

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES)	
ASSOCIATION and its TUOLUMNE)	
CHAPTER NO. 276,)	
)	
Charging Party,)	Case No. S-CE-1254
)	
v.)	PERB Decision No. 795
)	
JAMESTOWN ELEMENTARY SCHOOL)	March 20, 1990
DISTRICT,)	
)	
Respondent.)	
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JAMESTOWN TEACHERS ASSOCIATION,)	
CTA/NEA,)	
)	
Joined Party.)	
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Appearances: Maureen C. Whelan, Attorney, for California School Employees Association and its Tuolumne Chapter No. 276; A. Eugene Huguenin, Jr., Attorney, for Jamestown Teachers Association, CTA/NEA.

Before Hesse, Chairperson; Craib and Camilli, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California School Employees Association and its Tuolumne Chapter No. 276 (CSEA) to the attached proposed decision of a PERB administrative law judge (ALJ). Allegedly, the Jamestown Elementary School District (District) violated the Educational Employment Relations Act (EERA or Act)¹, section 3543.5,

¹**EERA** section 3543.5 states, in pertinent part:

It shall be unlawful for a public school employer to:

subdivisions (a), (b), (c) and (d) , by making unilateral changes in the computation of longevity pay and vacation allotments, by retaliating against Juanita Hoagland because of her support of CSEA, and by providing support and encouragement to the Jamestown Teachers Association, CTA/NEA (JTA) in its efforts to decertify CSEA.² The ALJ dismissed the complaint in its entirety. CSEA excepts to the failure to find violations with respect to all of the allegations.

We have reviewed the entire record in this case, including the proposed decision, CSEA's exceptions and JTA's response thereto. With regard to the allegations that the District retaliated against Juanita Hoagland, provided unlawful support to

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to 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.

(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.

²JTA participated in the hearing before the ALJ as a joined party after its unopposed motion to do so was granted. An election pursuant to a decertification petition filed by JTA on September 16, 1988 has been stayed pending the outcome of this charge. (Administrative Determination of April 5, 1989, Case No. S-D-118.)

JTA and made a unilateral change in the computation of longevity pay, we find the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopt them as our own.³ However, as discussed below, we find that the District made an unlawful unilateral change in the computation of vacation allotments for certain part-time employees.

DISCUSSION

In its initial contract proposal in 1986, CSEA requested that eight part-time instructional aides, who until then had received no paid vacation time, receive vacation allotments in accordance with the formula provided by Education Code section 45197.⁴ All other unit members had been receiving vacation allotments at the rate of one day per month.⁵ The District immediately agreed to the proposal and made it retroactive for four years. This agreement was, however, never integrated into the contract that was eventually agreed upon.

There is no evidence that the parties ever discussed the effect of the agreement concerning instructional aides on the vacation allotments of other part-time employees. At least two

³With regard to these three allegations, the arguments raised by CSEA in its exceptions were also raised before the ALJ and were adequately addressed in the proposed decision; therefore, it is unnecessary to address them here.

⁴Education Code section 45197 prescribes minimum vacation rates for classified employees and expressly provides that the rates may be exceeded.

⁵If an employee worked less than eight hours per day, he or she would receive a proportional amount, i.e., if the employee worked five hours a day, he or she would receive five hours per month.

part-time employees who were not instructional aides, Barbara Coffin and Gertrude Daniels, had received vacation allotments at the rate of one day per month prior to 1986. They continued to receive it at that rate during the 1986-87 and 1987-88 years. Prior to the 1988-89 year, Superintendent Dan White, who was new to the position, noticed the difference in vacation rates among part-time employees and changed Coffin and Daniels' vacation allotments to coincide with the rates applied to the instructional aides. This resulted in a substantial decrease in vacation time for Coffin and Daniels.⁶ White, who testified that he thought negotiations were unnecessary in this instance, implemented the change without providing notice to CSEA.

A breach of an agreement does not constitute an unlawful unilateral change unless it amounts to a change in policy which, by definition, has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. (Grant Joint Union High School District (1982) PERB Decision No. 196, at p. 9.) Citing Grant, as well as analogous precedent arising under the National Labor Relations Act⁷, the

⁶Coffin, who worked five and one-half hours per day for ten months of the year, had her vacation allotment reduced from 55 to 38.92 hours per year. While the ALJ stated that there was no evidence presented as to the precise effect upon Daniels' allotment, in fact, documentary evidence was introduced which allows the reduction to be calculated. This evidence shows that Daniels, who worked five hours per day, would have received 50 hours per year under the old formula, but received only 35.58 hours pursuant to the Education Code formula.

⁷See, e.g., Murphy Oil USA, Inc. (1987) 286 NLRB No. 104, at ALJ decision, p. 4 [127 LRRM 1111] (not every unilateral change

ALJ concluded that the change in vacation allotments was not unlawful because it did not amount to a change in policy. This conclusion appears to be based on two grounds: one, only two unit members were affected and; two, the change brought the two employees' vacation allotments into conformity with those provided to other part-time employees.

In its exceptions, CSEA argues that the established policies on vacation allotment were based on classifications, and not on part-time versus full-time status. In other words, CSEA claims that it was the District's practice to apply one vacation formula to instructional aides and another to all other part-time employees.⁸ Our reading of the record supports CSEA's view of the policies in existence prior to the disputed change in 1988.

As the ALJ noted, the record is devoid of evidence that the parties ever addressed, either at the time of the negotiations in 1986 or thereafter, whether the Education Code section 45197 formula would be applied to those part-time employees who had previously received vacation pay. Indeed, the evidence shows that those employees (Coffin and Daniels) continued to receive vacation pay at the rate of one day per month until White made the disputed change in 1988. This further demonstrates that the

in work rules constitutes an unlawful unilateral change; the change must be "material, substantial, and . . . significant").

⁸The classified unit has approximately 20 members and Coffin and Daniels are apparently the only part-time employees who are not instructional aides.

agreement in 1986 was intended to affect only the instructional aides .

While it may seem unusual to have separate vacation allotment policies for different groups of part-time employees, that is what the record before us shows to have been the status quo prior to the disputed change in 1988. When White made the change in 1988, a new policy was established, i.e., that all part-time employees would receive vacation allotments in accordance with the Education Code formula and only full-time unit members would continue to receive one day per month. Thus, based on the record before us, we cannot conclude that White merely brought Coffin's and Daniels' vacation allotments into conformity with established policy.

Nor do we find that, in these circumstances, the small number of employees affected is probative on the issue of whether there has been a change in policy as defined by the Board in Grant, supra. This was not an aberration, but a permanent arrangement that will continue to affect all part-time employees who are not instructional aides. While, in some cases, the number of employees affected might be indicative of whether there has been a policy change, that is not always true. The proper focus must be on identifying the relevant established policies and determining if, under the circumstances presented, the disputed action is in the nature of a policy change.

REMEDY

Where an employer unilaterally changes negotiable terms and conditions of employment, the Board normally orders the employer to cease and desist from its unlawful action and comply with its statutory bargaining obligations, restore the status quo ante, and make employees whole for any losses they suffered as a result of the unlawful unilateral change. (See, e.g., Rio Hondo Community College District (1983) PERB Decision No. 292.) All of these measures are appropriate in this case. It is also appropriate that the District be required to post a notice incorporating the terms of the Board's order. The posting requirement serves to inform employees of the resolution of the controversy and to announce the District's readiness to comply with the order. It also furthers the central purpose of the Act, namely, harmonious labor relations, by informing all concerned, including management and supervisory personnel, of activity found to be unlawful, thereby providing guidance and preventing a reoccurrence. (See Placerville Union School District (1978) PERB Decision No. 69, at pp. 11-12; Los Angeles Unified School District (1988) PERB Decision No. 659, at p. 12.)

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that the Jamestown Elementary School District and its representatives shall:

A. CEASE AND DESIST FROM:

"1. Refusing to negotiate in good faith with the California School Employees Association and its Tuolumne Chapter No. 276 (CSEA) by unilaterally changing the vacation allotments of part-time classified employees who are not instructional aides.

2. Denying CSEA the right to represent members of the classified bargaining unit by the conduct described above.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Absent prior agreement of the parties or negotiation through the completion of statutory impasse procedures, restore the status quo ante by reinstating the practice whereby part-time classified employees who are not instructional aides receive a vacation allotment of one day for each month worked.

2. Make Barbara Coffin and Gertrude Daniels whole by crediting them with the vacation time they would have accrued but for the unlawful unilateral change in their allotments.

3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration pursuant to PERB Regulation 32410, post at all school sites and all other work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the District. Such posting shall be maintained for a period of thirty (30) consecutive workdays.

Reasonable steps shall be taken to ensure that this Notice is not reduced in size, defaced, altered, or covered by any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with his instructions.

It is further ORDERED that all other allegations in the charge and complaint are hereby DISMISSED.

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. S-CE-1254, California School Employees Association and its Tuolumne Chapter No. 276 v. Jamestown Elementary School District, in which all parties had the right to participate, it has been found that the Jamestown Elementary School District violated section 3543.5, subdivisions (b) and (c) of the Educational Employment Relations Act.

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

A. CEASE AND DESIST FROM:

1. Refusing to negotiate in good faith with the California School Employees Association and its Tuolumne Chapter No. 276 (CSEA) by unilaterally changing the vacation allotments of part-time classified employees who are not instructional aides.

2. Denying CSEA the right to represent members of the classified bargaining unit by the conduct described above.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Absent prior agreement of the parties or negotiation through the completion of statutory impasse procedures, restore the status quo ante by reinstating the practice whereby part-time classified employees who are not instructional aides receive a vacation allotment of one day for each month worked.

2. Make Barbara Coffin and Gertrude Daniels whole by crediting them with the vacation time they would have accrued but for the unlawful unilateral change in their allotments.

Dated: _____ JAMESTOWN ELEMENTARY SCHOOL DISTRICT

By _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION and its TUOLUMNE)
CHAPTER NO. 276,)

Charging Party,)

v.)

JAMESTOWN ELEMENTARY SCHOOL)
DISTRICT,)

Respondent.)

Unfair Practice)
Case No. S-CE-1254)

PROPOSED DECISION)
(8/24/89))

JAMESTOWN TEACHERS ASSOCIATION,)
CTA/NEA,)

Joined Party.)

Appearances; Maureen C. Whelan, Attorney, for California School Employees Association and its Tuolumne Chapter 276; Becker and Bell by Gene Bell, for Jamestown Elementary School District; A. Eugene Huguenin, Jr., Attorney, for Jamestown Teachers Association, CTA/NEA.

Before Martha Geiger, Administrative Law Judge.

INTRODUCTION

This case arose out of a dispute between the California School Employees Association and its Tuolumne Chapter #276 (CSEA) and the Jamestown Elementary School District (the District). CSEA, the exclusive representative for the District's classified employees, alleged the District violated Educational Employment Relations Act section 3543.5(a), (b), (c) and (d)¹ (EERA) when it

¹ EERA is codified at Government Code section 3540 et. seq. Section 3543.5 reads in relevant part:

It shall be unlawful for a public school employer to:

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

made certain changes in vacation and longevity pay and when it took adverse action against CSEA member Juanita Hoaglund.

PROCEDURAL HISTORY

On September 16, 1988, the Jamestown Teachers Association, CTA/NEA, (JTA) filed a decertification petition with PERB, asking for an election to determine whether JTA or CSEA (or no organization) should represent the approximately 22 classified employees of the District². On December 14, 1988, the original unfair practice charge in this case was filed. It was amended twice, on January 17, 1989, and January 30, 1989. A complaint was issued on March 21, 1989, by the office of the General Counsel of the PERB. The Respondent's answer was filed on April 11, 1989.

CSEA requested on December 14, 1988, that the election pursuant to the decertification petition be stayed pending resolution of this unfair practice charge. This request was

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to 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.

(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.

² Case No. S-D-118

granted by an administrative decision of this Agency on April 5, 1989.

Because the action of this charge is blocking the election, JTA filed an Application for Joinder on April 13, 1989, pursuant to PERB Regulation 32164³. CSEA did not oppose this motion, and it was granted on May 17, 1989. CSEA, JTA, and the District participated in an informal conference on April 18, 1989, in an attempt to settle this matter. Settlement not being successful, the case was set for a formal hearing on May 30 and 31, 1989, in Sonora, California. Further testimony was held on June 13 and 14, 1989, also in Sonora.

After presentation of CSEA's case-in-chief, JTA and the District moved to dismiss the complaint for failure of proof of a prima facie case. The undersigned granted the motion as to certain paragraphs in the complaint, and denied it as to others. (Discussion, pp. 16-20 infra). After JTA and the District presented their cases, and after rebuttal from CSEA, JTA and the District renewed their Motion to Dismiss the remaining allegations. The Motion was argued orally by JTA on June 14, 1989, but CSEA chose to brief the matter. Briefs were filed by CSEA and JTA⁴ on August 9, 1989, and the matter was submitted for decision.

³ PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

⁴ The District chose not to file a written brief.

FINDINGS OF FACT

The District is an employer under the EERA. CSEA has been the exclusive representative for the classified employees for the District since 1986. The chapter structure consists of employees from nine separate school districts, all belonging to the Tuolumne Chapter. Officers are elected from among the chapter membership, and typically are representative of several districts.

Although the Chapter consists of many districts' employees, negotiations between CSEA and the various districts are conducted primarily with the chapter members from the district whose contract is under discussion. For example, only Sonora High School District employees represent the CSEA Chapter when negotiating with Sonora High School District. The sole exception to this rule is that, on occasion, a chapter officer (who may or may not be from the target district), or a paid CSEA staff member may also sit on a negotiating team. The contracts negotiated for each school district are ratified only by the CSEA members employed in that particular district, although the collective bargaining agreement typically lists the "Tuolumne Chapter #276" as the employees' representative.

The first contract between the District and CSEA was negotiated in 1986 and 1987. The contract was signed by the parties on March 11, 1987, and was effective until June 30, 1988. The CSEA bargaining team was Sherry Gobel, Ruth Howard, and Harvey Uhl. The former were employees of the District, and Uhl

was the Chapter President. Prior to the agreement's signing, Jan Dole had also been on the negotiation team while employed by the District. However, by the time the contract was signed, Dole had left the District and the area. (She later returned to the Tuolumne County area as a CSEA staff field representative.) The CSEA field staff member assigned to the Tuolumne Chapter in 1986, 1987 and the first part of 1988 was Jack Casey. Dole testified that, when negotiations on the contract commenced in 1986, the Jamestown Chapter chose to have Harvey Uhl rather than Jack Casey sit at the table because there were "hard feelings" toward Casey.

The CSEA Policy Manual and the CSEA Constitution and By-laws prohibit any non-member from sitting as a member of a bargaining team. A member is one who has paid established dues and fees. A member's resignation becomes effective only when he or she notifies the responsible person to halt any automatic dues deduction.

In the Summer of 1988, two significant personnel changes were made: CSEA field representative Joan Grace assumed Jack Casey's assignment to the Tuolumne County Chapter, and Dan White became superintendent for the Jamestown District.

Grace contacted Howard and Gobel in August 1988, to ascertain the status of negotiations, the contract having expired at the end of June. She learned that no proposal had been submitted to the District. Grace did not contact the District to introduce herself to White or any other administrators.

When White began his new job in July 1988, he asked to meet with the various employee organization representatives. Gobel and Howard introduced themselves to White, and the three had an introductory meeting⁵. White asked Gobel and Howard to submit a contract proposal. White also asked whether Howard and Gobel would do the negotiations for CSEA, or whether they would use "outside" negotiators (i.e., paid CSEA staff). By letter to the school board on July 28, Howard and Gobel indicated they would be doing the negotiating for CSEA.

On or about Wednesday, August 24, White met with all the classified employees. The meeting was called by Howard and Gobel at White's request. The purpose of the meeting was to talk about assignments for the coming year, to discuss hours of work, and to explain the schedule of payroll payments. Also in attendance at the meeting in order to meet the employees was the Jamestown Elementary School principal, Randy Panietz.⁶ After White concluded his introductions and his remarks to the employees, he and Panietz left the meeting. Howard and Gobel continued meeting with the employees, discussing CSEA matters.

A few days after the meeting with the classified employees, White met with Howard and Gobel concerning longevity payments. Longevity pay was earned by employees who had worked 15, 18 or 21 years for the District. Longevity pay was not referenced in the collective bargaining agreement per se, but was listed as part of

⁵ Employee Gib Miller was also in attendance.

⁶ Like White, Panietz was new to the District.

various salary schedules as far back as 1979. Employees who were eligible received the pay continuously since then, even when a particular salary schedule did not reference the longevity payments. After 15 years, the employee was paid \$350 on top of his or her regular wages. An additional \$350 was paid after 18 years of service, and another \$350 after 21 years of service.

White told Gobel and Howard that he believed the longevity pay should be prorated according to the hours worked by the affected employee. Thus, an employee who had worked more than 21 years for the District, but who worked only 7 hours a day as opposed to the full-time 8 hours per day, would receive $(\$1050 \times 7/8)$, or \$918.75 for the year, in addition to the regular salary earned. It is undisputed that, in the past, at least some of the part-time employees received longevity pay that was not prorated. Howard and Gobel told White that they agreed with him, but that he should speak to the affected employees. Once he did that, he should "do what was fair for the whole entire staff."⁷ White also requested that Howard and Gobel confirm in writing their agreement, but Howard did not do so until October 10, 1988. That confirmation/summary reads in its entirety:

We as representative of the classified staff at Jamestown School District, were contacted by the Superintendent on the week of August 29, 1988 regarding the "increment problem". We told the Superintendent to contact the employees involved. We did not attempt to interpret the provision of the agreement as to whether the District or the employee was

⁷ It is unclear exactly how many employees were affected by the proration, but White estimated five or six.

correct in the matter. We gave the Superintendent the opportunity to fully explain his position and told him that we wanted to see what was correct and fair to be done in this matter, and that we would support the decision made to prorate the longevity pay based on 8 hours being full time and any less hours being prorated.

Sincerely,
/s/
Ruth Howard

/s/
Sherry Gobel

10/10/88 rh

White met with the affected employees shortly after his meeting with the two CSEA representatives, and then instituted the pro-rating of longevity pay. Howard testified similarly to White as to the content of the August meeting. She, however, said that she and Gobel "directed Mr. White to talk to the staff that it [the proration] involved . . . that if they agreed to it and didn't have any objections then to do what was fair for the whole entire staff." This testimony is somewhat equivocal as to whether Howard and Gobel agreed to White's proposal, or whether they merely agreed he should poll the affected employees.

To resolve the ambiguity, the undersigned has examined White's testimony, along with Howard's testimony and the document signed by Howard and Gobel in October, 1988. Howard and Gobel themselves did not conduct a vote as to the proration, nor did they themselves poll the employees. Such behavior indicates their approval of the Superintendent's proposal was given at their August meeting, and not withheld pending approval of the

affected employees or the unit. Thus, White's testimony that he had the agreement of Howard and Gobel in August is credited, and he was permitted by them to make the change once he had explained what he was doing to the affected employees.

CSEA's constitution, bylaws and policy manual require that any collective bargaining agreement or modification of a collective bargaining agreement be ratified formally by the chapter membership. The ratification is preceded by a review of the tentative agreement by the CSEA field director assigned to the Chapter, who gives a written recommendation to the Chapter to approve or disapprove the tentative agreement. This procedure was not followed in the longevity matter. White implemented the proration at the beginning of the 1988-89 school year.

A second change in practice that occurred at the beginning of the 1988-89 school year was how vacation time was allotted. Prior to 1986, most part-time classified employees did not receive any vacation pay. At least two part-time employees, however, had received vacation allotment as far back as 1981. In its initial proposal for a contract in 1986, CSEA requested vacation pay for the part-time employees who had never received it, to be paid in accordance with Education Code section 45197⁸. The District not only agreed to such payments, but also made the

⁸ Education Code section 45197 reads in pertinent part:

(c) For all employees regularly employed for fewer than 35 hours a week, regardless of the number of hours or days worked per week, the vacation credit shall be computed at the rate of 0.03846 for each hour the employee is in paid status, not including overtime.

payments retroactive. Indeed, the District agreed immediately to CSEA's proposal and implemented it long before a written collective bargaining agreement was signed and ratified. Since vacation pay had been implemented prior to any actual negotiations, it was never integrated into the final collective bargaining agreement.

Prior to the beginning of the 1988-89 school year, therefore, the majority of part-time employees received vacation pay according to Education Code section 45197. Two employees, however, Barbara Coffin and Gert Daniels, received vacation pay in 1986-87 and 1987-88, paid at the rate of one day per month, a formula that was used for full-time employees, and the formula under which they had received vacation allotment prior to 1986. When White noted the discrepancy between the calculations (i.e., the majority of part-timers receiving vacation pay under Education Code section 45197, and two part-time employees receiving vacation pay at the rate of one day per month), he changed the calculations so that all part-time employees received vacation pay according to the Education Code formula.

On September 8, 1988, Howard and Gobel called a meeting of all classified employees for 9:00 a.m. The employees generally were given release time, although Hoaglund testified that shortly after arriving at the meeting she was required to return to her job by Principal Randy Panietz and she did not return to the CSEA meeting until it was nearly ended. The full agenda of the meeting is not known, but evidently the employees discussed,

among other things, the status of negotiations and the bargaining unit's dissatisfaction with CSEA. The unit members requested Howard and Gobel do no further negotiating with the District until the representation issue could be sorted out. Further, Gobel and Howard were instructed to investigate affiliation with other unions.

Immediately after the meeting, Howard and Gobel revoked their CSEA dues deduction authorization. By this action, they no longer were members of CSEA, and had no authority to negotiate for CSEA. Most, but not all, of the remaining bargaining unit members also resigned from CSEA in the days that followed.

On September 14, the classified employees met again, this time after school so release time was not needed. The employees heard a presentation from a CTA organizer. Hoaglund testified that Howard told her (Hoaglund) that Panietz wanted all employees to attend.

During September, White began to hear rumors that the classified employees were not happy with CSEA's representation, but White never attended any meeting where employees discussed changing representatives. Although Hoaglund testified that White and Panietz were in the room for the September 8 meeting, there is no other evidence to support this. CSEA witness Barbara Coffin, White and Panietz deny that the latter were present at either meeting in September. White and Panietz did attend part of the August 24 meeting, and it is possible that Hoaglund has confused the meetings. Hoaglund's own testimony concerning the

September 8 meeting, that she received a message from Panietz to leave the meeting to register students, tends to prove the exact opposite of her belief that Panietz was in attendance. Thus it is found that neither White or Panietz had any direct knowledge of the subject matter of the September meetings.

White's statement that he had only heard rumors about the dissatisfaction with CSEA is bolstered by Hoaglund's testimony concerning a form, received from Howard and Gobel, during September or October. The form evidently asked the bargaining unit employees whether they wished for Howard and Gobel to "represent" the unit. Hoaglund received the form in the morning. She was then approached several times by Howard asking if she had completed the form. Irritated at the pressure put on her, Hoaglund gave the form to White to read and asked him, in effect, "Don't I have until the end of my workshift to complete this?" White read it, and indicated that the form did indeed give the employee until the end of the day. Hoaglund then requested that White "keep those ladies off my back, they've been here five times asking for it." White's response, according to Hoaglund, was "Maybe it's because you're not going with the flow."

In mid-September, CSEA Field Representative Joan Grace learned at a Tuolumne Chapter meeting (though not from a Jamestown employee) that the Jamestown employees were unhappy with CSEA, and that there might be a decertification attempt. Very shortly thereafter, Grace contacted Gobel by telephone and was informed that the latter had dropped her CSEA membership, and

that the employees were looking into affiliation with another union. Grace indicated she would like to meet with the bargaining unit, but Gobel, after checking with the employees, said such a meeting would not be worth Grace's time because the employees had "decided to go with another union."

Grace traveled to Jamestown on September 22, both in an effort to meet with Gobel as well as investigate a possible grievance. Grace was confronted by Panietz, Howard, and Gobel and told that the employees had filed a decertification petition. The four then went to Panietz' office and placed a telephone call to White. White inquired as to who Grace was. Grace informed all of them that, since Howard and Gobel had resigned from CSEA, the District could no longer negotiate with the two, and instead should deal only with a CSEA representative. After the conference call with White, Grace again told Howard and Gobel they were not authorized to speak for CSEA on any matters, nor were they permitted to represent the bargaining unit. Grace then left the meeting and met with the employee who had expressed interest in filing a grievance.

Shortly before Grace's trip to Jamestown, CSEA representative Jan Dole was also assigned to Jamestown because she at one time had been an employee of the Jamestown District and knew most of the employees very well. Grace did no more representation of the Jamestown unit after the September 22 trip.

On October 22, 1988, Dole went to Jamestown and met with White, Howard, Gobel and Gib Miller, a custodian for the

District. At that meeting, Dole explained to all concerned that, until a decertification election was held and the results certified, CSEA would continue to act as the exclusive representative. Further, Howard and Gobel could not negotiate for the bargaining unit without CSEA's consent and without their re-joining CSEA.⁹

After the meeting, Dole sent letters demanding bargaining on the issues of vacation allotment and longevity pay. At least two sessions were scheduled but never held. The first one, scheduled in March 1989 was not held because Hoaglund by now was part of the CSEA negotiating team and the District refused to negotiate with her. Hoaglund was absent from work because of stress from January through the end of the school year, and the District believed that having her at the bargaining table would exacerbate her stress. CSEA apparently concurred, because it scheduled another bargaining session for March 16, 1989. That session was also postponed because Jan Dole was injured in a car accident. No further bargaining has been requested or scheduled, and no contract covers the bargaining unit at this time.

Hoaglund, who opposed the efforts of Gobel and Howard to decertify CSEA worked as a secretary to Panietz. In the Fall of 1988 she received reprimands from him on several occasions. She went on medical leave in November 1988, returning in January

⁹ Dole also erroneously told the group that the fate of CSEA would be determined in a decertification election by a majority of the unit (not a majority of those voting) and that if CSEA lost the decertification election, a second election would be needed to select a new representative.

1989. She again received reprimands from Panietz, as well as from White. Hoaglund took another medical leave in January 1989, and had not returned to work as of the dates of this hearing.

CSEA filed an unfair practice charge alleging that the District refused to bargain in good faith when it changed the vacation and longevity benefits. Further, CSEA alleges that the District discriminated against Hoaglund when it reprimanded her on October 27, 1988, January 10, 1989, January 16, 1989, January 24, 1989 and January 25, 1989. CSEA alleges that these reprimands occurred because of Hoaglund's opposition to the effort to decertify CSEA. Finally, CSEA alleges that the District interfered with CSEA's rights, and unlawfully favored CTA, by giving release time to employees to attend meetings on September 8 and 14, 1988, and by bargaining directly with Howard and Gobel. Further, the totality of the District's conduct is alleged by CSEA to show unlawful support and encouragement for CTA by these unit employees.¹⁰

ISSUES

(1) Did the District's conduct regarding longevity and vacation benefits constitute a unilateral change and thus violate EERA section 3543.5(c), and derivatively 3543.5(b)?

(2) Was Juanita Hoaglund discriminated against because of her exercise of protected activity, specifically, her right to support CSEA, causing the District to violate EERA §3543.5(a)?

¹⁰ Paragraphs 18-22 of the Complaint allege discrimination against employee Gert Daniels. At the hearing, no evidence was presented on this matter, and CSEA withdrew those allegations.

(3) Did the District unlawfully support or encourage JTA in an effort to interfere with CSEA's representation, thus violating §3543.5(b)?

CONCLUSIONS OF LAW

The Motion to Dismiss

At the conclusion of the hearing, JTA and the District jointly moved to dismiss the complaint in its entirety. Specifically, they argued that paragraphs 3 - 7 concerning the longevity pay, and paragraphs 8 - 12 concerning the vacation pay, were not proven by CSEA. Essentially, JTA argued CSEA did not prove that it was denied notice and an opportunity to bargain about the changes. Further, JTA argued that CSEA never showed there was a unilateral change. Instead, the testimony was that some employees had some change in vacation and longevity benefits, but not that those changes affected the remainder or even a majority of the bargaining unit.

As to paragraphs 3 - 12, the Motion to Dismiss was denied because CSEA had established a prima facie case that a change had occurred and CSEA (not merely Gobel and Howard) did not have notice and an opportunity to bargain.¹¹

The Motion to Dismiss also encompassed the allegation in paragraphs 13 - 17 alleging retaliation against Hoaglund. JTA and the District argued that Hoaglund never exercised any protected rights, that Hoaglund never denied the District was inaccurate in its assessment of her performance, and that the

¹¹ However, see discussion on p. 21-25.

reprimands were given for legitimate business reasons. JTA and the District argued that there was no nexus or connection between any activity by Hoaglund in support of CSEA in September and October and the adverse treatment received by Hoaglund in January.

Finally, JTA and the District moved to dismiss paragraphs 23 - 25, wherein the District was alleged to have favored JTA at the expense of CSEA by (1) the totality of its conduct in August through October; (2) by the specific acts of giving release time for the purpose of attending meetings in September; and (3) by negotiating with Howard and Gobel at a time they were no longer CSEA representatives.

The undersigned heard oral argument from JTA (on its own behalf and on the behalf of the District) and from CSEA in opposition to the Motion. After the argument, and after a recess to study the record, the undersigned granted the Motion to Dismiss as to paragraphs 13 - 17 (the Hoaglund retaliation) and paragraphs 23 - 25 (the interference/support allegation). The Motion to Dismiss was denied as to paragraphs 3-12 (the changes in vacation and longevity benefits).

Although the transcript contains the actual ruling, the undersigned will restate the reasons for the dismissal here for purposes of making a complete record for the parties.

Discrimination charges must be upheld when an employee (1) engages in protected activity; (2) the employer knows of this activity; (3) the employer takes adverse action against the

employee that it would not have done but for the protected activities. Novato Unified School District (1982) PERB Decision No. 210.

Concerning Hoaglund, there was evidence of protected activity in that she attended, albeit briefly, the August and September meetings. Further, Hoaglund was asked in September whether she wished Gobel and Howard to represent her. Although not a formal decertification vote, Hoaglund's right to express support or non-support for CSEA, CTA, or Howard and Gobel is protected.

There is little or no evidence, however, that the District knew of Hoaglund's activities or her position on the CSEA decertification. Neither White nor Panietz were at the CSEA meetings. The sole comment of White to Hoaglund ("I guess you're not going with the flow") occurred only after Hoaglund showed White a paper she had received from Howard and Gobel asking whether Hoaglund wanted Howard and Gobel to continue representing the employees. Although Hoaglund testified she interpreted White's statement to mean she should support JTA and abandon CSEA, there is no rationale for this interpretation. According to testimony, the document itself referred neither to JTA nor CSEA but only to Howard and Gobel. Further, White's comment is reasonably interpreted to be an accurate statement. Hoaglund was feeling pressured by Howard and Gobel to complete the form. Her tone indicated she was angry at Howard and Gobel. White supported Hoaglund's belief that she had until the end of the day

to complete the form. When she expressed frustration, White's comment could reasonably be said to explain that evidently other employees were responding more quickly than Hoaglund. I find no reasonable interpretation of the statement to mean that White wanted Hoaglund to support CTA or CSEA or Howard and Gobel. He was merely trying to explain why Howard and Gobel seemed to be pressuring her.

The Motion to Dismiss was also granted as to paragraphs 23 - 25. The District neither supported nor encouraged an effort to unseat CSEA. The August meeting called by White was nothing more than an introductory staff meeting. When his business was completed, White (and Panietz) left. There is no evidence he took any interest or notice in any CSEA business discussed after he left.

Furthermore, the District did not sanction a decertification meeting on September 8. The meeting was called by Howard and Gobel. Although it was held during the workday, CSEA's own witnesses testified that employees had to leave at various times to perform their duties. Thus, the meeting was not mandatory in any sense of the word. The meeting on September 14 was held after work. In neither case was there credible evidence that any District representative had knowledge of the purpose of the meetings, the content of the meetings, or who attended. Hoaglund's testimony that Howard told Hoaglund that Panietz wanted everyone to attend on September 14 is attenuated hearsay, and no proof at all of what Panietz actually said.

There was no evidence that JTA was given access denied to CSEA, or that the District favored JTA over CSEA, impliedly or explicitly.

Finally, White's own statement that he was aware generally of dissatisfaction with CSEA is not enough to connect him with any effort to favor one group over another. White's comments at the October 22 meeting with Dole indicate that he (like Howard, Gobel) had little knowledge of the consequences of a decertification petition. But once the process was explained, he willingly continued to negotiate with CSEA, not Howard and Gobel. Indeed, the only time he negotiated with the latter two was in August, when they were the CSEA representatives.

Thus, paragraphs 13 - 17 and 23 - 25 were dismissed by the undersigned, and paragraphs 18 - 22 were withdrawn by CSEA. The undersigned denied the Motion to Dismiss as to the unilateral changes (3 - 12) because CSEA had presented a prima facie case that a change had been made in two negotiable subjects, vacation and longevity benefits. At the conclusion of the hearing, and after testimony presented by JTA and the District, the Motion to Dismiss was renewed. JTA orally argued the Motion to Dismiss paragraphs 3-12, but CSEA requested it be permitted to brief the issues. That request was granted, along with JTA's request that it be permitted to restate its motion in writing, concurrent with CSEA's written response.

The Longevity Pay

A unilateral change in a mandatory subject of bargaining is a violation of the duty to bargain in good faith. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]; Pajaro Valley Unified School District (1978) PERB Decision No. 51. This is so even when the contract has expired. Pittsburg Unified School District (1982) PERB Decision No. 199. Only after the parties have negotiated and reached impasse may the employer unilaterally implement its last best offer. Modesto City Schools (1983) PERB Decision No. 291.

Here, the parties were without a contract. Thus, until bargaining had occurred and the parties reached agreement, or completion of impasse, the District was required to maintain the status quo in regards to mandatory subjects and bargaining.

The issue of longevity pay is a mandatory subject of bargaining as it is wages, an item specifically denoted as within the scope of bargaining in EERA §3543.2¹².

In the specific case here, the District changed the method of paying longevity pay to part-time employees by prorating the amount owed in a ratio identical to the part-time hours worked per day. More than one employee was affected by this change, resulting in a reduction of longevity pay.

¹² Section 3543.2(a) reads in relevant part:

The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment.

Thus, a change was made in a mandatory subject of bargaining. The change, however, was not unilateral. Rather, it occurred with the consent of the representatives of the bargaining unit. Testimony established that the change occurred in late August, after White met with Howard and Gobel. The latter two agreed to the change, as evidenced by their oral statements and the memorialization of that meeting.

Whether White was entitled to rely upon the authority manifested by Howard and Gobel is dependent upon principles of agency, set forth by the United States Supreme Court in International Association of Machinists v. NLRB (1940) 311 U.S. 72, and specifically adopted by PERB in Antelope Valley Community College District (1979) PERB Dec. No 97. The standard set forth in those cases is whether one party (here, the employer) had just cause to believe the other party (Howard and Gobel) was acting with the apparent authority of CSEA. At the time White met with Howard and Gobel, the two were still CSEA members, and had the authority to negotiate for the unit. Indeed, CSEA field representative Joan Grace communicated with them in August concerning negotiations, consistent with her belief that they were empowered to negotiate for CSEA. Thus White was justified in relying upon the representations of Gobel and Howard, as well as the evidence of their participation in the negotiations for the recently expired collective bargaining agreement, as witnessed by their signatures on the document, in concluding that the two had the authority to speak for CSEA.

CSEA argues that, since Howard and Gobel did not follow CSEA's internal policies for negotiations (i.e., having the tentative agreement reviewed by CSEA staff and having the entire unit ratify the agreement), White's action was unilateral. This argument is rejected, however. Not only did White rely reasonably on Howard and Gobel's representations of authority (bolstered by their history as negotiators), even Howard and Gobel believed they had the authority to negotiate. Their ignorance of CSEA's internal procedures cannot be used by CSEA to shield itself from complying with an agreement it disapproves of.

Therefore, while the agreement by Howard and Gobel to the District's proration of longevity was not reduced in writing at the August meeting, nor was it submitted to CSEA or the membership, it was concurred with by the agents of the exclusive representative, who had the opportunity to object if they disagreed. Thus the District did not violate §3543.5(c) when it prorated the longevity pay.

The Vacation Formula

As with the longevity pay, the payment of vacation pay is a term of condition of employment within the scope of negotiations. Since the method of calculating the vacation allotment affects how large the benefit is, the manner of calculation is just as negotiable as the fact of the payment of the benefit.

Here, testimony established that the vast majority of part-time employees received vacation pay as calculated by a formula found in Education Code section 45197. However, two unit

employees (Coffin and Daniels), until school year 1988-89, had received vacation at the rate of one day per month. That is, if the employee worked a five-hour day, he or she received a vacation day of five-hours for every month worked. In September 1988, however, all part-time employees were given vacation pay according to the Education Code formula. For Coffin, the different formula application meant a reduction of vacation hours from 55 to 38.92 for the 1988-89 school year. There was no testimony as to the effect on Daniels' vacation allotment.

Unlike the longevity benefit, no discussion occurred with Gobel and Howard concerning the vacation formula. The past practice was not written into the collective bargaining agreement, either, evidently because the vacation pay had already been implemented prior to the start of negotiations for the 1986-88 contract.

Thus, the parties, neither in contract negotiations nor there-after, ever addressed the issue of whether the two part-time employees who had been receiving vacation allotment prior to 1986 should continue receiving it under the old formula, or whether they should be paid under the Education Code formula.

This failure to address this issue resulted in the dual method of payment in 1987-88. Is the District's action to bring the part-time employees who received the one day per month allotment into conformity with the remainder of the part-time employees a unilateral change?

PERB has previously ruled that a unilateral change can be found even where only one employee was affected. Pittsburg, supra. However, that case (in which an employee's hours were changed) differed significantly from this case, i.e., the change here resulted in uniformity within the unit. This distinction is crucial because PERB will not find a unilateral change that does not (1) violate the past practice of the District and (2) amount to a change in policy, having a generalized effect or continuing impact upon the terms and conditions of employment of the bargaining unit. Grant Joint Union High School District (1982) PERB Decision No. 196; Lake Elsinore School District (1988) PERB Decision No. 666.

The NLRB has established a standard which holds that when a change in terms and conditions of employment affects only one or two employees, the change will not be considered a breach of the duty to bargain unless the change reflects a change in policy with respect to employees generally. Santa Rosa Blueprint Service, Inc. (1988) 288 NLRB No.88 [130 LRRM 1403], Mike O'Connor Chevrolet-Buick-GMC Co. Inc.. et. al. (1974) 209 NLRB 701 [85 LRRM 1419]. In one case where the employer changed a condition of employment that had existed for thirteen years, the NLRB ruled that the change did not affect the employees in general, and thus did not violate the duty to bargain. Advertiser's Manufacturing Company. (1986) 280 NLRB 128 [124 LRRM 1017]. The NLRB's general rule is that an employer violates the duty to bargain only if the change is "material,

substantial, and . . . significant." Murphy Oil USA, Inc. (1987)
,286 NLRB No. 104 [127 LRRM 1111].

While the vacation formula change for Daniels and Coffin may have violated past practice, it does not have any generalized effect on the unit as a whole. Nor is there any evidence that the employer refused to bargain generally about vacation allotment. The change itself, while it affected two members of the bargaining unit, reinforced the bargained-for benefit enjoyed by the bulk of the part-time employees. Hence, the vacation allotment change was not an unfair labor practice, and is dismissed.

ORDER

The charge and complaint in Case No. S-CE-1254 is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later

than the last day set for filing" See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, sections 32300, 32305 and 32140.

Dated: August 24, 1989

MARTHA GEIGER
Administrative Law Judge