

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES )  
ASSOCIATION, )  
 )  
Charging Party, ) Case No. SF-CE-1761  
 )  
v. ) PERB Decision No. 1163  
 )  
ARCATA ELEMENTARY SCHOOL DISTRICT, ) June 26, 1996  
 )  
Respondent. )  
\_\_\_\_\_ )

Appearance: School and College Legal Services by Patrick D. Sisneros, Attorney, for Arcata Elementary School District.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Arcata Elementary School District (District) to a PERB administrative law judge's (ALJ) proposed decision (attached). In his decision, the ALJ found that the District violated section 3543.5(c) of the Educational Employment Relations Act (EERA)<sup>1</sup> by

<sup>1</sup>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 do any of the following:

- (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

unilaterally changing its past practice of having a full-time custodian position, at Sunset Elementary School (Sunset Elementary), when it converted the vacant full-time position into two part-time positions. The ALJ also found that the District's action violated EERA section 3543.5(b) by effectively interfering with the right of the California School Employees Association (CSEA) to represent its members. The ALJ dismissed the allegation that the District's conduct violated EERA section 3543.5(a).

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript and the District's exceptions. The Board finds the ALJ's findings of fact to be free of prejudicial error and adopts them as the findings of the Board itself. The Board finds the ALJ's conclusions of law to be free of prejudicial error and adopts them as the conclusions of the Board itself as modified by the following discussion.

#### DISCUSSION

The District offers several exceptions to the ALJ's proposed decision. The District contends that it has not converted a vacant full-time custodian position to two part-time positions. Instead, it asserts that the full-time position simply remains vacant while the District experiments with a split shift approach

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(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.

to providing custodial services using two new part-time positions. Therefore, the District argues that its action does not fall within the ambit of Cajon Valley Union School District (1995) PERB Decision No. 1085 (Cajon Valley), and there was no duty to negotiate over the creation of the new part-time positions.

Second, the District asserts that the creation and assignment of the part-time custodian positions was completely consistent with the past practice with regard to the configuration of custodial services. The District argues that there is a history of full-time and part-time custodian positions being assigned to schools or designated as districtwide positions.

The District also claims that the parties did, in fact, negotiate and reach consensus on the establishment of the part-time custodian positions during the interest-based bargaining process. The District asserts that CSEA failed to support the consensus agreement when it was put to a vote of the CSEA membership.

EERA section 3543.2(a)<sup>2</sup> limits the scope of representation

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<sup>2</sup>Section 3543.2 states, in pertinent part:

(a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. . . . 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

to matters relating to hours, wages, and other enumerated terms and conditions of employment. EERA reserves all matters outside the scope of representation to the public school employer. PERB applies the test it established in Anaheim Union High School District (1981) PERB Decision No. 177,<sup>3</sup> to determine whether a subject is within the scope of representation. This balancing test places a subject within the scope of representation 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 mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of its mission.

In applying this test, PERB has looked to private sector cases for guidance in defining the management prerogative. The National Labor Relations Board (NLRB) has excluded managerial decisions "which lie at the core of entrepreneurial control" from the scope of representation unless the decision is based on labor costs. (Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609, 2617] (Fibreboard); Otis Elevator Co. (1984)

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consult with any employees or employee organization on any matter outside the scope of representation.

<sup>3</sup>The California Supreme Court approved this test in San Mateo City School Dist. v. Public Employment Relations Bd. (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800].

269 NLRB 891 [116 LRRM 1075] (Otis Elevator); and First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705] (First National).

PERB has taken a similar approach in determining whether employer decisions which may affect the terms and conditions of employment are negotiable.<sup>4</sup> The Board recognizes as within the management prerogative the employer's decisions involving the level of services to be provided. This prerogative includes decisions to create new positions, to determine the number of hours to be assigned to new positions, to discontinue a service by abolishing a position, and to lay off employees.

(Mt. San Antonio Community College District (1983) PERB Decision No. 297; Davis Joint Unified School District (1984) PERB Decision No. 393; Alum Rock Union Elementary School District (1983) PERB Decision No. 322; and Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.)

The Board has only recently considered the negotiability of the employer's decision to change the hours of a vacant position.

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<sup>4</sup>PERB has specifically referred to the standard established in Fibreboard in finding that various employer decisions fall within management prerogative and are outside the scope of representation. See, e.g., Alum Rock Union Elementary School District (1983) PERB Decision No. 322 (District creation and abolition of job classifications); State of California (Department of Personnel Administration) (1987) PERB Decision No. 648-S (Department of Personnel Administration) (contracting out); Whisman Elementary School District (1991) PERB Decision No. 868 (non-unit work performed by volunteers); Stanislaus County Department of Education (1985) PERB Decision No. 556 (District decision to cease operation of child care center); and San Diego Unified School District (1982) PERB Decision No. 234 (District decision to create Employee Assistance Program).

Although not cited by the ALJ,<sup>5</sup> the Board first considered this issue in San Jacinto Unified School District (1994) PERB Decision No. 1078 (San Jacinto). In that case, the employer reduced the hours of a vacant library technician position from 8 hours to 6 hours per day, and increased the hours of a vacant health clerk position from 5 hours to 6 hours per day. The Board stated that had the employer decided to create new positions, leave the existing positions vacant, and allocate a different number of hours to the new positions, its decisions would constitute a level of service change outside the scope of representation. In San Jacinto, the Board found that the employer had not met its burden of showing that the positions were new, holding that the employer had simply changed the hours of the vacant, existing library technician and health clerk positions. The Board went on to conclude that any change in the hours of a vacant position affects the collective interests of bargaining unit members, involves economic considerations rather than a significant change in the level or kind of service to be provided and, therefore, is a matter within the scope of representation.

This case provides the Board with an opportunity to refine its rulings in San Jacinto and Cajon Valley with regard to the negotiability of a change in the hours of a vacant position. In doing so, the Board must give consideration to the employer's

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<sup>5</sup>The ALJ relied solely on the Board's decision in Cajon Valley in finding that a district's change in the hours of a vacant position is a negotiable subject.

exercise of management prerogative and the rights of employees to be represented in matters relating to terms and conditions of employment.

The Board faced similar considerations in determining the negotiability of the employer's decision to contract out work. The Board originally placed all contracting out decisions within the scope of representation. (Arcohe Union School District (1983) PERB Decision No. 360.) However, later decisions have limited the negotiability of the employer's contracting out decisions to those based on labor cost considerations. Contracting out decisions based on a change in the nature and direction of a significant facet of business are not negotiable. (Department of Personnel Administration; San Diego Community College District (1988) PERB Decision No. 662, rev. in part sub nom. San Diego Adult Educators v. PERB (1990) 223 Cal.App.3d 1124 [273 Cal.Rptr. 53].)

In reaching this conclusion in Department of Personnel Administration, the Board harmonized its ruling with the holdings of Fibreboard, Otis Elevator and First National. The Board defined the boundary between the management prerogative and the scope of representation by focusing on whether the employer needs unencumbered decision-making or whether the subject is amenable to resolution through the bargaining process. The Board concluded:

If the decision to be made by this employer on contracting out is based upon considerations other than labor costs, it is difficult to see how the decision would be

amenable to collective bargaining. The unions would, of necessity, be involved in decision making beyond their own interests of employee wages and hours. But such is not the function of an exclusive representative, it is the function of management to be concerned with the running of the business.

The approach taken by the Board in Department of Personnel Administration can be applied with regard to the negotiability of an employer's decision to change the hours of a vacant position. Such a decision which reflects a change in the nature, direction or level of service falls within management's prerogative and is outside the scope of representation.<sup>6</sup> Conversely, a decision to change the hours of a vacant position which is based on labor cost considerations and does not reflect a change in the nature, direction or level of service, is directly related to issues of employee wages and hours and is within the scope of representation.

Applying this approach to the instant case, the District changed the hours of a vacant full-time custodian position, converting it to two 3 3/4-hour-per-day positions. The District does not assert, however, that its action reflected a decision to change the level of custodial service being provided. On the contrary, it is clear that the District intended that no change in the nature, direction or level of custodial service would result from its decision. Instead, it contends that the use of

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<sup>6</sup>As with other management decisions which fall outside the scope of representation, the effects of a non-negotiable decision to change the hours of a vacant position are negotiable to the extent that they affect the terms and conditions of employment of bargaining unit members.

the two part-time positions represents an innovative attempt to deliver that service more efficiently.

The District's selection of the somewhat unusual time base of 3 3/4 hours per day for the part-time custodian positions, suggests some significance attributable to that selection. The District offers no information or explanation relative to its selection of the unusual 3 3/4-hour time base. However, the record indicates that employees of the District who work less than 4 hours per day do not qualify for the employee benefit package offered by the District. Based on these facts, the Board concludes that the District's decision to change the hours of the vacant, full-time custodian position to two 3 3/4-hour-per-day custodian positions did not reflect a decision to change the nature, direction or level of custodial service being provided, but rather was based on consideration of the labor costs associated with that service. Accordingly, that decision was within the scope of representation, and the District was required to provide CSEA with notice and the opportunity to negotiate. When it did not do so and unilaterally changed the full-time position to two part-time positions, the District violated the EERA.

The District, citing the Board's analysis in Cajon Valley, contends that it has not changed the hours of a vacant position; rather, it has established two new part-time positions and left the full-time position vacant. Consequently, since the establishment of a new position is a matter of management

prerogative, the District argues that it had no duty to negotiate with CSEA. As noted above, the negotiability of the District's action turns on the question of whether it reflects a change in the nature, direction or level of service being provided. Here, the District's action clearly does not reflect such a change. Furthermore, as correctly determined by the ALJ, the same custodial work formerly performed by a full-time custodian at Sunset Elementary is now being performed by two part-time custodians. A position is defined by the duties assigned to it, not simply by the designation given to it in a position accounting system. Therefore, the District's assertion that its action was not negotiable because it created two "new" part-time custodian positions is without merit.

The District also argues that its action with regard to the part-time custodian positions is consistent with its established past practice of utilizing both full-time and part-time custodians at various schools and times throughout the District and, therefore, is not subject to negotiations. This argument is also without merit. The conduct at issue here is the change in the hours of the vacant full-time custodian position. While the District has maintained both full-time and part-time custodian positions in the past, it has presented no evidence that it has previously changed the hours of those positions when they became vacant. Therefore, the District has not demonstrated that its action was consistent with an established past practice.

Finally, the District argues that it did not refuse to negotiate and, in fact, reached consensus with CSEA in interest-based bargaining that the two part-time custodian positions would be continued. As noted by the ALJ, it is undisputed that the District initially decided to divide the full-time custodian position without notifying or negotiating with CSEA. The interest-based bargaining sessions in which the parties engaged occurred weeks after the hiring of the part-time custodians. The disputed versions offered by the District and CSEA of the "consensus" reached in those sessions, as well as the ultimate refusal by CSEA to agree to the part-time custodian positions, make it clear that the parties had not completed the bargaining process. Therefore, the District's argument is rejected.

In summary, the District changed the hours of a vacant position, converting it from full-time to two part-time positions. The District's action did not reflect a decision to change the nature, direction or level of custodial service, but was based on labor cost considerations. Consequently, the District's decision was within the scope of representation. The District took this action before the parties had reached agreement or exhausted the statutory impasse procedures. Therefore, the District failed to negotiate in good faith in violation of EERA section 3543.5(c) and thereby denied CSEA the

right to represent its members in violation of EERA section 3543.5 (b) .<sup>7</sup>

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Arcata Elementary School District (District) violated the Educational Employment Relations Act (EERA) , Government Code section 3543.5(c). The District violated EERA by unilaterally changing its past practice of having a full-time custodian position at Sunset Elementary School by converting the vacant full-time position into two part-time positions. Because this action had the additional effect of interfering with the right of the California School Employees Association (CSEA) to represent its members, the unilateral change also was a violation of EERA section 3543.5(b). The allegation that the District's conduct violated EERA section 3543.5(a) is hereby DISMISSED.

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Converting the vacant full-time custodian position at the Sunset Elementary School into two part-time positions prior to the completion of negotiations.

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<sup>7</sup>The parties filed no exception to the ALJ's conclusion that the District had not violated EERA section 3543.5(a).

2. Interfering with the right of CSEA to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Within thirty (30) workdays of the service of this decision, rescind the action of converting the vacant full-time custodian position at the Sunset Elementary School into two part-time positions.

2. Within ten (10) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to classified employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such positing 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 with any other material.

3. Upon issuance of this decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Members Johnson and Dyer joined in this Decision.



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-1761, California School Employees Association v. Arcata Elementary School District, in which all parties had the right to participate, it has been found that the Arcata Elementary School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c) and (b). The District violated EERA by unilaterally changing its past practice of having a full-time custodian position at Sunset Elementary School by converting the vacant full-time position into two part-time positions. The District took this action prior to negotiating with the California School Employees Association (CSEA) and without first exhausting the statutory impasse procedure.

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

A. CEASE AND DESIST FROM:

1. Converting the vacant full-time custodian position at the Sunset Elementary School into two part-time positions prior to the completion of negotiations.
2. Interfering with the right of CSEA to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

Within thirty (30) workdays of the service of this decision, rescind the action of converting the vacant full-time custodian position at the Sunset Elementary School into two part-time positions.

Dated: \_\_\_\_\_ ARCATA ELEMENTARY 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 REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.



STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,	)	
	)	
Charging Party,	)	Unfair Practice
	)	Case No. SF-CE-1761
v.	)	
ARCATA ELEMENTARY SCHOOL DISTRICT,	)	PROPOSED DECISION
	)	(10/31/95)
Respondent.	)	
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Appearances: David R. Young, Labor Relations Representative, for the California School Employees Association; Patrick D. Sisneros, Associate General Counsel, School and College Legal Services, for the Arcata Elementary School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A public school employer is accused here of dividing a vacant full-time custodian position into two part-time jobs without prior negotiations with the union. The union contends that it first learned of the change from an advertisement in the newspaper. The employer denies that the full-time position was abolished, asserting that the job continues to exist but is unfilled. The employer also asserts that the union consented to the hiring of the part-time employees.

The California School Employees Association (CSEA or Union) commenced this action on February 6, 1995, by filing an unfair practice charge against the Arcata Elementary School District (District). The general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against the District on March 1, 1995.

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

The complaint alleges that prior to January 10, 1995, it was the policy of the District that the custodian position at the District's Sunset School was a full-time job. On or about that date, the complaint alleges, the District changed the policy by posting notices for two 3 and 3/4 hour positions. The complaint alleges that after the Union demanded to negotiate, the parties met but did not reach agreement. The complaint alleges that on or about January 25 and 30, the District hired two individuals to fill the part-time positions. By these actions, the complaint alleges, the District failed to negotiate in good faith in violation of the Educational Employment Relations Act (EERA or Act) section 3543.5(c), (a) and (b).<sup>1</sup>

The District answered the complaint on March 20, 1995, denying generally the operative allegations against it. A

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<sup>1</sup>Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at Government Code section 3540 et seq. In relevant part, section 3543.5 provides as follows:

It shall be unlawful for a public school employer to do any of the following:

(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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(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.

hearing was held on August 16, 1995, at the District office in Arcata. With the filing of briefs, the matter was submitted for decision on October 23, 1995.

FINDINGS OF FACT

The District is a public school employer under the EERA. The Union is the exclusive representative of a comprehensive unit of the District's classified employees. Included within the unit are the District's custodial employees.

The District has three schools: Sunny Brae Middle School, Bloomfield Elementary and Sunset Elementary. Prior to the events at issue, the District employed one full-time lead custodian and one full-time custodian at both Sunny Brae and Sunset and one full-time lead custodian and one part-time custodian at Bloomfield. Until the events at issue, these work hours for custodians had been in effect for at least 15 years.

In December of 1994, the District superintendent terminated the employment of the custodian at Sunset on the ground that he had failed his six months' probationary period. Thereafter, the District posted a notice for a full-time custodian at Sunset. After the closing of the application period on January 5, the District hired no one. On January 10, the District posted a job vacancy notice for two custodian positions at Sunset of 3 and 3/4 hours each. The application closing date was fixed at January 19.

The District gave no prior notice to CSEA about its decision to advertise for two part-time positions rather than

one full-time position. CSEA's negotiating committee chair and District employee, Donald T. (Chris) Christensen, testified that he learned of the plan to hire the part-time custodians from a unit member who saw an advertisement in the newspaper. On January 11, Mr. Christensen wrote a memo to District Superintendent David Hochman, asking to meet as soon as possible about the filling of the position at Sunset. He also asked that the District take no action prior to reaching an agreement with CSEA.

The superintendent responded to Mr. Christensen's letter by agreeing to meet with the CSEA negotiating team on January 20. At the meeting, CSEA asserted that the full-time position should not be divided into two part-time jobs and should be filled as before. The superintendent disagreed and the matter was left unresolved. This was the only negotiating session between the District and CSEA about the issue.

Despite CSEA's protest, the District hired the two part-time custodians for Sunset School. One went to work on January 25, 1995, and the other on January 30. Each was assigned to work a shift of 3 and 3/4 hours. One custodian begins work at 5:30 a.m. and the other at 2:30 p.m. By working less than four hours a day, the two custodians are not eligible for fringe benefits.

Superintendent Hochman testified that the District wanted the part-time custodians because the work shift could be divided and the custodians could work when children were not present. He said that an eight-hour custodian would have to start in the

morning and work during the school day. Since children are present, he said, a day-shift custodian could not clean the facility as well as one who works after hours. Despite his preference for the part-time work shifts, the superintendent said that the District has not abolished the full-time position. Rather, he said, it remains as an unfilled position.

The District Board of Trustees considered the hiring of the two part-time custodians at its meeting on February 27. In the early part of the meeting, the school board approved the hiring. Later in the meeting, Mr. Christensen protested the decision not to fill the eight-hour position and to hire the two part-time custodians. He complained that CSEA was not given the opportunity to bargain about the decision which he described as a negotiable subject. He asked the trustees to rescind the decision to hire the part-time custodians so CSEA and the District could negotiate.

Following Mr. Christensen's statement, the school board voted to rescind its earlier approval of the hiring of the part-time custodians. Minutes of the meeting state that the District trustees also "directed the superintendent to begin bargaining with CSEA." Despite the school board's refusal to approve of their hiring, the two part-time custodians remained on the District payroll. Superintendent Hochman testified that there was a tacit understanding between him, the school board and CSEA that the two custodians would remain employed while the challenge to their hiring was pending.

Following the action of the school board, further consideration of the change in the custodian position was deferred to the District's "Interest-Based Bargaining" (IBB) Committee. The IBB Committee is composed of representatives of the District administration, confidential employees, CSEA and the Arcata Teachers Association, exclusive representative of the District's certificated employees. Committee ground rules call for all decisions to be made by consensus. Mr. Christensen testified that he interpreted "consensus" to mean that all persons on the committee reach an agreement. Superintendent Hochman testified that he interpreted "consensus" to mean an absence of further objection to the proposal at issue.

The IBB Committee took up the issue of the custodian position at its meeting of March 27, 1995. At that meeting there were six representatives from the District. Among them were the superintendent, two principals and at least one confidential employee. There were five representatives from CSEA and three from the Arcata Teachers Association.

Mr. Christensen testified that he and the CSEA representatives spoke against the division of the full-time position into two part-time positions. However, he said, he agreed to take the plan to divide the position back to a meeting of the chapter. He said the consensus reached was that the CSEA representatives would take the issue back to the chapter membership for a vote. Mr. Christensen decided that he would remain "neutral" on the proposal when it went before chapter

members. He did not tell others on the IBB Committee of this intent.

Superintendent Hochman initially testified that the consensus he understood the parties to have reached on March 27 was that the District would keep the two part-time custodians. On cross-examination, however, he acknowledged that the consensus reached was that the CSEA representatives would take the issue back to their membership for a decision. He said he believed, nevertheless, that the representatives would support the plan when the members considered it. He said he did not understand that it was Mr. Christensen's plan to remain neutral.

The question of whether to agree to the employment of the two part-time custodians was put before a CSEA membership meeting on April 11, 1995. The membership voted against agreeing to accept the District's action. Mr. Christensen testified that he later told the superintendent of the chapter's refusal to agree.

There were no further negotiations between the District and CSEA on the issue. The matter was never taken through the statutory impasse procedure. As of the date of the hearing, the two part-time custodians were still employed by the District at the Sunset Elementary School.

#### LEGAL ISSUE

Did the District unilaterally change a vacant full-time custodian position into two part-time jobs and thereby fail to meet and negotiate in good faith with CSEA?

### CONCLUSIONS OF LAW

An employer's pre-impasse unilateral change in an established, negotiable practice violates its duty to meet and negotiate in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. (Davis Unified School District, et al. (1980) PERB Decision No. 116.)

In order to establish a unilateral change an exclusive representative must prove that there existed a past practice involving a negotiable subject. The exclusive representative must prove that the employer changed that practice in a manner that will have "a generalized effect" or a "continuing impact" on the members of the negotiating unit. (Grant Joint Union High School District (1982) PERB Decision No. 196.) The change must have been made without affording the exclusive representative notice and the opportunity to negotiate. Or if there was notice, the exclusive representative must prove that it made a demand to meet and negotiate but was rejected. Finally, the exclusive representative must show that the employer made the change before the parties had reached agreement or exhausted the impasse procedures.

It is clear, initially, that this dispute involves a negotiable matter. Hours of work is a specifically enumerated negotiable subject under the EERA scope of representation

provision.<sup>2</sup> " [A] change in the hours of a vacant position is a subject within the scope of representation, and therefore, a negotiable subject because it impact[s] the number of hours which have been regularly assigned to positions that were temporarily vacant." (Cajon Valley Union School District (1995) PERB Decision No. 1085.)

CSEA argues that by dividing the eight-hour position into two positions of three and 3/4 hours the District has changed both hours and benefits. The change in hours is the reduction of an eight-hour position into two positions of three and 3/4 hours, a loss of 30 minutes of custodial work time each day. The change in benefits is the removal of health coverage from the custodian positions, an occurrence that followed from the failure of the two part-timers to work the minimum of four hours required for coverage. CSEA rejects any contention that the meeting of the IBB Committee constituted bargaining. Nothing about the committee meeting constituted bargaining, CSEA argues, and the Union did not waive any rights by participating in it.

The District argues that it did not refuse to negotiate with CSEA but, through the IBB Committee, negotiated and reached an agreement with CSEA about the custodial positions. CSEA, the District contends, then took the agreement back to its membership where it actively opposed it. Moreover, the District contends, it long has employed both full-time and part-time custodians and the creation of the part-time positions at issue was completely

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<sup>2</sup>Section 3543.2.

consistent with the past practice. Furthermore, the District argues, it did not reduce the hours of the full-time custodian position because that job has not been abolished but continues in existence, although vacant.

I am unpersuaded, initially, by the contention that the position for a full-time custodian at Sunset remains in existence, although unfilled. The two part-time custodians replaced a full-time custodian. There is no evidence that the District has sufficient work to employ both a full-time custodian and the part-timers. The rationale for the change, from the beginning, was that the hours of the part-time custodians would permit classroom cleaning when no students were present. This is something the superintendent apparently believed to be impossible with a full-time custodian. Minutes from the IBB meeting show that the superintendent presented the hiring of the part-time custodians as being in lieu of a full-time custodian. I believe that the choice before the District was to have either a full-time custodian or two part-time custodians, but not both.

The next question is whether the decision to make the change was done unilaterally. Plainly, the District decided to divide the position into two part-time jobs without first negotiating with the Union. By the time the Union learned of the plan, the District already had prepared a notice for the part-time jobs and placed an advertisement in the newspaper. It was a decision firmly made by the time the Union learned of it.

When Mr. Christensen objected to the change, the superintendent met with him but did not abandon the decision to hire the part-time custodians. With the Union still in opposition, the part-time custodians were hired and put to work in January. A month later, Mr. Christensen's protests at a school board meeting led the board to rescind its formal ratification of the hiring of the part-time custodians. But the two part-time custodians remained on the job nonetheless.

A month after the school board meeting, the hiring of the part-time custodians was placed before an IBB meeting for discussion. There is a conflict in the evidence about what happened at the IBB meeting. The District contends that at the end of the meeting, CSEA representatives had acquiesced in the change and promised to urge members of the chapter to approve it. CSEA contends that it promised only to take the matter back to the chapter for consideration.

I think it very unlikely that CSEA representatives acquiesced to the change at the IBB meeting. By the time of the meeting, CSEA had opposed the division of the full-time position into two part-time jobs both to the superintendent and the school board. The present unfair practice charge had been filed and CSEA had given every indication of contesting the change in every available forum. It is hard to imagine that CSEA would suddenly change its position at the IBB meeting. Indeed, the District acknowledges that CSEA representatives spoke against the change at the meeting.

I conclude that CSEA did not consent to the change at the IBB meeting. I believe that CSEA representatives made their opposition known. When it became clear that their views were in the minority, they agreed to take the matter back to the chapter as a method for moving the dispute out of the IBB arena. When the chapter rejected the proposal, the parties were back where they were at the beginning.

That the District may have employed another part-time custodian does not show a practice of converting full-time positions into part-time positions. Indeed, the hours of District custodians had remained unchanged for at least 15 years before the change in January of 1995. Since all evidence indicates that the District plans to make the conversion of the position from full-to part-time a permanent change, the action was one that will have a "continuing impact." The District did not bargain with the Union prior to making the change and did not exhaust the statutory impasse procedures over the dispute at the time when the agreement was open.

Accordingly, I conclude that the conversion of the full-time custodian position into two part-time jobs constituted a failure to negotiate in good faith in violation of section 3543.5(c). Since the action also had the effect of denying CSEA the right to represent its members, it also was in violation of section 3543.5(b). There is no evidence that the failure to negotiate in good faith also denied to individual employees rights protected by the EERA. The allegation that the District violated section

3543.5(a) therefore must be dismissed. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.)

REMEDY

The PERB in section 3541.5(c) is given:

. . . 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 employees with or without back pay, as will effectuate the policies of this chapter.

Here, the District unilaterally changed the hours of a custodian position by dividing the position into two part-time jobs. The District took this action prior to negotiating with CSEA and without first exhausting the statutory impasse procedure. The appropriate remedy in a unilateral change case is a return to the status quo ante. Here, this means that the District be directed to restore the full-time custodian position at Sunset Elementary School that existed prior to January 10, 1995. It is further appropriate that the District be directed to cease and desist from unilaterally changing the hours of employees.

The District also should be required to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this

controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Arcata Elementary School District (District) violated Government Code section 3543.5 (c). The District violated the Act by unilaterally changing its past practice of having a full-time custodian position at Sunset Elementary School. Because this action had the additional effect of interfering with the right of the California School Employees Association (CSEA) to represent its members, the unilateral change also was a violation of section 3543.5(b). The allegation that the District's conduct violated section 3543.5(a) is hereby DISMISSED.

Pursuant to section 3541.5 (c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing the past practice of employing a full-time custodian at the Sunset Elementary School by converting the full-time position to two part-time positions.

2. By the same conduct, interfering with the right of CSEA to represent its members.

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

1. Within thirty (30) workdays of the service of a final decision in this matter, rescind the action of converting the full-time custodian position at the Sunset Elementary School into two part-time positions.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to classified employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. 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 with any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any,

relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Ronald E. Blubaugh  
Administrative Law Judge