STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOS RIOS CLASSIFIED EMPLOYEES ASSOCIATION,	)	
Charging Party,	)	Case No. S-CE-982
v.	)	PERB Decision No. 684
LOS RIOS COMMUNITY COLLEGE DISTRICT,	)	June 23, 1988
Respondent.	)	

Appearances: Kathy Felch, Attorney, for the Los Rios Classified Employees Association; Susanne M. Shelley, Attorney, for the Los Rios Community College District.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Los Rios Classified Employees Association (LRCEA) to the proposed decision of a PERB administrative law judge (ALJ) dismissing its charge that the Los Rios Community College District (District) unilaterally changed a past practice of observing Lincoln's Birthday on a date which provides for two three-day weekends in February (in conjunction with Washington's Birthday) rather than one four-day weekend. The ALJ found that LRCEA waived its right to bargain over the 1985-1986 calendar for classified employees since it refused the District's invitation to bargain. The ALJ rejected LRCEA's assertion that the "zipper" clause in the parties' collective bargaining agreement allowed it to refuse the invitation to bargain.

Having found waiver on the part of LRCEA, the ALJ concluded that it was unnecessary to address the District's assertion that the charge was untimely.

We have reviewed the entire record, including the proposed decision, the exceptions thereto and the response to the exceptions and, finding the ALJ's findings of fact to be free of prejudicial error, we adopt them as our own. We affirm the dismissal of the charge. However, as set forth below, our analysis differs from that of the ALJ.

FACTUAL SUMMARY

Section 17.1 of the parties' collective bargaining agreement lists legal holidays, including Lincoln's Birthday (February 12). The agreement does not specify the dates of observance for each holiday; however, it does make reference to California Education Code section 79020. That section mandates the observance date for most holidays but allows discretion when February 12 falls on certain days of the week.[1] When it

[1]Education Code section 79020 states, in pertinent part:

> (h) When Veterans Day or Lincoln Day would fall on Tuesday, the governing board of a community college district may close the colleges on the preceding Monday, and maintain classes on the date specified in subdivision (a). When Veteran's Day or Lincoln Day would fall on Wednesday, the governing board of a community college district may close the colleges on either the preceding Monday or the following Friday, and maintain classes on the date specified in subdivision (a). When Veterans Day or Lincoln Day would fall on Thursday, the governing board of a community college

falls on a Wednesday, as it did in 1986, it could have been observed on either the preceding Monday or the following Friday.

On January 17, 1985, District Vice-Chancellor Douglas Burris sent a letter to Ann Lynch, president of LRCEA, (as well as to representatives of other bargaining units) which proposed to establish dates for "board-granted" days off during the winter recess (December 23-January 3). Attached was a proposed academic calendar for the 1985-1986 year. The letter ended by stating:

> Pursuant to the collective bargaining agreement, if you have any questions or desire to meet on any aspects of this proposal, please give me a call. Our current timeline calls for submitting this item to the Board of Trustees on February 6, 1985.

Burris testified that he expected to negotiate if any of the representatives had concerns about the winter recess or calendar. He sent the letter shortly after becoming vice-chancellor and was unaware that in the past the District had sent only the classified schedule to the employee organizations for comment. Lynch testified that she was surprised to receive the academic calendar because LRCEA had previously negotiated only the classified schedule. She also stated that she viewed Burris' letter as an offer to negotiate.

At Lynch's request, she and Burris met on January 28, 1985. They discussed primarily the winter recess issue and, according

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> district may close the colleges on the following Friday, and maintain classes on the date specified in subdivision (a).

to Lynch, they also discussed Lincoln's Birthday. Burris did not recall discussing Lincoln's Birthday. On the same date, Lynch wrote a follow-up letter wherein she indicated that the "winter recess" proposal would be submitted to the LRCEA executive board in early February. Lynch wrote to Burris again on February 13, stating that the union was responding to the "District's desire to close the campuses on December 23, 1985."[2] Lynch stated that LRCEA declined to negotiate over the issue until scheduled reopener negotiations in the fall and that the refusal to bargain was based upon the zipper clause in the parties' contract.^ Though Lynch's letter did not mention

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2There was apparently some confusion over the status of December 23. The District's proposal listed the 23rd as a work day, but Lynch thought Burris had proposed at the January 28 meeting that the campuses be closed that day (the 23rd would have been the only workday that week), forcing the employees to use a vacation day. Burris recalled Lynch proposing that the campuses close but that the 23rd be deemed an additional board-granted day off.

3The zipper clause reads as follows:

> The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter appropriate for collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Board and the Union for the life of this Agreement, each voluntarily and unqualifiedly waives the right, and each agrees that the other shall not be obligated to bargain collectively unless mutually agreed upon with respect to any subject or matter, even though such subjects or matter may not have

Lincoln's Birthday, she testified that the letter was intended to cover all calendar issues.

After receiving the letters from Lynch, Burris placed the proposed academic calendar on the Board of Trustees agenda for February 20. Although copies of all agendas are sent to LRCEA, no one from the union raised any issue at the meeting and the calendar was adopted. Burris testified that he thought the academic calendar was negotiable, even as to the classified unit, but that in his estimation he had communicated the proposal, yet received no response regarding any date on the calendar. In response to a hypothetical question presented by the ALJ, Burris stated that he assumed the parties would enter into more formalized negotiations, should there be a major disagreement over the calendar. However, he viewed LRCEA's concerns as relating only to the winter recess issue, which he viewed as separate from the calendar itself.

On March 5, Lynch spoke with Classified Personnel Manager Jimmy Mraule and Mraule followed up with a confirming letter of the same date. Lynch had apparently become aware of the District's intent to adopt a classified schedule incorporating the academic calendar. They discussed both the schedule and the winter recess. Mraule's letter assured Lynch that the District was not proposing to require employees to take time off on

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been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

December 23 as Lynch had feared. The letter also explained the District's rationale for the scheduling of Lincoln's Birthday (avoidance of too many Monday holidays and its consequential effect on Monday classes) and indicated that the District was planning to present the classified schedule to the Board of Trustees on March 20 (incorporating the holiday dates from the academic calendar). During the conversation between Lynch and Mraule, there was no offer to negotiate nor a demand to do so. When Lynch received the letter, she wrote to Burris (on March 11) protesting the proposed unilateral decision to celebrate Lincoln's Birthday on a Friday rather than a Monday as provided in the contract.[4] Lynch stated in her letter that the classified "calendar" was negotiable and requested that the Lincoln's Birthday issue (like the winter recess issue) be brought to the table during reopener negotiations. She referred to the zipper clause in the parties' contract as authority for LRCEA's position.

The classified schedule was not presented to the Board of Trustees in March as planned, but it reappeared on the April tentative agenda. In April, Lynch again wrote to Burris, noting that she thought their earlier communications had resolved the issue until reopeners. She requested that Burris make clear what the District's intentions were with regard to the

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[4]At the hearing, Lynch admitted that she misspoke, as the contract is silent on the issue. Instead, what she meant to refer to was past practice.

classified "calendar". Burris did not respond. The classified schedule was removed from the April agenda and was never presented to the Board of Trustees for approval. At hearing, Burris explained that the District thought it unnecessary, since the prior approval of the academic calendar effectively adopted a schedule for legal holidays for the classified staff as well. A classified schedule was never sent to LRCEA, but it was apparently sent to college deans for implementation and some unit members had seen it during the year. LRCEA was under the impression that the calendar issue had been held up until reopener negotiations. LRCEA attorney Kathy Felch sent a letter to Burris in July inquiring about the status of the calendar, but received no reply.

In the fall of 1985, during reopener negotiations, the issue of the winter recess was raised by John Bukey, the District's negotiator. He had been on leave during the earlier events and said he understood that a problem existed. After viewing a copy of the classified schedule the District was utilizing, the negotiators stated that they would like to poll their members concerning the Lincoln's Birthday issue. The District did not object. The winter recess issue was resolved at this meeting without controversy. On December 2, Felch sent Bukey a letter informing him that the membership had overwhelmingly opposed the District's proposed four-day weekend (as opposed to two three-day weekends) and asked to negotiate the issue further. The letter suggested that the District had raised the calendar

issue at the previous meeting and that Lincoln's Birthday remained the only unresolved issue. Bukey responded by letter on December 20, stating that the District had long before adopted the calendar and implied that the matter was closed.

DISCUSSION

While noting that the District's communications were at times far from clear, especially in light of the previous practice of adopting the academic calendar and classified schedule separately, the ALJ concluded that LRCEA was adequately notified of the District's calendar proposal and was given the opportunity to bargain. The ALJ relied on both Lynch's acknowledgment that she understood that the District was seeking to negotiate the academic calendar and on the LRCEA board's formal review of the calendar and winter recess proposal. The ALJ further determined that despite confusing and conflicting signals from the District, LRCEA's position was that it would refuse to bargain based on the zipper clause. He, therefore, viewed the case as turning on whether LRCEA could rely on the zipper clause.

The ALJ rejected LRCEA's reliance on the zipper clause for two reasons. First, he held that a zipper clause could be used to defend a refusal to bargain any change in terms and conditions of employment not covered by the contract only where the contract expressly allowed such an application of the clause, or where the negotiations history reflected a mutual agreement as to such application. Second, he held, in effect,

that only an employer may rely on a zipper clause to defend a refusal to bargain charge. Thus, he concluded that LRCEA's refusal to bargain the calendar until reopeners acted as a waiver of its right to bargain. Finding waiver, the ALJ did not consider whether the charge was timely,

a. Timeliness

Before addressing LRCEA's reliance upon the zipper clause, we find it necessary to first address the District's argument that the charge was untimely. The charge was filed on March 6, 1986. The District argues that, since it adopted a combined academic calendar and classified schedule in February of 1985, the March 1986 filing was clearly untimely.[5]

Prior to 1985, the District had adopted the academic calendar separately from the classified schedule. The academic calendar for the upcoming school year was adopted very early in the year and the classified schedule was adopted within a month or two thereafter. The District sent the classified schedule to the bargaining unit representatives for comment. In prior

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[5]Section 3541.5 of the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., states, in pertinent part:

> . . . . . .
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> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . .

years, the parties agreed on the schedule without formal negotiations, but both assumed such negotiations would be required if there was a major dispute.[6] As noted above, in early 1985 the District attem negotiate the academic calendar with the classified unit, rather than a separate classified schedule. Though unprecedented, LRCEA recognized this as an offer to bargain the calendar. Its response was a refusal to bargain based on the zipper clause. LRCEA thought the District had agreed to put the issue on hold until reopeners, while the District apparently believed the LRCEA's refusal to bargain allowed the District to go ahead and adopt the academic calendar incorporating the classified schedule. The District perpetuated this confusion by placing consideration of a separate classified schedule on the Board of Trustees' tentative agenda, then withdrawing it. During reopener negotiations in the fall, LRCEA was surprised to discover that the District would not discuss the classified schedule because it had been "adopted" many months earlier.

Under these circumstances, we consider the charge timely. The statute of limitations does not begin to run until the charging party has actual or constructive knowledge of the allegedly illegal act. Lake Elsinore School District (1986)

[6]Apparently, the informal discussions concerning the classified schedule sometimes took place in the midst of ongoing contract negotiations, which explains some witnesses' recall of "formal" negotiations over the classified schedule.

PERB Decision No. 563; Fairfield-Suisun Unified School District (1985) PERB Decision No. 547; see also, Lehigh Metal Fabricators, Inc. (1983) 267 NLRB 568 [114 LRRM 1064].

Here, the charge was filed on March 6, 1986, within six months of LRCEA's learning that the District had, in effect, already adopted a classified schedule. The District's conduct concerning the tentative Board of Trustees agenda made it reasonable for LRCEA to believe that the classified schedule was still an open issue. LRCEA's behavior throughout the period leading up to Bukey's December 20, 1985 letter is consistent with such a belief. There is no evidence in the record that LRCEA had become aware any earlier of the District's position that a classified schedule had indeed been effectively adopted in February of 1985.

While we have concluded that LRCEA was misled as to whether or not the District had adopted a classified schedule, documentary evidence, as well as the testimony of LRCEA witnesses, establishes that LRCEA recognized Burris' letter of January 15, 1985 as an offer to negotiate issues pertaining to the classified schedule, including Lincoln's Birthday. The evidence also clearly establishes that LRCEA decided to stand on its view of the applicability of the zipper clause and refused to bargain until scheduled reopener negotiations in the fall. Given this evidentiary backdrop, we agree with the ALJ that if the zipper clause did not suspend LRCEA's duty to bargain once

presented with an otherwise negotiable proposal,[7] then LRCEA waived the right to bargain over that matter,

b. Application of the Zipper Clause

As noted above, the ALJ concluded that a union could not use a zipper clause as a "shield" from bargaining an employer's proposal for a change in the status quo. He first noted that the usual scenario has the employer relying on the zipper clause in defense of union charges of a refusal to bargain, rather than, as here, the union relying on the zipper clause in defense of its refusal to request bargaining on a proposal properly noticed by the employer. Second, the ALJ found troublesome what he viewed as the implications of LRCEA's desired use of the zipper clause, to wit, the prohibition of any changes in negotiable terms and conditions of employment during the life of the contract, whether the term or condition is covered by the contract or not.

This Board has yet to articulate its view of the breadth and effect of various zipper clauses, though it has clearly stated that a zipper clause does not allow the employer to make

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[7]This Board has consistently held that employee work schedules or calendars and, specifically, holiday and vacation dates, are negotiable. See, e.g., Lake Elsinore School District (1986) PERB Decision No. 606; Palos Verdes Peninsula Unified School District/Pleasant Valley School District (1979) PERB Decision No. 96. While an academic calendar is not negotiable, if a school employer intends to establish both academic and employee work schedules in one calendar, then such calendar is negotiable. San Jose Community College District (1982) PERB Decision No. 240; Oakland Unified School District (1983) PERB Decision No. 367.

unilateral changes in the status quo (see, e.g., Los Angeles Community College District (1982) PERB Decision No. 252). In this case, we are not troubled by LRCEA's attempted use of the zipper clause. Instead, we look to the plain language of the zipper clause, which unambiguously gives both parties the right to refuse to bargain changes in all matters covered by the terms of the clause. The zipper clause covers all negotiable subjects, even if they were not "within the knowledge or contemplation of either or both parties at the time they negotiated the agreement." In practical terms, the clause purports to fix for the life of the agreement (absent mutual agreement to negotiate changes) those terms and conditions of employment established by past practice, as well as those established by the express terms of the contract. We disagree with the ALJ that this zipper clause could apply to extra-contractual subjects only if it expressly covered the particular subjects or if negotiations history demonstrated a mutual understanding of such an application. To require express mention of the particular subject or extrinsic evidence of bargaining history would be to disregard the plain language of the provision.[8]

[8]We note that where a public school employer is faced with a true emergency and a recalcitrant union, the employer may successfully defend a unilateral change in the status quo on the basis of business necessity. Fountain Valley Elementary School District (1987) PERB Decision No. 625; San Francisco Community College District (1979) PERB Decision No. 105.

Regardless of the existence of a zipper clause, neither party to a collective bargaining agreement has a duty to negotiate over any matter covered by the agreement during its term (subject, of course, to reopener provisions). See, e.g., Placentia Unified School District (1986) PERB Decision No. 595; Palo Verde Unified School District (1983) PERB Decision No. 321; cf. NLRB v. Jacobs Manufacturing Co. (2d Cir. 1952) 196 F.2d 680 [30 LRRM 2098]. To say that broad zipper clauses such as the one involved here may not be construed as a waiver of bargaining rights except as to subjects covered by the agreement would render such clauses mere surplusage. Instead, we will look to the language of the particular zipper clause and give it the breadth that language warrants.

We do not view zipper clauses to be inherently inconsistent with any rights or obligations provided by EERA. Indeed, as long as such clauses are freely entered into, they could serve to further stabilize and harmonize bargaining relationships. As the parties are free to memorialize an established past practice through express provision in a collective agreement, thereby fixing the affected terms and conditions of employment for a specified term, we find no significant distinction in the use of a clause which creates the same effect, albeit on a broader scale.[9] While we hold that zipper clauses are not inherently

[9]We note that our approach is consistent with recent precedent in the private sector. The National Labor Relations Board (NLRB) has progressively eased its original objection to

inconsistent with bargaining rights and obligations, we leave open the possibility that the character of a particular zipper clause or the surrounding circumstances could render such a clause unenforceable, in whole or in part.

Here, the zipper clause purports to mutually waive the right to negotiate over any "subject or matter" for the term of the agreement, whether or not such subject or matter was "within the knowledge or contemplation" of the parties at the time the agreement was negotiated. There is no language which could be construed as limiting the effect of the clause to matters actually covered elsewhere in the agreement or discussed during negotiations. Thus, we construe this zipper clause as affording both parties the right to refuse to negotiate changes in the status quo as to otherwise negotiable terms and conditions of employment for the duration of the agreement (subject to reopener provisions), whether such terms and conditions are established by contract or by past practice. Consequently, we find that LRCEA had the right, in theory, to refuse to bargain any proposed change in past practice with regard to the scheduling of holidays. But that does not end our inquiry, for we must now determine what the relevant past practice, if any, was.

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zipper clauses. See Radioear Corporation (1974) 214 NLRB 362 [87 LRRM 1330]; GTE Automatic Electric, Inc. (1982) 261 NLRB 149 [110 LRRM 1193TI

c. Past Practice

LRCEA insists that the past practice was to schedule Lincoln's Birthday so as to create, in conjunction with Washington's Birthday (the third Monday of February, as provided by Education Code section 79020(a)), two three-day weekends. The District's decision to observe Lincoln's Birthday on Friday, February 14, 1986,[10] allegedly violates that past practice. LRCEA's argument fails, however, because it misstates the past practice.

First, an examination of the discretion afforded by Education Code section 79020 in years prior to 1986 reveals that a four-day weekend was never before an option. In the two years other than 1986 where some discretion was afforded (1984 and 1985), two three-day weekends were created, but this was due to the limitations imposed by the statute in those years. In 1984, Washington's Birthday was observed on Monday, February 20, while Lincoln's Birthday could have been observed on Friday, February 10, Monday February 13 or Tuesday, February 14. In 1985, Washington's Birthday was observed on Monday, February 18, while Lincoln's Birthday could have been observed on Monday, February 11 or Tuesday, February 12. Thus, the fact that in the two years prior to 1986 two three-day weekends were created was due to statutory constraints, and was not due to an identifiable past practice.

10[10]In 1986, Washington's Birthday was observed on Monday, February 17.

Moreover, LRCEA's description of the past practice fails to distinguish the process through which calendar issues (and, in particular, the scheduling of holidays) were agreed upon from the results of that process. The evidence revealed that the classified schedule, including the scheduling of holidays, was arrived at each year through informal discussions (which would have become "formal negotiations" had there been any serious disagreement). Indeed, it could hardly have been any other way. The calendar necessarily varies from year to year and is not readily susceptible to the application of a static policy fixing its terms. This is especially true with regard to the narrower issue of the scheduling of Lincoln's Birthday, for the options allowed by Education Code section 79020 vary from year to year.

In sum, the past practice that LRCEA could rightfully insist adherence to was the annual process of discussing (or negotiating) the next year's schedule in the winter or early spring of each year. LRCEA clearly refused to take part in that process, insisting that it had no duty to discuss the issue until reopener negotiations scheduled in the fall. Thus, LRCEA's refusal constituted a clear and unmistakable waiver[11] of its right to bargain the classified schedule (and, in

[11]This Board has adopted the standard for waiver used by the National Labor Relations Board, which requires that a waiver of bargaining rights be "clear and unmistakable." Los Angeles Community College District (1982) PERB Decision No. 252.

particular, the scheduling of Lincoln's Birthday) for the 1985-1986 school year.

ORDER

The complaint in Case No. S-CE-982 is hereby DISMISSED.

Chairperson Hesse and Member Porter joined in this Decision.