

13 PERC ¶ 20159

CALEXICO UNIFIED SCHOOL DISTRICT

California Public Employment Relations Board

**California School Employees Association and its Calexico Chapter No. 399,
Charging Party, v. Calexico Unified School District, Respondent.**

Docket No. LA-CE-2417

Order No. 754

July 17, 1989

Before Porter, Craib and Shank, Members

Unilateral Change -- Subcontracting -- School Busing -- 15.15, 43.54, 43.521, 72.612, 72.614, 72.666 School district violated its bargaining obligation by unilaterally subcontracting transportation services to private charter companies for all "out-of-valley" bus trips. However, district did not violate its bargaining obligation by purchasing vans for use by nonunit teachers and coaches to transport students to various events. Evidence showed that district had established practice whereby teachers and coaches used their private vehicles for such events. In absence of showing that change in distribution of overlapping duties was of significant magnitude, mere fact that district purchased vans did not alter pertinent determination that transportation of students in those circumstances was not exclusively performed by unit bus drivers.

Unfair Practice Remedies -- Backpay -- Effect Of Statute Of Limitations -- 74.344 In case involving unlawful subcontracting of school district's transportation services, backpay order for bus drivers' loss of overtime was limited to period commencing six months prior to filing of original unfair-practice charge.

APPEARANCES:

Madalyn J. Frazzini, Attorney, for California School Employees Association & its Calexico Chapter No. 399; Atkinson, Anderson, Loya, Ruud & Romo by Karen E. Gilyard and James C. Romo, Attorneys, for Calexico Unified School District.

DECISION

CRAIB, Member:

This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Calexico Unified School District (District) to the attached proposed decision of a PERB administrative law judge (ALJ) finding that the District violated section 3543.5, subdivisions (a), (b) and (c), of the Educational Employment Relations Act (EERA).¹ Specifically, the ALJ found that the District unlawfully adopted and implemented a policy of contracting out certain transportation services to private carriers and transferred other work out of the bargaining unit by assigning nonunit employees to transport students to extracurricular activities.

We have reviewed the entire record in this case, including the District's exceptions and the response thereto. Except as noted below, we find the ALJ's findings of fact to be free of prejudicial error and adopt them as the findings of the Board itself. We also affirm and adopt the ALJ's conclusions of law concerning the District's contracting out of transportation services.² As

discussed below, we reverse the proposed decision insofar as it finds that the District unlawfully transferred work out of the unit. Additionally, we find that the remedy must be modified to cover only that period beginning six months prior to the filing of the unfair practice charge.

DISCUSSION

Transfer of Work

Prior to 1984, bus drivers, in addition to their normal routes driving full-size District buses, would sometimes be assigned to transport students to various events in District minibuses. Periodically, nonunit employees (coaches and teachers) would also transport students to events using their private vehicles. Sometime during the 1985-86 school year, the District purchased a van for teachers and coaches to use in transporting students. Prior to that time, the District would occasionally rent a van for the coaches or teachers to drive. During the 1986-87 school year, the District purchased a second van. The bus drivers have not been assigned to drive the vans.

The decision to transfer work to nonunit employees is negotiable as long as it has an impact on subjects within the scope of representation. (*Rialto Unified School District* (1982) PERB Decision No. 209.) In *Eureka City School District* (1985) PERB Decision No. 481, at page 15, the Board set out the following test for the evaluation of unlawful transfer of work claims:

In our view, in order to prevail on a unilateral transfer of work theory, the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which they had previously performed or that nonunit employees began to perform duties previously performed *exclusively* by unit employees. However, where, as here, unit and nonunit employees have traditionally had overlapping duties, an employer does not violate its duty to negotiate in good faith merely by increasing the quantity of work which nonunit employees perform and decreasing the quantity of work which unit employees perform.

(Footnote omitted. Emphasis in original.)

Concluding that the bus drivers and teachers/coaches had overlapping duties in the transport of students to extracurricular activities, the ALJ noted that, in accordance with *Eureka*, merely increasing the nonunit employees' share of such duties would not be unlawful. Finding that the purchase of vans for use by nonunit employees represented "a significantly different degree of commitment and kind of transferring out of bargaining unit work," the ALJ nonetheless found a violation, citing *Oakland Unified School District* (1983) PERB Decision No. 367.

The District, in its exceptions, argues that *Oakland* is factually distinguishable and has no application to the present controversy. We agree. In *Oakland, supra*, at page 24, the Board concluded that a *ten-fold* increase in the amount of *subcontracting* was an unlawful unilateral change in past practice. In the present case, though the purchase of vans caused some increase in the assignment of transportation duties to nonunit employees, it is unclear how significant that increase was. There is certainly no evidence that the increase was of the magnitude found in *Oakland*. Moreover, *Oakland* is of little relevance in transfer of work cases, where the Board has clearly stated in *Eureka* that a mere increase in the relative amount of overlapping duties assigned to nonunit employees is not unlawful.³ Therefore, we find *Eureka* to be controlling in this case and reverse the ALJ's finding that the District unlawfully transferred work out of the unit.⁴

Remedy

The ALJ ordered the District to compensate the bus drivers for the loss of overtime caused by the District's unlawful contracting out, beginning in 1984. The charging party argued that the remedial period should begin in 1984, citing *Montebello Rose Co. v. Agricultural Labor Relations Board* (1981) 119 Cal. App.3d 1, where the court affirmed an award of back pay antedating the six-month statute of limitations period in a surface bargaining case to cover the period when the

unlawful conduct had been concealed from the charging party. Acknowledging that the facts in the instant case are distinguishable from those in *Montebello*, the ALJ found that the District had waived the right to rely on the statute of limitations by failing to raise the issue in its answer to the complaint or thereafter.⁵ He, therefore, found it appropriate to begin the remedial period in 1984, the time of the first known instance of improper contracting out.

In its exceptions, the District asserts that it did raise the statute of limitations as soon as conduct pre-dating the limitations period became an issue, and reiterated that argument in its post-hearing brief. The District also argues that EERA section 3541.5, subdivision (a)(1), sets forth a jurisdictional prerequisite which, if not complied with, results in denial of access to the statutory process. We find that the District is correct on both counts.

The charge and complaint both describe the allegedly unlawful act as a memo, dated February 26, 1986, that stated the District's intent to contract out all "out of valley trips." It was not until the hearing, when the charging party moved to amend the complaint, that contracting out prior to February 1986 became an issue in the case. The District objected to the amendment on statute of limitations grounds and reiterated that argument in its post-hearing brief. Thus, the District raised the statute of limitations issue as soon as it was made aware that conduct more than six months prior to the filing of the charge was at issue. Consequently, assuming arguendo that the statute of limitations may be waived, under these circumstances, the District could not have waived its right to assert such a defense.

At the time the ALJ issued his proposed decision, Board precedent treated the statute of limitations contained in EERA section 3541.5, subdivision (a)(1), as an affirmative defense that may be waived by a failure to assert it in a timely fashion. (See *Walnut Valley Unified School District* (1983) PERB Decision No. 289.) Recently, in *California State University, San Diego* (1989) PERB Decision No. 718-H, the Board overruled *Walnut Valley* and its progeny, holding that the statute of limitations contained in EERA section 3541.5 (as well as identical provisions in the other two statutes administered by PERB) is jurisdictional in nature and, thus, cannot be waived. Accordingly, we find that the remedial period proposed by the ALJ must be modified to begin six months prior to the filing of the unfair practice charge, which the record shows was filed on August 14, 1986.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to section 3541.5, subdivision (c), of the Government Code, it is hereby ORDERED that the Calexico Unified School District (District), its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the California School Employees Association and its Calexico Chapter No. 399 (CSEA) as the exclusive representative of a unit of its employees by unilaterally contracting out bus driver work, thereby reducing the opportunity for overtime pay, a matter within the scope of representation.
2. By the same conduct, denying CSEA its statutory right to represent its members.

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

1. Prior to contracting out the bus driver work found to be unlawful in the Decision above, upon the request of CSEA, meet and negotiate with CSEA over the decision and effects of contracting out such work.
2. Pay to all bus drivers in the bargaining unit an amount equal to the income lost due to the denial of overtime opportunities resulting from the unlawful contracting out of bus driver work.
3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration pursuant to PERB Regulation 32410, post at all school sites and all other work

locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with her instructions.

Members Porter and Shank joined in this Decision.

1 EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

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.

2 The District's exceptions to the contracting out violation are based on arguments also made to the ALJ. As the ALJ fully addressed and properly rejected those arguments, there is no need to address them again in this Decision.

3 The Board has yet to deal with a situation where there is a severe redistribution of overlapping duties from unit to nonunit employees. Given the dearth of evidence in this case as to the magnitude of the reassignment of overlapping transportation duties, it is unnecessary to address that issue in this case.

4 Unlike the ALJ, we find no significance in the fact that the District purchased vans for the use of nonunit employees, rather than renting vans as it had done in the past. While this may have precipitated an increase in nonunit employees' share of overlapping duties, as discussed above, such an increase is lawful.

5 EERA section 3541.5, subdivision (a) states, in pertinent part:

Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:

(1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . .
