

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION & ITS CHAPTER 82,

Charging Party,

v.

FULLERTON JOINT UNION SCHOOL
DISTRICT,

Respondent.

Case No. LA-CE-4538-E

PERB Decision No. 1633

May 19, 2004

Appearances: California School Employees Association by A. Alan Aldrich, Senior Labor Relations Representative and Janet Jones, Labor Relations Representative, for California School Employees Association & its Chapter 82; Law Offices of Margaret A. Chidester & Associates by Sharon J. Ormond, Attorney, for Fullerton Joint Union School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California School Employees Association & its Chapter 82 (CSEA) from a Board agent's dismissal of its unfair practice charge. The charge alleged that the Fullerton Joint Union School District (District) violated the Educational Employment Relations Act (EERA)¹ by unilaterally changing the work schedules of custodians.

After reviewing the entire record in this matter, including the original and amended unfair practice charge, the warning and dismissal letters, CSEA's appeal and the District's response, the Board reverses the Board agent's dismissal and remands this case to the General Counsel's Office for issuance of a complaint consistent with this decision.

¹EERA is codified at Government Code section 3540, et seq.

BACKGROUND

The District and CSEA are parties to a collective bargaining agreement (CBA) effective through June 30, 2005. Relevant to this charge are two provisions of Article VI, entitled “Duty Hours.” These relevant provisions state:

1. Workweek

A. The regular workweek for full-time employees shall be forty (40) hours rendered in units of eight (8) hours, excluding non-paid lunch periods.

B. The workweek shall consist of five (5) consecutive workdays for all employees rendering service averaging four (4) hours or more per day during the workweek.

C. The District retains the right to extend the regular workday or workweek when it is deemed necessary to carry out the District’s business.

2. Workday

The workday for all employees shall be established and regularly fixed by the District in order to meet the District’s educational goals and objectives.

The CBA also includes an entire agreement clause and a zipper clause.

According to the charge, during the graduation period, the second or third week in June, there is an increase in vandalism throughout the District. For the last seven years, the District has extended the shifts of day and night custodians at each campus to provide security and prevent vandalism during this period. As a result, each custodian earned approximately six hours of overtime per day during the graduation period.

On June 4, 2003, District Administrator of Personnel Services, Greg Franklin (Franklin) advised CSEA that the District intended to change work shifts for all custodians during the week of June 9 – June 13, 2003, to provide coverage for security and prevent vandalism.

According to CSEA, Franklin stated that the reason for the change was to cut overtime costs in light of the state budget crisis. CSEA further asserts that the District never claimed the work shift changes were to further “educational” goals, but rather the District admitted that “business” reasons were the motivating factor.

The proposed schedule changed the start and end times of the custodians’ shifts, but kept the shift length to eight hours. As a result of the temporary shift change, none of the custodians would earn overtime during the graduation period. CSEA orally expressed its opposition to the change and on June 5, sent a fax to Franklin again expressing CSEA’s opposition to the change and asking to meet and confer.

The District did not respond to the request to negotiate, and the custodians worked the altered eight hour shifts during the week of June 9 – June 13.

CSEA then filed this charge alleging that the District violated EERA by unilaterally changing the work shifts of custodians during the graduation period. The District defended its actions on the grounds that the CBA permitted such changes. CSEA countered that the CBA only permits the District to initially set the hours of work and does not permit subsequent unilateral changes to avoid overtime.

BOARD AGENT’S DISMISSAL

The Board agent analyzed the charge as an unlawful unilateral change. Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982)

PERB Decision No. 196.) An employer does not make an unlawful change if its actions conform to the terms of the parties' agreement. (Marysville Joint Union School District (1983) PERB Decision No. 314.)

The issue before the Board agent was whether the CBA permitted the District to unilaterally change the work shifts of the custodians. The Board agent concluded that CSEA did not establish a change in policy. Specifically, the Board agent noted that Article VI, Section 2, provides that “the workday for all employees shall be established and regularly fixed by the District in order to meet the District’s educational goals and objectives.” According to the Board agent, this language gives the District the authority to establish work shifts to meet educational goals and objectives.

In dismissing the charge, the Board agent stated that CSEA had provided no facts demonstrating what is meant by the phrase to “meet the District’s educational goals and objectives.” CSEA had argued that the District implemented the changes because of cost concerns and that such concerns did not constitute an educational goal or objective. CSEA argued that its interpretation was supported by the contrasting language of Article VI, Section 1, which gives the District the right to extend the regular workday or workweek “to carry out the District’s business.” According to CSEA, the CBA distinguishes between “educational” and “business” reasons and that the District cannot use Article VI, Section 2 solely to avoid overtime.

The Board agent rejected all of CSEA’s arguments. Specifically, the Board agent held that avoiding overtime costs could constitute a legitimate educational objective since “a District’s educational goals or objectives may very well be furthered by conserving funds due to cost concerns.” According to the Board agent, CSEA had failed to establish any ambiguity

in the language of the contract. As the Board agent believed that the CBA clearly permitted the District's actions, the charge was dismissed.

DISCUSSION

On appeal, CSEA argues that the Board agent erred in dismissing the charge. According to CSEA, the language of Article VI, Section 2 is at least ambiguous as to whether the District may unilaterally change employee work shifts to avoid incurring overtime costs. Because of the ambiguity, CSEA argues that an evidentiary hearing should be held to determine the meaning of the disputed language. The Board agrees.

In recent cases, the Board has addressed the issue of what constitutes a clear and unmistakable contractual waiver. (Long Beach Community College District (2003) PERB Decision No. 1568 (Long Beach); County of San Joaquin (2003) PERB Decision No. 1570-M (San Joaquin).)

In Long Beach, the Board stated the following:

... any waiver of a right to bargain over a negotiable contracting out decision must be 'clear and unmistakable.' (Amador Valley Joint Unified School District (1978) PERB Decision No. 74 (Amador Valley); see also, Metropolitan Edison Co. v. NLRB (1983) 460 U.S. 693, 708 [103 S.Ct. 1467] (Metropolitan Edison)). The 'clear and unmistakable' standard is a high one and mandated by the Board's previous findings that there is a strong public policy against finding waivers based on inferences. (Los Angeles Community College District (1982) PERB Decision No. 252; Palo Verde Unified School District (1983) PERB Decision No. 321; see Daniel Construction Company, Inc. (1979) 239 NLRB 1335, 1336 [100 LRRM 1201].) A waiver of an exclusive representative's right to bargain will never be lightly inferred. (Oakland Unified School District (1982) PERB Decision No. 236.) In cases where the alleged waiver is exceptional in 'breadth or severity,' the 'clear and unmistakable' standard must be stringently applied. (San Marcos Unified School District (2003) PERB Decision No. 1508 (San Marcos)) The burden of proof for establishing an affirmative

defense of waiver rests exclusively with the District. (Placentia Unified School District (1986) PERB Decision No. 595.)
(At p. 14.)

In San Joaquin, the Board was faced with a contract interpretation issue similar to this one. There, the issue was whether an employer was obligated to submit a dispute to impasse procedures. The employer argued that the language of the local rule did not apply while the union argued that it did. In deciding that a complaint should issue, the Board in San Joaquin recognized the rule that:

. . . where the contract language or rule is unclear or ambiguous, the Board has held that the parties should be given an opportunity to offer evidence to support their differing interpretations at an evidentiary hearing. [At p. 6.]

Here, the Board finds that Article VI, Section 2 of the CBA is ambiguous in at least two areas. First, it is not clear whether the phrase “shall be established and regularly fixed by the District” allows the District to unilaterally make temporary changes to the work schedules of its employees. The language, at a minimum, is reasonably susceptible to CSEA’s interpretation that the District is only permitted to set “regular” work shifts and that the District cannot thereafter alter them for temporary periods of time.

The Board also finds ambiguous the conditional language “in order to meet the District’s educational goals and objectives.” CSEA argues that this language must be contrasted with the other CBA provision allowing the extension of the workday for “business” reasons. According to CSEA, cost savings constitute a business reason, not an educational one. Again, the Board finds that the language, at a minimum, is reasonably susceptible to CSEA’s interpretation. Whether achieving cost savings is a valid “educational” goal under the CBA is at its heart a dispute over contract interpretation. Such disputes are best resolved after an evidentiary hearing. (San Joaquin.)

Accordingly, the Board finds that CSEA has established a prima facie case and that a complaint should be issued.

ORDER

The Board REVERSES the Board agent's dismissal in Case No. LA-CE-4538-E and REMANDS the case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Chairman Duncan and Member Whitehead joined in this Decision.