee (consisting of Deputy District Director Bjornstad, Caltrans negotiator Robert Richmond and Caltrans District 10 Labor Relations Officer William Todd). The January 7 meeting closely resembled the October 29 meeting; CSEA expressed its concerns regarding the change in staffing policy, and Caltrans repeated its earlier contentions. The CSEA team then left the meeting to caucus and, upon its return, stated that because the 1981-82 winter season was half over, and in the interest of avoiding disruption, CSEA was willing to allow the staffing plan to continue as it had for the 1981-82 season. This concession was made conditional upon Caltrans' agreement to negotiate immediately regarding CSEA's proposal for staffing the 82-83 season. Caltrans[1] representatives were not interested in negotiating regarding that proposal at that time. According to the testimony of Caltrans negotiator Richmond, once CSEA agreed to allow the 1981-82 staffing plan to stand, there was no urgency in dealing with the 82-83 season at that time. Because the condition CSEA placed upon agreement to the 81-82 staffing plan was not met by Caltrans, no such agreement was consummated.

DISCUSSION

As established by the record, found by the ALJ, and not excepted to by either party, Caltrans unilaterally changed its long-standing staffing practice of temporarily upgrading and transferring regular full-time equipment operators for snow removal work. This unilateral change deprived those employees

of wages which they would have received, both in the form of temporarily increased base pay due to the upgrade and in the form of overtime. Caltrans does not deny that it unilaterally changed its practice regarding winter snow removal staffing, nor does it deny that, in so doing, it deprived affected unit employees of wages. Rather, it bases its exception on the contention that, as a matter of law, the issue of whether to staff an operation by the transfer of existing employees or to hire new ones is outside the scope of representation under SEERA due to the proviso to section 3516.3

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[3]The scope of representation under SEERA is set forth at section 3516 which, at the time this case arose, provided as follows:

> The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

This section has been amended, effective July 21, 1983, to provide as follows:

> The scope of representation shall be limited to wages, hours, and other term and conditions of employment, except, however, that the scope of representation shall not include either of the following:
>
> (a) Consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.
>
> (b) The amount of rental rates for

The statutory scope language of SEERA parallels that of the National Labor Relations Act (NLRA).[4] Section 8(d) of the NLRA requires good faith negotiations regarding " . . . wages, hours, and other terms and conditions of employment. . . ." Similarly, section 3516 of SEERA limits the scope of representation to ". . . wages, hours, and other terms and conditions of employment . . ." with the proviso that " . . . consideration of the merits, necessity, or organization of any service or activity provided by law or executive order" is outside scope.

This Board has recently ruled upon the scope of representation language of section 3516. In State of California (Department of Transportation) (8/18/83) PERB Decision No. 333-S, we noted:

> In interpreting language of SEERA, cognizance should be taken of the decisions of the National Labor Relations Board (NLRB) interpreting identical or similar language in the NLRA. Fire Fighters v. City of Vallejo (1974) 12 Cal.3d 608. In light of the virtually identical scope language of SEERA and the NLRA, PERB finds private sector precedent regarding scope to be applicable to SEERA cases.

> state-owned housing charged to state employees.

The substantive effect of this amendment is to render rental rates for state-owned housing outside scope; said amendment has no effect upon the instant case.

[4]The NLRA is codified at 29 U.S.C. 152 et seq.

This case provides us with our first opportunity to rule on the meaning of the scope language of SEERA in a fully-litigated matter.[5] It is thus appropriate that we fashion and state a test to guide the parties in determining whether given subjects are within scope. As noted above, we intend to conform our scope determinations under SEERA to the general parameters of scope in the private sector. Fire Fighters v. City of Vallejo, supra.

Initially we note that it is unnecessary to apply a test to certain matters which clearly fall within the category of wages or hours, for such subjects are expressly enumerated as within scope by the statute. With respect to other subjects arguably within the less precise category " . . . terms and conditions of employment . . . .", PERB will find such matters within scope if they involve the employment relationship and are of such concern to both management and employees that conflict is likely to occur, and if the mediatory influence of collective negotiations is an appropriate means of resolving the conflict.

Such subjects will be found mandatorily negotiable under SEERA unless imposing such an obligation would unduly abridge the State employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the State's mission. If

[5]State of California, (Department of Transportation) PERB Decision No. 333-S, supra, involved an appeal of a dismissal.

requiring negotiations on a subject would significantly abridge the State employer's managerial prerogative as set forth above, the subject will be held outside the scope of mandatory negotiations.[6]

The meaning of the proviso to section 3516 is likewise an issue of first impression for PERB. We note that its language is identical to the proviso to the scope of representation language of the Meyers-Milias-Brown Act (MMBA) which governs employer-employee relations in California local government jurisdiction.[7]

In interpreting the identical proviso language of the MMBA, in Fire Fighters v. City of Vallejo, supra, the California Supreme Court concluded that the Legislature included the proviso language

> . . . not to restrict bargaining or matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of "wages, hours and working conditions" to include more general

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[6]The scope test enunciated above parallels that promulgated by PERB for subjects not specifically enumerated under the Educational Employment Relations Act. That test was recently cited with approval by the California Supreme Court in Healdsburg Unified School District, et al. v. PERB (May 1983) 33 Cal.3d 850 [____Cal Rptr._____].

[7]MMBA is codified at Government Code section 3500 et seq. Section 3504 of that statute provides as follows:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations,

> managerial policy decisions . . . the underlying fear that generated this language - that is, that wages, hours and working conditions could be expanded beyond reasonable boundaries to deprive an employer of his legitimate management prerogatives - lies imbedded in federal precedents under the NLRA.

Thus, the Court held that federal precedent regarding managerial prerogatives was applicable to the proviso language of the MMBA which is substantially identical to that of SEERA.

We view the proviso language of section 3516 as essentially a codification of the portion of the scope test adopted by the Board and set forth above which removed essential managerial prerogatives from scope.

Applying that test to the subject matter at hand, we hold that the staffing practice at issue herein is itself negotiable. Clearly, it involved the employment relationship. The manner of assignment of employees to perform snow removal work necessarily affected matters of concern to employees, including workload, wages in the form of overtime and classification upgrade and safety. Just as clearly, the manner of staffing of the operation was of concern to management, which sought to save money. The interests of employees and

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> including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

management were at odds on the subject, and the dispute is one which was amenable to the mediatory influence of collective negotiations.

The method of the staffing of winter snow removal necessarily affects other mandatorily negotiable terms and conditions of employment. The method unilaterally chosen by Caltrans would deprive regular full-time employees of their opportunity for overtime, a subject which we have expressly held within scope. State of California (Department of Transportation) PERB Decision No. 333-S, supra; Willamette Industries, Inc. (1975) 220 NLRB 707. Arguably, the new staffing practices would affect safety of employees, clearly a matter within scope. Gulf Power Company (1966) 156 NLRB 622 [61 LRRM 1073], enfd (5th Cir. 1967) 384 F.2d 822 [66 LRRM 2501]. The new staffing method would disrupt the status quo regarding transfer of regular full-time employees, another subject recently held within scope by this Board. In State of California (Department of Transportation), supra, we noted that

> In the private sector, transfer of employees has long been held within scope. Continental Insurance Co. v. NLRB (2d Cir. 1974) 495 F.2d 44 [86 LRRM 2003]. The Developing Labor Law, Morris (1971) p. 406. See also Metromedia, Inc. (1977) 232 NLRB 486.

Requiring the state employer to provide the exclusive representative with notice and an opportunity to negotiate prior to changing an established practice regarding transfer of

employees would not usurp any essential managerial prerogative. No determination is involved as to which functions will be performed, or to what extent they will be performed. The employer continues to perform the same snow removal function, to the same extent. Because no essential managerial prerogative is involved, the subject of staffing is not removed from the scope of representation by the language of the proviso to section 3516.

For the reasons set forth above, we affirm the ALJ's holding that the staffing procedures at issue herein are within scope under SEERA.[8] By unilaterally altering those staffing procedures, Caltrans violated subsections 3519(b) and (c).[9]

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[8]In accord is Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services District (1975) 45 Cal.App.3d 116 [119 Cal.Rptr. 182]. In that case, involving an interpretation of the nearly identical scope language of the MMBA, the court held that an employer was not free to unilaterally implement a practice of utilizing temporary employees to perform overtime work which had customarily been performed by its regular full-time employees. As in the instant case, the employer's aim in making the change was to effect a cost savings, but the effect was to deprive regular employees of their customary priority in seeking such work. The court held that the fact that the employer's new policy might be preferable to its former practice did not excuse its failure to communicate with the union representative of the regular employees.

[9]Because we find the staffing question here to be within scope under the SEERA scope test promulgated in this decision, we need not rule upon the appropriateness of the ALJ's reliance upon Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609].

Having found that Caltrans violated subsections 3519(b) and (c) by unilaterally altering its established practice of staffing winter snow removal operations by allowing regular full-time employees to transfer to snow removal areas, we now turn to a discussion of CSEA's exceptions.

CSEA excepts to the ALJ's failure to find that, by refusing to grant released time for all three employees designated by CSEA to attend the October 29, 1981 meeting, Caltrans independently violated subsection 3518.5.

The ALJ held that the section 3518.5 allegation was neither charged nor litigated as such, but rather was raised for the first time by CSEA in its brief. We affirm that holding, for the reasons set forth in the attached proposed decision at p. 16, fn 9.

CSEA's remaining exception is to the ALJ's failure to order back pay for regular full-time equipment operators who were deprived of temporary upgrades and overtime pay due to Caltrans' new staffing practice. As noted above, the ALJ ordered Caltrans to restore the status quo by reimposing its former method of staffing snow removal operations in Districts 8 and 10, to cease and desist from making unilateral changes, and to post an appropriate notice. Because both the amount of back pay and the identity of those employees damaged would be so difficult to ascertain as to be speculative, the ALJ declined to order back pay.

Pursuant to subsection 3514.5(c), the Board has broad remedial powers to order affirmative action to effectuate the policies of SEERA. On the facts of this case, we find that the remedy proposed by the ALJ is appropriate. We decline to order back pay because, in these circumstances, no clear method exists for determining which regular employees would have applied for or been transferred to snow removal duties but-for Caltrans[1] unlawful unilateral change.

We are mindful of decisions of the National Labor Relations Board (NLRB) in which back pay has been ordered in various circumstances in which the precise amount was difficult to compute. See, for example, Cities Service Oil Co. (1966) 158 NLRB 1204 (overtime which employees would have received absent unlawful transfer of unit work); International Harvester Co. (1973) 204 NLRB 191 (deprivation of more lucrative work assignments). In the circumstances of the instant case, unlike those cited above, not only would the amount of backpay be difficult to ascertain, but there would be no way to ascertain the identity of the recipients of such backpay. See, in this regard, International Longshoremen's Union, Local No. 13 (1970) 183 NLRB 221 (unlawfully operated hiring hall; impossible to conclude which employees would have registered and been referred out absent union's unlawful system).

The hiring hall cases cited in the dissent do not persuade us that we should order a compliance proceeding in an attempt

to ascertain the identity of the proper recipients of backpay in the circumstances of this case. In International Brotherhood of Boilermakers (1980) 253 NLRB 747 [109 LRRM 3296] and in International Association of Bridge, Structural and Ornamental Workers, Local 433 (1977) 228 NLRB 1420, aff'd (9th Cir 1979) 600 F.2d 770 [101 LRRM 3119], the violation to be remedied was the improper "back-door" referral of applicants for employment by unions which operated exclusive hiring halls. In those circumstances, the referrals should have been made according to the terms of a detailed hiring hall arrangement, which set forth with specificity the criteria for proper referral to openings as they became available. The particular instances of improper referral had been proven. Thus, it would be possible to identify with specificity which individuals should have been dispatched on the occasions in question by ascertaining that they were present in the hiring hall, available for work, and that they satisfied the express criteria of the hiring hall agreement.

In the instant case, however, no such express criteria were established under Caltrans[1] practice by which it could be ascertained which individuals would have been accepted for snow removal work, had they been allowed to apply. Thus, we find distinguishable the hiring hall cases cited in the dissent.

We are no less mindful than our dissenting colleague of the Board's obligation to provide remedies which effectuate the

purposes of EERA. Where appropriate, we would not hesitate to order that a compliance hearing be conducted to allow the aggrieved charging party to demonstrate which individuals should receive backpay, if such could be fairly ascertained. In the circumstances of this case, however, we find that any such proceedings would result in an unduly speculative award, and hence we decline to order backpay.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the State of California (Department of Transportation) has violated subsections 3519(b) and (c) of the State Employer-Employee Relations Act. It hereby is ORDERED that the State of California (Department of Transportation) shall:

A. CEASE AND DESIST FROM:

Making unilateral changes in matters within the scope of representation, specifically, by deciding in Districts 8 and 10 to eliminate opportunities for regular Caltrans employees to obtain temporary promotions and work in snow removal, without first meeting and conferring in good faith with the exclusive representative, California State Employees' Association (CSEA).

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

1. In accord with the practice existing prior to the 1981-82 winter season, permit regular Caltrans employees to

volunteer for work in snow removal and to seek and obtain temporary promotions into such higher job classifications which the Department may need to have filled and for which the persons who volunteer are qualified.

2. Give reasonable written notice and the opportunity to meet and confer to CSEA, the exclusive representative of its employees prior to acting upon any matter within the scope of representation, including any decision to eliminate the opportunity for regular Caltrans employees to volunteer for work in snow removal and to obtain temporary promotions for which they may be qualified.

3. Within thirty-five (35) days following the date of service of this Decision, post copies of the Notice attached as an Appendix hereto for thirty (30) consecutive working days on all work locations within Districts 8 and 10 where notices to employees are customarily placed. 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 regional director of the Public Employment Relations Board in accordance with her instructions.

C. All other allegations of the charge are hereby DISMISSED.

Member Tovar joined in this Decision.

Chairperson Gluck's concurrence and dissent begins on page 20.

GLUCK, Chairperson, concurring and dissenting: I concur in the finding that the Department's action violated SEERA subsection 3519(b) and (c). However, I find to be at least premature the majority's conclusion that a backpay remedy, which it does not otherwise reject, cannot be determined.

There is no doubt that the record before us does not permit calculation of an appropriate order of this kind. It may be that the identification of those employees adversely affected cannot be determined. But, nothing in the record supports the majority's dogmatic assertion that the difficulty in making such a determination would render an award speculative. The conclusion reached by the administrative law judge, and followed by the majority here, is based more on the absence of pertinent proof than on the presence of supporting evidence.

Indeed, it seems that the calculation of the total amount of wages lost by the permanent employees may be possible by a reference to the number of temporaries hired and the average wages of the permanents at the time in question. Further, a Board order authorizing the parties to negotiate the ultimate distribution may be a realistic approach to effectuating the Act's purposes and would be consistent with the Board's oft-asserted policy of favoring the voluntary resolution of disputes.

The point is not that a backpay order must finally result or that a precise calculation is possible, but that permitting

the General Counsel to investigate the matter and report back to the Board is preferable to a perfunctory disposition of the matter of remedy. As the National Labor Relations Board has put it:

> It may be that the General Counsel will be unable to identify which employees [were harmed by the employer's unlawful act]. . . .However, I believe that the General Counsel should have the opportunity to attempt to do so in a backpay proceeding. A wrong cognizable under the Act has been established. . . .To the extent that [the employees] have lost earnings and benefits because of that discrimination, they should be made whole. International Association of Bridge, Structural and Ornamental Workers, Local 433, (1977) 228 NLRB 1420.

In enforcing this order, the 9th Circuit Court of Appeals approved deferral of the identification of the injured employees until the compliance stages of the proceeding and rejected the notion that the difficulties the General Counsel may have in identifying those employees made a backpay award any less appropriate. Even where the ability to identify the injured employees is questionable, it is the NLRB policy that "an effort must be made at whatever the cost in order to provide a complete remedy." International Brotherhood of Boilermakers (1980) 253 NLRB 747, 763 [109 LRRM 3296].

In considering the difficulty in determining a backpay award under such circumstances as here, the National Labor Relations Board stated:

> The reasonableness of such a remedy must comport with the Board's duty to bring about 'a restoration of the situation, as nearly

> as possible, to that which would have been obtained but for the illegal discrimination.'
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> It has long been recognized that 'in applying its authority over backpay orders, the Board has not used stereotyped formulas, but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations.' Anshu Associates, Inc. (1978) 234 NLRB 791, 795.

In Brown & Root, Inc. (8th Cir. 1963) 311 F.2d 447, 452, the court concluded:

> [I]n many cases it is difficult for the Board to determine precisely the amount of back pay which should be awarded to an employee. In such circumstances the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations.

I would remand this matter to the General Counsel to conduct such proceedings as he may deem appropriate to determine what remedy, if any, would be appropriate and pursuant thereto, to return to this Board his recommendations,

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. S-CE-107-S, California State Employees' Association v. State of California (Department of Transportation), in which all parties had the right to participate, it has been found that the State of California (Department of Transportation) has violated subsections 3519(b) and (c) of the State Employer-Employee Relations Act (SEERA) by unilaterally changing its past practice of permitting regular Caltrans employees to volunteer for work in snow removal and to obtain temporary promotions into positions for which they are qualified.

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:

Making unilateral changes in matters within the scope of representation, specifically, by deciding in Districts 8 and 10 to eliminate opportunities for regular Caltrans employees to obtain temporary promotion and work in snow removal, without first meeting and conferring in good faith with the exclusive representative, California State Employees Association (CSEA).

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

1. In accord with the practice existing prior to the 1981-82 winter, permit regular Caltrans employees to volunteer for work in snow removal and to seek and obtain temporary promotions into such higher job classifications which the Department may need to have filled and for which the persons who volunteer are qualified.

2. Give reasonable written notice and the opportunity to meet and confer to the recognized exclusive representative, CSEA, prior to acting upon any matter within the scope of representation, including any decision to eliminate the opportunity for regular Caltrans employees to volunteer for work in snow removal and to obtain temporary promotions for which they may be qualified.

STATE OF CALIFORNIA
(Department of Transportation)

Dated: BY: _____
Authorized Representative

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 WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES' ASSOCIATION, Charging Party, v. STATE OF CALIFORNIA (DEPARTMENT OF TRANSPORTATION), Respondent.	)	Unfair Practice Case No. S-CE-107-S PROPOSED DECISION (10/4/82)

Appearances; Jeffrey Fine, Attorney, for the California State Employees Association; William M. McMillan, Attorney, for the State of California (Department of Transportation).

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

Because of heavy snowfall, it is necessary for the State Department of Transportation to increase its wintertime workforce in certain mountainous regions. During the winter of 1981-82, it is alleged here, the state in two mountain areas departed from its past practice of temporarily promoting and transferring regular employees and met its winter requirements by hiring part-time and temporary workers. This action, the exclusive representative contends, affected the wages and promotional opportunities of unit members. The state denies that it changed its past practice, arguing that it long has relied upon part-time help for snow removal. In any event, the state continues, the decision about how to hire the workforce

is outside the scope of representation and the negotiating obligation extends only to the effects of the decision. As to the effects, the state asserts, it did negotiate.

The California State Employees' Association (hereafter CSEA) filed the charge at issue on December 18, 1981, against the State of California (Department of Transportation) (hereafter Cal Trans, Department or State). The charge alleges that the State violated State Employer-Employee Relations Act (hereafter SEERA) sections 3519(b) and (d) and section 3519.5(0)[1] by changing its policy in Cal Trans

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[1]Unless otherwise indicated, all references are to the Government Code. The allegation that the state violated section 3519.5(c) is an obvious typographical error. Section 3519.5 deals only with unfair practices committed by employee organizations. CSEA's apparent intent was to allege that the state employer failed to meet and confer in good faith, a violation of section 3519(c). In relevant part, section 3519 provides as follows:

> It shall be unlawful for the state to:
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> . . . . . .
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and confer in good faith with a recognized employee organization.
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.
>
> . . . . . .

District 10 of temporarily promoting employees for assignment in snow removal and instead hired heavy equipment operators from outside state service. The charge further alleges that the Department would agree to meet and discuss the impact of the new policy and that when a meeting was held early in October the State limited the CSEA committee to one employee representative.

A complaint was issued on February 3, 1982, by the general counsel of the Public Employment Relations Board (hereafter PERB). On February 19, 1982, the Department answered the charge, denying that the hiring of permanent intermittent employees as heavy equipment operators in District 10 constituted a change in policy and asserting that it long has hired such employees. The Department also denied that it had refused to meet and confer in good faith.

On March 31, 1982, CSEA amended the charge by adding allegations that the State had changed its past practice and hired permanent intermittent heavy equipment operators in Cal Trans Districts 3 and 8. The amendment alleges that this action constitutes a change from the past practice of upgrading regular, full-time employees for work in snow removal. The amendment alleges that the State had failed to meet and confer in good faith about the changes or the impact they might have on unit employees. On April 9, 1982, the hearing officer then processing the charge permitted the amendment and directed the corresponding amendment to the complaint. The Department

answered the charge on April 20, admitting that permanent intermittent employees had been hired in the two Cal Trans districts but denying that their hiring constituted a change in past practice.

A hearing was conducted on August 4, 1982, at the PERB's Sacramento Regional Office. The final brief was received on September 15, 1982, and as of that date the case was submitted for decision.

FINDINGS OF FACT

The Department of Transportation is the state agency which possesses and controls all state highways and which lays out, constructs[2] and maintains[3] state highways and freeways.[4] For administrative purposes, the Department had divided the state into 11 geographical districts. Highway construction and maintenance is budgeted and carried out on a district basis. The chief administrator in each district is called the district director of transportation and it is under the director's general supervision that highway maintenance is carried out in each district.

2streets and Highways Code, section 90.

[3]Streets and Highways Code, section 91.

[4]Streets and Highways Code, section 100.1.

One of the Department's maintenance responsibilities is to keep the various all-winter highways clear of the substantial amounts of snow which can fall in California's mountainous regions. The Department considers six of its 11 districts to be in snow areas.[5] The snow districts, with district headquarters in parenthesis, are: District 2 (Redding), District 3 (Marysville), District 6 (Fresno), District 8 (San Bernardino), District 9 (Bishop), and District 10 (Stockton).

During the winter months, work force requirements increase significantly in the snow districts. Over the years, Cal Trans has used several approaches to augment its mountain area maintenance crews. In Cal Trans districts which include both valley and mountain terrain, the Department has had a practice of shifting some of its valley workers to the mountains over the winter. This approach has involved both the temporary upgrading of some employees to the position of heavy equipment operator and also the transfer of entire crews of heavy equipment operators from the valley to the mountains. Another approach used over the years has been the employment of permanent intermittent employees who are hired to work each year during periods of heavy snowfall but not during the other months. Permanent intermittents may return year after year. Finally, the Department has hired temporary employees to work as needed on a one-time basis.

[5]The snow districts are listed on CSEA Exhibit No. 6.

In the Cal Trans maintenance series, there are seven employee job classifications: Highway Maintenance Worker, Landscape Maintenance Worker, Equipment Operator, Heavy Equipment Operator, Highway Maintenance Leadworker, Landscape Maintenance Leadworker and Maintenance Supervisor. All job classifications require possession of a valid California driver's license. Cal Trans heavy equipment operators must have a class I chauffeur's license. Equipment operators must have a class II license and the other employees need only an ordinary class III operator's license.

Because Cal Trans heavy equipment operators are more highly paid than other nonsupervisory maintenance workers, snow removal with its attendant use of heavy equipment is a desired assignment. Employees in lower classes who are qualified as heavy equipment operators often request snow duty and the temporary promotion to heavy equipment operator which may accompany work in the snow. Employees believe that by temporarily operating heavy equipment in snow removal they will enhance their opportunities to receive permanent positions as heavy equipment operators. Moreover, temporary assignments in higher classifications bring corresponding temporary 5 percent increases in salary. Snow work also is desired because it provides the chance for substantial amounts of overtime pay in the cleanup following a large storm. Many Cal Trans employees have worked voluntarily in snow removal for a number of years

and have come to depend on snow removal assignments as part of their family finances.

Snow season normally extends from approximately December 1 through the following April 15. In the past, when Cal Trans districts decided to transfer employees from the valley to the mountains, volunteers were recruited. A memorandum soliciting volunteers would be circulated in October directing interested employees to apply by a specified deadline. Persons selected for snow duty would be notified in November and given a specific reporting date and location. The transferred employees would be housed and fed in Cal Trans dormitories.

Although CSEA originally charged that Cal Trans had changed its past practices in Districts 3, 8 and 10, the organization only presented evidence about Districts 8 and 10.[6] In essence, the evidence establishes that in both Districts 8 and 10 the Department made a calculated effort to reduce the numbers of valley employees transferred to snow stations and given temporary promotions with the wintertime reassignment.

[6]CSEA, in the March 31 amendment to the charge, listed District 3 as one of the districts in which snow removal staffing was unilaterally changed. However, in his opening statement at the hearing, counsel for CSEA listed only Districts 8 and 10 as locations of the snow staffing change. No evidence was presented about District 3. It is concluded, therefore, that CSEA has abandoned the contention that a change was made in District 3 and that portion of the charge and corresponding complaint is dismissed.

In place of the valley employees, the two districts hired temporary and permanent intermittent equipment operators.

District 8 is located in southeastern California and comprises large portions of San Bernardino and Riverside Counties, including several mountainous regions. The record establishes that, among other areas, Cal Trans crews perform snow removal on Cajon Pass along Interstate Highway 15 north of San Bernardino and along Interstate 10 and State Route 111 between Banning and Palm Springs.

Over the years, District 8 administrators have relied heavily on the temporary promotion of various maintenance workers to the position of heavy equipment operator for service in snow removal. In the 1977-78 snow season, the district gave a limited term upgrade to nine employees. There were 17 limited term upgrades in 1978-79, 60 in 1979-80, 23 in 1980-81 and six in 1981-82. The parties stipulated that the 1981-82 snowfall was approximately average in District 8 although there was a large, late season storm.

The first indication to District 8 employees that snow removal might be handled differently in 1981-82 was a Cal Trans newspaper advertisement for experienced equipment operators with a class I chauffeur's license. Despite this indication of a change, CSEA job steward John Hughes was advised by a coworker shortly thereafter that he had been offered a snow assignment. In order to clarify the situation, Mr. Hughes

contacted a District 8 administrator and asked about the position. The administrator responded that in order to accept a snow assignment an employee first would have to resign his regular job. The snow position would be part-time with a guarantee of only 20 hours of work per month. When Mr. Hughes inquired about whether this was a new approach, the administrator denied that it was.

At the PERB hearing, however, Ben Ramirez, assistant maintenance engineer for District 8, confirmed Mr. Hughes' suspicions that the district had made a deliberate shift away from the use of regular employees to augment winter crews in the mountains. Prior to 1981-82, Mr. Ramirez testified, the district did promote valley employees into the positions of heavy equipment operator and supervisor and temporarily reassign them to the mountains. However, he continued, District 8 entered the 1981-82 fiscal year with 20 employees more than authorized. Some kind of reduction was necessary.

Mr. Ramirez testified that district administrators decided to reduce the number of employees who would be upgraded for snow work and to use permanent intermittent and temporary employees instead. Use of permanent intermittent and temporary employees is less expensive, Mr. Ramirez testified, because the Department can limit their time on the state payroll to short periods. Because permanent intermittents were guaranteed only two weeks of work per month, they could be released from duty

between storms. However, when permanent employees are promoted to higher positions and assigned to the mountains the Department must hire replacements to work in the valley for the entire time the regular employees are absent.

Despite its deliberate intent to reduce the reassignment and temporary upgrade of valley employees, Mr. Ramirez said that the district had planned to make more reassignments had the winter been severe. When the winter remained mild into early January, he testified, it was decided to make no further reassignments. The testimony of Mr. Ramirez is credited.

The evidence indicates that CSEA was never notified by the District 8 management that there would be changes in snow removal staffing. The evidence also indicates that CSEA never acted on its suspicions and demanded to meet and confer about the matter.

District 10, the other snow district about which evidence was presented, is comprised of the northern San Joaquin Valley and the central western slope of the Sierra Nevada Mountain range. Among the areas requiring snow removal are State Route 4 to Bear Valley and State Route 88 through the Carson Pass. A Cal Trans dormitory for snow removal crews working on State Route 4 has been maintained at Cabbage Patch in Calaveras County.

Over the years, District 10 has used various methods of meeting its snow removal personnel needs. Among these has been

the limited-term upgrade of regular employees, the lateral transfer of regular employees, the hiring of permanent intermittent employees and the hiring of temporary employees to work in snow removal. The record reflects that in 1977-78, the district had 13 limited-term upgrades, seven lateral transfers, 28 permanent intermittent employees and nine temporary employees. In 1978-79, there were 16 limited-term upgrades, 10 lateral transfers, 29 permanent intermittents and eight temporary employees. In 1979-80, there were 35 limited-term upgrades, nine lateral transfers, 26 permanent intermittents, and 11 temporary employees. In 1980-81, there were 31 limited-term upgrades, nine lateral transfers, 19 permanent intermittents and 23 temporary employees. In 1981-82, there were 19 limited-term upgrades, three lateral transfers, 30 permanent intermittents and 23 temporaries. The parties stipulated that 1981-82 was an above average year for snowfall in District 8.

As with District 8, there was no official Cal Trans announcement that a change was contemplated in staffing procedures for District 10 snow removal. Rumors about a change began to circulate among employees during the early summer of 1981. The first official confirmation took place when employees obtained a copy of an August 21, 1981, memorandum from District 10 Director D. L. Wieman to W. E. Schaefer, chief

of the Cal Trans division of operations.[7] According to the memo, District 10 intended to supplement its mountain crews on

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7The text of Mr. Weiman's August 21, 1981, memo reads as follows:

> Winter Snow Removal Operation
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> In accordance with our recent conversation, this is to inform you of our plans to change some of our winter staffing and dormitory arrangements at Cabbage Patch Maintenance Station on Route 4 in Calaveras County for the coming winter season. If the changes are successful, we will most likely continue in future seasons.
>
> The following changes will be made in staffing:
>
> 1. In addition to the regular crew at Cabbage Patch, we plan to use only Permanent Intermittent Heavy Equipment Operators for storm and snow removal operations. They will work an irregular 32 hour work week to cover evening and night shifts, seven days a week. Days off will be staggered to accomplish this. As a result, we do not plan to use any valley crew personnel other than necessary upgrades for Supervisor and Leadworker.
>
> 2. We will close down the cooking facilities in the dormitory. Employees will be expected to provide their own meals.
>
> 3. We will pay long-term per diem in lieu of providing dormitory lodging and meals for winter limited-term upgrades to Supervisor and Leadworker.

State Route 4 through the use of permanent intermittent employees rather than by the temporary promotion and transfer

4. We will also close the dormitory except for those who wish to rent rooms in lieu of other facilities in the area. An appropriate rental rate will be determined and the employee will be expected to provide all of his own services.

By making these changes, we expect to eliminate eight (8) full-time winter positions as follows: two (2) Highway Maintenance Workers, three (3) Equipment Operators, two (2) Cook II's and one (1) Cook I.

We anticipate a savings of approximately 6,600 hours (3.7 P. Y.'s) and a net savings in cost of $55,000 which includes wages, State furnished meals, laundry service, and mileage less per diem for two people. This approximate overall savings was based on figures taken from the 1980-81 winter season which was a relatively light winter.

Another advantage of these changes is eliminating the need for backfilling valley crew personnel (who volunteer to work in snow removal) with limited-term personnel.

We feel that closing the dormitory cooking facilities will reduce winter operating costs considerably, but yet give adequate storm coverage by using P.I. employees instead of full-time employees. We plan to supplement lower elevation coverage (Arnold area) with regular personnel from the Altaville yard when needed.

Eliminating the dormitory cooking facilities and not using valley crew personnel will help overcome several winter operations problems. Namely, how to handle lodging and meals for various personnel will be

of valley employees to the mountains. The memo also proclaimed an intent to end food service at the Cabbage Patch dormitory and to close the dorm except for employees who wished to rent it at a rate to be established.[8] The memo projected a

> simplified. In past years, some crew members qualify for State paid lodging and meals at the dormitory (valley personnel). Other crew members must pay for lodging and meals (if they reside in the dormitory and work for the winter season). Others are furnished O.T. meals if they work the qualifying hours per shift. This causes dissension among crew members because of varying rules and policies. Using P.I. employees that know they must provide their own meals and lodging (except for O.T. meals that will be eaten at local cafes) will help clear up this situation.
>
> Considering all these factors and the anticipated monetary savings, we feel using P.I. employees is the best approach for our winter operations.
>
> Should this approach appear to be successful, we would also anticipate expanding it on a limited basis to Route 88 in the Jackson area in future seasons.

[8]In its brief, CSEA alludes to the closure of the dormitory and elimination of food service at Cabbage Patch and argues that at minimum the effects of that decision are negotiable. In neither the original charge nor in the amendment does CSEA raise the issue of whether or not Cal Trans violated SEERA by refusing to negotiate about the effects of the closure of the Cabbage Patch dormitory. It is concluded, therefore, that the issue of the closure of the dormitory and its effects upon matters within scope is not presented here. For a respondent to be found guilty of an uncharged violation, the wrongful conduct must be intimately related to the subject of the complaint or arise from the same course of conduct and the matter must have been fully litigated at the hearing. San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230. It cannot be said that the dormitory closure is

savings of $55,000 for the collective changes and stated that if the changes were successful, similar actions would be taken at a later date for snow crews working on State Route 88.

Cal Trans maintenance employees are members of state employee negotiating unit 12 for craft and maintenance workers. CSEA was certified on July 10, 1981, as the exclusive representative of employees in unit 12 and the organization has remained the exclusive representative continuously thereafter. During the summer of 1981, CSEA held a meeting in Modesto which was attended by some 60 to 70 District 10 employees. The subject of snow removal jobs was a matter of intense employee concern at the meeting and a three-member committee, consisting of job steward Bob Hedrick and CSEA members Paul Raggio and Pete Daniels, was named to meet with District 10 management.

A meeting with district management ultimately was arranged for October 29 by Earl Dale, then a CSEA staff representative. Mr. Dale asked that the three members of the committee be released from work so they could accompany him to the meeting. However, William Todd, District 10 labor relations officer,

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intimately related to the Cal Trans decision to use intermittent employees in snow removal. Nor can it be held that the matter of the dormitory closure and elimination of the cook positions was fully litigated at the hearing. For these reasons, this proposed decision does not consider whether the closure of the Cabbage Patch dormitory, the elimination of the hot food service and the elimination of the cook positions was an unfair practice and/or whether the Department committed an unfair practice by failing or refusing to meet and confer in good faith about the effects of that decision upon unit members.

stated that only one employee would be released for the meeting and the two other employees would not be admitted.[9]

Although CSEA scheduled the meeting with the intent of negotiating about the proposed change, it is clear that the District 10 administrators saw it only as an occasion for informing CSEA about what already had been decided. Larry Bjornstad, deputy district director and principal department spokesperson at the meeting with CSEA, testified that the purpose of the session was "to inform them [CSEA] of

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[9]In its brief, CSEA argues that the refusal to grant released time or otherwise permit CSEA representatives Raggio and Daniels to attend the October 29 meeting was either an unfair practice or an admission that the session was something less than a meet and confer. While the denial of released time may be some evidence of the District 10 management's attitude about the meeting, it cannot be found to be of itself an unfair practice. In its December 18 statement of the charge, CSEA alleged that the "local administration refused to meet with a three-member delegation selected by the union with authority to negotiate a settlement of the charge. (Emphasis in the original.) Paul Flannery, Cal Trans assistant district director, would only agree to meet with one representative from the union . . . while insisting on having three management staff present during the discussions." In context, this allegation is a complaint that the October 29 meeting did not meet the statutory requirements for meeting and conferring in good faith. It cannot be construed as an allegation that the State refused to grant reasonable released time to a reasonable number of employees as required by section 3518.5. Moreoever, it cannot be said that the issue of whether or not the State granted reasonable released time was fully litigated, or indeed, litigated at all. The issue raised by CSEA in its brief does not meet the requirements of San Ramon Valley Unified School District, PERB Decision No. 230, footnote No. 8, supra, and therefore is not considered in this proposed decision.

what we planned to do, and, of course, we listened to their concerns." That the Department did not plan to engage in a give-and-take with CSEA is further illustrated by Mr. Bjornstad's testimony that he "didn't understand negotiations" at that time and "would have been highly reluctant to make any agreements without headquarters approval because at that time I did not know the rules at all."

CSEA raised a number of concerns at the October 29 meeting. The organization complained that the planned change in snow removal staffing would impact upon employee pay by preventing employees from getting temporary upgrades in their classification and by eliminating an opportunity for a significant amount of overtime pay. CSEA also complained that the change would adversely affect promotional opportunities by removing a primary method by which employees become skilled in the operation of heavy equipment. Finally, CSEA argued that the permanent intermittent and temporary workers hired to work in snow removal would be less safe than regular employees in the operation of Cal Trans heavy equipment.

To these arguments. District 10 representatives responded that the use of permanent intermittent and temporary employees did not constitute a change because the Department long had used such employees in snow removal and, in any case, the Department's decision on staffing patterns is not within the

scope of representation.[10] District 8 representatives also explained to the CSEA team that hiring permanent intermittent and temporary employees in the mountain areas was easier than transferring valley employees who then would have to be replaced. The Department denied altogether CSEA's concerns that temporary employees would be less safe than regular workers.

During the October 29 meeting and at other times, Cal Trans representatives made confusing and contradictory statements to CSEA about whether the Department's District 10 administration had the authority to make a deal with CSEA. At the October 29 meeting, Mr. Todd of the District 10 administration told the CSEA team that CSEA's position on snow removal staffing had statewide implications and was not negotiable at the district level. On the same day, however, the opposite representation was made to other CSEA representatives by higher-ranking Cal Trans negotiators. At a negotiating session in Sacramento, Robert Richmond, chief Cal Trans negotiator for unit 12 employees, told CSEA's chief unit 12 negotiator Rick Funderburg

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[10]The scope of representation is set out in section 3516 which provides as follows:

> The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

that the impact of the snow removal staffing pattern was a local matter which local Cal Trans administrators had the authority to negotiate.

Subsequently, Mr. Funderburg discussed the matter with District 10 administrator Todd who repeated his position that the District 10 administration had no authority to negotiate with CSEA. Mr. Funderburg raised the issue again at a November 6 meeting with Mr. Richmond and other top Cal Trans negotiators. Mr. Richmond again insisted that the local Cal Trans administrators had the authority to negotiate with CSEA's local representatives. It was agreed at the November 6 meeting that CSEA would make a formal demand to meet and confer with District 10 administrators about the impact of the planned change upon employees within unit 12. This demand was CSEA's first written demand following the Department's official notification of the planned change by a letter dated October 28, 1981.[11] CSEA negotiators did not learn of the October 28 letter until after the meeting they had held on October 29.

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[11]The letter was sent by Robert Richmond of the Cal Trans office of labor relations to Dan Western, CSEA general manager. The letter reads as follows:

> This is to inform you that Caltrans District 10 (Stockton) plans to change its staffing arrangements for the winter snow removal operations. In the past, additional staffing needs on the snow removal crews

CSEA staff representative Carolynne Born sent the formal demand for a meet and confer session to District 10 administrators in a letter dated December 8, 1981. The letter demanded "an immediate meet-and-confer session regarding the

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> were met by using a combination of Permanent Intermittent employees, Limited Term appointments, and temporary transfers of personnel from valley crews. This season it is anticipated that all heavy equipment operator needs will be filled by using Permanent Intermittent employees. The additional Caltrans Highway Maintenance Leadworkers and Supervisors needed will be provided by Limited Term appointments from the appropriate employment lists.
>
> In addition, the dormitory and cooking facilities at the Cabbage Patch Maintenance Station will be closed. However, we believe there are sufficient private facilities in the area where housing and food service are provided. Two employees selected to fill the limited term appointments for leadworker and supervisor at Cabbage Patch will be provided the appropriate per diem in lieu of being provided bunk house and meal facilities.
>
> It is anticipated that this plan will result in a significant savings in the cost of operations. In addition to the savings generated by not operating the dormitory at Cabbage Patch, the District will not be required to undergo the expensive and time consuming process of temporarily backfilling vacant positions created when a member of a valley crew transfers to a winter crew.
>
> It appears that this plan creates minimal impact for employees. However, if you have concerns which you wish to discuss, don't hesitate to call me . . . .

use of permanent intermittent employees for snow removal during the winter season." It protested that even though CSEA had "continually expressed our concerns to management regarding the potential impact on our represented employees," management had denied rights for a meet-and-confer session and "prior notification."

District 10 director Wieman responded by a letter on December 11 in which he agreed to a meet-and-confer session. However, Mr. Wieman observed that a meeting already had been held about the subject on October 29 and that advance notice had been given by the October 28 letter. Nonetheless, he continued, even though he believed that the Department had met its obligations, District 10 representatives would agree to another meeting at a mutually convenient time.

In accord with Mr. Wieman's commitment, a meet-and-confer session was conducted on January 7, 1982. Representing CSEA were all three members of the committee the District 10 membership had appointed the previous fall, Messrs. Hedrick, Raggio and Daniels, along with Ms. Born, who by then had replaced Mr. Dale as CSEA staff representative in that area. Representing District 10 were Deputy District Director Bjornstad, Labor Relations Officer Todd, and Cal Trans Chief Negotiator Richmond from Sacramento. Mr. Richmond originally was described as an "observer" but later in the session he became a participant on behalf of Cal Trans.

The content of the discussion on January 7 closely paralleled the meeting of October 29. CSEA expressed concerns about the impact of the staffing change on employee income and diminished opportunity for promotions because of reduced opportunities for operating heavy equipment. CSEA also argued that use of intermittent employees would adversely affect the safety of other workers. Mr. Bjornstad rejected the safety concern but indicated that he would be willing to make some training assignments from the valley to the mountains, consistent with operational needs, in order to meet CSEA concerns about promotions.

Management repeated its assertion that staffing patterns were a managerial decision and that the change could be made without CSEA consent. Nonetheless, District 10 representatives did explain their rationale for the decision. The Cal Trans negotiators described the cost savings which the use of permanent intermittents would provide and also described the problems which had arisen in backfilling the positions of valley employees transferred to the mountains.

Ultimately, in the characterization of Ms. Born, CSEA and Cal Trans District 10 management agreed to disagree. Following a caucus, the CSEA team returned to the meeting and stated that because by that date the 1981-82 winter was approximately half over and in the interest of not disrupting the current operation, CSEA was willing to allow the staffing operation to

remain as it was for the remainder of the season. In return for this, CSEA requested a commitment from management to negotiate for the 1982-83 winter season. CSEA also proposed several methods for meeting the concerns raised by management. Among these was a percentage limit on the number of valley employees who could be transferred to the mountains for snow work and provision for the training of employees for upward mobility. Management did not respond to these proposals because, in the words of Cal Trans negotiator Richmond, when CSEA agreed to leave staffing as it was in 1981-82, "the urgency of having to deal with those issues was . . . [at that time] not critical."

Following the January 7 meeting, Mr. Todd and Ms. Born exchanged letters summarizing their respective views of the agreements which were reached. The two letters reflect substantially identical views about the outcome of the meeting. In essence, the parties agreed that staffing decisions for the 1981-82 winter had been made and would not be changed barring unusual circumstances, that there would be continued meet-and-confer sessions with regard to the 1982-83 season about those aspects of snow staffing which are within the scope of representation, and that staffing decisions would remain with management pending the resolution of statewide negotiations between the state and CSEA.

LEGAL ISSUES

1) Was the Cal Trans decision in Districts 8 and 10 to shift snow removal jobs from regular to intermittent and temporary employees,

A) A matter within the scope of representation, or, alternatively,

B) A decision affecting matters within the scope of representation?

2) If so, did Cal Trans fail to meet and confer in good faith with the exclusive representative and thereby violate section 3519(b), (c) and/or (d)?

CONCLUSIONS OF LAW

Scope of Representation

CSEA argues that the Cal Trans decision to shift snow removal work from regular to intermittent and temporary employees was itself negotiable. In support of this proposition, CSEA cites federal precedent under the National Labor Relations Act, California judicial precedent under the Meyers-Milias-Brown Act (section 3500 et seq., hereafter MMBA) and PERB precedent under the Educational Employment Relations Act (section 3540 et seq., hereafter EERA). The employee organization contends that the disputed Cal Trans decision was, in essence, a decision to reduce overtime pay and temporary promotional pay, matters within the literal language of section 3516.

The Department argues that the decision about snow removal staffing was a matter within the "merits, necessity or organization" of a governmental service and thus not negotiable. The Department contends that inclusion of the "merits, necessity or organization" language makes the scope of representation under SEERA more narrow than that under the federal labor laws. There is no right to overtime, the Department argues, and it is a managerial right to schedule work and hire employees in a manner designed to minimize the amount of overtime employees work.

Although the PERB several times has considered questions involving the scope of representation under the EERA,[12] the Board itself has not yet interpreted the differently worded and apparently broader scope language in SEERA. SEERA provides that:

> (t)he scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

Unlike the EERA, SEERA does not attempt to define the words, "terms and conditions of employment." Rather, the limiting factor in SEERA is the exclusion from meeting and

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[12]The scope of representation under the EERA is specified in section 3543.2. The PERB's approach to resolving scope questions under the EERA can be seen in Anaheim Union High School District (10/28/77) PERB Decision No. 177.

conferring of "consideration of the merits, necessity, or organization" of a governmental service or activity. In this respect, the scope provision of SEERA parallels the MMBA, the employer-employee relations law which covers employees of California local government and special districts. MMBA section 3504 reads as follows:

> The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

In construing the MMBA scope limitation the California Supreme Court concluded that the Legislature had "not [intended] to restrict bargaining on matters directly affecting employees' legitimate interests in wages, hours and working conditions but rather to forestall any expansion of . . . 'wages, hours and working conditions' to include more general managerial policy decisions." Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616 [116 Cal.Rptr. 507]. In this way, the court reasoned, the MMBA scope of representation does not differ significantly from the National Labor Relations Act. Although the federal law does not have the "merits, necessity or organization" language, the court noted that federal precedent is replete with cases holding that wages, hours and working conditions cannot be expanded to deprive an

employer of legitimate managerial prerogatives.[13] Thus, the Supreme Court concluded, because federal decisions reflect the same interests as those prompting the "merits, necessity or organization" language, "federal precedents provide reliable if analogous authority on the issue." Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d 608, 617. It is clear, therefore, that federal precedent also is reliable authority for interpreting the scope provision of SEERA, the Department's argument notwithstanding. And, because of the similar wording between the statutes, it also is concluded that California court interpretations of the MMBA are persuasive precedent for scope questions arising under SEERA.

In Fibreboard, supra, the U.S. Supreme Court held as negotiable an employer's decision to lay off certain

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l[3]See, e.g., Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609] in which Justice Stewart's often-quoted concurring opinion describes the limit on the employer's obligation to bargain with these words:

> Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. [57 LRRM 2617]

maintenance workers and contract out their work to another company. The employer's motivation for this change was economic and there was no evidence of animus toward the union. The court concluded that the statutory phrase "conditions of employment" literally covered the assignment of work to outside employees and the termination of unit members. Moreover, the court reasoned, the employer merely had substituted one group of workers for another to do the same kind of work in the same plant with no alteration of the company's basic operation. Finally, the court observed that the primary motivation for this change was to reduce the size of the workforce, decrease fringe benefits and eliminate overtime payments, all matters long regarded as peculiarly suitable for resolution within the framework of collective bargaining.

While the Cal Trans decision in Districts 8 and 10 does not involve subcontracting, the parallel with Fibreboard is obvious. In essence, Cal Trans has replaced one group of workers with another. There is no change in the Department's basic operation. The kind of work is the same and the type of equipment used is the same. The motivation for the decision was purely economic and was designed to reduce overtime and other costs. The decision was not, in the words of Justice Stewart's concurring opinion, "at the core of entrepreneurial

control" nor did it involve "the basic scope of the enterprise."[14]

California precedent under the MMBA is equally convincing that the Cal Trans decision itself was a matter within the scope of representation.[15] In Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist. (1975) 45 Cal.App.3d 116 [119 Cal.Rptr. 182] a failure to meet and confer in good faith was found where a public employer eliminated the possibility of overtime for its regular fire fighters. Under the past practice, the fire district usually assigned overtime to its regular employees. Under the new policy, however, the employer decided to hire temporary employees who would perform all work which formerly required regular employees to work overtime. The court of appeal rejected the employer's argument that its decision to eliminate overtime was outside of scope, reasoning that:

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[14]Contrary to the Cal Trans argument that employees have no right to overtime, a unilateral change in past-practice which had the effect of depriving drivers of the regular opportunity to work overtime has been held to be a refusal to bargain. Willamette Industries, Inc. (1975) 220 NLRB 707 [90 LRRM 1478].

[15]Under the MMBA, the "phrase 'wages, hours, and other terms and conditions of employment' is to be liberally construed, consistent with the 'generous interpretation' which has been accorded it in decisions dealing with the federal law from which it has been incorporated." (Citations omitted.) International Assn. of Fire Fighters Union v. City of Pleasanton (1976) 56 Cal.App.3d 959, 968 [129 Cal.Rptr. 68].

> The assignment of overtime work to temporary service personnel will have an obvious effect on the workload and compensation of the regular employees, since the regular employees will be deprived of their customary priority in seeking such work. It may be that the district's new policy is to be preferred to the former practice. Nevertheless, the district is required to meet with the representatives of its employees and discuss their grievances candidly. 45 Cal.App.3d 116, 119.

The Cal Trans decision in Districts 8 and 10 to hire more intermittent and temporary employees had the direct effect of eliminating overtime pay opportunities for regular employees. The decision also reduced the opportunities for regular employees to obtain temporary promotions to the higher-paying class of heavy equipment operator with accompanying 5 percent pay differential. The effect on wages was direct. It is concluded, therefore, that the Cal Trans decision to shift snow removal jobs from regular to intermittent and temporary employees was itself within the scope of representation.

Alleged Failure to Meet and Confer

CSEA next argues that Cal Trans failed to meet and confer in good faith about its decision to shift snow removal jobs away from regular employees. Citing both NLRB precedent and PERB decisions under the EERA, CSEA contends that the Department made a unilateral change and thus committed an act that was per se an unfair practice. A unilateral change about

a matter within scope is of itself a failure to meet and confer in good faith because, CSEA argues, it presents the employee organization with a fait accompli. Moreover, CSEA asserts, the two meet and confer sessions which were held took place after-the-fact and management entered those sessions with a closed mind and did little more than assert that snow removal staffing was a matter outside of scope.

The Department argues that its staffing actions in Districts 8 and 10 were consistent with past practice and did not constitute a change. Permanent intermittent and temporary workers long have been employed in snow removal work, the Department continues, and the staffing arrangements in the 1981-82 snow season were in accord with that long-time practice. Moreover, the Department asserts, meet and confer sessions were held between the Department and CSEA and those meetings resulted in an agreement which satisfied any obligation Cal Trans might have had to meet with the employee organization.

It is well-established that an employer which makes a pre-impasse unilateral change about a matter within the scope of representation violates its duty to meet and confer in good faith. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. See generally, Davis Unified School District

(2/22/80) PERB Decision No. 116, San Francisco Community College District (10/12/79) PERB Decision No. 105 and San Mateo Community College District (6/8/79) PERB Decision No. 94. Moreover, before an employer can make a unilateral change affecting a matter within scope, the employer must give notice of the change and an opportunity to negotiate to the exclusive representative. See Delano Union Elementary School District (4/30/82) PERB Decision No. 213 and cases cited therein.

These principles of decisional law are fully reflected in the specific provisions of SEERA. Section 3516.5 requires the state employer, except in cases of emergency, to give reasonable written notice and the opportunity to meet and confer to recognized employee organizations prior to adopting any law, rule, resolution or regulation directly relating to matters within scope.[16] Section 3517 requires the governor

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[16]Section 3516.5 provides as follows:

> Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.
>
> In cases of emergency when the employer determines that a law, rule, resolution, or

or representative to meet and confer in good faith with recognized employee organizations regarding wages, hours and other terms and conditions of employment and to consider fully the presentations of the organization "prior to arriving at a determination of policy or course of action."[17]

Cal Trans did not meet these statutory requirements in reaching and implementing its decisions about 1981-82 snow staffing in Districts 8 and 10. Initially, the Cal Trans argument that it made no change is rejected. While it is true that Cal Trans long has used both permanent intermittent and temporary employees in its snow removal work, the Department also has relied heavily upon the temporary upgrade of its own

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> regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

[17]In relevant part, section 3517 provides:

> The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy of course of action . . . .

regular employees. The evidence is unchallenged that in 1981-82 the managers of Districts 8 and 10 set out with the deliberate intent of eliminating or severely reducing the use of regular employees on temporary assignment. The uncontradicted and credited testimony of Ben Ramirez establishes this intent in District 8 and the August 21, 1981 memo of District 10 Director Wieman establishes the intent for District 10. The evidence also establishes that both districts were successful in implementing their intent and actually reduced the number of regular employees given temporary upgrades to work in snow removal.

The evidence also establishes that in both Districts 8 and 10 the decision to change the past practice was made prior to any consultation with the exclusive representative. In District 8, the Department never informed the exclusive representative of its intent to change the snow removal staffing and denied that a change was occurring when questioned by a CSEA job steward. In District 10, the decision was made and placed in writing as of the August 21 memorandum. CSEA was not given official notice of the District 10 staffing change until the October 28 letter from the Department to CSEA general manager Dan Western. There is no evidence to indicate that the decision to make the snow removal staffing change was inspired in either district by an emergency which precluded prior meeting with the exclusive representative.

Subsequent to the snow staffing decision, District 10 management held two meet and confer sessions with CSEA representatives. These meetings, however, were after-the-fact. The decision to make the change had been made and the Department's principal representative at the meet and confer sessions testified that he believed the purpose of the first of those meetings was "to inform them (CSEA) of what we planned to do." As CSEA argues, the meetings did not have the indicia of good faith. Cal Trans did not approach them with an open mind, free from any predetermined resolve not to budge. Placentia Fire Fighters v. Placentia (1976) 57 Cal.App.3d 9 [129 Cal. Rptr. 126].

The Department contends that the parties reached an agreement after the second meet and confer session. A more accurate description was offered by CSEA representative Born who characterized the result as an agreement to disagree. Because the parties were in disagreement about whether the Department's underlying decision was within the scope of representation, they could not reach any understandings on the merits. The only significant result of the meetings was that CSEA dropped its demand that the former staffing patterns be reinstated for the 1981-82 snow season and the Department agreed to conduct more meet and confer sessions on snow removal staffing.

On these facts and on the record as a whole, it is concluded that the Department failed to meet and confer in good faith with the exclusive representative and thereby violated section 3519(c). This failure to meet and confer in good faith had the effect of denying CSEA its statutory right to represent its members in violation of section 3519(b).[18] CSEA's final allegation is that the Department's actions also violated section 3519(d). Section 3519(d) makes it unlawful for the State to dominate or interfere with the formation or administration of an employee organization. No evidence was presented in support of this contention and it is not addressed in CSEA's brief. In the absence of proof, the allegation must be dismissed.

REMEDY

In this case, CSEA has been sustained in its contention that the Department unilaterally changed a matter within the

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[18]Employee organization rights are set forth in section 3515.5 which, in relevant part, provides:

> Employee organizations shall have the right to represent their members in their employment relations with the state, except that once an employee organization is recognized as the exclusive representative of an appropriate unit, the recognized employee organization is the only organization that may represent that unit in employment relations with the state. . . .

scope of representation in violation of section 3519(b) and (c). In unilateral change cases, the ordinary remedy is restoration of the status quo ante including back pay plus interest. San Mateo Community College District, supra, PERB Decision No. 94. CSEA seeks back pay as part of the remedy.

It is concluded that while restoration of the prior policy is appropriate, back pay is not. Restoring the prior policy will put the parties in the positions they occupied prior to the Department's unilateral change and will permit future meeting and conferring on snow removal staffing to be conducted in an atmosphere free from the coercive effect of a decision already made. With respect to back pay it should be noted that in its brief, CSEA acknowledges that its claims of impact may be speculative but argues that the speculative nature of the claim "affects the remedy and . . . not . . . the duty to bargain." Indeed, this is the case. While it can be said with certainty that but for the changed policy more regular Cal Trans employees would have been given temporary promotions and assigned to snow removal in 1981-82, it is impossible to know which employees would have been affected. Choosing the employees for snow removal work was discretionary with Cal Trans management and depended upon the Department's needs. No individual employee ever was assured of a right to a temporary promotion for snow removal work. Thus, it is not possible to

say which individual workers were affected by the change in policy.

It is appropriate that the Department be required to post a copy of a notice at work locations throughout Districts 8 and 10. The notice should be subscribed by an authorized agent of the Department indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting will provide unit members with notice that the Department has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the SEERA that unit members be informed of the resolution of the controversy and announces the Department's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78), PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979), 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the State of California (Department of Transportation) has violated subsections 3519(b) and (c) of the State Employer Employee Relations Act. It hereby is ORDERED that the State of California (Department of Transportation) shall:

A. CEASE AND DESIST FROM:

Making unilateral changes in matters within the scope of representation, specifically, by deciding in Districts 8 and 10 to eliminate opportunities for regular Cal Trans employees to obtain temporary promotions and work in snow removal, without first meeting and conferring in good faith with the exclusive representative.

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

1. In accord with the practice existing prior to the 1981-82 winter, permit regular Cal Trans employees to volunteer for work in snow removal and to seek and obtain temporary promotions into such higher job classifications which the Department may need to have filled and for which the persons who volunteer are qualified.

2. Give reasonable written notice and the opportunity to meet and confer to the recognized exclusive representative prior to adopting any law, rule, resolution or regulation directly relating to matters within the scope of representation, including any decision to eliminate the opportunity for regular Cal Trans employees to volunteer for work in snow removal and to obtain temporary promotions for which they may be qualified.

3. Within five (5) working days of the date upon which this order becomes final, post copies of the Appendix

attached hereto for thirty (30) working days on all District 8 and District 10 bulletin boards where notices to employees are regularly posted.

4. Within twenty (20) consecutive workdays from the service of the final decision herein, notify in writing the Sacramento regional director of the Public Employment Relations Board of the steps the Department has taken to comply with this Order. Continue to report in writing to the regional director periodically thereafter, as directed. All reports to the regional director shall be served concurrently on the charging party herein.

It is further ordered that the present charge be DISMISSED in all other respects.

Pursuant to California Administrative Code, title 8, Part III, section 32305, this Proposed Decision and Order shall become final on October 25, 1982, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be either actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on October 25, 1982, or sent by telegraph or certified

United States mail, postmarked not later than the last day for filing, in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305, as amended.

Dated: October 4, 1982

Ronald E. Blubaugh
Hearing Officer