STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS HACIENDA LA PUENTE CHAPTER #115,	)	
Charging Party,	)	Case No. LA-CE-3603
v.	)	PERB Decision No. 1186
HACIENDA LA PUENTE UNIFIED SCHOOL DISTRICT,	)	February 27, 1997
Respondent.	)	

Appearances: California School Employees Association by Arnie R. Braafladt, Attorney, for California School Employees Association and its Hacienda La Puente Chapter #115; Wagner & Wagner by John J. Wagner, Attorney, for Hacienda La Puente Unified School District.

Before Caffrey, Chairman; Garcia and Dyer, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Hacienda La Puente Unified School District (District) of an administrative law judge's (ALJ) proposed decision (attached). The ALJ found that the District violated Educational Employment Relations Act (EERA) section 3543.5 (a), (b) and (c)[1] when it refused the

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

California School Employees Association and its Hacienda La Puente Chapter #115's (Association) requests to negotiate a unit member's change in hours. After reviewing the entire record, the Board affirms the ALJ's decision consistent with the following discussion.

DISCUSSION

After rejecting several District defenses, the ALJ held that when the District refused the Association's requests to negotiate the change in Edward Price's (Price) shift, the District breached its obligation to negotiate in good faith in violation of EERA section 3543.5(b) and (c). The District filed exceptions to the proposed decision, making three main arguments.

First, the District reasserts its claim that the management rights clause in the parties' agreement permits the District to change Price's shift unilaterally. It points out that the clause allows the District to "determine staffing patterns" and to "assign employees," which is precisely what the District says it did.

As the ALJ correctly noted, to establish waiver it must be shown that an employee organization waived its right to negotiate

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> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

in "clear and unmistakable" terms. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74; Oakland Unified School District v. Public Employment Relations Board (1981) 120 Cal.App.3d 1007, 1011 [175 Cal.Rptr. 105].) The ALJ's citation to San Jacinto Unified School District (1994) PERB Decision No. 1078 and the subsequent discussion of the degree of specificity required to establish waiver thoroughly explained the application of this rule.[2] Examining the management rights clause in this case, we do not find a clear, unmistakable waiver of the Association's right to negotiate shift changes and determine there is no precedential support for the exception.

The District's second exception asserts that the decision to change Price's shift was made by an isolated site administrator and is not indicative of a change in policy. Therefore, says the District, this is nothing more than a possible isolated breach of contract and there can be no unilateral change since the law requires a change of policy having a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment.[3]

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[2]See also, Barstow Unified School District (1996) PERB Decision No. 1138 at page 16 (reconsideration granted on other grounds in Barstow Unified School District (1996) PERB Decision No. 1138a), where the Board held that the employee organization had validly waived the right to negotiate the decision to contract out transportation services by agreeing to district rights language expressly permitting the district the exclusive right to "contract out work."

[3]The Board notes that the ALJ described, as affirmative defenses, the evidence and arguments offered by the District concerning the parties' collective bargaining agreement and past practice. The District's evidence and arguments constitute an

The Association responds by supporting the ALJ's citation to Moreno Valley Unified School District (1995) PERB Decision No. 1106, in which a shift change affecting only two employees was found to have a generalized and continuing impact upon unit members' terms and conditions of employment.

We agree with this assessment, since the District took this action based on the belief that it had a contractual right to make shift changes without negotiating, and there is no evidence to suggest that the District would have refrained from changing more employees' shifts pursuant to the management rights clause. The ALJ correctly found that the District's action reflects a policy change, and the fact that only one employee was affected in this instance does not defeat a finding that the action was more than an isolated contract breach.

In its third exception, the District argues that the issue as stated by the ALJ was not the same issue set forth in the complaint (reclassification). Since the ALJ found that there was no reclassification, according to the District, there can be no violation; therefore, the District concludes that the complaint should be dismissed. The Association responds that the issue on which the ALJ decided the case is the same issue that was raised

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attempt to rebut the Association's prima facie case rather than affirmative defenses. This imprecision does not affect the analysis in this case.

in the Association's demand to negotiate, in the charge, and the complaint, and that it was fully litigated by the parties.[4]

We agree, since it is plain that from the earliest days of the dispute, the parties' disagreement centered on the fact that Price did not wish to change from the night shift to the day shift. The main issue has always been the District's right to unilaterally make a shift change, not reclassification.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, the Public Employment Relations Board finds that the Hacienda La Puente Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), by refusing to negotiate a unit member's shift change with the California School Employees Association and its Hacienda La Puente Chapter #115 (Association).

Pursuant to EERA section 3541(c), it is hereby ordered that the District and its. representatives shall:

A. CEASE AND DESIST FROM:

[4]The Association also invites the Board to apply Tahoe-Truckee Unified School District (1988) PERB Decision No. 668, which discusses circumstances under which an "unalleged violation" may be entertained by the Board. The Board will not decide today whether those circumstances are met in the case at bar since there is no "unalleged violation." The ALJ analyzed and decided this as a unilateral change case, which is the same type of violation alleged in the charge and complaint.

1. Failing and refusing to negotiate with the Association about changes in shifts that alter hours of bargaining unit employees.

2. Denying the Association the right to represent its members in their employment relations with the District.

3. Denying bargaining unit employees the right to be represented by the Association in their employment relations with the District.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Upon request by the Association, return Edward Price (Price) to the position of Custodian II on the night shift at Los Altos High School, if that has not already occurred.

2. Pay to Price the differential he lost as a result of the shift change.

3. Within thirty-five (35) days following the date this decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

4. 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.

Member Dyer joined in this Decision.

Chairman Caffrey's concurrence begins on page 8.

CAFFREY, Chairman, concurring: I agree with the finding that the Hacienda La Puente Unified School District (District) violated Educational Employment Relations Act (EERA) section 3543.5 (a), (b) and (c)[1] when it refused the requests of the California School Employees Association and its Hacienda La Puente Chapter #115 (Association) to negotiate a unit member's change in hours. I write separately to respond directly to the issues raised by the District on appeal.

The District offers three exceptions to the Public Employment Relations Board (PERB or Board) administrative law judge's (ALJ) proposed decision. First, the District reasserts its claim that the management rights clause of the parties' collective bargaining agreement (CBA) permits the District to change unit members' shifts unilaterally. It points out that the clause allows the District to "determine staffing patterns" and

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[1]Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

to "assign" employees, which the District argues expressly address its authority in the area of shift changes.

To prevail on this argument the District must show that the Association, in agreeing to the management rights clause, waived its right to negotiate over shift changes in "clear and unmistakable" terms. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74; Oakland Unified School Dist, v. Public Employment Relations Bd. (1981) 120 Cal.App.3d 1007, 1011 [175 Cal.Rptr. 105].) The ALJ offered numerous citations which establish the rule that a generally worded management rights clause, such as the clause here, is insufficient to constitute a waiver of statutory bargaining rights. (San Jacinto Unified School District (1994) PERB Decision No. 1078.) The District has presented no convincing argument as to why this rule should not apply in this case. Therefore, the exception is without merit.

Secondly, the District asserts that there is no evidence that the decision to change the shift of a bargaining unit member was anything other than a possible isolated breach of the parties' CBA made by an individual site manager. Therefore, the Board's test for establishing an unlawful unilateral change has not been met.[2]

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[2]In order to establish an unlawful unilateral change, the charging party must demonstrate that: (1) the employer breached or altered the parties' written agreement or established past practice; (2) the action was taken without providing the exclusive representative with notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change in policy having a

This exception is also without merit. The District's action was based on its incorrect belief that the management rights clause of the CBA gave it the right to unilaterally change the shifts of bargaining unit members. While only one employee's shift was unilaterally changed in this case, it is clear that the change in policy has the generalized and continuing impact on bargaining unit members of exposing them to similar unilateral shift changes. Therefore, the Board's test for establishing an unlawful unilateral change has been met. (Moreno Valley Unified School District (1995) PERB Decision No. 1106.)

Finally, the District argues that the issue as stated by the ALJ in his proposed decision is not the issue set forth in the PERB complaint in this case. Specifically, the complaint alleged that the District had eliminated an evening Custodian II position, established a day Grounds Worker I position, and reassigned an employee from the former position to the latter. The District asserts that the ALJ found this allegation to be unproven but then proceeded to create another issue, a unilateral shift change, and found that the District had committed an unfair labor practice. In objecting to the ALJ's statement of the issue, the District offers the following comment at footnote 2 of its statement of exceptions:

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generalized or continuing impact on the terms and conditions of employment of bargaining unit members; and (4) the change involves a matter within the scope of representation. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; Grant Joint Union High School District (1982) PERB Decision No. 196.)

> Could it be that the ALJs who sit for the PERB are biased, or at least have the appearance of bias, in that they have petitioned and have been certified as a bargaining unit under California law as an appropriate unit and empathize with the employee organizations who appear before them?

Despite the District's assertion, the record in this case is clear that the issue in dispute was the District's unilateral change of the shift of a bargaining unit member. In fact, a substantial portion of the District's post-hearing brief addresses the shift change issue. Accordingly, the District's exception is rejected.

As Chairman of the Public Employment Relations Board, I find it necessary to respond to the District's suggestion that PERB ALJs appear to be biased in favor of the employee organizations appearing before them. First, employees of the Board are specifically excepted from the definition of "State employee" found in section 3513(c) of the Ralph C. Dills Act (Dills Act).[3] Therefore, PERB ALJs are without collective bargaining rights and are expressly excluded from any bargaining unit. Second, the fundamental component of PERB's role in administering the EERA and the other collective bargaining statutes PERB oversees, is its neutrality. Evidence of bias or any lack of neutrality by PERB, its ALJs or any of its agents should be brought to the attention of the Board immediately. Conversely, unsubstantiated and self-serving suggestions of bias by a party displeased with

[3]The Dills Act is codified at Government Code section 3512 et seq.

the outcome of a case pending before PERB, as it appears has occurred here, do a disservice to PERB and bring discredit to the party offering the unfounded suggestions.

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. LA-CE-3603, California School Employees Association and its Hacienda La Puente Chapter #115 v. Hacienda La Puente Unified School District, in which all parties had the right to participate, it has been found that the Hacienda La Puente Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to negotiate with the Association about changes in shifts that alter hours of bargaining unit employees.

2. Denying the Association the right to represent its members in their employment relations with the District.

3. Denying bargaining unit employees the right to be represented by the Association in their employment relations with the District.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Upon request by the Association, return Edward Price (Price) to the position of Custodian II on the night shift at Los Altos High School, if that has not already occurred.

2. Pay to Price the differential he lost as a result of the shift change.

Dated: _____

HACIENDA LA PUENTE UNIFIED 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 HACIENDA LA PUENTE CHAPTER #115, Charging Party, v. HACIENDA LA PUENTE UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-3 6 03 PROPOSED DECISION (7/26/96)

Appearances: Genie Lee, Labor Relations Representative, for California School Employees Association and its Hacienda La Puente Chapter #115; Wagner, Sisneros and Wagner by John J. Wagner, Attorney, for Hacienda La Puente Unified School District.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

The California School Employees Association and its Hacienda La Puente Chapter #115 (CSEA) commenced this action on September 8, 1995, by filing an unfair practice charge against the Hacienda La Puente Unified School District (District). On January 2, 1996, the Office of General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging the District unilaterally eliminated a Custodian II evening position, added a Grounds Worker I day position, and reassigned employee Edward Price from the Custodian II evening position to the new Grounds Worker I position. The complaint also alleges that the District later refused a CSEA demand to negotiate about the change. This conduct, the complaint alleges

further, violated the Educational Employment Relations Act (EERA) section 3543.5(c), (a), and (b).[1]

The District answered the complaint on January 22, 1996, denying all allegations.

An informal settlement conference was conducted by a PERB agent on February 21, 1996, but the dispute was not resolved. A formal hearing was conducted by the undersigned at the PERB regional office in Los Angeles, California on May 20-21, 1996. With the receipt of the final brief on July 15, 1996, the case was submitted for decision.

FINDINGS OF FACT

Jurisdiction

Edward Price is a public school employee within the meaning of section 3540.1(j) and the District is a public school employer

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. In relevant part, section 3543.5 states:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

within the meaning of section 3540.1(k).[2] CSEA is the exclusive representative of an appropriate unit of classified employees (including Mr. Price) within the meaning of section 3540.1(e).

Price Assignment

Edward Price is employed by the District as a Custodian II at Los Altos High School. He works the 3:00 p.m. to 11:00 p.m. shift. His shift is also known as the night shift.

In March 1995,[3] Mr. Price was informed that he would be assigned from the night shift to the day shift, which runs from 7:00 a.m. to 3:00 p.m. The reason for the change in assignment, according to Principal Donald White, was a need on the day shift for an additional employee to perform grounds work.

Mr. Price protested the assignment to Principal White because the shift change would interfere with his day job at Levitz Furniture. Mr. Price explained that he needed the day job for financial reasons, but Mr. White did not alter his decision. Mr. Price's assignment to the day shift became effective on or about March 23, 1996.

Mr. Price's night shift position was not eliminated as part of the assignment, nor was a new position created on the day

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[2]The District is a so-called "merit system" district. In essence, the merit system is tantamount to a civil service system covering the District's classified employees. Pursuant to Education Code section 45240 et seq., a merit system requires the creation of a personnel commission, which is granted authority over certain employment conditions of classified employees. (See Personnel Commission v. Barstow Unified School District (1996) 43 Cal.App.4th 871 [50 Cal.Rptr.2d 797].)

[3]Unless otherwise noted, all dates refer to 1995.

shift at that time. Mr. Price's Custodian II position was merely transferred from the night shift to the day shift. Accordingly, because there was no vacant night shift position remaining, Mr. White did not fill in behind Mr. Price.

Mr. Price was never officially reclassified from Custodian II to Grounds Worker I as part of the reassignment. However, his duties changed significantly. While working the night shift prior to the reassignment, Mr. Price performed primarily custodial duties. After he was assigned to the day shift, his work shifted to primarily grounds work.

The position description for the Custodian II classification requires the incumbent to perform a number of "essential duties." In addition to the duties traditionally recognized as custodial, the incumbent is also required to "perform routine groundsman duties [including] watering, trimming, and hoeing." Thus, the Custodian II position and the Grounds Worker I position have overlapping duties.

According to Director of Maintenance and Operations George Cota, employees in the Custodian II classification "routinely" perform the groundsworker duties reflected in the Custodian II position description. Mr. Cota also testified that it has never been the District's practice to restrict custodians to working indoors.

The District did not give CSEA notice of Mr. Price's reassignment prior to its effective date on or about March 23. In a March 29 letter, CSEA Labor Relations Representative Genie

Lee demanded to negotiate about "the elimination of a Custodian II night position at Los Altos High School and the creation of a Groundsworker I position on days." In a similar follow-up letter on July 21, Ms. Lee again asked to negotiate about the change in Mr. Price's hours, as well as what she described as a change in his classification from Custodian II to Grounds Worker I. The District rejected these demands to negotiate.

About ten months later, at Principal White's request, the personnel commission created a new Grounds Worker I position. The District filled that position on the day shift and reassigned Mr. Price back to the night shift, where he currently works. (Mr. Price's reassignment back to the night shift is not part of this unfair practice proceeding.) Once again, at no time did Mr. Price's classification change, nor was the Custodian II classification ever eliminated at Los Altos High School.

It is apparent that CSEA filed this unfair practice charge under the belief that not only had Mr. Price's hours been unilaterally changed by his assignment to the day shift, but also a new Grounds Worker I classification had been created on the day shift, Mr. Price had been assigned to the new position, and his former Custodian II position on the night shift had been eliminated. For the following reasons, it is found that CSEA's belief that the District changed Mr. Price's classification as part of his reassignment was due to a faulty conclusion reached by CSEA Chapter President Vern Wallery.

As a clerk/typist in the District's operations department, Ms. Wallery tracks employee movement in the Custodian I, Custodian II, and Grounds Worker I classifications. The main reason for tracking employees is to assist in the process of providing substitutes when needed. This process is primarily based on information (an "action sheet") Ms. Wallery receives from the personnel office during the normal course of her duties. Ms. Wallery testified that on those occasions when she does not timely receive an action sheet, she prepares the appropriate document tracking employees based on "word of mouth or per [her] supervisor's instructions."

Relying on conversations with Mr. Price and her supervisor, Rudy Chavarria, Ms. Wallery erroneously concluded that Mr. Price's classification had been changed from Custodian II on the night shift to Grounds Worker I on the day shift, and the night Custodian II position had been eliminated. Accordingly, Ms. Wallery included this incorrect information on the document she prepared to track employee movement.[4] It was this document upon which at least part of the present unfair practice charge was based. As more fully explained elsewhere, however, Mr. Price's classification remained unchanged at all times.

Past Practice

Assistant Superintendent of Personnel Services Barbara Koehler testified that what happened to Mr. Price was "a shift change only" and was "not a classification or reclassification

[4]See Charging Party Exhibit No. 5.

change." Ms. Koehler further testified on direct examination that, during her seven-year tenure as assistant superintendent, site administrators and other management representatives throughout the District have frequently made such changes.

On cross-examination, however, Ms. Koehler was unable to offer testimony about any specific incidents where employees' shifts were changed unilaterally. Asked at the hearing for "documentation here today to prove" this practice existed, Ms. Koehler responded "my testimony is that happened. Do I have on hand documentation or proof? No, I do not."

Ms. Koehler also conceded that the District has never notified CSEA of changes in shift assignments and has never negotiated such changes with CSEA.

On the other hand, CSEA President Wallery testified about her understanding of the District's practice. Under her version of the practice, a District form entitled "Classified Request for Transfer and/or Change in Assignment"[5] is the appropriate document to be used in implementing a shift change. That form was not used in the assignment of Mr. Price from the night shift to the day shift at Los Altos High School, Ms. Wallery testified.

In contrast, Ms. Koehler testified that Charging Party Exhibit No. 6 is used only when an employee requests a transfer from one site to another, and/or a change in assignment. Ms. Koehler defined a request for change in assignment as a request for more or fewer hours. The form is never used to request a

[5]Charging Party Exhibit No. 6.

change in a shift assignment, according to Ms. Koehler's testimony.

This conflict in testimony is resolved in favor of Ms. Koehler for the following reasons. The form itself expressly provides for only certain types of requests. These are requests to be considered for more (or less) hours (or months) in "positions within [the applicant's] classification." No where does the form expressly refer to a shift change.

If the intended use of the form had included a request to change shifts, it would have been easy to make that clear. Moreover, it is possible that the form is simply unartfully drafted and in actual practice has been used to implement a shift change. However, there is no evidence that ever occurred.

The foregoing reasons, especially the lack of any examples where the form has been used to implement a shift change, points to the conclusion that the form has not been used as part of an established practice covering shift changes.

The only other testimony about the District's practice was provided by Mr. Price in describing his employment history. He said he was first employed by the District in the 1970s as a Custodian II at Valley Vocational Adult Education Center. After one year working the "graveyard shift" from 11:30 p.m. to 7:00 a.m., he applied for an open position as a Laundry Worker I at the request of Mr. Cota, who was then his supervisor. The reason for this change was that his position on the graveyard shift was being eliminated.

Mr. Price later returned to a Custodian II position on the day shift at California Elementary School for reasons not contained in the record. He later traded positions with another Custodian II and did "roving" custodial work on the day shift at Grazide Elementary School. This move was accomplished by applying to the District for a change in assignment. When the roving positions were closed, the District placed incumbent custodians in then-existing openings. It was at that time that Mr. Price moved to the position he currently holds at Los Altos High School.[6]

ISSUE

Whether the District breached its obligation to negotiate when it unilaterally reassigned Mr. Price from the night shift to the day shift?

CONCLUSIONS OF LAW

CSEA argues in its brief that classification and hours are negotiable topics and the District unilaterally changed both when it reassigned Mr. Price from the night shift to the day shift. The District, in response, contends that it did not change Mr. Price's classification; and, if it had unlawfully changed Mr. Price's classification, his remedy would lie with the personnel commission, not PERB. In addition, the District argues, its action with respect to Mr. Price was merely a shift change that

[6]During his tenure in these various positions, Mr. Price has held a number of "moonlighting" jobs, including the one at Levitz Furniture. He has never secured District permission before accepting employment outside the District.

is permitted by the management rights clause in the collective bargaining agreement and a well established past practice.

It is important to clarify, at the outset what this case is not about. Contrary to the position adamantly staked out by CSEA, the core issue presented here does not concern the District's right to set classifications or its obligation to negotiate about classifications. It is clear that the District did not intend to reclassify Mr. Price and he was not reclassified. It is the personnel commission, not the District, that retains the broad right to establish classifications in the first place. (See e.g., Sonoma County Board of Education v. Public Employment Relations Board (1980) 102 Cal.App.3d 689 [163 Cal.Rptr. 464]; Personnel Commission v. Barstow Unified School District, supra, 43 Cal.App.4th 871.) PERB has similarly recognized a personnel commission's authority to set classifications. (See e.g., San Bernardino City Unified School District (1989) PERB Decision No. 723 (Education Code section 45268 does not limit a merit system district's authority to negotiate changes in salary differentials between classifications within an occupational group as long as the relative ranking of the classification "as set by the personnel commission" remains undisturbed).)

Nor did the unilateral change in Mr. Price's actual duties from custodial to groundskeeping effectively circumvent the classification function of the commission, as CSEA also argues. Because the groundskeeping duties assigned Mr. Price squarely

fell within those listed on his Custodian II position description, the District was free to make those assignments without running afoul of its obligation to negotiate. (See e.g., Rio Hondo Community College District (1982) PERB Decision No. 279, pp. 16-19 (assignment of classroom teaching responsibilities to instructors who had not previously performed such duties permissible as "reasonably comprehended within the scope of their existing job duties," where employees' position description required instructors to "perform such duties as may be assigned").)

The issue presented here is whether the District breached its obligation to negotiate in good faith with CSEA when it changed Mr. Price's hours by unilaterally reassigning him from the night shift to the day shift.

An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and violative of EERA section 3543.5(c). (Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

To prevail on a complaint of unilateral change, the charging party must establish by a preponderance of the evidence that (1) the employer breached or altered the party's written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e.,

having a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196; Pajaro Valley Unified School District, supra, PERB Decision No. 51; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

Because the District's change in Mr. Price's shift affected his hours, it is a matter within the scope of representation under the Act. (Los Angeles Community College District (1982) PERB Decision No. 252.) In addition, although the District's action in this particular case concerns only Mr. Price, the general authority to unilaterally change shifts involves a policy having a generalized effect or continuing impact on bargaining unit members into the future. (Jamestown Elementary School District (1990) PERB Decision No. 795, p. 6; Moreno Valley Unified School District (1995) PERB Decision No. 1106, adopting proposed decision of administrative law judge at 18 PERC ^25134, p. 458.)

It is undisputed that the District refused CSEA's requests to negotiate about the change in Mr. Price's shift. The District, however, advances two affirmative defenses. First, the District claims it retained the right to make shift changes under the collective bargaining agreement and, second, the change in Mr. Price's shift was in line with years of past practice. In

neither of these affirmative defenses has the District met its burden of proof.

The record here simply does not establish a past practice of unilateral shift changes. It is widely recognized that a binding past practice must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (Elkouri and Elkouri, How Arbitration Works, 4th Edition, p. 439.) The Board has long taken a similar approach. It has described a valid past practice as one that is "regular and consistent" or "historic and accepted." (Pajaro Valley Unified School District, supra, PERB Decision No. 51, pp. 6, 10.) In a more recent case it found a past practice existed on the strength of concrete evidence establishing twelve incidents over a seven year period with union knowledge. (Temple City Unified School District (1989) PERB Decision No. 782, pp. 13-14.)

As CSEA points out, the evidence in this case does not meet these standards. Although Ms. Koehler testified that the District had a practice of making shift changes during her seven year tenure, she was unable to cite a single specific example. Moreover, she conceded in her testimony that the District never notified CSEA of the shift assignments and thus never subjected the decisions to the negotiating process. Under these circumstances, there is insufficient evidence to conclude that

the District had the right to unilaterally make shift assignments on the basis of an open past practice.

The only specific examples of such changes came from Mr. Price himself. His employment history dating from the late 1970s indicated that his shift was changed on several occasions. However, the record is less than clear concerning the reasons for his various movements and whether the changes were voluntary or involuntary. On one occasion he said he applied for a change from a Custodian II to a Laundry Worker I at the request of Mr. Cota because his position on the graveyard shift was being eliminated. He later returned to a Custodian II position for undisclosed reasons and then voluntarily traded for a roving custodial assignment. After the roving positions were closed, he was placed at Los Altos High School. Plainly, some of these assignments were voluntary, while some were involuntary or dictated by District needs. In any event, the evidence surrounding each move is extremely sparse.

This brief summary of a single employee's approximately 15-year journey through the District's classified ranks hardly qualifies as the kind of past practice necessary to support the District's defense here. More importantly, it bears repeating that CSEA was never given notice of these events by the District, nor is there evidence in the record to base a conclusion that CSEA otherwise knew or should have known of the existence of a practice the District now claims as a defense. Under these circumstances, the District violated the Act when it refused

CSEA's request to negotiate in March 1995. (San Jacinto Unified School District (1994) PERB Decision No. 1078, adopting proposed decision of administrative law judge at 18 PERC 1)25059, pp. 182, 188 (even if the District had a practice of unilaterally changing shifts in the past, "[a] union's acquiescence in previous unilateral changes does not operate as a waiver of the right to bargain for all times").) Therefore, the District's past practice defense is rejected.

In support of its claim that it retained the right to change shifts under the collective bargaining agreement, the District relies on a broadly worded "Management Rights" clause in the agreement. In relevant part, that provision states

> It is understood and agreed that the district retains all of its powers and authority to direct, manage, and control to the full extent of the law. Included in but not limited to those duties and powers are the exclusive right to: . . . direct the work of its employees; determine the times and hours of operation; determine the kinds and levels of services to be provided, and the method and means of providing them; . . . determine staffing patterns; determine the number and kinds of personnel required; maintain the efficiency of district operations; . . . In addition, the board retains the right to hire, transfer, assign, evaluate, promote, terminate, and discipline employees.

The same clause also provides that these enumerated rights "shall be limited only by the specific and express terms of this agreement."

The District argues that the management rights clause encompasses the authority to change shifts, and that nothing in

the agreement limits that right. Therefore, it was free to unilaterally change Mr. price's shift.

For the District to prevail on this argument, it must show that CSEA waived its right to negotiate about shift changes in "clear and unmistakable" terms. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74; Oakland Unified School District v. Public Employment Relations Board (1981) 120 Cal.App.3d 1007, 1011 [175 Cal.Rptr. 105].) A review of applicable precedent leads to the conclusion that the District has not done so.

It is well established under the National Labor Relations Act that general language in a management rights clause to the effect that the employer retains the right to take more specific actions affecting negotiable terms and conditions of employment falls short of being a clear and unmistakable waiver. In the private sector, when a management rights clause is the source of the asserted waiver, it is normally scrutinized to determine whether it affords justification for the "specific" unilateral action at issue. (See Hardin, Developing Labor Law, Third Edition, Vol. I, pp. 703-704.)

The same rationale is followed by California courts. In Independent Union of Public Service Employees v. County of Sacramento (1983) 147 Cal.App.3d 482 [195 Cal.Rptr. 206], a case similar to the instant dispute, a county employer unilaterally changed the shifts of several custodians. In defending against the union's complaint, the county argued that the "county rights"

provision in its memorandum of understanding giving it the right to "direct and assign" its employees permitted the shift change. The appellate court disagreed, concluding that the contract language giving the county the right to "direct and assign" employees did not constitute a "clear and unmistakable" waiver of the right to negotiate about the shift changes. (id., at pp. 487-488.)

PERB has taken a similar approach in a number of cases. In San Jacinto Unified School District, supra, PERB Decision No. 1078, the district unilaterally changed the shifts of classified employees who worked athletic events. In doing so, the district relied on a broadly worded management rights clause giving it the authority to "determine the times and hours of operation . . . to assign . . . employees" and to "determine the kind and levels of services to be provided." This general language in the management rights clause --which, incidentally, is virtually identical to the clause in the instant case -- did not give the employer the right to unilaterally change employee shifts, the Board found, because it did not address the more specific change in shifts worked by classified employees during athletic events. "A generally-worded management rights clause will not be construed as a waiver of statutory bargaining rights." (Id., at 18 PERC H25059, p. 188; see also Moreno Valley Unified School District, supra, PERB Decision No. 1106, adopting proposed decision of administrative law judge at 18 PERC (25134,

pp. 458-459 (management rights clause giving employer authority to determine "staffing patterns" and to "assign" employees does not also confer the right to change shifts); State of California (Department of Mental Health) (1990) PERB Decision No. 840-S, p. 2, fn. 2, adopting proposed decision of administrative law judge at 14 PERC 21103, p. 406 (broadly worded management rights clause giving employer the right to determine "scheduling" does not constitute waiver of union right to negotiate about change in nurses' rotating workweek schedule).)

In contrast, PERB will find a waiver of bargaining rights when a management rights clause reserves to the employer the right to take action in the specific area contested by the union. (See e.g., Mammoth Unified School District (1983) PERB Decision NO. 371 (union waived its right to negotiate about employee suspensions under a management rights clause that reserved to the employer "the right to . . . suspend and terminate employees").)

The management rights clause relied upon by the District in this case does not contain the level of specificity required under PERB law to constitute a clear and unmistakable waiver of CSEA's right to negotiate about shift changes. While the clause admittedly gives the District exclusive authority in a number of broadly described areas -- e.g., directing the work of employees, determining staffing patterns and the kinds/levels of services, assigning and transferring employees, etc. -- it does not

expressly address the District's authority in the area of shift changes.[7]

In the absence of bargaining history or other evidence that compels a different interpretation, it is concluded that the District did not retain the right to change hours of unit employees under the management rights clause in the current agreement. Accordingly, the District had an obligation to negotiate with CSEA about the change in Mr. Price's hours occasioned by his shift change. When it refused CSEA's request to negotiate, it breached its obligation to negotiate in good faith, in violation of section 3543.5(c).

REMEDY

The PERB in section 3543.1(c) is given:

> . . . 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.

It has been found that the District breached its obligation to negotiate about a shift change that altered the hours of Mr. Price, a bargaining unit employee, in violation of section 3543.5(c). By the same conduct, the District denied CSEA the right to represent its members, in violation of section 3543.5(b). The conduct also denied Mr. Price the right to be

[7]I note that Article VII of the agreement expressly defines a "transfer" as "a change of job location." Therefore, the District's reserved right to transfer employees has no application here.

represented by his chosen representative in his employment relations with the District, in violation of section 3543.5(a). It is therefore appropriate to order the District to cease and desist from such activity in the future.

As a remedy, CSEA also seeks (1) Mr. Price's return to the night shift at Los Altos High School as a Custodian II; (2) reimbursement for lost shift differential pay; and (3) reimbursement for "secondary pay" associated with the loss of employment with Levitz Furniture.

The record indicates that Mr. Price has already returned to his position as Custodian II on the night shift. However, if that has not occurred, the District is hereby ordered, upon request by CSEA, to return Mr. Price to the night shift at Los Altos High School. The District shall also be ordered to make Mr. Price whole for any losses, financial and otherwise, he incurred as a result of the unlawful unilateral change.

However, the make whole remedy granted here shall not extend to reimbursement for lost "secondary pay" from Levitz Furniture. While PERB is given broad remedial power, its authority typically runs to remedies that address rights guaranteed by the EERA. Not every individual monetary or other personal loss related to a violation of EERA is compensable under PERB law. (Cf. State of California (Secretary of State) (1990) PERB Decision No. 812-S (PERB lacks authority to award punitive damages or damages for emotional or psychological injuries).) Indeed, CSEA has cited no

legal authority, and I am aware of none, that supports the novel remedy the union seeks here.

It is also appropriate that the District be required to post a notice incorporating the terms of the Order. The Notice should be subscribed by an authorized agent of the District, indicating that it will comply with the terms thereof. The Notice shall not be reduced in size and reasonable effort will be taken to insure that it is not altered, covered by any material or defaced and will be replaced if necessary. Posting such a notice will inform employees that the District has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. (Davis Unified School District, et al., supra, PERB Decision No. 116; see Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to the Educational Employment Relations Act (Act), Government Code section 3541(c), it is hereby ordered that the Hacienda La Puente Unified School District (District) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to negotiate with the California School Employees Association and its Chapter #115

(CSEA) about changes in shifts that alter hours of bargaining unit employees.

2. Denying CSEA the right to represent its members in their employment relations with the District.

3. Denying bargaining unit employees the right to be represented by CSEA in their employment relations with the District.

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

1. Upon request by CSEA, return Mr. Edward price to the position of Custodian II on the night shift at Los Altos High School.

2. Consistent with this proposed decision, make Mr. Edward Price whole for losses, financial and otherwise, he incurred as a result of the District's unlawful action.

3. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. 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.

4. Within five (5) workdays of service of a final decision in this matter, notify the Los Angeles Regional Director

of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the charging party.

Pursuant to California Code of Regulations, 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 Cal. Code Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5 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 Cal. Code Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 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 Cal. Code Regs., tit. 8, secs. 32300, 32305 and 32140.)

FRED D'ORAZIO
Administrative Law Judge