STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and its PITTSBURG CHAPTER NO. 44, Charging Party, v. PITTSBURG UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-235 Request for Reconsideration PERB Decision No. 318 PERB Decision No. 318a April 2, 1984

Appearances: Madalyn J. Frazzini, Attorney for California School Employees Association and its Pittsburg Chapter No. 44; Mark W. Goodson, Attorney (Breon, Galgani, Godino & O'Donnell) for Pittsburg Unified School District.

Before Tovar, Jaeger, and Burt, Members.

DECISION

JAEGER, Member: The Public Employment Relations Board (PERB or Board) having duly considered the Pittsburg Unified School District's (District) request for reconsideration hereby grants that request consistent with the discussion below.

DISCUSSION

In Pittsburg Unified School District (6/10/83) PERB Decision No. 318, the Board affirmed the Administrative Law Judge's (ALJ) conclusion and found that the District violated subsections 3543.5(a), (b) and (d) of the Educational

Employment Relations Act[1] (EERA or Act) by unilaterally reducing the work year of clerical employees from 12 months to 10 months effective upon expiration of a collective bargaining agreement between the parties, when it had an obligation to remain strictly neutral and to maintain the status quo due to the pendency of a question concerning representation (QCR).

The Board ordered the District to reinstate the status quo and to make the affected employees whole for any losses they suffered as a result of the District's unlawful conduct. It also ordered the District to negotiate with the California School Employees Association and its Pittsburg Chapter No. 44

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[1]EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise specified. Section 3543.5 provides in pertinent part:

> It shall be unlawful for a public school employer to:
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> (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.
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> . . . . . .
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

(Association) concerning the work year of employees. The Board's Order did not specify either the date from which the make-whole remedy would run or under what circumstances, if any, the District's liability for back pay would be terminated.

PERB rule 32410(a)2 provides:

> Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision. . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

The District requests reconsideration of the Board's make-whole remedy, asserting that liability for back pay should be terminated when, after the QCR was resolved, the District and the exclusive representative negotiated in good faith and reached agreement concerning the subject matter of the unilateral change.

Subsection 3541.5(c) of the Act empowers the Board "to issue . . . [an] order directing an offending party to . . . take such affirmative action . . . as will effectuate the policies of [the Act]." The Board has previously found that where a remedy will not effectuate the purposes of the Act,

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2pERB rules are codified at California Administrative Code, title 8, section 31001 et seq.

reconsideration is justified. Delano Union Elementary School District (10/15/82) PERB Decision No. 213a; Rio Hondo Community College District (5/16/83) PERB Decision No. 279a.

In Rio Hondo Community College District, supra, we determined that a back pay award for violation of an employer's duty to negotiate in good faith should be terminated at the point at which the parties subsequently reached agreement concerning the subject matter of the unilateral change. Although this case does not directly involve a violation of the duty to negotiate but, rather, concerns an employer's duty to maintain neutrality in the face of a pending QCR, it presents an analogous situation to the Rio Hondo type of bargaining case. In both instances, the employer is charged with the duty not to make unilateral changes until it affords an exclusive representative notice and an opportunity to negotiate. Where, however, as a result of the filing of a decertification petition, there is a pending QCR, there is no exclusive representative present with which the employer may negotiate. In such circumstances, the employer must refrain from making unilateral changes until the QCR is resolved. Once the QCR is resolved, the employer's duty to negotiate is revived. If, subsequent to the resolution of the QCR, the exclusive representative requests to negotiate and the parties reach agreement concerning the subject matter of the unilateral

change,[3] employees are thereby restored to the position they would have occupied had the employer complied with its duty to maintain neutrality in the face of the QCR. It would not effectuate the purposes of the Act to extend the terms of the remedy beyond that point. Such an agreement would terminate both the make-whole portion of the remedy and, inasmuch as the parties have mutually agreed to alter the status quo, that portion of the remedy ordering restoration of the status quo ante.

For the above reasons, we grant reconsideration of the Board's remedy to clarify the Order. Accordingly, we shall order the District to restore the status quo ante and make employees whole for any monetary losses they have suffered as a result of the District's unlawful conduct, from the date of the unilateral change until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the District's unlawful unilateral change.[4]

3We disagree with the Association's argument that, under Rio Hondo, back pay should terminate only when a subsequently negotiated agreement specifically addresses the conduct complained of in the unfair practice charge itself. In order to terminate liability for back pay, a subsequently negotiated agreement need only address the basic subject matter of the unilateral change, and need not constitute a "waiver" by the Association of its claim that the District acted unlawfully.

[4]In its brief accompanying its request for reconsideration, the District claims that it reached agreement with the exclusive representative concerning the subject matter

The District also requests reconsideration of the remedy on the grounds that it had a "business necessity" excuse for making unilateral changes and, therefore, an award of back pay is inappropriate or, in the alternative, that the award should be tolled at the time that layoffs became financially necessary. These are arguments which the District asserted or should have asserted at the hearing on this matter, and, therefore, do not constitute the type of "extraordinary circumstances" which justify granting reconsideration of the Board's Decision. Livermore Valley Joint Unified School District (10/21/81) PERB Order No. JR-9; Rio Hondo Community

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of reductions in hours in November 1981. It asserts that this agreement, reached after the administrative law judge issued his proposed decision, constitutes "newly discovered evidence" within the meaning of PERB rule 32410(a) and that the Board should affirmatively determine whether this agreement should terminate the District's back pay liability. The Association disputes the District's interpretation of the November 1981 agreement.

While we have granted the District's request for reconsideration to clarify what we have found to be an ambiguity in the Board's Order, we find that it would be inappropriate for the Board to determine in a request for reconsideration decision whether, as a factual matter, the District has complied with that Order. The purpose of requesting reconsideration on the grounds of newly discovered evidence is to permit the Board to have access to evidence which was unavailable at the time of hearing which could affect the underlying determination that the respondent did or did not act unlawfully. PERB rule 32410(a) is not intended to provide a party with a forum in which to prove that, subsequent to the issuance of a Board decision, it has complied in whole or in part with the Board's Order. Such a claim is properly raised in a compliance hearing, should one be required.

College District, supra; South Bay Union School District (8/19/82) PERB Decision No. 207a.

Finally, the District requests reconsideration on the ground that it was prejudiced by delay in the Board's processing of this case. As the Board indicated in Mt. San Antonio Community College District (3/24/83) PERB Decision No. 297, delay in an administrative agency's procedures is no basis upon which to deny employees a remedy for an employer's illegal conduct. Quoting from the United States Supreme Court's decision in NLRB v. J.H. Rutter-Rex Mfg. Co. (1969) 396 U.S. 258 [72 LRRM 2881, 2883], we noted, "[w]ronged employees are at least as much harmed by the Board's delay. . . as is the wrongdoing employer." The District's request for reconsideration on the grounds of delay is, therefore, denied.

ORDER

The Order in Pittsburg Unified School District (6/10/83) PERB Decision No. 318, is AMENDED to read as follows:

Based upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code subsection 3541.5(c), it is hereby ORDERED that the Pittsburg Unified School District, board of trustees, superintendent, and their respective agents shall:

1. CEASE AND DESIST FROM:

(a) Interfering with employees because of the exercise of their right to freely select an exclusive

representative to meet and negotiate with the employer by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit.

(b) Denying the California School Employees Association its right to represent unit members free from employer interference by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit.

(c) Encouraging employees to join an organization in preference to another by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(a) Upon request, meet and negotiate with the exclusive representative regarding work year reductions.

(b) Reinstate the 12-month work year and make whole the affected clerical employees in the operations and support unit whose work year, pay and benefits were reduced from their established 12-month work year for any and all losses they have suffered from the date of the unilateral change until the parties reach agreement or complete the statutory impasse procedure in negotiations concerning work year reductions.

(c) Mail copies of the attached Notice to the employees affected by the District's conduct within thirty-five (35) days after service of this Decision. The mailing should inform employees of reinstatement and reimbursement procedures.

(d) Within thirty-five (35) days after the date of service of this Decision, prepare and post copies of the Notice to Employees attached as an appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for at least thirty (30) consecutive workdays at the District's headquarters office and at all locations where notices to classified employees are customarily posted. Such Notices must not be reduced in size and reasonable steps shall be taken to ensure that they are not defaced, altered or covered by any material.

(e) 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.

3. It is further ORDERED that the allegation that the Pittsburg Unified School District violated Government Code subsection 3543.5(c) by the conduct at issue in the instant case is DISMISSED.

Members Tovar and Burt joined in this Decision.

APPENDIX

NOTICE TO ALL 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-235, California School Employees Association and its Pittsburg Chapter No. 44 v. Pittsburg Unified School District, in which all parties had the right to participate, it is found that the Pittsburg Unified School District violated the Educational Employment Relations Act, Government Code subsections 3543.5(a), (b), and (d), by unilaterally reducing the work year of clerical employees when it had an obligation to remain strictly neutral and to maintain the status quo due to the pendency of a question concerning representation.

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

1. CEASE AND DESIST FROM:

(a) Interfering with employees because of the exercise of their right to freely select an exclusive representative to meet and negotiate with the employer by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit.

(b) Denying the California School Employees Association its right to represent unit members free from employer interference by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit.

(c) Encouraging employees to join an organization in preference to another by failing to maintain the established work year of clerical employees while a question of representation is pending involving employees in the negotiating unit.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

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(c) Mail copies of the this Notice to the employees affected by the District's conduct within thirty-five (35) days after service of this Decision. The mailing should inform employees of reinstatement and reimbursement procedures.

(d) Written notification of the actions taken to comply with the Board's Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Dated: PITTSBURG UNIFIED SCHOOL DISTRICT

By _____

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