STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,	)	
Charging Party,	)	Case No. SF-CE-1119
v.	)	PERB Decision No. 744
CALISTOGA JOINT UNIFIED SCHOOL DISTRICT,	)	June 19, 1989
Respondent.	)	

Appearances: Madalyn J. Frazzini, Attorney, for California School Employees Association; School and College Legal Services by Margaret M. Merchat, Assistant General Counsel, for Calistoga Joint Unified School District.

Before Hesse, Chairperson; Craib and Camilli, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board on exceptions filed by the Calistoga Joint Unified School District (District) to the proposed decision of an administrative law judge (ALJ) who found that the District violated section 3543.5, subdivision (c) and, derivatively, subdivisions (a) and (b), of the Educational Employment Relations Act (EERA or Act)[1] by unilaterally transferring work out of the

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

Section 3543.5 provides, in pertinent part:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

classified bargaining unit.

FACTUAL SUMMARY

The California School Employees Association (Association) became the exclusive representative of classified employees of the District in October 1985. The incidents giving rise to this case occurred in the summer of 1986. During that time, no collective bargaining agreement had yet been proposed nor negotiated. In late May, 1986, District Superintendent Thomas Henry called the Association's Chapter President Stephanie Bigham to inform her that the District would be discussing reductions in the classified staff at the June 4, 1986 school board meeting. Contemplated changes included eliminating an instructional aide position and two noon-duty supervisor positions at the elementary school.

The Association immediately sent a memorandum to the. District addressing the proposed reductions. In pertinent part, it stated that

> [t]hese decisions and effects fall within the scope of negotiations: the effects of layoff are negotiable; the decision to reduce hours, as well as the effects of such reductions, are negotiable.

> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

The Association also demanded that the District begin bargaining as soon as possible, in order to reach agreement before implementation of the proposed decisions.

At the June 4, 1986 board meeting, Bigham presented the Association's proposed contract and again demanded that the District negotiate any proposed reductions. The board members discussed, at length, the proposed reductions, but took no formal action.

There was no further communication between the District and the Association until the agenda for the July 16, 1986 board meeting was received by the Association. The agenda contained a recommendation for the elimination of the instructional aide and two noon-duty supervisor positions.

In addition to Bigham, Michael Persch, field representative for the Association, attended the July 16, 1986 meeting. He read the following prepared statement.

> This shall serve as our written demand to negotiate the decision, where appropriate, and the effects of all the proposed layoffs/transfer of work from the bargaining unit/reduction in hours being proposed for adoption by the Board tonight.
>
> This demand to negotiate will be followed at the appropriate time with proposals including but not limited to alternative actions, timing, appropriateness of duties, seniority, reassignment, severance pay, number of employees to be affected etc.
>
> We encourage the Board, in order to avoid a unilateral action, to postpone these decisions to accommodate the obligation to bargain the aforementioned action.

The Association argued at the meeting that the proposed reduction of the noon-duty positions was either a reduction in hours or a transfer of work and, therefore, the District was required to negotiate both the decision and the effects of the reduction. Additionally, the Association argued that the District was required to negotiate the effects of the elimination of the instructional aide position.

The District took the position that it need only negotiate the effects of the layoffs and eliminated positions. The District indicated its willingness to so negotiate. The Association wanted the proposed decisions negotiated before their final approval. In response, one board member offered to table the discussion if the Association waived the mandatory 30-day notice to the affected employees. The Association refused.[2] The District approved the elimination of the instructional aide position and the noon-duty supervisor positions. The elementary

[2]Persch testified that the District refused to engage in any negotiations without a waiver of the notice requirement. Bigham testified that no one on the board indicated whether the District would negotiate. The ALJ credited the District's witness' testimony which indicated that the District was willing to negotiate the effects of the decisions to eliminate positions and lay off employees. The ALJ found it unlikely that the District would require waiver of the notice requirement in exchange for continued negotiations after the decision to lay off and eliminate positions was made. Furthermore, he found it unlikely that the board would refuse to participate in effects negotiations after being advised by legal counsel to do so. We defer to this credibility determination by the ALJ. (Santa Clara Unified School District (1979) PERB Decision No. 104.)

students were subsequently supervised by members of the certificated unit during the noon hour.

On August 22, 1986, the Association filed charges against the District on a number of issues, including the District's alleged failure to bargain the decision to eliminate the instructional aide and noon-duty supervisor positions. A complaint was issued and hearings were held on March 23-25, 1987. Solely at issue in this appeal is the elimination of the noon-duty supervisor positions.

THE PROPOSED DECISION

The District argued that the elimination of the noon-duty supervisor positions was a layoff and, therefore, the District need only negotiate the effects after the decision was made. The Association presented two theories. First, it asserted that the noon-duty supervisor position was not a separate position, but part of an instructional aide position; therefore, the elimination involved a reduction in hours for the employees. Alternatively, it argued that the elimination of the classified position and reassignment to the certificated unit constituted a unilateral transfer of unit work to nonunit members.

The ALJ rejected the District's argument and the Association's reduction in hours argument and held that the District "breached its obligation to negotiate in good faith by unilaterally transferring work of noon duty supervisors to the certificated unit." In so holding, the ALJ relied on the Board's decisions in Eureka City School District (1985) PERB Decision

No. 481 and Lincoln Unified School District (1984) PERB Decision No. 465.

In Eureka, the Board held that an impermissible transfer of work from unit to nonunit employees did not take place where unit and nonunit employees traditionally had overlapping duties and the employer merely increased the quantity of work which nonunit employees performed and decreased the unit employees' share of the overlapping duties. (Ibid, at p. 15.) The Board expressly set forth the burden of proof:

> . . . the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which they had previously performed or that nonunit employees began to perform duties previously performed exclusively by unit members.

(Ibid., emphasis in original.)

In reaching the conclusion that the elimination of the noon-duty supervisory positions resulted in a unilateral transfer of work, the ALJ relied on three factors. First, and most importantly, that the

> noon duty supervision has always been performed solely by classified employees who were also instructional aides, whereas certificated employees have always handled yard duty supervision at other times during the day.

(Emphasis in original.) Secondly, the ALJ found that the salary schedule tied the noon-duty supervisors to the classified unit. And third, he found that, in the past, the certificated employees

performed yard supervision only before and after school, and during recesses. He held that

> [a]lthough the duties performed by teachers during those periods bear some similarity to duties performed by classified employees during the noon period, they are not identical.

He reasoned that the certificated employees' duties, as yard supervisors, may vary because of the different activities which occur during the day.

THE DISTRICT'S EXCEPTIONS

The District excepts to two of the ALJ's conclusions. First, it argues that the ALJ erred in his conclusion that there was an unlawful transfer because, the District contends, the Association waived its right to bargain by its actions and failure to demand to bargain. Additionally, it argues that, even if the Association's conduct was insufficient to support waiver, the conduct warrants a reduction in the District's back pay liability.

Second, the District argues that the ALJ erred when he concluded that there was no overlap of duties between the classified and certificated units' yard supervision and, hence, no unlawful transfer of work took place. It takes particular exception to each of the factors relied upon by the ALJ.

DISCUSSION

1. Application of the Eureka Test

As discussed earlier, in Eureka City School District, supra, PERB Decision No. 481, the Board held that in order to prevail on

a unilateral transfer of work charge, the charging party must show that duties were transferred out of the unit by showing either that unit employees ceased to perform work which they previously performed, or that nonunit employees began to perform duties previously performed exclusively by unit employees, (Ibid, at p. 15.) The District argues that, because the certificated employees had always supervised yard duty before school, during recesses, and after school, the yard supervision duties were overlapping and, thus, met the Eureka criteria.

The District errs in its Eureka analysis. The facts in Eureka presented a markedly different problem than that presently before the Board. In Eureka, a teacher and an instructional aide shared teaching responsibilities for a special education program. The aide was subject to the teacher's supervision. In a departure from the district's previous procedure, the teacher and the aide were not assigned to the same class (nor the same school) during the teaching day. The Board found that, although the duties assumed by the aide increased because of the new arrangement, work had not been "transferred" to nonunit, classified employees. The Board relied primarily on the fact that the duties of the aide and the teacher had overlapped significantly for the entire time that aides had been assigned to the program.

By contrast, the case presently before the Board involves a situation where, regardless of whether there were overlapping duties, the District eliminated work previously performed by the

classified unit and reassigned it to the certificated unit. These facts fall squarely within the first prong of the Eureka test: the classified employees "ceased to perform work which they had previously performed." (Ibid. at p. 15.) Subsequent to the elimination of the noon-duty supervisory positions, no classified unit employee performed any yard duty supervision. Since classified employees "ceased to perform work which they had previously performed," under Eureka, an unlawful unilateral transfer of work took place. Given this analysis, we need not address the specifics of the District's exceptions, as we do not adopt the ALJ's Eureka analysis. Whether or not the duties were overlapping, the District unlawfully transferred all of the classified unit's yard supervision work to the certificated unit.

2. Waiver of the Right to Bargain

The District argues that, even if it had a duty to bargain over the transfer of work to the certificated unit, it should be relieved of that duty because of the Association's dilatory and confusing actions. The crux of its argument is that the Association did not properly request bargaining on the issue of transfer, but instead addressed generally the layoff/reduction of hours.

This analysis completely ignores the Association's repeated requests for negotiations. Prior to the June 4, 1986 board meeting, the Association indicated its desire and demand for negotiations on both the decision-making process and the effects of any proposed decision. A demand was reiterated at the June 4

meeting. And at the July 16, 1986 board meeting, the Association expressly demanded to negotiate "the decision, . . . and the effects of all the proposed layoffs/transfer of work from the bargaining unit/reduction in hours being proposed." (Emphasis added.)

The Board has held that, where there was a clear demand to meet and discuss a matter, even without a specific request to negotiate, a duty to bargain exists, and no waiver occurs, even if the position maintained by the requesting party was erroneous as a matter of law. (Goleta Union School District (1984) PERB Decision No. 391; see also, Newman-Crows Landing Unified School District (1982) PERB Decision No. 223 (it is not essential that a request be specific or in a particular form).)

The Association, while not specifically addressing transfer in each of its requests to bargain, did consistently demand negotiations over the decision to reduce the hours of the aide and yard-duty positions. The District always took the position that there was only a layoff and no reduction in hours, thus asserting that it need only bargain effects.

Since the Association consistently requested negotiations over the decision and effects of the elimination of the yard-duty supervisory position, including a specific request on July 16, 1986, to bargain the District's decision to "transfer," we reject the District's waiver argument. The District's attempt to limit its liability, also based on the Association's alleged waiver, similarly must fail.

CONCLUSION

We, therefore, find that the District violated section 3543.5, subdivision (c), and, derivatively, subdivision (b),[3] by unilaterally transferring work from the classified unit to the certificated unit without first affording the Association an opportunity to negotiate with the District over that decision.

REMEDY

Section 3541.5, subdivision (c) grants PERB

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In this case, since it has been found that the District unilaterally transferred work, the appropriate remedy is to restore the status quo. (Santa Clara Unified School District, supra, PERB Decision No. 104.) The District, therefore, must return the noon-duty supervisory positions to the classified unit. It is also appropriate for the District to compensate the affected employees for any financial losses which they suffered due to the unilateral change. The District must also notify the exclusive representative of the classified unit of any future decisions to transfer work and, upon request, bargain over that decision.

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[3]We decline to find a section 3543.5, subdivision (a) violation as there was no evidence submitted that the District's actions directly affected the exercise of any protected rights by any members of the Association.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, we find that the Calistoga Joint Unified School District (District) violated the Educational Employment Relations Act (EERA) section 3543.5, subdivisions (b) and (c). Pursuant to EERA section 3541.5, subdivision (c), it is hereby ORDERED that the District, its governing board, and its representatives, shall:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to meet and negotiate in good faith with the California School Employees Association (Association), as the exclusive representative of the District's classified employees, by unilaterally transferring work out of the unit, a matter within the scope of representation.

(b) By the same conduct, denying to the Association rights guaranteed by EERA, including the right to represent its members.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) In the future, provide notice to the Association of any proposed decision to transfer work out of the bargaining unit and, upon request, meet and negotiate with the Association over the decision, and the effects thereof, of transferring work out of the classified unit.

(b) Return the work of the noon-duty supervisors to the classified unit and pay to all affected employees in the unit the lost income and other benefits, plus interest, caused by the

transfer of work.

(c) Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites, and all other work locations where notices to employees are customarily placed, copies of the Notice, attached as an Appendix hereto. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

(d) Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Chairperson Hesse and Member Camilli joined in this Decision.

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. SF-CE-1119, California School Employees Association v. Calistoga Joint Unified School District, in which all parties had the right to participate, it has been found that the District violated the Educational Employment Relations Act (EERA) section 3543.5, subdivisions (b) and (c) by unilaterally transferring work from the classified unit to the certificated unit without affording the exclusive representative notice and the opportunity to negotiate.

As a result of this conduct, we have been ordered to post this notice and we will:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to meet and negotiate in good faith with the California School Employees Association (Association), as the exclusive representative of the Calistoga Joint Unified School District's classified employees, by unilaterally transferring work out of the unit, a matter within the scope of representation.

(b) By the same conduct, denying to the Association rights guaranteed by EERA, including the right to represent its members.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) In the future, provide notice to the Association of any proposed decision to transfer work out of the bargaining unit and, upon request, meet and negotiate with the Association over the decision, and the effects thereof, of transferring work out of the classified unit.

(b) Return the work of the noon-duty supervisors to the classified unit and pay to all affected employees in the unit the lost income and other benefits, plus interest, caused by the unilateral transfer of work.

Dated: CALISTOGA JOINT UNIFIED SCHOOL DISTRICT

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 DEFACED, ALTERED, REDUCED IN SIZE OR COVERED BY ANY OTHER MATERIAL.