

FACTS

The hearing officer's findings of fact are free of prejudicial error, and are hereby adopted as the findings of the Board.¹

DISCUSSION

The hearing officer found that the District violated subsections 3543.5(c) and, concurrently, 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act) when it refused to negotiate over the effects of a proposed layoff.²

¹The hearing officer misstated the record when he found that "average class size exceeds the contractual limit . . . in one instance." Proposed Decision, p. 10. In fact, the record demonstrates that the size of one particular class exceeded the contractual limit applicable to District-wide average class size, but that this did not cause the District-wide average to rise above the limit. However, this error does not affect the outcome of the case, and thus is non-prejudicial.

²EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code, unless otherwise noted. Subsections 3543.5(a), (b), and (c) provide as follows:

It shall be unlawful for a 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.
- (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 so ruling, he affirmed the principle that an employer, while free to unilaterally determine that a layoff is necessary, has an obligation to provide to the exclusive representative of its employees notice and an opportunity to negotiate over the effects of layoff which have an impact upon matters within scope. In San Mateo County Community College District (6/8/79) PERB Decision No. 94, at p. 13, the Board noted that "[a]lthough an employer may be free to exercise its management prerogative to close all or part of its business for financial reasons, the employer must still give the employee organization notice and opportunity to negotiate over the effects of the decision"3 In Florida Steel Corporation (1978) 235.

³Insofar as implementation of a layoff will have an impact upon negotiable matters enumerated in subsection 3543.2(a), such an impact must be negotiated. Subsection 3543.2(a) defines negotiable matters as:

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 certificated personnel has

NLRB 941 [100 LRRM 1187], [enf'd in pertinent part, (4th Cir. 1979) 601 F.2d 125], the NLRB determined that an employer who refused to negotiate over the effects of layoff failed in its bargaining duty. In Anaheim Union High School District (10/28/81) PERB Decision No. 177, the Board established a test to determine whether a subject which is not specifically enumerated in subsection 3543.2(a) is negotiable under the Act:

[A] subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages, or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediating influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

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.

In Newman-Crows Landing Unified School District, (6/30/82)

PERB Decision No. 223, at pp. 12-13, the Board noted that,

The layoff of employees unquestionably impacts on their wages, hours, and other conditions of employment. It may concurrently impact upon those employees who remain. Nevertheless, the determination that there is insufficient work to justify the existing number of employees or sufficient funds to support the work force, is a matter of fundamental managerial concern which requires that such decisions be left to the employer's discretionary prerogative. . . .

Thus, while an employer is free to determine that a layoff is required, it may not, in the absence of agreement or the completion of negotiations, unilaterally implement in-scope effects that are inconsistent with existing laws, contract provisions, policies, or established practices.

The hearing officer found further that although the layoff herein was merely proposed at the time the Association made its request for negotiations, and that the impact upon matters within scope was speculative at that point, the District was nonetheless obligated to bargain over those admittedly speculative effects. For the reasons set forth by the hearing officer, and in reliance upon the cases and analysis set forth by him, we affirm his conclusion that the District had a negotiating obligation at the time it proposed the layoff, even though the full extent to which the layoff would ultimately be implemented was unknown at that time.

The District argues, in essence, that because at the time it passed its resolution proposing the layoff it had no intent to implement it in a manner which would affect matters within scope, and because the Association did not prove that the layoff as implemented had an effect on matters within scope, its refusal to negotiate effects of layoff prospectively was undertaken in good faith and hence did not violate the Act. As the hearing officer noted,

. . . it would not be consistent with PERB's decisions in this area to leave the judgment of whether or not a subject is 'substantially' affected (and subject to negotiations) to the exclusive and unilateral province of an employer. Leaving such a decision in the employer's hands would thwart the collective negotiations objectives set forth in EERA, the salutary purposes of which were fully discussed in San Mateo County Community College District, supra, at 14-17.

Because it may reasonably be expected that a layoff of any magnitude will have an effect upon matters within scope, the proposal of layoff itself triggers the employer's obligation to provide notice and an opportunity to negotiate to the exclusive representative. Such a practice will give the parties an opportunity to negotiate before the fact, when such dialogue can potentially be of the greatest value.

The District argues that by agreeing to the management's rights and zipper clauses at issue herein, the Association

waived its right to negotiate over the effects of the proposed layoff herein. We find that the negotiating history and text of the clauses at issue indicate that there was no such waiver. We adopt the hearing officer's reasoning with respect to these issues.

CONCLUSIONS OF LAW

In keeping with the above discussion, we affirm the findings of the hearing officer, except as modified below. Thus we affirm his finding that, by refusing to negotiate over the effects of the proposed layoff on matters within scope, the District violated subsection 3543.5(c) of the EERA and, concurrently, subsections 3543.5(a) and (b). We further agree that the Association failed to prove that the actual implementation of the layoff ultimately affected matters within scope, and thus that no affirmative relief (other than notice posting) is mandated.⁴

⁴In this regard we disavow his statement that:

The District's unilateral action affecting subjects within the scope of representation justifies an order to the District that it cease and desist from further unilateral actions affecting subjects within the scope of representation without first giving notice to and negotiating with the exclusive representative about the effects of such actions. (Proposed Decision, p. 22)

This is because, as noted above, we do not find that the District unilaterally changed matters within scope. Rather, the gravamen of the violation here is the District's flat refusal to negotiate over effects of the proposed layoff.

ORDER

Upon consideration of the entire record in this case, and in light of the foregoing decision, the Board affirms the hearing officer's conclusion that the District violated subsections 3543.5(a), (b) and (c) of the EERA.⁵ The Board hereby ORDERS that the District shall:

(1) CEASE AND DESIST FROM:

(a) Failing or refusing to provide to the Association notice and an opportunity to negotiate over the effects of a proposed layoff upon matters within the scope of representation;

(b) Denying to the Association the right to represent unit members by failing or refusing to provide to the Association notice and an opportunity to negotiate over the effects of a proposed layoff upon matters within the scope of representation;

(c) Interfering with the right of employees to select an exclusive representative to negotiate on their behalf by failing and refusing to provide to the Association notice and an opportunity to negotiate over the effects of a proposed layoff upon matters within the scope of representation;

⁵The Association excepts to the lack of specificity expressed in the notice and order as to the District's bargaining obligation. We have modified that language to conform to our factual conclusion and to clarify the obligation of the District.

(2) TAKE THE FOLLOWING AFFIRMATIVE ACTION:

Within ten (10) workdays following the date of service of this decision, post at all work locations where notices to employees customarily are placed, copies of the notice attached as Appendix A 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 ensure that such notices are not altered, defaced or covered by any other material or reduced in size. Within ten (10) workdays following service of this decision, notify the San Francisco regional director of the Public Employment Relations Board in writing of the steps the employer has taken to comply with the terms of this decision. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on charging party herein.

By: ~~Virgil Jensen~~, Member

~~Harry Gluck~~, Chairperson

Irene Tovār, Member

APPENDIX A

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

After a hearing on Unfair Practice Case No. SF-CE-367, in which all parties had the right to participate, it has been found that the Newark Unified School District Board of Education violated the Educational Employment Relations Act by failing or refusing to meet and negotiate with the Newark Teachers Association, CTA/NEA, with respect to the effects of Resolution No. 499, providing for layoffs, which was approved by the District on February 27, 1979. It has been found that this action violated subsection 3543.5(c) of the Educational Employment Relations Act (EERA). The same conduct has also been found to have violated subsection 3543.5(b) of the EERA since it interfered with the right of the Association to represent its members. It has been further found that this same conduct interfered with negotiating unit members' right to be represented by their exclusive representative, thus constituting a violation of subsection 3543.5(a) of the EERA. As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

WE WILL CEASE AND DESIST FROM:

- (1) Failing or refusing to provide to the exclusive representative notice and an opportunity to meet and negotiate regarding effects of proposed layoffs within the scope of representation, as defined by section 3543.2.
- (2) Denying the exclusive representative its right to represent unit members by failing or refusing to provide notice and an opportunity to negotiate about matters within the scope of representation.
- (3) Interfering with employees because of the exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by failing and refusing to provide to the exclusive representative notice and an opportunity to meet and negotiate over effects of proposed layoffs within the scope of representation.

NEWARK UNIFIED SCHOOL DISTRICT

Authorized Representative

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