

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CSEA and its NORTH SACRAMENTO )  
CHAPTER NO. 368, )  
 )  
Charging Party, ) Case No. S-CE-203  
 )  
v. ) PERB Decision No. 193  
 )  
NORTH SACRAMENTO SCHOOL DISTRICT ) December 31, 1981  
 )  
Respondent. )  
\_\_\_\_\_ )

Appearances: Charles L. Morrone, Attorney for California School Employees Association and its North Sacramento Chapter No. 368; Richard L. Hamilton, Attorney (Biddle, Walters & Bukey) for North Sacramento School District.

Before Jaeger, Moore, and Tovar Members.

DECISION

The instant case comes before the Public Employment Relations Board (hereafter Board) on exceptions to the hearing officer's proposed decision filed by the North Sacramento School District (hereafter District).

The hearing officer determined that the District violated section 3543.5(c) of the Educational Employment Relations Act (hereafter EERA)<sup>1</sup> by failing to meet and negotiate in good

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<sup>1</sup>The EERA is codified at Government Code Section 3540 et. seq. All statutory citations are to the Government Code unless otherwise specified.

Subsection 3543.5(c) states:

It shall be unlawful for a public school employer to:

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

faith with the California School Employees Association (hereafter CSEA) regarding a reduction in employee work hours, by negotiating directly with employees, and by taking unilateral action on a matter within the scope of representation.<sup>2</sup>

The Board has reviewed the record and concludes that the

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<sup>2</sup>Section 3543.2 defines the scope of representation for exclusive representatives as follows:

The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certified personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

hearing officer's findings of fact as set forth in the proposed decision, attached hereto, are substantially free from prejudicial error and are adopted by the Board itself.<sup>3</sup>

The Board further affirms the hearing officer's conclusions of law as modified below. The Board additionally finds that the District's conduct violated subsections 3543.5(a) and (b).<sup>4</sup>

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<sup>3</sup>The District excepts to several of the hearing officer's findings of fact. First, to her statement that the District was responding to Proposition 13 constraints in deciding to reduce the hours of work (hearing officer's proposed decision, page 3). The District alleges it was not responding to Proposition 13 fiscal constraints in setting the meeting with the employees and that it also was not attempting to negotiate directly with employees. Although Proposition 13 was not voted on until June 1978, and the meeting between the District and teachers' aides took place in the spring of 1978, we find this exception without merit. The District admits that during the spring of 1978 it faced the "spectre" of Proposition 13, that it was very mindful of the issue and aware that there would be "massive curtailments" of school districts' income. Second, the District excepts to the hearing officer's conclusion that reduction in hours notices were given when, in fact, such notices were layoff notices issued in accordance with appropriate Education Code provisions as well as Personnel Commission Rules. This second exception goes to the heart of the issue in the case and is addressed in the discussion section of the Decision. The District's third exception is based on the hearing officer's finding that all the employees accepted a reduction in hours. The District claims some exercised the option to go on the reemployment list--take a layoff in lieu of reduction in hours. The record is not clear as to how many, if any, did exercise that option. Further, even if the hearing officer misstated the record, her error would not affect the outcome of the case and thus is not prejudicial.

<sup>4</sup>Subsections 3543.5(a) and (b) make it unlawful for an employer to:

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

## DISCUSSION

The District does not argue that reduction of hours is not within the scope of representation. However, the District does except to the hearing officer's characterization of its action as a "reduction in hours." It claims it was actually instituting a "layoff" procedure, and that only as part of that procedure did it offer a reduction in hours in lieu of layoff. We find that the hearing officer correctly characterized the District's actions as a reduction in hours. The District's contention helps support the finding: in lieu of means in place of, instead of. As the hearing officer correctly points out, layoffs and reduction of hours are separate actions: one

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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.

An employer that fails to meet and negotiate with the exclusive representative necessarily denies that organization its right to represent its members in violation of subsection 3543.5(b). (San Francisco Community College District (10/12/79) PERB Decision No. 105.) In San Francisco CCD, a case including a flat refusal to negotiate, we also determined that an employer's failure or refusal to negotiate interferes with its employees' right to be represented in their employment relationship by the representative of their choice in violation of subsection 3543.5(a). Although in the instant case the Association dropped its subsection 3543.5(b) charge before the hearing officer rendered his decision, the Board sua sponte finds concurrent subsections (a) and (b) violations where there is a refusal to negotiate. As we held in the San Francisco case, if the same employer concurrently violates more than one unfair practice provision, it is the duty of the Board to find more than one violation. (See Oakland Unified School District (4/23/80) PERB Decision No. 126, at pp. 2-3, footnote 2 and San Diego Unified School District (6/19/80) PERB Decision No. 137, at p. 5, footnote 5.)

suspends the employment relationship entirely for a time; the other maintains the relationship but alters some of its terms. Just because the District opted for reduction in hours instead of layoff does not justify its failure to meet and confer with the exclusive representatives on an issue which is clearly within scope of representation.<sup>5</sup> Healdsburg Union High School District (6/19/80) PERB Decision No. 132.

The District argues that the reduction in hours in lieu of layoff notice is appropriate under subsection 45101(g) and section 45298 of the Education Code and Personnel Commission Rule 3.19.<sup>6</sup> Section 3540 provides in part that:

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<sup>5</sup>If the District was instituting a layoff as they contend, it was still obligated to negotiate as to effects and manner of implementation of the layoff - something it failed to do.

<sup>6</sup>Education Code section 45101 states in pertinent part:

Definitions. Definitions as used in this chapter:

(g) "Layoff for lack of funds or layoff for lack of work" includes any reduction in hours of employment or assignment to a class or grade lower than that in which the employee has permanence, voluntarily consented to by the employee, in order to avoid interruption of employment by layoff.

The provisions of this section shall not apply to school districts to which the provisions of Article 6 (commencing with section 45240) of this chapter are applicable.

Education Code section 45298 states:

Reemployment and promotional examination preference of persons laid off: Voluntary

Nothing contained [in EERA] shall be deemed to supersede other provisions of the

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demotions or reduction in time. Persons laid off because of lack of work or lack of funds are eligible to reemployment in preference to new applicants. In addition, such persons laid off have a right to participate in promotional examinations within the district during the period of 39 months.

Employees who take voluntary demotions or voluntary reductions in assigned time in lieu of layoff shall be, at the option of employee, returned to a position in their former class or to positions which increased assigned time as vacancies become available, and without limitation of time, but if there is a valid reemployment list they shall be arranged on that list in accordance with their proper seniority.

Personnel Commission Rule 3.19 states:

Decreases In Assigned Time

A. When a permanent position is to be reduced in assigned time, the incumbent shall have the right to transfer into any vacant position in the class which is not greater in assigned time than his former position. If a vacant, permanent position of equal time is not available, the incumbent may bump the incumbent of a position with equal time who has the least seniority in the class, provided that he has greater seniority. If no such option is available, he may bump the employee with the least seniority among those occupying positions of less time than the original position and greater time than the reduced position, provided that he has greater seniority. An employee so bumped shall have similar bumping rights.

B. When an employee is faced with a reduction in assigned time, the rules on

Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

The majority in Healdsburg, supra, interpreted this language to mean that, where a proposal pertains to a subject which is covered by the Education Code, the negotiability of that proposal or subject is not precluded so long as it does not directly conflict with the Code. Healdsburg, supra, at pp. 14-15. Subsection 45101(g) applies exclusively to nonmerit systems and is therefore inapplicable to the North Sacramento School District's merit system.<sup>7</sup> Section 45298, applicable to merit system districts, establishes a procedure to be followed regarding promotional and reemployment practices subsequent to layoff. Personnel Commission Rule 3.19

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transfer and demotion shall be given a liberal interpretation in order to relieve the effect of such reduction.

C. The employee shall be notified in writing of any reduction in hours. The employee shall acknowledge receipt of such notification and agreement to the reduction by affixing his or her signature to a copy of the notification and returning the same to the District Administration.

<sup>7</sup>A merit system district is one which observes civil service procedures.

establishes employee rights of transfer and bumping rights after it's been decided that a permanent position is to be reduced in assigned time. Therefore, neither section 45298 of the Education Code nor Personnel Commission Rule 3.19 conflict with the finding that the reduction of hours issue is negotiable. As in the voluntary reduction in hours proposal analyzed in Healdsburg, supra, the notices sent out by the District in the present case allowed the employees affected by the layoff decision to voluntarily select a reduction in hours in lieu of layoff. The Board in Healdsburg found that such a proposal was "inextricably bound to employees' wages and hours." Healdsburg, supra, p. 77.

We find that the decision to reduce hours is within the scope of representation. The District thus violated subsection 3543.5(c) by taking unilateral action on a matter in which the District was obligated to negotiate. San Mateo Community College District (6/8/79) PERB Decision No. 94; Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51.

Although the hearing officer did not find a violation of subsections 3543.5(a) and (b) when the District met directly with the employees and instituted unilateral changes in hours, nonetheless, Board precedent clearly supports our finding that these acts are a violation of subsections 3543.5(a) and (b).

San Francisco Community College District (10/12/79) PERB Decision No. 105.

ORDER

Based upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the North Sacramento School District has violated subsections 3543.5(a), (b) and (c) of the Educational Relations Employment Act. It is hereby ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Taking unilateral action with respect to reduction in hours of classified employees or other matters within the scope of representation;

2. Negotiating or seeking to negotiate directly with unit employees with respect to reduction of their hours or other matters within the scope of representation;

3. In any other manner failing or refusing, upon request, to meet and negotiate in good faith with CSEA as the exclusive representative of its classified employees;

4. Denying CSEA its right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation or by negotiating directly with unit employees and;

5. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally

changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE ACT:

1. Reinstate, upon request, all teacher aides to their full hours of employment prior to the June and July 1978 reduction of hours; make whole each of the teacher aides whose hours were so reduced for any loss of pay and benefits which they suffered because of reduced hours during the 1978-79 school year until such time as: (1) they are reinstated to their previous hours or; (2) their hours of employment are changed upon agreement with CSEA or; (3) the District has met and negotiated in good faith with CSEA through the impasse procedures;

2. Within five workdays of date of service of this Decision, post copies of this ORDER at its headquarters and in each school for 30 consecutive workdays while school is in session in conspicuous places where notices to classified employees are customarily posted; and

3. Upon completion of the posting period and within 35 workdays of service of this decision, notify the Sacramento regional director of the Public Employment Relations Board in writing of the action the District has taken to comply with the ORDER. Further, notify the Sacramento regional

director in writing when full compliance with this ORDER has been achieved.

By: Irene Tovar, Member

Barbara D. Moore, Member

John W. Jaeger, Member

APPENDIX: NOTICE.

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

After a hearing in which all parties had the right to participate, it has been found that the North Sacramento School District violated the Educational Employment Relations Act (EERA) by taking unilateral action regarding reduction of hours for teacher aides, without providing the exclusive representative, the California School Employees Association (CSEA) and its North Sacramento Chapter No. 368, with notice and an opportunity to negotiate. As a result of this conduct, we have been ordered to post this Notice. We will abide by the following:

WE WILL NOT take unilateral action regarding proposed changes of employee wages, hours or terms or conditions of employment, without providing the exclusive representative with notice and opportunity to negotiate.

WE WILL NOT deny to CSEA, or any other employee organization of the North Sacramento School District, rights guaranteed to them by the EERA.

WE WILL REINSTATE, upon request, all teacher aides to their full hours of employment prior to the June and July 1978 reduction of hours and make whole each of the teacher aides whose hours were so reduced for any loss of pay and benefits

which they suffered as a result of the reduction of hours during the 1978-79 school year until such time as (1) they are reinstated to their previous hours or, (2) their hours of employment are changed upon agreement with CSEA or, (3) after the District has met and negotiated in good faith with CSEA.

Dated:

NORTH SACRAMENTO SCHOOL DISTRICT

By: \_\_\_\_\_  
District Representative

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

PUBLIC EMPLOYMENT RELATIONS BOARD  
STATE OF CALIFORNIA



CSEA and its NORTH SACRAMENTO )  
CHAPTER NO. 368, )  
 ) Unfair Practice  
 ) Case No. S-CE-203-78/79  
Charging Party, )  
 ) PROPOSED DECISION  
v. )  
 )  
NORTH SACRAMENTO SCHOOL ) (6/13/79)  
DISTRICT, )  
 )  
Respondent. )

Appearances: Richard L. Hamilton, Attorney (Biddle, Walters & Bukey), for North Sacramento School District; Charles J. Morrone, Attorney, for CSEA and its North Sacramento Chapter No. 368.

Before Marian Kennedy, Hearing Officer

STATEMENT OF THE CASE

On December 13, 1978, CSEA and its North Sacramento Chapter No. 368 (hereafter CSEA) filed an unfair practice charge against North Sacramento School District (hereafter District) alleging that the District violated sections 3543, 3543.5(b) and 3543.5(c)<sup>1</sup> of the Educational Employment Relations Act (hereafter EERA) by negotiating directly with employees, for whom CSEA is an exclusive representative, by denying CSEA its right to represent these employees in their employment relations with the District, and by refusing to meet and negotiate in good faith with CSEA with respect to a reduction in work hours of these employees. Respondent answered denying each of the allegations.

<sup>1</sup>Unless otherwise specified, all statutory citations are to the Government Code.

Following an informal conference, a formal hearing was conducted in Sacramento on March 16, 1979. In its post-hearing brief, CSEA sought to withdraw its charges of violation of sections 3543 and 3543.5(b) and to "clarify" its 3543.5(c) charge, alleging that the District violated that section by negotiating directly with employees in the unit represented by CSEA and by taking unilateral action on a mandatory subject of negotiation. In its response brief, the District objected to the CSEA's amendment as untimely, since the amendment was first sought in CSEA's post-hearing brief. The District acknowledged, however, that it was not prejudiced by the language change. Since the change sought does not alter the substance of the charge but merely corrects the designation of the subsections of EERA allegedly violated, and the District is not thereby prejudiced, the clarification is permitted pursuant to California Administrative Code, title 8, part III, section 32655.

#### FINDINGS OF FACT

The parties are in substantial agreement on the facts. CSEA is the exclusive representative for a comprehensive unit of classified employees of the District, including teacher aides. The parties entered into a collective bargaining contract in September of 1977 effective through June of 1980.

In April or May of 1978 Mrs. Bonnie Ward, acting on behalf of the deputy superintendent for support services for the District, held a series of meetings with the teacher

aides in the various District schools. In these meetings the aides were asked whether they expected to return the following year and what were the maximum and minimum number of hours they would accept. The District had decided, in response to Proposition 13 financial constraints, to reduce the hours of some aides rather than lay off any of them. Mrs. Ward, therefore, also solicited the aides' agreement to reduced hours in lieu of layoff.

The single aide who testified stated that, faced with such a choice, she agreed to a reduction of hours. In addition, at least some of the aides were asked to meet separately with their school principal prior to the meeting with Mrs. Ward and in these meetings were informed of their option to accept reduction in hours in lieu of layoff, and acquiesced in the reduction in hours.

In late June and early July of 1978, the District sent out notices to 40 teacher aides formally telling each what their reduced hours would be and that their acceptance of reduced hours was an alternative to layoff. The notice further stated that any aide who did not notify the District that she accepted the reduced hours would be laid off as of a specified date. All employees accepted the reduction and none were laid off.

CSEA was not notified of either the aides' individual meetings with their principals or their group meetings with Mrs. Ward; nor was CSEA informed in advance of the reduction-in-hours notices.

CSEA first learned of the reduction in hours when a field representative called the District in late June or early July as part of a survey of school districts to inquire whether any layoffs or reduction in hours of employees was contemplated as a result of the passage of Proposition 13. Upon being told that there would be reductions in hours for some teacher aides, she requested and subsequently received copies of the notices sent by the District to the aides.

Thereafter, the field representative wrote to the superintendent of the District protesting the District's action in reducing aides' hours without first meeting and negotiating with CSEA. At her request, CSEA and the District met on the issue on July 28, 1978. At the meeting CSEA demanded that the District negotiate with respect to the reduction of hours. The District refused, asserting that the subject was outside the scope of negotiations. No further meetings were held.

The current negotiated contract was entered into by the parties on September 8, 1977. Included in CSEA's initial contract proposal was an article dealing with layoffs and reemployment. The proposed article defined layoff, provided that the personnel commission's layoff procedures shall apply, and provided for the continued accumulation of seniority and for rehire rights. It made no reference to reduction of hours or reduction of hours in lieu of layoff. The District responded that that article was outside the scope of representation.

CSEA's witness, a member of the union's negotiating team, testified that the layoff proposal was raised only once in negotiations and, in light of the District's refusal to discuss the proposal as outside of scope of representation, the union did not raise it again. The District's negotiating team witness did not recall the article being raised orally in negotiations at all.

CSEA responded to the District's refusal to negotiate the layoff article, as well as several others, by filing an unfair practice charge with the Public Employment Relations Board (hereafter PERB) on May 23, 1977. On July 25, 1977, CSEA wrote to the PERB withdrawing the charge, without prejudice, as part of the agreement between the parties to a contract.

The collective negotiating contract in effect at all times relevant in this case includes a "waiver" clause which reads as follows:

Waiver

- A. The Association agrees not to initiate or reopen negotiations on any topic before one hundred and twenty (120) days prior to the termination date of this Agreement, unless the scope of representation under the Rodda Act (SB 160) is broadened by State Statute, or by Educational Employment Relations Board rule, regulation or order, in which case negotiations may be reopened ninety (90) days after such amendment solely on matters hitherto not subject to negotiations.
- B. The District retains the right to make, modify and enforce reasonable rules and procedures not inconsistent with this Agreement.
- C. Items within this agreement requiring clarification may be subject to negotiation during the period of this agreement upon the request and mutual agreement of both parties.

ANALYSIS AND CONCLUSIONS OF LAW

CSEA contends that the District committed unfair practices by negotiating directly with employees regarding reduction of hours and by unilaterally reducing their hours without first negotiating with CSEA.

The District contends that the reduction of hours was made in lieu of laying off employees and that it therefore had no obligation to negotiate with CSEA and could unilaterally take action on that subject on three alternative grounds: (1) reduction of hours in lieu of layoff is not a mandatory subject of negotiation; (2) even if it is a mandatory subject, the union waived its right to meet and negotiate on the subject during the contract term by agreeing to the inclusion of a "waiver" clause in the contract; or (3) if it is a mandatory subject of negotiation, CSEA is estopped from so arguing now because it previously filed an unfair practice charge on that issue and then withdrew the charge as part of the agreement of the parties in reaching a contract.

Section 3543.5(c) provides that:

It shall be unlawful for a public school employer to: . . . (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative. . . .

Meeting and negotiating in good faith is defined by section 3540.1(h) as follows:

. . . meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, . . .

Finally, "scope of representation" is defined in section 3543.2 as being limited to:

. . . matters relating to wages, hours of employment, and other terms and conditions of employment. 'Terms and conditions of employment' mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. . . . All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, . . .

#### Scope of Representation

The District takes the position that the reduction in hours of employees in this case does not fall within the statutorily defined scope of representation. As part of that argument the District characterizes its action as a "layoff" or "reduction of hours in lieu of layoff." In fact, the District notified each of 40 teacher aides that their hours would be reduced to a specified number, that they could signify acceptance of the new hours by completing and returning a form and that, if an acceptance was not received by the District, the aide would be laid off as of a specified date. No one was laid off.

It is clear that the unilateral action taken here was simply the altering of the hours of work of bargaining unit employees. While layoffs, with one exception, are not among the enumerated terms and conditions of employment in section 3543.2, there is no question that hours of employment is explicitly a mandatory subject of negotiation. Indeed, the

District offers no ground for finding that reduction of hours is not directly a matter of "hours of employment" and therefore within scope.

The District's characterization of its unilateral action as a layoff or reduction in hours in lieu of layoff stems from the Education Code requirement that any reduction in hours of classified employees must be "consented to by the employee in lieu of layoff." California Sch. Employees Assn. v. Pasadena Unified Sch. Dist. (1977) 71 Cal.App.3d 318; [139 Cal.Rptr 633]. Layoffs and reductions of hours are, nonetheless, separate actions: one suspends the employment relationship entirely for a time; the other maintains the relationship but alters some of its terms. The District made the policy decision that its educational objectives would be better served by reducing the hours of some 40 teacher aides rather than laying off a much smaller number of aides. By choosing to reduce hours and maintain the employment relationship, instead of instituting layoffs, the District brought itself within the mandatory scope of negotiation. The District cannot avoid that result by arguing that, if it had made the other choice, then arguably it would not have to negotiate.

The PERB has found, in accordance with National Labor Relations Board (hereafter NLRB) precedent, that an employer violates section 3543.5(c) by making unilateral changes in matters which are mandatory subjects of negotiation. See Pajaro Valley Unified School District

(May 22, 1978) PERB No. 51<sup>2</sup> and cases cited therein;

NRTA-AARP Pharmacy (1974) 210 NLRB 443 [86 LRRM 1129].

Furthermore, while the question has not yet been directly decided by the PERB, it is well-settled law under the National Labor Relations Act that an employer violates its obligation to bargain in good faith with an exclusive representative by meeting and negotiating directly with employees on matters

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<sup>2</sup>In Pajaro, the PERB found that the unilateral action of passing on increased health benefit costs to employees did not constitute a refusal to negotiate in good faith because the employer was merely continuing a past practice of passing on those costs. In footnote #1 of its reply brief, the District alludes to the hearing officer's exclusion of proffered "past practice" evidence. The evidence which the District sought to introduce was that, prior to the EERA and prior to any collective negotiating contract, the District had routinely met with aides once each spring to solicit information about what hours they wanted to work and where during the next year. Essentially, the District's argument is that in the past it dealt directly with employees regarding their hours and it was only continuing that practice by meeting directly with employees in 1978-79 rather than negotiating with their exclusive representative.

The argument ignores the obvious fact that there is now a law obligating the District to negotiate with an exclusive representative of its employees and there is now such a representative while there was none in the past. "Past practice" cannot be ground for continuing even well-established acts which are now forbidden by the law.

Counsel for the District indicated in his argument on admissibility of the evidence that he did not seek to introduce evidence that CSEA had acquiesced in the District's dealing directly with employees in the past and thereby waived its right to object to the employer continuing that practice.

Finally, the evidence sought to be presented related only to past obtaining of information from aides in yearly spring meetings. The District did not offer to show that it has in the past negotiated layoffs versus reduction in hours with employees. While the soliciting of availability information would arguably not constitute negotiating directly with employees, it is also not the basis for finding the violation. It is the negotiation directly with employees of layoffs versus reduction of hours which is prohibited and for which there is no evidence of past practice. Thus, even if past practice could somehow justify continued direct negotiation with employees, there was in fact not any past practice with respect to that.

within the scope of representation.<sup>3</sup> Thus, in Popular Volkswagen (1973) 205 NLRB No. 62 [84 LRRM 1002], the board found a violation based upon the employer meeting with employees and seeking their agreement to a change in working hours from a five-day to a four-day week.

Therefore, the District violated section 3543.5(c) by failing to negotiate with CSEA regarding the reduction of hours and by negotiating directly with employees and taking unilateral action on that subject, absent some waiver of its bargaining rights by CSEA.

#### Waiver

The District contends that, even if it had an obligation during the initial negotiation of the contract to negotiate regarding reduction of hours, that obligation does not exist during the contract term because CSEA waived its right to negotiate on that subject by (1) making a proposal regarding layoffs and then dropping it when the District asserted that the subject was outside the scope of negotiation, and (2) subsequently signing a contract which included a waiver of CSEA's right to negotiate on any topic during the contract term unless the PERB or the Legislature broadened the scope of negotiating. Neither type of waiver is appropriately found in this case.

The NLRB has consistently found that failure of a union to obtain a particular concession during bargaining and its

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<sup>3</sup>The PERB has cited with approval NLRB precedent on this point in Hanford High School Federation of Teachers, AFT, AFL-CIO v. Hanford Joint Union High School District Board of Trustees (June 27, 1978) PERB No. 58.

abandonment of it, even in return for other concessions, is not sufficient to find a waiver of the union's right to bargain. Beacon Piece Dyeing & Finishing Co., Inc. (1958) 121 NLRB 953; Timken Roller Bearing Co. v. NLRB (6th Cir 1963) 325 F.2d 746 [54 LRRM 2785]. Thus, in Beacon Piece Dyeing the NLRB held that a union waiver of bargaining on mandatory subjects "would not be readily inferred". To find waiver based upon a union's unsuccessful presentation of a bargaining demand would "encourage employers to firmly resist inclusion in contracts of as many subjects as possible with a view to such resistance giving them a right of unilateral action thereafter on all subjects excluded from the contract" and would "discourage unions from presenting any subjects in negotiations . . . [in order to avoid the] dilemma of either giving up the demand and thereby losing its bargaining rights on the subject, or striking in support of the demand. . . [which] would seriously impede the collective bargaining process and lead to more strikes." (121 NLRB 960.) The District offers no reason why a different rule should apply in this case.

The District also contends that CSEA has waived its right to negotiate during the contract term regarding reduction of hours by inclusion in the contract of the waiver clause quoted above. That contention also must fail. The National Labor Relations Board has, over the years, brought the same close scrutiny to explicit waiver clauses in collective bargaining contracts as it has to asserted implied waivers and has repeatedly held that "[w]aiver of

a statutory right [to bargain on a mandatory subject] will not be lightly inferred. The relinquishment to be effective must be 'clear and unmistakable'" (NLRB v. C & C Plywood (1967) 148 NLRB 414, 416, affd. 385 U.S. 421 [17 L.Ed.2d 486, 87 S.Ct.559]). The PERB adopted the same review standard in Amador Valley Secondary Educators Association (October 2, 1978) PERB No. 74.

Moreover, the NLRB has given waiver clauses an even more carefully drawn interpretation where waiver is asserted to justify unilateral action by the employer. Thus, in New York Mirror (1965) 151 NLRB 834, the NLRB held that it "will not find that contract terms of themselves confer on the employer a management right to take unilateral action on a mandatory subject of bargaining unless the contract expressly or by necessary implication confers such right." (151 NLRB at. 839-40 (emphasis added).) In addition, a broadly written waiver clause will be scrutinized in light of the contract negotiations to determine if the union "consciously yielded" the right to negotiate on the matter in question by inclusion of the waiver language. Id.

By contrast, the cases in which the NLRB has found an effective waiver are almost exclusively waivers specifically referring to the particular subject upon which bargaining is later sought. Thus, in Nevada Cement Co. (1970) 181 NLRB 738, cited by the District, there was a specific contract term regarding the subject about which the union sought bargaining, supplementary income payments, and a specific provision forbidding reopening on that subject for a fixed

period. Similarly, in Wrought Washer Manufacturing Co., Inc. (1968) 171 NLRB 532, also cited by the District, the union explicitly compromised its demand for an outside time study by agreeing to the selection and training of an employee to perform the time study and then later sought to have an additional time study by an outside expert. The NLRB found that the union had waived its right to demand the study by an outside person by agreeing to the trained employee compromise.<sup>4</sup>

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<sup>4</sup>The NLRB arguably deviated from its carefully circumscribed interpretation of waiver clauses in Radioear Corp. (1974) 214 NLRB 362. There three members of the board ruled, in the face of a vigorous dissent that the decision flew in the face of the entire body of board precedent in the subject, that an all-encompassing zipper clause in the contract by which the union agreed that "the company shall not be obligated to bargain collectively with respect to any subject matter not specifically referred to or covered in this agreement" constituted a waiver with respect to a matter discussed during contract negotiations but not included in the contract. Even if this departure from precedent portends a loosening of the board's strict interpretation of waiver clauses, that case is easily distinguishable from the case at hand by both the degree of discussion of the subject during negotiations and by the difference in breadth of the waiver clause.

In the instant case the waiver clause neither specifically nor in light of the contract negotiations covers the issue of reduction in employees' hours. That is, the language of the clause does not expressly refer to reduction of hours as one of the scope questions which the parties intended to cover by the clause. Furthermore, the evidence is clear that, while the union sought during contract negotiations to include a provision regarding layoffs and the employer refused on the ground that the issue was outside the scope of negotiation, there was no such discussion regarding reduction of hours. To read the waiver clause at this stage to cover a matter which was not in the contemplation of the parties at the time the clause was agreed upon would not only contravene PERB and NLRB precedent as well as the fundamentals of contract interpretation, but would seriously undermine the collective negotiating process by removing from it for the contract term a central and mandatory subject of negotiation. Certainly it cannot be said, based upon the language of the waiver clause or the negotiating history, that the contract "expressly or by necessary implication" conferred on the employer the right to take unilateral action on a mandatory subject of negotiation.

The District points to part E. of the Health and Welfare Benefits section of the contract as evidence that the parties did contemplate unilateral reduction of employees' hours by the District. That section provides in

relevant part: "Eligibility for district contributions . . . once achieved in a fiscal year shall not be reduced during that year, despite the fact the hours-per-week qualification may change due to a reduction of hours in duty status." The District contends that the reference to reduction of hours shows that the parties intended the employer to have the right to unilaterally reduce hours. The argument is without merit.

In New York Mirror, supra, the employer shut down and sold its newspaper business without consulting the exclusive bargaining representative and asserted that severance clauses in the contract which provided for specific amounts of pay "in the event of merger, consolidation, or permanent suspension" of the newspaper similarly sanctioned unilateral action. The board rejected the argument on the ground that the severance provisions show only that the parties bargained about the compensation to be paid to employees in the event of lawful suspension of operations and these provisions are entirely consistent with the union's reserving its statutory right to bargain regarding the suspension itself. In the instant case, the provision preserving health and welfare benefit contributions at a given level despite subsequent reductions in hours is also entirely consistent with CSEA's reserved right to negotiate regarding any reduction. Clearly the provision cannot be said to "expressly or by necessary implication" waive that right.

The waiver clause fails to justify the District's unilateral action in this case on a further separate and

independent ground. The clause provides that "the Association agrees not to initiate or reopen negotiations . . . ." (emphasis added). The evidence is clear that the CSEA did not either initiate or reopen negotiations but instead sought to negotiate in response to the District's unilateral action on a mandatory subject. There is a world of difference between a union, on the one hand, agreeing to defer raising particular subjects for negotiation during the contract term and, on the other, giving the employer carte blanche to take whatever unilateral action it chooses on mandatory subjects. The effect of the latter interpretation is totally to abdicate the union's role in the negotiating process during the contract term and therefore should not be imposed on a union based upon narrower waiver language but found only where the waiver language unmistakably demonstrates the union's intention to agree to such a far-reaching waiver.

For all the foregoing reasons, the District's contention that CSEA has waived its rights to bargain during the contract terms with respect to reduction of employees' hours is rejected.<sup>5</sup>

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<sup>5</sup>The District refers in passing to the "Entire Agreement" clause of the contract as further evidence of waiver. The clause provides that the contract supersedes and cancels all other agreements and no supplemental agreements shall be binding unless executed by both parties in writing. That clause adds nothing to the District argument since CSEA does not assert the existence of any agreement separate from the contract as justification for its right to bargain regarding reduction of hours during the contract term.

## Estoppel

Finally, the District contends that CSEA is estopped from arguing that the issue of reduction of hours is a mandatory subject of negotiating because it previously filed an unfair practice charge on the District's earlier refusal to negotiate about a layoff provision and then withdrew the charge as part of the parties' overall settlement in reaching a contract. That contention cannot stand for two reasons. First, the withdrawal of the prior charge (S-CE-61-5/23/77) was explicitly "without prejudice" to CSEA's right to refile the charge. Certainly, since the same charge could have been refiled during the appropriate limitations period, the withdrawal "without prejudice" cannot be interpreted to estop CSEA from filing a separate subsequent charge arising from different factual circumstances and raising the same and related legal issues.

Where presented with similar arguments, the NLRB has routinely rejected them. Thus in DeTray Plating Works, Inc. (1965) 155 NLRB 1353, 1360, the board affirmed the trial examiner's holding that withdrawal of a charge without prejudice, even as part of a settlement in a representation case, does not bar a later charge on the same conduct. A ruling such as the District urges here would impede collective negotiations by discouraging union relinquishment of refusal to bargain issues in favor of achieving a generally acceptable contract out of fear that it would later be estopped from preventing wide-ranging unilateral action by

the employer on matters about which the parties had reached no scope agreement.

Secondly, the previous charge related to the District's refusal to bargain with respect to layoffs and other matters not including reduction of hours. Since unilateral action upon reduction in hours presents a different scope issue, CSEA cannot possibly be estopped from filing a charge on it based upon its earlier withdrawal of the charge relating to layoffs. For the foregoing reasons, the District's estoppel contention is rejected.

#### REMEDY

Government Code section 3541.5(c) provides that the PERB shall have the power to issue a decision and order in an unfair practice case directing a party to cease and desist from the unfair practice and to take such affirmative action as will effectuate the policies of the EERA.

It has been found that the District failed to meet and negotiate in good faith by unilaterally reducing the hours of and negotiating separately with bargaining unit employees.

Accordingly the District will be ordered to cease and desist from failing to meet and negotiate with the Association on reduction of hours and from negotiating separately.

In addition, the District will be ordered to restore the teacher aides to the "status quo ante" by, upon request, reinstating them to their previous hours of employment and making them whole for any loss of pay and benefits resulting from the reduction in hours. This is the remedy normally ordered by the NLRB for unilateral adverse changes in

working conditions. See, e.g. Abingdon Nursing Center (1972) 197 NLRB 781 [80 LRRM 1470]; Missourian Publishing Company, Inc. (1975) 216 NLRB 175 [88 LRRM 1647].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the North Sacramento School District has violated Government Code section 3543.5(c). Pursuant to Government Code section 3541.5(c), it is hereby ordered that North Sacramento School District and its board members, superintendent and agents shall:

A. CEASE AND DESIST FROM:

1. Taking unilateral action with respect to reduction in hours of classified employees or any other mandatory subject of negotiation;
2. Negotiating or seeking to negotiate directly with bargaining unit employees with respect to reduction of their hours or any other mandatory subject of negotiation; and
3. In any other manner failing or refusing, upon request, to meet and negotiate in good faith with CSEA as the exclusive representative of its classified employees;

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Reinstate, upon request, all teacher aides to their full hours of employment prior to the June and July 1978 reduction of hours and make whole each of the teacher aides whose hours were so reduced for any loss of pay and benefits which they suffered because of reduced hours

during the 1978-79 school year and until such time as they are reinstated to their previous hours or their hours of employment are changed upon agreement with CSEA or after the District has met and negotiated in good faith with CSEA through impasse;

2. Prepare and post a copy of this Order at its headquarters and in each school for 30 working days while school is in session in conspicuous places where notices to classified employees are customarily posted; and

3. Upon reinstatement and payment of back pay and benefits and completion of the posting period, notify the Sacramento Regional Director of the Public Employment Relations Board of all action it has taken to comply with this order.

Pursuant to California Administrative Code, title 8, section 32305, this proposed decision and order will become final on July 3, 1979 unless a party files a timely statement of exceptions. See Cal. Admin. Code, title 8, sec. 32300. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on July 3, 1979 in order to be timely filed. (See Cal. Admin. Code, tit. 8, sec. 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each

party to this proceeding. Proof of service shall be filed with the Board itself.

Dated: June 13, 1979

Marian Kennedy  
Hearing Officer