STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELSINORE VALLEY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-2028
v.	)	PERB Decision No. 606
LAKE ELSINORE SCHOOL DISTRICT,	)	December 31, 1986
Respondent.	)	

Appearances; A. Eugene Huguenin, Jr., for Elsinore Valley Education Association, CTA/NEA; Parham and Associates, Inc., by James C. Whitlock for Lake Elsinore School District.

Before Morgenstern, Burt and Porter, Members.

DECISION

PORTER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Lake Elsinore School District (District) to a proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District violated the Educational Employment Relations Act (EERA or Act)[1] by unilaterally adopting the school calendar and changing the work year of the teachers. For the reasons which follow, we reverse the ALJ's proposed decision and dismiss the charge.

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

FACTS

The collective bargaining agreement between the Elsinore Valley Education Association, CTA/NEA (Association) and the District expired in June 1982, and agreement on the successor three-year contract was not reached until April 1983, retroactive to July 1982. It contained provisions for reopening portions of the agreement in each of the succeeding two school years (1983-84 and 1984-85).

The reopeners for the 1983-84 school year were still in mediation as of May 1984.[2] Nevertheless, the District superintendent submitted to the school board at its May 16 meeting a "draft tentative calendar" for the 1984-85 school year. This was included in his "Superintendent's Report" and noted in the minutes. The Association president was at the meeting and apparently requested a copy of the draft calendar, which was supplied by the superintendent two days later, attached to a letter which stated that time was fleeting and there were important issues to be addressed in negotiations. These issues included the District-proposed increased school year for children and the District calendar. The enclosed draft calendar reflected the longer school year for students, along with a longer work year for teachers, both of which were consistent with the District's initial proposal for 1984-85.

[2]All dates herein refer to 1984, unless otherwise indicated.

Also, on May 18, the District's negotiator wrote to the Association's negotiator, again attaching a copy of the draft calendar, and proposed three dates for negotiations, saying that one of the items the District wanted to negotiate was calendar.

According to the superintendent's unrebutted testimony, in early June he sent a memo to the new Association president outlining topics that needed attention soon. Included among these was calendar. He requested to negotiate as soon as the Association had selected its 1984-85 bargaining team.

On June 12, the District negotiator wrote to the new president of the Association, enumerating a few topics which he said the District had previously requested to negotiate, and included calendar as one of the topics. His letter states that he had raised the issue of calendar at the table on June 7 but that the Association's negotiator, Tom Brown, told him that the team at the table was the 1983-84 negotiating team and it could not respond to a 1984-85 issue. The letter states that the District wished to negotiate these subjects at the Association's earliest convenience.

At the June 21 school board meeting, the board minutes indicate that the board took action to adopt a proposed school calendar, which the minutes state was "subject to negotiations." According to the minutes, the Association president attended the meeting but apparently made no objection to the action taken by the board.

The superintendent testified that, by August 13, it was clear that no agreement would be reached on the District's proposal to increase the number of preservice days for teachers, since the parties had not commenced negotiations on the 1984-85 issues. Thus, in order to have sufficient time to notify teachers of the start of school, the District revised its proposed calendar on August 13 to eliminate the proposed additional preservice day. Instead, under the revision to the calendar, the number of preservice days was consistent with the terms of the collective bargaining agreement. The first bargaining session for the 1984-85 contract was held on August 16, and calendar was one of the issues under discussion, but no agreement was reached at that time. Nevertheless, teachers and students returned on the dates indicated on the District's proposed calendar.

In late November 1984, and still before agreement was reached on the calendar, the school board expressed concern that the spring vacation was different than that of the high school district. The board instructed the superintendent to attempt to negotiate an agreement to conform the vacation to that of the high schools and set a deadline of February 15, 1985 for such agreement to be reached in order to have sufficient time to notify students and their parents before vacation. On December 6, the superintendent informed the Association's bargaining chairperson of the board's instructions and apparently requested a meeting to negotiate the issue. The chairperson responded on December 19 with a memo stating, in

essence, that the Association was prepared to address "the total hours issue" either in negotiations for the 1983-84 and 1984-85 years (the parties were waiting for the factfinding report for 1983-84 and were at impasse for 1984-85) or in the unfair practice hearing in this case scheduled for January 17, 1985.

In January 1985, the District administration again revised the calendar, making spring vacation one week later than as indicated on the earlier version. The memo attached to the calendar and distributed to school principals and secretaries states that this is "STILL A PROPOSED CALENDAR." (Emphasis in original.)

The collective bargaining agreement then in effect includes an article specifying that the work year for the teachers shall be 179 days for returning teachers and 180 days for new teachers, with 175 student attendance days, 1 parent conference day, 3 preservice days for returning teachers and 4 preservice days for new teachers. Finally, it states that the school year calendar shall be attached.

The agreement contains, as an appendix, a "proposed" calendar for the 1982-83 school year that was tentatively agreed to in September 1982 and later incorporated into the full agreement. The significant dates are as follows:

August 31	New teachers' first day
September 1	Returning teachers' first day
September 7	Students' first day
December 20 - January 3	Christmas recess
April 4 - 8	Spring recess
June 10	Last day of school

The appendix also states that the District shall establish 1 full day of parent conferences and up to 4 student minimum days for partial day conferencing.

The 1982-85 agreement also had attached to it, as a second appendix, a "proposed calendar" for 1983-84. It is not clear from the record when this calendar was agreed to, as the parties were still in factfinding on that year's negotiations during the spring of 1984.[3] Nonetheless, the significant dates are as follows:

September 7	New teachers' first day
September 8	Returning teachers' first day
September 12	Students' first day
November 16	Parent-teacher conference
December 19 - January 2	Christmas recess
April 16 - 20	Spring recess
June 15	Closing day of school - unless modified by negotiations or legislation

The charge in this case was filed on August 2, 1984 by the Association's bargaining chairperson, James Caldwell. The Association later substituted as the charging party. The charge alleges that the District took unlawful unilateral action by adopting a school calendar on June 21, 1984 that altered the work year of the bargaining unit members. Caldwell was the Association's only witness, and he testified that, as of the date

[3]Although the ALJ stated in his decision that the previous year's calendar was adopted in September, he was apparently referring to the calendar adopted by the District for 1982-83, since the record does not reveal when the 1983-84 calendar was adopted.

of the hearing (January 17, 1985), the District was "giving implementation" to the calendar that was adopted in June 1984, except that the District did not increase the number of preservice days required of the teachers. The witness testified that the calendar adopted in June for 1984-85 differed from the 1983-84 calendar in that the teachers were to come back a week earlier, it lengthened the work year by five days, it changed Christmas vacation to a later time, it changed spring break to a two-week earlier time, and it designated two minimum days in April for parent conferencing. The witness also stated that, in the spring of both 1983 and 1984, there had been two days of parent conferences that gave rise to grievances in which it was alleged that teachers had to work additional hours.

The District raised four defenses. First, it argued that the Association waived its right to bargain the subject of calendar. Second, the District asserted that the calendar was only a tentative calendar, subject to negotiations and, therefore, under San Jose Community College District (1982) PERB Decision No. 240, no unfair practice was committed. Third, the District raised business necessity as a defense, since it needed time to plan and notify parents and employees of important dates. Finally, the District argued that its action was consistent with past practice in that it had adopted tentative calendars in previous years.

The ALJ rejected all of the District's defenses. As a remedy, he ordered the usual cease and desist and posting and,

in addition, required the District to pay employees for the extra days worked plus ten percent per annum, to meet and negotiate upon request, and to return to the status quo for 1985-86.

DISCUSSION

This case presents the issue of whether the District's adoption of a calendar, "subject to negotiations," violates EERA section 3543.5(c).[5] Previous Board decisions have established that the employee calendar is a negotiable subject, including the work year starting and ending dates, holidays, vacations and extra hour assignments. Palos Verdes Peninsula Unified School District/Pleasant Valley School District (1979) PERB Decision No. 96. However, a calendar adopted for the purpose of establishing the student calendar is not negotiable and, therefore, the District does not commit an unfair practice by unilaterally adopting such a calendar. Palos Verdes, supra; San Jose Community College District (1982) PERB Decision No. 240.

Contrary to the Association's arguments, we find the decision in San Jose to be closely analogous to the facts in this case. In San Jose, the district informed the association that it intended to withdraw from an experimental program, which would

---

[5]Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:
>
> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

have the effect of changing 15 inservice days to teaching days. The association demanded to negotiate the subject of calendar, and the district agreed. At the first meeting, the district presented its proposal, which reflected its expressed intent to withdraw from the experimental program and, thus, increased the number of teaching days by 15. The association presented a counterproposal at the second meeting, which the district rejected, maintaining its original position. At the next two sessions, no movement was made by either side. The district declared impasse, but PERB refused to certify it. The district then adopted a calendar that appeared to be the same as the one it proposed. The Board found that the district's evidence showed that the calendar adopted was, by definition, tentative and only a mechanism to initiate the upcoming school year student registration process. The tentative nature was evidenced by the district's continued involvement in the negotiating process and by the fact that the district made a proposal following adoption of the calendar that was different than that adopted. Five more sessions followed, with no movement by the district in its proposal.

In San Jose, the ALJ had concluded that the district committed a violation by adopting the tentative school calendar that the ALJ found unilaterally altered the past practice with regard to the beginning and ending dates of the first semester. In addition, he found no violation with regard to the substitution of teaching days for inservice days, since he

determined that the association had waived its right to negotiate. The Board reversed the ALJ, concluding that the district did not affect a matter within scope on the calendar adoption issue, since the evidence demonstrated that the district adopted its calendar solely for operational purposes and continued to comply with its obligation to negotiate in good faith over the dates of certificated service. "By so doing, the District fulfilled its duty to negotiate in good faith as required by the Act."

On the issue of change in number of inservice days, the Board agreed with the ALJ's conclusion but found that the association had failed to prove that the substitution of teaching days for inservice days affected a matter within scope. There was no evidence about additional work that was required and, as to those issues related to the discontinuation of the inservice program that did affect matters within scope, the evidence showed that the parties continued to negotiate in good faith.

Also relevant to the present case is Oakland Unified School District (1983) PERB Decision No. 367. In that decision, the district had met with the charging party three times to negotiate the school calendar for the school year 1980-81. Prior to reaching agreement, the district adopted calendars for 1980-81, 1981-82 and 1982-83. The calendar for 1980-81 switched a holiday to a date different than that specified in the collective bargaining agreement. The Board affirmed the ALJ's finding of a violation with respect to the 1980-81 calendar, since it switched

a date of a holiday specified in the contract. However, the Board reversed the ALJ's finding of a violation with regard to adoption of the calendars for 1981-82 and 1982-83. Citing San Jose, supra, the Board stated:

> Based on the District's expressed willingness to negotiate these calendars with OSEA, we find that, by its action on July 23, the board intended only to adopt a student calendar and not an employee calendar governing employees represented by OSEA. Oakland, supra, page 37.

The Board also found that, at a subsequent meeting to negotiate calendar, there was no request made by the association to negotiate the calendars for 1981-82 and 1982-83, nor was there any refusal by the district to negotiate these calendars then or at any subsequent time. Thus, the association failed to sustain its burden of proving that the district violated the Act by its conduct.

In Gonzalez Union High School District (1984) PERB Decision No. 410, the Board found that the district violated the Act when it unilaterally adopted a tentative school calendar, notwithstanding that it had a past practice of adopting tentative calendars at the same time each year. The Board found that the district's conduct evidenced an unwillingness to negotiate the subject, thereby making the calendar final. The contract between the parties contained a provision that, if neither side requested to renegotiate the contract by February 1, the contract would be automatically extended for another year. On February 9, the district's representative wrote to the association notifying it

that, since no request had been received, the contract was automatically extended. In March, the district adopted its tentative calendar. Thereafter, when the association demanded to negotiate, the district refused to negotiate and, instead, said it would "discuss" the issues. The Board concluded that, by this conduct, the district failed to afford the union the opportunity to negotiate on the calendar, and this unwillingness had the effect of making the calendar final.

We find these cases instructive in resolving the issue before us. In the present case, the District informed the Association several times prior to June 21 of its desire to commence negotiations on the calendar. The District also attempted to raise the issue at the bargaining table in early June, only to be told by the Association that its bargaining team could not address that issue since it involved the 1984-85 school year. Following the District's adoption of the calendar on June 21, the District continued to recognize its obligation to negotiate. In August, prior to the first bargaining session, the District modified the calendar and changed the starting day for teachers to reflect the language of the contract, since the superintendent realized that the parties would not reach agreement on the proposed increase in preservice days in time to notify teachers of their return date. The District then met with the Association on August 16 to negotiate the contract, including the calendar. Although the starting date for school for the 1984-85 year was

earlier than in 1983-84, it was similar to the starting date in 1982-83.

Similarly, in December, prior to agreement on the calendar, the District realized that the spring break indicated in the calendar did not conform to the high school district calendar. However, when the District attempted to meet to negotiate this change with the Association, it was told essentially that the calendar issue was being litigated (referring to the present unfair that had been filed but had not yet gone to hearing) and was also the subject of negotiations for the complete contract reopener subjects. The Association representative concluded his response by indicating that the issue would be resolved in one of those two forums and, thereupon, refused to meet separately to negotiate the issue. As a result, the District again changed the calendar by moving the dates of spring break to a later time to coordinate the student attendance with that of the high school district.

Given the facts in this case, we conclude that the Association has failed to carry its burden of proving by a preponderance of the evidence that the District's adoption of the calendar was either intended to be a final calendar, or that it unilaterally altered the terms and conditions of employment. In so holding, we rely upon San Jose Community College District, supra, and find that the mere adoption of a tentative calendar is not a per se refusal to bargain, nor is it a per se change in the terms and conditions of employment. The adoption of a calendar

may evidence a refusal to bargain if the surrounding facts and circumstances reflect that the district intends it to be a final calendar. One of the ways of proving this is if the district implements it and, in so doing, changes the terms and conditions of employment.[6] However, in this case, the District repeatedly expressed its willingness to negotiate the subject, both before and after its action on June 21. The action taken clearly reflected its tentative nature, and the board minutes likewise indicate it was subject to negotiation. Further, the District's conduct evidenced its continued recognition of its bargaining obligation. Although the Association argues that the calendar changed the status quo, there is insufficient evidence to conclude that significant changes were, in fact, implemented. Taken as a whole, the record does not support a finding that the calendar was a final calendar adopted in derogation of the District's bargaining obligation, nor that it unilaterally implemented changes in the terms and conditions of employment. Because we conclude the Association has failed to carry its burden of proof, we need not reach the remaining defenses raised by the District.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that

---

[6] We would note that such changes may constitute independent, unlawful unilateral changes as well.

the unfair practice charge and complaint against the Lake Elsinore School District are DISMISSED.

Members Morgenstern and Burt joined in this Decision.