STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS SOUTH SAN FRANCISCO CHAPTER #197,	
Charging Party,	Case No. SF-CE-593
v.	PERB Decision No. 343
SOUTH SAN FRANCISCO UNIFIED SCHOOL DISTRICT,	September 2, 1983
Respondent.	

Appearances: James E. Hall, Attorney (Richards, Watson, Dreyfuss and Gershon) for South San Francisco Unified School District.

Before Gluck, Chairperson; Tovar and Morgenstern, Members.

DECISION

TOVAR, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the South San Francisco Unified School District (District) to the attached proposed decision of a PERB administrative law judge (ALJ). The exceptions are directed at the ALJ's findings that the District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)[1] by: 1) unilaterally reducing the hours of employment of two part-time classified positions from six hours a day to five

[1]The EERA is codified at Government Code section 3540 et seq. All statutory references herein are to the Government

and; 2) refusing to negotiate the effects of its decision to lay off teachers' aides.

For the reasons which follow, we affirm The ALJ's conclusion that the District violated the EERA by unilaterally reducing the hours of two classified positions. However, we reverse his finding that the District violated the Act by refusing to negotiate the effects of its layoff decision.

FACTS

Neither party has taken exception to the ALJ's findings of fact. Upon our review of the record, we find the statement of facts set forth in the proposed decision to be free of prejudicial error. On this basis we adopt the factual findings of the ALJ as the findings of the Board. For convenience, a summary of those facts is provided below.

Code unless otherwise noted. Section 3543.5 provides in pertinent part 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 1980, the District and the exclusive representative of its classified employees, California School Employees Association and its South San Francisco Chapter #197 (CSEA), negotiated a contract which, by its terms, was effective for the 1980-81 and 1981-82 school years. The contract included the following provisions on the subject of hours for part-time employees:

> Part-Time Assignments.
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> The minimum length of the workday and work year for part-time employees shall be designated by the District. At the beginning of the school year, part-time assignments shall be assigned a fixed, regular and ascertainable minimum number of hours. This shall not restrict modification of the work day or work year when such is necessary to carry on the business of the District subject to other paragraphs of this article. [Emphasis added.]
>
> Reduction in Assigned Time.
>
> Any reduction in regularly assigned time shall be considered a layoff and must be adhered to under Education Code procedures.

In negotiating these provisions, the parties exchanged several counterproposals which contained different language in place of the sentence which is underlined in the above-set-forth "Part-Time Assignments" provision. The District proposed the above-underlined language minus the phrase "subject to other paragraphs of this article," citing its need to increase or decrease assignments from time to

time. CSEA countered by proposing the following in place of the disputed sentence:

> This article shall not restrict the extension of the regular workday or work week on an overtime basis when such is necessary to carry on the business of the District.

Clearly, the language proposed by CSEA gave the District leeway only to increase, but not decrease, assigned work hours.

After a number of mediation sessions, CSEA abandoned its effort to secure a contract provision which would absolutely prohibit the District from decreasing the hours of bargaining unit members. It agreed instead to a provision which would permit such reductions in cases of operational necessity. In addition, the phrase "subject to other paragraphs of this article" was agreed to. The unrefuted testimony at the PERB hearing indicates that this was added to assure that if the District reduced hours, it would do so pursuant to the above-set-forth "Reduction in Assigned Time" provision requiring that procedural protections provided in the Education Code be observed.

During negotiations for this contract, PERB issued its decision in Healdsburg Union High School District, et al. (6/19/80) PERB Decision No. 132, in which the Board held, inter alia, that the effects of an employer's layoff decision are negotiable. CSEA thereupon prepared a proposal relating to layoffs and presented it to the District. The District

negotiated the proposal, but its position was one of firm resistance to the provisions sought by CSEA on the grounds that the layoff procedures already promulgated by its personnel commission were preferable. Ultimately, CSEA yielded on this subject and the agreed-upon contract contained no provisions expressly controlling layoff procedures.

The contract did, however, contain the following "Effect of Agreement" clause:

> It is understood that the specific provision (sic) contained in this Agreement shall prevail over District practices, procedures, Personnel Commission rules and over State laws to the extent permitted by law, and that in the absence of specific provisions in this Agreement, such practices and procedures are discretionary with the Board of Trustees and the Personnel Commission.

Finally, the contract contained a zipper clause which provides as follows:

> During the term of this Agreement, the Association and the District expressly waive and relinquish the right to meet and negotiate and agree that neither party shall be obligated to meet and negotiate with respect to any subject or matter whether or not referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both the District or the Association at the time they met and negotiated on and executed this Agreement, and even though such subject or matter was proposed and later withdrawn . . . .

On May 29, 1981, the District gave notice of its intent to lay off 20 percent of its teachers' aides effective at the end

of the school year. The reasons for the layoff were that the District had suffered a reduction in compensating education funds used to pay teachers' aides and that it had closed one of its schools.

Upon learning of the District's layoff decision, CSEA prepared a negotiating proposal and presented it to the District on June 26. The proposal contained the following provisions: definition of the terms "layoff" and "class;" a method of determining seniority and procedures for making this information available to employees; timing of layoffs (at end of school year only); alternatives to layoff (transfers, retirement, retraining); layoff notification procedures; reemployment rights and procedures; prohibition against contracting out or use of volunteers for performance of work previously done by laid-off workers; and right to elect retirement in lieu of layoff. The District superintendent's response, however, was that the District did not wish to negotiate CSEA's proposal because the existing contract included an agreement that neither party had the right to request any further negotiations for the life of the contract (zipper clause).

In November 1981, two six-hour aide positions were vacated. The District then advertised these positions as five-hour positions and, despite CSEA's request to negotiate

this reduction, filled the positions at five hours without negotiating. There is no evidence that, other than the change in hours, any other aspects of the positions were changed.

DISCUSSION

The Layoff

On exceptions, the District argues, inter alia, that it had no duty under the EERA to negotiate CSEA's June 26 proposal on layoff procedures because the parties had previously agreed by contract that the set of layoff procedures provided in the District personnel commission regulations would be the controlling procedures in the event of layoff. In particular, the District argues that the "Effect of Agreement" clause of the contract expressly provides that personnel commission rules will control where, as with layoff procedures, the contract makes no specific provision on that subject. Moreover, asserts the District, the contract's zipper clause expressly provides that the parties will not be obligated to negotiate on any subject for the term of the contract, "even though such subject or matter was proposed and later withdrawn [at the time of contract negotiations]."

In Kern Community College District (8/19/83) PERB Decision No. 337, we found that, where there was no evidence of an established policy on layoff procedures, the employer violated its duty to bargain when, following its decision to lay off employees, it refused the exclusive representative's request to

convene negotiations on the effects of the decision. In attempting to reserve to itself unilateral control over the creation of a policy on layoff procedures, we held, the employer violated the fundamental purpose of the Act (citing Moreno Valley Unified School District (4/30/82) PERB Decision No. 206, affirmed, Moreno Valley Unified School District v. PERB (1983) 142 Cal.App. 3d 191).

While so deciding, we were careful to point out that

> Where a public school employer and an exclusive representative have agreed in advance on a comprehensive policy to be implemented in the event of a layoff decision, the parties are not obligated to renegotiate those matters each time the District announces a decision to layoff.

This proviso simply reiterates our holding in Newark Unified School District (6/30/82) PERB Decision No. 225, where we found that an employer violates the EERA when it "unilaterally implement[s] in-scope effects that are inconsistent with existing laws, contract provisions, policies or established practices." See also Placer Hills Union School District (11/30/82) PERB Decision No. 262, where we dismissed charges of unlawful unilateral action upon evidence that the employer was proceeding according to its established past practice in laying off an employee.

In the instant case, the evidence shows that at the time of the layoff at issue the District personnel commission rules contained a set of regulations controlling layoff procedures,

identified as "Rule XVI" and dating at least as far back as 1972. These regulations were made a subject of negotiation at the 1980 contract talks. CSEA proposed its own code of layoff procedures, but the District opposed that plan, asserting instead that Rule XVI should continue to be the controlling policy in the event of layoff. Ultimately, CSEA abandoned its efforts to negotiate a change in that policy. Instead, it agreed to a contract which made no express mention of layoff procedures, but included the above-noted "Effect of Agreement" clause providing that personnel commission rules would control as to subjects for which the contract makes no specific provision.

Upon these facts we find that CSEA contractually agreed that the provisions of Rule XVI would continue to constitute the controlling policy on layoff procedures for the term of the contract. Having so agreed, CSEA was not entitled to a second opportunity to negotiate that subject when, during the contract term, the District decided to lay off teachers' aides. The EERA's purpose of fostering stable labor relationships surely requires that both exclusive representatives and employers be held to the agreements they have negotiated.[2]

Moreover, the parties' collectively negotiated contract also included a zipper clause providing that both parties waive

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[2]The EERA's purpose is set forth at section 3540.

their right to negotiate during the contract term as to, inter alia, subjects which were proposed at the time of contract negotiations but later withdrawn. As we noted in Los Angeles Community College District (10/18/82) PERB Decision No. 252,

> The purpose of a zipper clause is to foreclose further requests to negotiate regarding negotiable matters, even if not previously considered, during the life of a contract.[3]

Thus, while the District did not by virtue of the zipper clause acquire a right to unilaterally change its layoff procedures, it was privileged to maintain its existing policy for the contract term, and thus acted lawfully in rejecting CSEA's request to negotiate a change in that policy. For these reasons, we dismiss this portion of the charge.

The Reduction in Hours

As set forth in our factual summary above, the contract provision regulating hours of part-time employees provides that the District has the authority to set the hours for part-time positions at the start of each school year. As to mid-year changes in those established hours, however, the contract

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[3]See Gorman, Labor Law (1976) p. 472. "Such a provision may fairly be read to deprive the union of the privilege during the contract term to propose additions to the written contract and to require the employer to bargain about the union's proposals."

limits the District to cases where such is "necessary to carry on the business of the District . . . ." The contract goes on to require that in the event of such mid-year changes, the Education Code provisions regulating layoffs are to be applied.[4]

The ALJ found that the District had failed to prove that the instant reduction in hours of two positions was necessary to carry on the business of the District. He thus concluded that this breach of contract evidenced a change in the District's policy on hours for part-time employees. Grant Joint Union High School District (2/26/82) PERB Decision No. 196. Additionally, he ruled that the District had failed to apply the Education Code procedures as required.

On exceptions, the District argues that it did not breach its obligation to apply Education Code procedures. It points out that at the time of the reductions the positions had been voluntarily vacated, and thus that there was no occasion to apply Education Code procedures requiring, for example, notice to incumbents and the application of seniority rules.

While these observations of the District are true, they are entirely nonresponsive to the ALJ's determination that the District had breached its contractually established policy by implementing a mid-year reduction in hours without a showing of

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[4]See Education Code sections 45117, 45298 and 45308.

operational necessity. Finding no reason to disturb that finding, therefore, we affirm the ALJ's conclusion that the District thereby violated subsections (a), (b) and (c) of the EERA.

The Remedy

We have concluded that, by reducing the hours of two bargaining unit positions in the midst of the 1981-82 school year, the District unilaterally changed the policy on hours to which it had contractually agreed. The employees who ultimately filled those positions, therefore, are entitled to be made whole for the resulting loss in wages. We note, however, that the existing contractual agreement between the parties authorized the District to set the hours for part-time bargaining unit employees at the start of each year. Thus, the District could, consistently with that policy, lawfully establish the two positions at issue at five hours per day (or any other figure) at the start of the succeeding school year. Therefore, because the 1981-82 school year has already concluded, the District's obligation will be to pay to the affected employees the wages they would have received during that school year but for the unlawful unilateral change identified herein, minus any offset or mitigation. For these reasons also, we decline to order the restoration of the status quo prior to the violation.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is hereby ORDERED that the South San Francisco Unified School District shall:

A. CEASE AND DESIST FROM:

Violating subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act by unilaterally changing the hours of employment of its employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

1. Make whole the affected employees by paying to them the wages they would have received but for the unilateral reduction in hours of the two bargaining unit positions, plus interest at the rate of 7 percent per annum. This amount is to be offset by any income earned by the affected employees which they would not have been able to earn but for the unilateral reduction in the hours of the two aide positions.

2. Within five 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 an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty consecutive workdays. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material or reduced in size.

3. Within twenty workdays following service of this Decision, notify the San Francisco regional director of the Public Employment Relations Board in writing of what 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.

All other unfair practice allegations in Case No. SF-CE-593 are hereby DISMISSED.

Chairperson Gluck and Member Morgenstern joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-593 in which all parties had the right to participate, it has been found by the Public Employment Relations Board that we, the South San Francisco Unified School District, violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act. Specifically, we were found to have unlawfully reduced the hours of two part-time classified positions during the 1981-82 school year in violation of the policy contained in the agreement we negotiated with the California School Employees Association.

As a result of this conduct, we have been ordered to post this Notice and will abide by the following. We will:

1. CEASE AND DESIST FROM:

Violating the rights of our classified employees and their exclusive representative by unilaterally changing the hours of employment of bargaining unit employees.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

Make whole the affected employees by paying to them the wages they would have received but for the unilateral reduction in the hours of the two bargaining unit positions, plus interest at the rate of 7 percent per annum. This amount may be offset by any earnings of affected employees which they would not have been able to earn but for the unilateral reduction in the hours of the two aide positions.

Dated: _____

SOUTH SAN FRANCISCO UNIFIED
SCHOOL DISTRICT

By _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS SOUTH SAN FRANCISCO CHAPTER #197, Charging Party, v. SOUTH SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-593 PROPOSED DECISION (6/30/82)

Appearances: Dave Low, field representative, for California School Employees Association and its South San Francisco Chapter #197; Leland D. Stephenson, attorney (Paterson and Taggart) and James E. Hall, attorney (Richards, Watson, Dreyfuss and Gershon) for South San Francisco Unified School District.

Before: Gerald A. Becker, Administrative Law Judge.

PROCEDURAL HISTORY

This unfair practice charge was filed on September 10, 1981 by the California School Employees Association and its South San Francisco Chapter #197 (hereafter Association) against the South San Francisco Unified School District (hereafter District). After various amendments, the Association alleges the District violated Government Code subsections 3543.5(a), (b) and (c) of the Educational Employment Relations

Act (hereafter EERA or Act)[1] by taking four unilateral actions without negotiating:

1. Announcing and implementing a 20 percent layoff of instructional aides in May and June of 1981;

2. At the same time reducing the hours of cafeteria employees effective at the beginning of the 1981-82 school year;

3. Reducing the work year for instructional aides at the beginning of the 1981-82 school year; and

4. Reducing two six-hour instructional aide positions to five hours in November 1981.

An informal conference held on November 13, 1981 failed to resolve the charge and a formal hearing was held before the undersigned administrative law judge on January 28, 1982.

Briefing was due to be completed on April 12, 1982, but the District failed to file a simultaneous post-hearing brief, due on March 24, 1982. On May 12, 1982 a motion was filed by the District's new attorney to allow a late filing. No "extraordinary circumstances" having been shown as required by PERB Regulation 32133, the motion was denied by order dated May 20, 1982.

ISSUES

1. Did the District violate subsections 3543.5(a), (b)

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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.

and (c) by taking the following unilateral actions without negotiating:

(a) Laying off instructional aides;

(b) Reducing cafeteria employees' hours;

(c) Reducing instructional aides' work year; and

(d) Reducing two six-hour instructional aide positions to five hours in mid-year?

2. Did the Association waive its right to negotiate in its contract with the District?

3. Did the District in turn waive its right to assert this contract defense by agreeing to reopen negotiations on the layoffs and reductions in hours?

FINDINGS OF FACT

A. The unilateral actions.

The Association is the exclusive representative of a unit of classified employees in the District.

In late May and early June of 1981, the District initiated a 20 percent layoff of instructional aides and also a reduction in hours for certain cafeteria employees. All the affected individuals were part-time employees.

The reasons for the instructional aide layoffs were a decline in compensatory education funds used to pay instructional aides, as well as the closure of a school. Cafeteria workers' hours were reduced because the cafeteria program had been operating at a substantial loss.

Dave Low, Association field representative, and Ann Skaggs, Association president, met with Bob Dominge, director of classified personnel, on June 5, 1981 to discuss the layoffs and reductions in hours. Low told Dominge the layoffs and reductions in hours were negotiable, but received no response. A second meeting was set up for June 26, 1981.

The Association perceived the June 26 meeting to be a negotiating session and brought along its negotiating team and a comprehensive layoff proposal including reasons for layoff, layoff procedures, notices, seniority lists, reemployment rights, election of voluntary retirement and continuation of benefits. On the contrary, Dominge and the other two District administrators who attended the meeting thought it would be an informal discussion and did not anticipate the Association proposal or the number of people in attendance.

At the meeting the Association "walked through" its proposal with the District. Dominge suggested a few changes to the proposal concerning seniority lists and also expressed a reservation about the Association's proposal that layoffs take place only at the end of the school year. Dominge then stated he would not be able to respond to the entire proposal at that time and another meeting was set up for July 14.

On July 7 Dominge met with other District administrators and it was determined that the Association's layoff proposal would have to be sunshined. Accordingly, Dominge cancelled the

July 14 meeting to allow time to sunshine the proposal and also because he was going on vacation. The meeting was rescheduled for August.

In the meantime, the superintendent, Thomas Gaffney, himself returned from vacation. At a staff meeting held on July 14, 1981, Gaffney was informed of the developments with the Association. Gaffney stated his view that the District had negotiated a contract with the Association which contained a zipper clause, and he would not reopen the contract to discuss the Association's layoff proposal.

Accordingly, at a meeting held on August 17, 1981, Dominge informed the Association the District would not negotiate the layoff proposal. As the reason for this apparent turnabout, he cited Gaffney's direction that the District refused to reopen negotiations on any matter until expiration of the current agreement between the parties. Dominge did say, however, that if the Association would drop its demand to negotiate, he would use its layoff proposal as a "guideline" for future layoffs.

In September 1981, at the beginning of the next school year, the District sent notices to cafeteria workers indicating their reduced hours.[2] Around the same time, instructional

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[2]Although the record is not clear on this point, it seems the reduction of cafeteria employees' hours which took place in the beginning of the 1981-82 school year was not a second reduction in hours for cafeteria workers, but rather the implementation of the cutback announced in May. This assumption seems reasonable in light of the fact the cafeterias are closed during the summer months.

aides also received notices advising them of "minimum" work year assignments for the 1981-82 year approximately 10 days shorter than the previous year's assignments. According to Dominge, the work year assignments for instructional aides were merely a guaranteed minimum as required by the parties' agreement, and additional work days could be added during the year.

The fourth unilateral change charged by the Association took place in November 1981 when two six-hour instructional aide positions were vacated. Despite the Association's request to negotiate, the District advertised and filled the two positions at five hours rather than six as previously. There is no evidence any other elements of the positions were changed. The District stated it did not have to negotiate, analogizing the situation to one in which an old position is abolished and a new one is created in its place.

B. Past practice, negotiations history and the parties 1980-82 agreement.

The evidence shows that before the parties negotiated agreements under EERA, the past practice in the District was that the work hours and work year of instructional aides and cafeteria workers varied from year to year. According to Judy Rogers, director of elementary education with responsibility for instructional aides since 1974, there have been different work hours and work years for instructional aides since 1974, depending upon school site needs and funding.

Winifred Anderson, an instructional aide on the Association negotiating team, corroborated Rogers' testimony. Since 1972 her work year has changed from year to year. According to Anderson, the school principal determines the hours and work year of instructional aides, who then receive a letter from the District just prior to the start of school giving them their work hours and work year assignment.

The situation with respect to cafeteria workers is similar. Judy Milner, a cafeteria worker also on the Association negotiating team, in the past had her work hours reduced when programs were cut back. For example, in 1979 her hours were reduced when the District stopped its breakfast program, and in 1980 her work hours were further reduced when the snack bar was closed after school. As with instructional aides, she was given notice of her work year assignment just prior to the beginning of school each year.

Before the 1979-80 school year, the District and the Association had only a "short form" contract covering only wages and benefits. In the 1979-80 school year the first full-length agreement was negotiated. The Association was concerned about the fluctuating hours and work years of part-time employees such as cafeteria workers and instructional aides. In response to this concern, the following provisions were negotiated:

> Part-time Assignment.
> The length of the work day for part-time

> employees shall be designated by the District. At the beginning of the school year, part-time assignments shall be assigned a fixed, regular, and ascertainable minimum number of hours.
>
> Reduction in Assigned Time.
> Any reduction in regularly assigned time shall be considered a layoff and must be adhered to under Education Code procedures.

In the negotiations for the 1980-82 agreement, the part-time assignment provision was modified as follows (the additions are underlined):

> Part-Time Assignments.
> The minimum length of the work day and work year for part-time employees shall be designated by the District. At the beginning of the school year, part-time assignments shall be assigned a fixed, regular and ascertainable minimum number of hours. This shall not restrict modification of the work day or work year when such is necessary to carry on the business of the District subject to other paragraphs of this article.

The provision requiring a reduction in time to be treated as an Education Code layoff remained the same. The "subject to" proviso in the part-time assignment provision was intended to refer to this layoff requirement.

The parties also negotiated a "zipper" clause which provides in pertinent part as follows:

> During the term of this Agreement, the Association and the District expressly waive and relinquish the right to meet and negotiate and agree that neither party shall be obligated to meet and negotiate with respect to any subject or matter whether or

> not referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both the District or the Association at the time they met and negotiated on and executed this Agreement, and even though such subject or matter was proposed and later withdrawn. . . .

An "Effect of Agreement" clause further provides:

> It is understood that the specific provision (sic) contained in this Agreement shall prevail over District practices, procedures, Personnel Commission rules and over State laws to the extent permitted by law, and that in the absence of specific provisions in this Agreement, such practices and procedures are discretionary with the Board of Trustees and the Personnel Commission.

During the negotiations for the 1980-82 agreement, the Association also presented a comprehensive layoff proposal. The District resisted this proposal on the ground that the personnel commission already had a layoff procedure. The Association eventually dropped the proposal and no layoff provision was included in the parties' final agreement.

Dominge never has negotiated for the District, but has served only as a resource person in negotiations. At negotiation sessions, the District has always been represented by an attorney from the law firm of Paterson & Taggart.

DISCUSSION AND CONCLUSIONS OF LAW

A. The parties' positions.

The Association complains about four, separate unilateral changes made by the District:

(1) The 20 percent layoff of instructional aides announced May 29, 1981 and effective 30 days thereafter;

(2) The reduction of cafeteria employees' hours announced the same date and apparently effective the beginning of the next school year;

(3) The reduction in instructional aides' work year effective September 1981;

(4) The November 1981 change in two instructional aide positions from six hours to five.

Although no District brief was timely filed, from the evidence presented it seems the District's defenses are that the contract language on hours and part-time assignments gives the District the authority to make these changes and, together with the history of the negotiations and the zipper clause in the contract, constitute a waiver by the Association of its right to negotiate these matters.

In response to the District's position, the Association argues that even if negotiations were foreclosed by the contract language, the meeting with Dominge on June 26, 1981 and his apparent intent to negotiate the layoff proposal waived the District's right to assert the contract as a defense to negotiations.

B. <u>The May 29, 1981 20 percent layoff of instructional aides</u>.

The evidence with respect to this instructional aide layoff is scanty. On May 29, 1981 layoff notices went out to

instructional aides, the actual layoffs to take effect 30 days thereafter.[3]

The Association requested to negotiate these layoffs, presented a proposal to the District concerning them, but the District's eventual response in the August 17, 1981 meeting was, contrary to earlier indications, that it would not negotiate the layoff proposal.

Under PERB precedent, a district's decision to initiate layoffs, and the reasons therefor, are non-negotiable. Healdsburg Union High School District (6/19/80) PERB Decision No. 132, at pp. 72-73.[4] Nevertheless, an employer is required to negotiate the implementation of a layoff and the effects or impact on the employees' wages and working conditions so long as there is no conflict with Education Code provisions. Healdsburg, supra, at pp. 73-81; see also, Oakland Unified School District (11/2/81) PERB Decision No. 178, at pp. 4-6.[5]

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[3]Unlike the reduction of cafeteria employees' hours which took place at the same time, it is assumed the reduction in the instructional aides' work year which was implemented in September 1981 is a separate action and accordingly will be dealt with as such herein.

[4]The Healdsburg decision has not been finalized in the courts. A hearing before the California Supreme Court presently is pending.

[5]But compare the treatment of the negotiability of the timing of layoffs in Healdsburg and Oakland. Healdsburg seems to indicate timing is non-negotiable (p. 72), while Oakland

Therefore, although portions CSEA's layoff proposal may have been non-negotiable, other portions relating to the implementation and effects of the layoff certainly were negotiable under the Healdsburg rationale. Since the District refused to negotiate at all on the layoffs, unless its contract waiver defense is found valid its failure to negotiate the implementation and effects of the layoff is a prima facie unfair practice.

It is first noted there is no layoff provision in the parties' negotiated agreement. The fact a layoff provision was proposed by CSEA but ultimately dropped does not constitute a waiver of its right to negotiate the effects of a layoff. Waiver of a union's right to negotiate must be "clear and unmistakable." San Francisco Community College District (10/12/79) PERB Decision No. 105 at p. 17; see also, Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74 at p. 8. Abandonment by a union of a bargaining demand in return for other concessions does not meet the "clear and unmistakable" test for waiver. Timken Roller Bearing Co. v. NLRB (6th Cir. 1963) 325 F.2d 746 [54 LRRM 2785, 2789]; Beacon Piece Dying (1958) 121 NLRB 953, 957 [42 LRRM 1489]. If the rule were otherwise, employers would be encouraged to resist

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seems to indicate the opposite (pp. 4-6). As to other "effects" of layoff, the PERB has yet to rule which are negotiable.

contractual demands so that at a later time they could take unilateral actions without input from the union. Beacon Piece Dying, supra, at p. 960. Thus, the Association's failure to have a layoff provision included in the parties' agreement does not constitute a waiver of its right to negotiate.

Furthermore, inclusion in the parties' agreement of a zipper clause which relieves the District from negotiating on a subject proposed in negotiations but later withdrawn, also does not establish a waiver of the Association's right to negotiate the implementation and effects of the instructional aide layoff. Absent a specific waiver of a specific negotiations subject, such a generalized zipper clause serves only to insulate a party from further requests to negotiate, it does not sanction an employer's unilateral change in a negotiable matter without first affording the union an opportunity to negotiate. Equitable Life Insurance Co. (1961) 133 NLRB 1675 [49 LRRM 1070]; Goodyear Aerospace Corp. (1973) 204 NLRB 831 [83 LRRM 1461], modified on other grounds (6th Cir. 1974) 497 F.2d 747 [86 LRRM 2763].

In other words, such a generalized zipper clause shields an employer from further requests to negotiate, thereby favoring stability of bargaining relationships and agreements. However, such a zipper clause cannot be used by an employer as a sword empowering it to disturb the equilibrium of a bargaining relationship by making unilateral changes in negotiable

matters. NLRB v. Auto Crane Co. (10th Cir. 1976) 536 F.2d 310 [92 LRRM 2364].

The fact there was a personnel commission layoff rule which, according to the parties' agreement, prevails in the absence of a contractual provision, does not negate the District's obligation to negotiate. Although the Association's layoff proposal conflicts in some respects with the personnel commission rule (most notably, when layoffs may occur), most of the Association's proposal concerns subjects not covered by the personnel commission rule, such as reemployment rights.

Therefore, since the implementation and effects of layoff are negotiable, and there is nothing in the parties' agreement which waives the Association's right to negotiate the subject, the District's unilateral implementation of the instructional aide layoffs without affording the Association an opportunity to negotiate constitutes a refusal to negotiate in good faith in violation of section 3543.5(c). Derivative violations of the Association's section 3543.5(b) right to represent bargaining unit members, and employees' section 3543.5(a) right to be represented by an exclusive representative of their own choosing, also are found. San Francisco Community College District (10/12/79) PERB Decision No. 105, pp. 18-20.

C. Reduction in cafeteria employees' hours and instructional aides' work year in September 1981.

Reduction in cafeteria employees' hours and the reduction in the instructional aides' work year both took place at the

beginning of school in September 1981. "Hours of employment" is a specifically enumerated subject within the scope of representation set forth in section 3543.2. Employees' work year similarly is within the scope of representation. Palos Verdes Peninsula Unified School District (7/16/79) PERB Decision No. 96. Absent a valid defense, the District is not permitted to take unilateral action on employees' work hours or work year without regard to its negotiating obligation.

The parties' 1980-82 agreement, however, while giving the District somewhat less discretion than it had under past practice, specifically and unequivocally gives the District the authority to designate the minimum work day and work year for part-time employees at the beginning of the school year. This is exactly what the District did at the beginning of the 1981-82 school year respecting cafeteria employees' work hours and instructional aides' work years. Further, as required by the agreement, the reduction in cafeteria employees' assigned time was effectuated under Education Code layoff procedures.

With respect to the decrease in the work year for instructional aides, Dominge testified this was not necessarily a reduction but rather a guaranteed minimum work year as specified in the parties' agreement. Additional work days during the year still could be assigned.

Accordingly, since the Association specifically negotiated for, and granted the District the authority to designate the

minimum length of the work day and the work year for part-time employees at the beginning of each school year, the District merely was following the agreement in these two areas and no unlawful unilateral changes were made.

The Association's claim the District waived its right to assert this contract defense with respect to the cafeteria workers' cutback is without merit. Although the Association apparently intended the June 26, 1981 meeting with Dominge to be a full-fledged negotiations session, there is no evidence that Dominge and the other administrators considered it anything more than an informal discussion. Furthermore, Dominge's cancellation of the next meeting, in part to allow time to sunshine the Association's proposal, when coupled with the District's later refusal to negotiate, does not constitute a "clear and unmistakable" relinquishment of the District's right to rely on the terms of the negotiated agreement. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74.

D. Reduction of two instructional aide positions from six hours to five.

In November 1981, after two six-hour instructional aide positions were vacated by the incumbents, the District advertised and filled the two positions for five hours only. The Association objected and requested to negotiate over the reduction in hours. The District refused, claiming it has the

unilateral right to set the hours for vacated positions, analogizing the situation to one in which a position has been abolished and a new one created.

Reduction in employees' hours clearly is negotiable and unilateral action thereon is impermissible. North Sacramento School District (12/31/81) PERB Decision No. 193. There is no evidence here, as the District appears to contend, that the two six-hour positions were abolished, and two new five-hour positions were created. There is no evidence the governing board or personnel commission took any such action, and from the job announcement it seems the positions are exactly the same as the previous ones, except for the reduction to five hours.

It might be contended the District had the authority to make this unilateral reduction in hours under the part-time assignment provision of the agreement which provides, in pertinent part, that the District may modify the work day of part-time employees,

> . . . when such is necessary to carry on the business of the District subject to other paragraphs of this article.

However, the District presented no evidence of any business justification for this reduction in hours. Furthermore, as required by the agreement, the reduction in hours was not implemented as a layoff under Education Code procedures.

It also might be argued the District's reduction of the hours of only two positions merely is a violation of this part-time assignment provision which provides in pertinent part:

> At the beginning of the school year, part-time assignments shall be assigned a fixed, regular, and ascertainable minimum number of hours. (Emphases added.)

The PERB does not have the authority to enforce contract violations which do not also constitute unfair practices (section 3541.5(b)).

In Grant Joint Union High School District (2/26/82) PERB Decision No. 196, the Board itself dealt with this issue of which contract violations also constitute unfair practices. The Board stated:

> Such a breach [of contract] must amount to a change of policy, not merely a default in a contractual obligation, before it constitutes a violation of the duty to bargain. (Emphasis added.)

In this case, even though there is only one isolated instance of the District unilaterally changing the hours of part-time positions in mid-year contrary to the parties' agreement, the District indicated its position is it has the absolute right to do so. Under the circumstances, it is appropriate to conclude if similar situations were to arise in the future, the District would not hesitate to take unilateral action again. The District's posture deviates from the contractual language agreed to by the parties in the 1980-82

agreement. Thus, this is not merely an isolated instance, but rather an indication of a continuing pattern of behavior on the part of the District.

Such a change in policy is a repudiation of the parties' agreement and of the District's bargaining obligation, and constitutes an unfair practice under subsection 3543.5(c). It also constitutes derivative violations of sections 3543.5(a) and (b). San Francisco Community College District, supra.

REMEDY

Under section 3541.5(c) of EERA, the Public Employment Relations Board has:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of the employees with or without back pay, as will effectuate the policies of this chapter.

Since it has been found the District committed unfair practices by unilaterally laying off instructional aides without affording the Association an opportunity to negotiate the implementation or the effects, and also by unilaterally reducing two six-hour aide positions to five hours also without affording an opportunity to negotiate, it is appropriate to order the District to cease and desist from taking unilateral actions on matters within the scope of representation without first affording the Association an opportunity to negotiate thereon.

Affirmative relief also is necessary to restore the status quo and give the Association the negotiating opportunities it would have had but for the District's unilateral actions and refusals to negotiate.

With respect to the two instructional aide positions reduced from six hours to five, the District is ordered to restore the two positions to six hours. In addition, since the District violated its negotiated agreement with the Association by reducing the hours of these part-time positions in mid-year, back pay for the extra hour per day, plus interest at the legal rate, is awarded to the incumbents of the positions from the time they began working the reduced five hour day.

The affirmative remedy for the District's failure to negotiate the implementation and effects of the instructional aide layoff presents more difficulty. Since the layoffs themselves are within management's prerogative and therefore non-negotiable, it is not appropriate to order the District to restore the laid-off instructional aides to employment. Moreno Valley Unified School District (4/30/82) PERB Decision No. 206, at p. 13.

On the other hand, the Association is entitled to have the District fulfill its statutory negotiating obligation in a meaningful fashion. This only can be accomplished if the Association is given some measure of economic bargaining power with respect to the laid-off instructional aides. In such

cases the NLRB traditionally imposes a "limited" back pay order which runs prospectively from the date of the NLRB's decision. See, e.g., Transmarine Navigation Corp. (1968) 170 NLRB 389 [67 LRRM 1419]; Royal Plating and Polishing Co. (1966) 160 NLRB 990, 996-997 [63 LRRM 1045]. In a similar Agricultural Labor Relations Board case, the California Supreme Court has approved such a remedy. Highland Ranch v. Agricultural Labor Relations Board (1981) 29 Cal.3d 848 [176 Cal. Rptr. 753]. The Supreme Court stated:

> The limited backpay remedy that the NLRB adopted in Transmarine imposed a prospective requirement upon the employer to pay each terminated employee a daily sum equal to the employee's former wages during the mandated bargaining process. The order additionally provided that the employer's "limited backpay" obligation would terminate as soon as (1) the parties reached agreement on the issues subject to bargaining, (2) the parties bargained to a bona fide impasse or (3) the union failed to bargain in good faith. Finally, the NLRB also placed an absolute ceiling on the employer's potential monetary obligations under the order, specifying that in no event should any employee receive daily payments for a period of time exceeding the period it had taken the employee to obtain alternative employment after his termination.

It is concluded in the present case that such a limited back pay award, with certain modifications, is appropriate in that it will to some measure make whole the laid-off employees for the District's failure to negotiate the implementation and effects of their layoffs and, as nearly as possible, it will

recreate the economic climate which existed before the District's unlawful, unilateral actions.

Accordingly, the District is ordered, upon the Association's request, to negotiate in good faith concerning implementation and effects of the subject instructional aide layoff, and to pay the laid-off employees the normal wages they were receiving at the time of the layoffs, beginning the date the Association requests to negotiate until the earliest of the following:

> (1) The date the District and the Association reach agreement on the implementation and effects of the layoff;
>
> (2) Upon completion of the statutory impasse procedure if the parties fail to reach agreement; or
>
> (3) A subsequent failure by the Association to negotiate in good faith.

The usual rules concerning mitigation of damages also will apply. Amounts earned by laid-off instructional aides during the limited back pay period will be deducted from the District's back pay obligation. Los Gatos Joint Union High School District (3/21/80) PERB Decision No. 120, at pp. 2-6.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice

will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and to restore the status quo. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(c), it is hereby ordered that the SOUTH SAN FRANCISCO UNIFIED SCHOOL DISTRICT, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Refusing to negotiate in good faith with the Association on the implementation and effects of layoff;

(b) Making unilateral changes in work hours and other conditions of employment in violation of its negotiations agreement with the Association and without affording the Association an opportunity to negotiate.

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

(a) Restore the two instructional aide positions reduced to five hours back to six hours and, in addition, give back pay to the incumbents for the additional hour, with interest at the legal rate, from the date the incumbents began working in the positions;

(b) Negotiate upon request with the Association on the implementation and effects of the instructional aides' layoff, and pay the laid-off employees their normal wages at the time of the layoff, beginning from the date of a request to negotiate until the earliest of the following:

(1) The date the District and the Association reach agreement on the implementation and effects of the layoff;

(2) Upon completion of the statutory impasse procedure if the parties fail to reach agreement; or

(3) A subsequent failure by the Association to negotiate in good faith.

Amounts earned by laid-off instructional aides during the negotiations period will be deducted from the District's backpay obligation.

(c) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty (30) workdays at its headquarters offices and in conspicuous places

at the location where notices to classified employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(d) Within twenty (20) workdays from service of the final decision herein, give written notification to the San Francisco Regional Director of the Public Employment Relations Board, of the actions taken to comply with this Order. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the charging party herein.

All other unfair practice allegations are DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on July 21, 1982, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on July 21, 1982, in order to

be timely filed. See California Administrative Code, title 8, part III, section 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. See California Administrative Code, title 8, part III, sections 32300 and 32305 as amended.

Dated: June 30, 1982

GERALD A. BECKER
Administrative Law Judge