

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SAN DIEGO ADULT EDUCATORS, LOCAL)
4289, AMERICAN FEDERATION OF)
TEACHERS/CALIFORNIA FEDERATION) **Case No. LA-CE-1905**
TEACHERS, AFL-CIO,)
) **Request for Reconsideration**
Charging Party,) **PERB Decision No. 662**
)
v.) **PERB Decision No. 662a**
)
SAN DIEGO COMMUNITY COLLEGE) **November 23, 1933**
DISTRICT,)
)
Respondent.)

Appearances: Liebert, Cassidy & Frierson by Larry J. Frierson for San Diego Community College District; Gattey, Messersmith & Fuchsman by James M. Gattey, Attorney, for San Diego Adult Educators, Local 4289, American Federation of Teachers/California Federation of Teachers, AFL-CIO.

Before Hesse, Chairperson: Porter, Craib, and Shank, Members.

DECISION

HESSE, Chairperson: The San Diego Adult Educators, Local 4289, American Federation of Teachers/California Federation of Teachers (Union) and the San Diego Community College District (District) each request reconsideration of Decision No. 662, issued by the Public Employment Relations Board (PERB or Board) on April 5, 1988.¹ Having duly considered the requests for reconsideration, the Board itself hereby denies those requests for the reasons that follow.

¹Both parties filed requests for reconsideration pursuant to PERB Regulation 32410 (PERB Regulations are codified at Calif. Admin. Code, title 8, sec. 31001 et seq.).

In Decision No. 662, the Board found, among other things, that the District had, on two occasions, contracted with the Foundation, a private non-profit organization, to offer certain language classes previously taught by bargaining unit members. Thus, the District had "contracted out" bargaining unit work without providing the Union with notice and an opportunity to negotiate in violation of the Educational Employment Relations Act (EERA) section 3543.5 (c).²

The Board found that the District entered into agreements with the Foundation without affording the Union an opportunity to bargain the June 22 and August 23, 1983 decisions and their effects. The June 1983 agreement with the Foundation followed a prior management decision (in March 1983) to discontinue certain (fee-based language classes offered by the District (French, German, and Spanish). The August 1983 agreement to contract out was simply an extension of the June decision, albeit encompassing the remaining fee-based language courses taught by District employees.

Additionally, the Board provided prospective reinstatement rights for those employees placed on layoff status due to the

²Government Code section 3543.5(c) provides as follows:

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.

August 1983 action of the District. However, those teachers laid off in March 1983 were not reinstated, nor awarded back pay due to the Board's conclusion that they were properly laid off.

DISCUSSION

PERB Regulation 32410(a) states, in pertinent part:

. . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

The Board has held, based on this regulation, that reconsideration is not appropriate where a party merely restates an argument previously considered and rejected by the Board in its underlying decision. (Rio Hondo Community College District (1983) PERB Decision No. 279a.)

The argument raised by the Union in its request for reconsideration reiterated arguments considered and rejected by the Board in the underlying decision. The Union's position is based on the theory that restoration of reinstatement rights is "fair" to those teachers who were laid off in March. These teachers were laid off prior to the contract with the Foundation, and were not afforded back pay and reinstatement, unlike the hourly instructors laid off in August 1983.

Since the layoff in March 1983 was lawful, we cannot order back pay or reinstatement under EERA. The Board simply cannot remedy conduct that does not constitute an EERA violation. The

teachers still retain their statutory rights under Education Code section 87746.

The District raises two arguments. First, the decision to contract with the Foundation to teach French, German, and Spanish was not contracting out. According to the District, since the District originally intended to cease offering these classes, any action to contract with the Foundation was antedated by the lawful cessation of the classes and, thus, cannot be based on labor costs. In essence, the lawful decision made in March 1983 to discontinue the classes should insulate the District from any liability for later actions in contracting with the Foundation.

The second argument advanced by the District is that the August decision to terminate all language classes was, likewise, not based on labor costs and, thus, the decision is non-negotiable. That is, the decision to contract with the Foundation was for purposes other than reducing costs because the classes were already self-supporting.

The District's arguments are without merit. While the decision to lay off teachers in March 1983 was proper and nonnegotiable, the decision to contract with the Foundation was negotiable. The Board recognized this very dichotomy when it declined to find the March 1983 layoff improper. But, merely because that decision was proper, all later action is not "insulated." The work done by the Foundation was at the behest of, with the cooperation of, and for the benefit of the District. The District did not really cease to offer language classes,

instead it continued to exercise control while the Foundation, the District's agent, provided the language classes. That contract must be rescinded, at least until the parties have negotiated the decision to contract out.

As to the second argument raised by the District, that the action in laying off teachers in August 1983 was not based on labor costs, this too is meritless. The action in August would not have occurred but for the earlier layoff (based on labor costs) and the decision to contract out language services.

ORDER

The requests for reconsideration of PERB Decision No. 662 (Case No. LA-CE-1905) are hereby DENIED.

Members Craib and Shank joined in this Decision.

Member Porter's concurrence and dissent begins on page 6.

Porter, Member, concurring and dissenting: I concur in the denial of the Union's request for reconsideration. I would grant the District's request for reconsideration.