

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ASSOCIATION OF SONOMA COUNTY)
OFFICE OF EDUCATION/CTA/NEA,)
)
Charging Party,) Case No. SF-CE-1827
)
v.) PERB Decision No. 1225
)
SONOMA COUNTY OFFICE OF EDUCATION,) November 4, 1997
)
Respondent.)
_____)

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for Association of Sonoma County Office of Education/CTA/NEA; School and College Legal Services by Robert S. Latchaw, Representative, for Sonoma County Office of Education.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (Board) on appeal by the Sonoma County Office of Education (County) to an administrative law judge's (ALJ) proposed decision (attached). The ALJ found that the County violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)¹ when it increased the class size

¹EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, 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.

in certain classrooms without providing the Association of Sonoma County Office of Education/CTA/NEA (Association) with notice or an opportunity to negotiate.

The Board has reviewed the entire record, including the ALJ's proposed decision, the County's exceptions and the Association's response. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, the Board finds that the Sonoma County Office of Education (County) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), when it increased class size without providing the Association of Sonoma County Office of Education/CTA/NEA (Association) with notice or an opportunity to negotiate the change.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the County, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate with the Association about the change in class size in the court

(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.

schools.

2. Denying the Association its right to represent bargaining unit members in their employment relations with the County.

3. Denying bargaining unit members their right to be represented by their chosen representative.

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

1. Return the court school class size practice to that which prevailed prior to the change.

2. 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, altered, defaced or covered by any other material.

3. 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 the director's instructions.

Chairman Caffrey and Member Dyer joined in this Decision.



**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**

After a hearing in Unfair Practice Case No. SF-CE-1827, Association of Sonoma County Office of Education/CTA/NEA v. Sonoma County Office of Education, in which all parties had the right to participate, it has been found that the Sonoma County Office of Education (County) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c) when it increased class size without providing the Association of Sonoma County Office of Education/CTA/NEA (Association) with notice or an opportunity to negotiate the change.

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 meet and negotiate with the Association about the change in class size in the court schools.
2. Denying the Association its right to represent bargaining unit members in their employment relations with the County.
3. Denying bargaining unit members their right to be represented by their chosen representative.

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

Return the court school class size practice to that which prevailed prior to the change.

Dated: _____ SONOMA COUNTY OFFICE OF EDUCATION

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 WITH ANY OTHER MATERIAL.

Employment Relations Act (EERA or Act) section 3543.5(a), (b) and (c).¹

The County did not file an answer.²

Settlement efforts were without success.

Formal hearing was held on May 21, 1996, in Sonoma, California. During the hearing, ASCOE moved to amend paragraphs 3 and 4 of the complaint to delineate the specific areas in which class size changes were made. The motion was granted. The delineation was that the class size changes were made in the court schools. With the filing of post-hearing briefs on July 9, 1996, the matter was deemed submitted for decision.

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. In relevant part, section 3543.5 states that it is an unfair practice for the public school employer 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. 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.

²After ascertaining from PERB files that no answer was on file, the County was given an opportunity to submit an endorsed copy of the answer filed with PERB. No endorsed copy was provided.

FINDINGS OF FACT

The County is an employer and ASCOE is the exclusive representative of employees within the County, both within the meaning of the Act.

The bargaining unit represented by ASCOE has 176 members and includes teachers for the court schools, community schools, special education, preschool, speech and language services, adaptive physical education, hard of hearing, visually handicapped and nurses.

Victor Trucco (Trucco) is director of the Alternative Education Program, which includes the court and community schools. Noel Shumway (Shumway) has served as the County representative in negotiations and administration of the parties' collective bargaining agreements (CBA).

Teresa Smith (Smith), is a speech and language therapist and has served as ASCOE chief negotiator for four years.

The parties have had a series of successive CBAs, the last of which ended June 30, 1994. While very extensive in covering terms and conditions of employment, that agreement did not contain any provisions on class size.

The County operates two court schools for student inmates under the jurisdiction of the County probation department. One school is Hamilton DeForest (Hamilton) and the other is the Youth Camp. The students at both schools are awaiting sentencing by the probation department.

The court school classes run year round. Only enrolled students may attend and the County gets standard average daily attendance support from the State of California. Student attendance is erratic but for at least 15 years the County has maintained a practice of class size not exceeding 15 in the court schools, with fewer in the maximum security area.³

On October 24, 1994, during negotiations on a successor agreement, the parties agreed to establish a joint study committee to review issues relating to class size procedure during the 1994-95 school year.⁴

The new article was initiated by ASCOE because there were concerns about the ratio of students to teachers. ASCOE's 1994-95 contract proposal, presented to the County on February 2, 1995, included a provision to continue the class size committee.

Sometime in March 1995, Smith heard a complaint from Bill Brooke, a teacher at Hamilton, that the County planned to increase the class size at the school.

³Three teachers testified as to the class size at the Hamilton site. One had been at the site for 15 years. His testimony was that 15 was the class size for the live-in unit and 12 for the maximum security area. A fourth teacher, assigned to the Youth Camp for 25 years, had class sizes ranging from 17 to 22, which were split with another teacher.

⁴The provision provided:

SCOE & ASCOE will establish a joint study-committee to review issues during the 1994-95 school year relating to class size procedure. Committee membership will be by mutual agreement.

Smith wrote to Shumway on March 23, 1995, about the change in class size from 15 to 1 to 30 to 1. She wrote that the change was a change in working conditions and demanded to bargain class size for the court school classes. Smith noted that in the prior year's negotiations the parties had agreed to a class size committee and that changing class size before the recommendations of that committee issued "does not show good faith."⁵

The County did not respond to this letter.

The class size committee held four meetings between February 21 and June 2, 1995. On May 24, 1995, the class size committee issued a draft proposal that included a recommendation of the 15 to 1 ratio for court and community schools, with at least one full-time assistant.

Mary Lantz (Lantz), assistant superintendent, wrote to class size committee chair Friedman on June 1, 1995, expressing concern about the committee recommendations on class size. With the exception of one special program, she noted there were no legal caseload maximums. Lantz suggested another approach.

Trucco made a presentation to the class size committee on June 2, 1995. Trucco explained a reorganization that was occurring at the juvenile hall, and the impact of such change on the class size ratio.⁶

⁵The committee was already underway and was chaired by Nancy Friedman (Friedman), a member of the negotiating team for ASCOE.

⁶Minutes of the meeting, made by Friedman, reflect a suggestion that Trucco said past practice was a class size of 15 and that the range could go from 18 to 30. Trucco denied making that statement. Because of other findings regarding the actual

On June 8, 1995, Lantz wrote to three teachers at Hamilton and indicated that class size was to be in the range of 20 to 24 students. Also planned, wrote Lantz, was to have an instructional aide and juvenile hall assistant in the classroom.

On June 27, 1995, the County made a counter package proposal to resolve negotiations. Among the provisions was to continue the class size committee, adding more administrative representatives, and that the parties would agree to meet and negotiate following the committee's recommendations.

On that same day the parties' negotiations teams agreed to meet and negotiate class size following recommendations of the class size committee.

Also on that same day, Roberta Jue (Jue), ASCOE president, wrote to Shumway regarding the County's failure to negotiate court school class size per ASCOE's earlier request. Jue then requested that no changes in the class size of court school classrooms be made until the matter was resolved.

On July 7, 1995, Shumway responded to Jue's demand. Shumway countered that the County had responded to ASCOE's March 23 demand to negotiate. He said earlier discussions lead the County to understand that the issue was included in the class size committee's charge. He noted Trucco's June 2 meeting with the committee to explain the impact of court school program on class size. He stated that if ASCOE did not want the committee to

practice in class size, it is unnecessary to resolve this **apparent conflict.**

carry out the charge, then the County would bargain the issue. He expressed his disappointment that ASCOE was changing the ground rules in the middle of "this collaborative process."

George Cassel, ASCOE representative, responded on August 18, 1995, noting that Shumway was ignoring the fact that the County was not waiting for the committee's recommendations, but rather, during the class size committee's deliberations, was itself making an unilateral change at the court schools.

On August 9, 1995, principal Laurie Mason notified all court school and community school teachers that their 1995-96 assignments would have enrollments of 20 to 30 students.

Trucco said that as a result of the change, there is now one instructor, one assistant and up to three probation supervisors for up to 30 students.

ISSUE

Whether the assignment of 20 to 30 students per teacher was a violation of the Act?

CONCLUSIONS OF LAW

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). (Regents of the University of California (1985) PERB Decision No. 520-H; 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 (Grant); Pajaro Valley Unified School District, supra, PERB Decision No. 51; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

The County urges that the union has failed to prove a violation of the Act under the Grant analysis.

I disagree. Taking the Grant analysis in reverse order, class size is expressly referred to in EERA's definition of scope of representation.⁷

The implementation of the higher class size ratio was not a breach of the agreement, as the agreement did not refer to class size. However, the increase in class size ratio for the court schools did amount to a change of policy and has a generalized effect and continuing impact upon bargaining unit members' terms and conditions of employment.

⁷Section 3543.2.

There is no question that the past practice was to have no more than 15 students in each class. There is no question that a new and higher ratio was placed into effect and that this created a different set of working conditions for the teachers. The County recognized this (along with the probation department) by adding an instructional aide and up to three probation officers in each classroom.

The County never gave ASCOE notice of the intended change. The County made the decision to change the class size practice, and when ASCOE learned of this change and demanded to negotiate, the employer refused. ASCOE wrote to the County in March 1995 with information of a possible change, and demanded to bargain any change in class size. The County ignored this request. ASCOE wrote to the County again, on June 27, 1995, noting the failure to respond to the request to negotiate made earlier and requested no change in class size until the matter had been resolved with ASCOE.

The County responded to this demand with the disingenuous contention that ASCOE was bypassing the class size committee's work. Thus, it is clear that ASCOE was denied the opportunity to negotiate the change.

Under the last of the Grant criteria, the change of class size in the court schools to 20 to 30 students for each teacher was a striking contrast to the past practice of class size ratios of 15 to one teacher.

I conclude that ASCOE has established a unilateral change under Grant.

The County argues that since none of ASCOE's witnesses are currently teaching in the court schools, there is no demonstrated impact of the increased class size policy.

This argument is rejected. The statutory definition of scope of representation expressly includes class size. Since class size itself is negotiable, the charging party need not demonstrate some impact of a change in class size, before prevailing on a charge of unilateral change of class size. The testimony of the teachers clearly established a past practice of a maximum of 15 students per teacher. Trucco's testimony established that the class size has gone to as high as 30 students to one teacher.⁸

The County argues that the employer's rights provision of the parties' CBA, which includes the right to determine staffing patterns, authorizes the change in class size.

However, waiver by contract is an affirmative defense that was never raised by the County before or during the hearing. PERB Regulation 32644⁹ imposes upon a respondent the duty to set forth any affirmative defense in its answer. The County did not file an answer to the complaint, and no affirmative defense is

⁸The fact that there are additional staff in the classroom does not mitigate the negotiability of class size.

⁹PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

before the administrative law judge.¹⁰ (See Beverly Hills Unified School District (1990) PERB Decision No. 789.)

Accordingly, the defense of the employer's rights provision is rejected.¹¹

The County contends that class size ratio of 1 to 15 is a bargaining position and thus should not be imposed on the County. As the forgoing analysis has demonstrated, however, the clear and undisputed past practice is to have class size at 15 or less.

The County unilaterally changed this past practice when it boosted class size to 20 to 30 students. By that action, the County violated section 3543.5(c) and, derivatively, section 3543.5(a) and (b).

REMEDY

Under section 3541.5 (c) PERB is empowered 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 County violated EERA when it unilaterally increased the class size of the court schools. This

¹⁰The parties were advised at the hearing that because of the absence of an answer on file, I would consider no affirmative defenses.

¹¹Even if one were to consider the contract defense, class size and staffing patterns do not mean the same thing. Class size defines the ratio of students per teacher. There was no evidence in the record to ascertain what staffing pattern was meant by the parties in this case. Staffing patterns could mean, among other things, allocation of personnel to specific duties.

same conduct was found to interfere with ASCOE's rights to represent bargaining unit members, and constituted interference with bargaining unit members' right to be represented by ASCOE. It is appropriate to order the County to cease and desist from such activity in the future. It is further appropriate to order the County to restore the status quo ante, that is, return to the class size ratio that prevailed before the unlawful act. (See Compton Unified School District (1989) PERB Decision No. 784.) The County will restore the practice of class size ratios to 1 to 15, save for the maximum security area, where the class size was 1 to 12.

It is also appropriate that the County be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the County, indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the County 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 readiness of the County to comply with the ordered remedy. (Davis Unified School District, et al., supra, PERB Decision No. 116; 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 3541.5(c), it is hereby ordered that the Sonoma County Office of Education (County) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate with the Association of Sonoma County Office of Education/CTA/NEA (ASCOE) about the change in class size in the court schools.

2. Denying ASCOE its right to represent bargaining unit members in their employment relations with the County.

3. Denying bargaining unit members their right to be represented by their chosen representative.

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

1. Return to the court school class size practice that prevailed prior to the change.

2. Within 10 days of service of this proposed decision, post at all work locations where notices to employees are customarily placed, copies of the notice attached as an appendix hereto. Such posting shall be maintained for a period of thirty (30) consecutive work days. Reasonable steps shall be taken to ensure that said notices are not reduced in size, altered, defaced or covered by any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the

San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

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.)

Gary Gallery
Administrative Law Judge