STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS STANISLAUS COUNTY CHAPTER NO. 668,	)	
Charging Party,	)	Case No. S-CE-742
v.	)	PERB Decision No. 556
STANISLAUS COUNTY DEPARTMENT OF EDUCATION,	)	December 31, 1985
Respondent.	)	

Appearances: Harry J. Gibbons, Jr., for California School Employees Association and its Stanislaus County Chapter No. 668; Finkle & Stroup by Mary Beth de Goede and Leith B. Hansen for Stanislaus County Department of Education.

Before Jaeger, Morgenstern and Porter, Members.

DECISION

MORGENSTERN, Member: The California School Employees Association and its Stanislaus County Chapter No. 668 (CSEA) excepts to the decision, attached hereto, by a Public Employment Relations Board (PERB or Board) administrative law judge (ALJ) finding that the Stanislaus County Department of Education (County) did not violate section 3543.5(a), (b) or (c) of the Educational Employment Relations Act (EERA or Act).[1] Specifically, CSEA's charge contends that the County failed to

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

In relevant part, section 3543.5 provides:

negotiate its decision to cease operation of three child development centers for migrant children (centers) and to select an outside nonprofit corporation to perform that function. CSEA also claims that the County failed to negotiate the effects of that decision.

FACTUAL SUMMARY

We have reviewed the decision of the ALJ and, finding his factual findings free from prejudicial error, adopt them as the Board's factual summary.

DISCUSSION

We are in essential agreement with the conclusions of law reached by the ALJ. First, we agree that CSEA raised the issue of contracting out long before the District reached its final decision to cease operation of the centers. The parties engaged in various negotiating sessions, some of which involved the discussion of CSEA's proposals designed to head off the County's decision to end its direct involvement in the migrant child development program (program).

> 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.

The principle point of contention at issue in this case concerns the most appropriate characterization to be given the County's decision to cease direct operation of the centers. CSEA relies on Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609] and asserts that the employer's decision involved the subcontracting out of bargaining unit work. The County, on the other hand, argues that the decision falls within its managerial prerogative to change the nature and direction of its business. Relying on Otis Elevator Co. (1984) 269 NLRB 891 [116 LRRM 1984], the County asserts that its decision was not undertaken merely to save labor costs but because it wanted to cease direct operation of a program it found exceedingly troublesome and uncertain.

Upon review, we affirm the ALJ's conclusion that the County's decision was not one appropriately relegated to the negotiating process. The decision to cease direct operation of the centers invariably meant that County employees lost their jobs. Clearly, it was a decision about which both management and the employees were concerned. However, for the reasons outlined by the ALJ, the duty to negotiate the decision would have significantly abridged the employer's freedom to exercise managerial prerogatives essential to its mission.[2]

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[2]Under the Board's test enunciated in Anaheim Union High School District (1981) PERB Decision No. 177, a subject is negotiable 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

As the ALJ noted, the migrant child education program is not mandated by the laws of this State but is, rather, a program created by the Federal Government. The County initially opted to provide direct educational services at the centers; however, the program exists despite County involvement. Unlike a school district that abandons its in-house transportation program and hires a private bus company to carry the students to and from its schools, here, the migrant child centers are not part of a County program which survives as such after the County decided it no longer wished to be in the business of directly providing the educational services. As the ALJ noted:

> . . . The present case does not present the situation where federal funds were used to finance what is essentially a local program, like the cleaning of classrooms. Here, federal funds were provided to a local employer to run a federal program. The migrant education program was initiated by the federal government and tightly controlled by it. Unlike the cleaning of classrooms, operation of the migrant program is an activity which did not exist before the arrival of federal funds and might well cease should those funds ever be withdrawn.

Thus, since the County's role in the migrant child program was that of a conduit for federal funds, we agree that whether a school employer continues to operate a program on behalf of the

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employees that conflict is likely to occur and the mediatory influence of collective bargaining is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge the employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission. Also see section 3543.2.

Federal Government is a basic managerial prerogative about which negotiation is not required.

ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case, the attached decision of the Public Employment Relations Board administrative law judge is AFFIRMED and Case No. S-CE-742 is hereby DISMISSED.

Member Porter joined in this Decision. Member Jaeger's concurrence begins on page 6.

Jaeger, Member, concurring: I join my colleagues in finding that the County Department of Education (County) was not obligated to negotiate its decision to discontinue its migrant education activities. However, I do not share with them, or with the administrative law judge, some of the views they express.

Charging Party's characterization of the County's decision as "contracting out" or "subcontracting" is inapropos. As I understand the evidence, the County acted as a "broker" or agent of the Federal Government in finding, and overseeing, organizations that provided a migrant-education service to the Federal Government. The County itself was not responsible for providing the service, except in the single instance subject to the dispute here, and did not subcontract when it selected the six other agencies which provided migrant education.

When the County discontinued its own involvement as a direct supplier, it "brokered" a contract with a private, non-profit organization to furnish the educational service to the Federal Goverment, assuming the role it filled elsewhere as general administrator and funnel of federal funds.

In sum, the County, for reasons which are not unlawful under EERA,[1] changed the nature and direction of its operations by "dropping out" of the business of being a direct

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[1]For example, discontinuing operations in order to destroy majority support for a union would presumably be unlawful.

supplier of migrant education. In the private sector, such entrepreneurial decisions have been held to be outside the scope of mandatory negotiations. See Otis Elevator Co (1984) 269 NLRB 891 [116 LRRM 1984].

In its precedential decision, Anaheim Union High School District (1981) PERB Decision No. 177, given approval by the California Supreme Court in San Mateo City School District, et al. v. PERB (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800], the Board established the test of negotiability. In part, that test provides that a subject is negotiable if:

> The employer's obligation to negotiate would not significantly abridge the employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission. (Emphasis added.)

It is clear that sheltering an employer's right to make basic educational policy determinations was within the Board's contemplation when it included the underlined language. Here, as I see it, the District's decision was to discontinue the migrant program rather than to continue its operations through a subcontractor.

For these reasons, I join in dismissing the complaint.

However, I cannot subscribe to the theory that the issue is not subject to negotiation because the program was federally ordained, not an "integral part of a County program," and not dependent on the County's voluntary involvement. I find no authority for the proposition that the identity of the customer or the nature of the work performed by bargaining unit

employees determine whether those employees may excerise their statutory right to negotiate their wages, hours or working conditions. Certainly, an employer's decision to take on work that is not typical, or that it is not legally required to perform, does not vest in him the privilege of avoiding his obligations under the Act.

Nor can I agree that the federal origin of program funding bears on the question of negotiability. Although the Board has not addressed this specific question, it has considered funding sources in unit determination cases in a manner demonstrating that employees performing work funded by external sources, including the Federal Government, are not to be deprived of their right to bargain with their employers.[2] In short, where the employer gets its money from does not exempt it from the obligation to negotiate how at least some of that money shall be distributed among the employees.

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[2]See Oakland Unified School District (1977) EERB Decision No. 15; Peralta Community College District (1978) PERB Decision No. 77; Redondo Beach City Unified School District (1980) PERB Decision No. 114.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and its STANISLAUS CHAPTER No. 668, Charging Party, v. STANISLAUS COUNTY DEPARTMENT OF EDUCATION, Respondent.	Unfair Practice Case No. S-CE-742 PROPOSED DECISION (10/23/84)

Appearances: Harry J. Gibbons, Attorney for the California School Employees Association and its Stanislaus Chapter No. 668; Mary Beth de Goede and Leith B. Hansen, Attorneys (Finkle & Stroup) for the Stanislaus County Department of Education.

Before Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

It is contended here that a county superintendent of schools subcontracted unit work when he turned over to a non-profit corporation the operation of a federally funded migrant education program. The county advances several defenses including a contention that its decision to cease operation of the federal program was outside the scope of representation and therefore non-negotiable.

The California School Employees Association and its Stanislaus Chapter No. 668 (hereafter CSEA) filed the charge at issue on March 19, 1984. The charge alleges that the

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

Stanislaus County Department of Education (hereafter County)[1] unilaterally subcontracted bargaining unit work by laying off certain employees and transferring operation of three migrant child development centers to a nonprofit corporation. On May 18, 1984, the Sacramento Regional Attorney of the Public Employment Relations Board (hereafter PERB) issued a complaint alleging that by the transfer the County had violated Educational Employment Relations Act subsection 3543.5(c) and derivatively (a) and (b).[2] Specifically, it is alleged that the County failed to negotiate about the decision to cease

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[1]Even though the charge and complaint list the respondent as the Stanislaus County Department of Education, the parties stipulated that actual employer and respondent in this action is the Stanislaus County Superintendent of Schools. See reporter's transcript at p. 3.

[2]Unless otherwise indicated, all references are to the Government Code. The Educational Employment Relations Act (hereafter EERA) is found at section 3540 et. seq. In relevant part, section 3543.5 provides 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.

operation of the centers and select another agency to perform the function and about the effects of the decision. On June 11, 1984, the County answered the complaint, denying any violation of the EERA and asserting affirmatively that it had satisfied all negotiating requirements.

On June 11 the County also filed a motion to dismiss that portion of the complaint which alleges a failure to negotiate about the effects of the decision. The County argued that an allegation about failure to negotiate on the effects of the change was not included in CSEA's original charge and thus could not be the subject of a complaint. On July 18, 1984, the hearing officer then processing the case denied the motion on the ground that the charge included within it factual allegations sufficient to support the complaint as issued.

A hearing on the complaint was conducted in Sacramento on August 16 and 17, 1984. The last of the briefs from the parties was received on October 16, 1984, and the case was submitted for decision as of that date.

FINDINGS OF FACT

The Stanislaus County Department of Education, a public school employer under the EERA, provides a variety of services to small school districts within Stanislaus County. It takes care of business operations for some districts, conducts teacher training programs and operates an instructional materials center. The County operates the John F. Kennedy

Center for Severely Handicapped Children and provides teachers for handicapped students in various school districts.

For some years, the County also has served as the agent of the federal government in the administration and operation of Headstart and migrant child development programs. The programs are funded primarily by the federal Administration for Children, Youth and Families with the State Department of Education providing local matching funds. The programs are operated under strict federal guidelines. The County's role in Headstart has been as the administrator of the program in Stanislaus County and the direct operator of three Headstart centers. The County's role in the migrant program has been as the administrator in a seven-county region and the direct operator of the migrant program within Stanislaus County. It was the County's decision last year to step out of its role as the operator of the migrant program at three locations in Stanislaus County that led to the present case. The County has retained its role as administrator of Headstart in Stanislaus County and operator of three Headstart centers and its role as seven-county administrator of the migrant program.

The County commenced its service as regional administrator of the federal migrant education program sometime in the early 1970's. It was solicited for this task by federal authorities who found it too difficult to deal directly with individual counties. The region administered by the County comprises

Stanislaus, Madera, Merced, Tuolumne, Santa Clara, Contra Costa and Santa Cruz Counties. Federal funds to operate all migrant child development programs in the seven counties pass through the Stanislaus County Department of Education. In its role as regional administrator, the County chooses the organizations which will receive the federal migrant education funds, awards, the contracts, monitors the operation of the program and transmits the federal monies involved. In each county, one delegate organization is chosen to operate the migrant program throughout that county. During the time that the Stanislaus County Department of Education has been the regional administrator, the only migrant program operated by a governmental entity in any of the seven counties was the one which the Stanislaus County Department itself operated.

The County began the direct operation of the migrant child development program within Stanislaus County sometime in the 1970's. In recent years, the Stanislaus migrant child development program has been operated at farm labor camps in Patterson, Westley and Ceres. This is a reduction from a higher number of centers which the County operated in the early days of its involvement. The Stanislaus County Housing Authority owns and manages the three labor camps where the child develpment program is offered.

The migrant child development program is in operation during the agricultural harvest season, approximately May 1 through November 15. The number of children in the three centers may vary widely according to crop conditions, the weather and labor unrest. The peak enrollment is approximately 440 children. The children range in age from 6 weeks to 5 years. The program is limited to children whose parents receive at least 50 percent of their income from agriculture and whose annual income is not greater than an amount set by the federal government. The program involves both instruction and child care.

For some years, top administrators within the County have held an ongoing discussion about the proper role of a county department of education. One focus of that discussion was the operation of the migrant program. A number of factors made its continued operation undesirable from the County's point of view. One problem was a conflict between the calendar year orientation of the migrant program and the academic year orientation of all other County operations. This conflict carried over into the funding cycle with income and expenditures for the migrant program geared toward a calendar year while the remainder of the County's operations were funded on a fiscal year basis. In addition, federal rules for the migrant program were designed for operation by a community agency and the County found them cumbersome for a governmental entity.

The County's general dissatisfaction with the migrant program came into clear focus in the spring of 1983 when the County discovered that it was losing money on the program. After being self-supporting for years, the migrant program was headed for a 1983 deficit of $139,166. The projection was that the program could lose as much as $250,000 annually in 1984 and later years. When they received those gloomy numbers, County administrators began to think seriously about getting out of the migrant program.

Shortly after the deficit was discovered in May of 1983, County personnel director Jack Francis contacted CSEA field representative Nancee Maya and told her of the problem. Since August of 1979, CSEA has been exclusive representative of an office-technical-business-services unit, a paraprofessional unit and an operations and support unit of the County's employees. Since August of 1980, CSEA also has been exclusive representative of a permit teacher unit of the County's employees.

On July 12, 1983, Mr. Francis wrote to Ms. Maya advising her that the County might have to lay off "a considerable number of classified employees who are connected with our migrant/child development programs." He urged an early meeting between the parties to reach an understanding on the timing of layoff notices. CSEA and the County agreed to hold a meeting within three days of Mr. Francis' letter.

At the time the parties met on July 15 they were, to some degree, dealing with a hypothetical change. Although leaning toward removing itself from the migrant program, the County was still considering the idea and did not plan to make a final decision before September. Despite the uncertainty, the parties negotiated on July 15 and reached what they described as an "agreement in relation to the effect of layoff of classified and certificated employees in relation to the possible termination of the Child Development Program operated by the Department." The agreement set out eligibility for unemployment insurance benefits and provided for continuation of health insurance coverage.

Mr. Francis again met with Ms. Maya on August 5, 1983, at a meeting she described as dealing with the design and content of the layoff notices. Mr. Francis testified that at the meeting the parties had discussed whether the County's proposed action was similar to the contracting out of bus services which previously had been undertaken in a nearby Oakdale school district. He testified that Ms. Maya had stated that she believed the County's impending action was not like the Oakdale situation. Ms. Maya testified that she did not recall making such a statement.

On August 17, the County commenced sending layoff notices to employees in the migrant program. The notices were sent on a rolling basis with the date an individual employee received a

notice determined by when that employee finished his or her pre-determined period of employment. Ultimately, 107 employees received layoff notices.

Not long after the first layoff notices were sent to employees, newspaper articles were published about the layoff. The articles led to consternation among parents and others about whether the migrant education centers would be closed. To ward off those fears, representatives of the County office met with interested parties to assure them that the centers would not be closed but that some other organization might take over their operation.

Despite the apparent finality of wording in the layoff notices, the County was still undecided in early fall about whether it would continue to operate the migrant program in 1984. A negotiations session was held on September 14, 1983, to permit further discussions between the parties about the financial problem, estimated during the meeting to be a deficit of about 30 percent. At the meeting, Mr. Francis set out a timetable for a final decision about the County's role in the migrant program. Under the timetable, a final decision had to be made by October 14 in order to permit time for the selection of a replacement agency.

The parties next met on October 26, 1983. Although the meeting was held after the deadline, Mr. Francis earlier had advanced, the County still had not reached a final decision on

the migrant program. Negotiations once more centered upon the question of whether or not the County should cease its direct involvement in the operation of the migrant program. In an effort to avoid the threatened layoff, CSEA offered to accept a pay reduction of 5 percent for all employees working in the migrant program. The County responded by giving CSEA a financial analysis the union earlier had requested. The analysis showed various ways that cuts of up to 30 percent would have to be taken from the program if it were to become self-sufficient. The County rejected the proposed 5 percent cut as completely inadequate. During the meeting, the County sought to allay Ms. Maya's earlier voiced concerns that transfer of the program to a delegate agency would constitute contracting out of unit work. The County reported to her information it had received from federal authorities that employees of organizations operating federal programs under County supervision could not be considered County employees.

The parties met again, on November 1, 1983. The County still had not made a final decision about whether or not to terminate its direct involvement in the operation of the migrant program. Once more, the focus of the negotiations was on whether or not the County should take that step. CSEA proposed that the salaries of migrant child development center employees "be reduced to the extent necessary for the program to remain within the limits of its funding." The County

rejected the proposal. Mr. Francis told the union that such pay reductions would create an impossible morale problem with employees in the migrant program receiving 30 percent less than other County workers performing comparable duties. He said the unequal pay also would have divided employees along racial lines because the majority of those affected would have been Hispanic.

On November 7, 1983, the County reached a final decision to remove itself from direct operation of the migrant program. The decision was reached by consensus after a lengthy discussion between John Allard, the County superintendent, John Hendrickson, the assistant superintendent, and Mr. Francis. The three administrators reviewed the problems which the County had encountered with the migrant program. They concluded that while the CSEA proposal to accept a wage reduction would solve the immediate financial problem it would not solve the problem in future years.

On the same day as it reached its final decision, the County sent a letter to all affected employees advising them that the County would seek a private, non-profit organization to take over the migrant program. On November 16, the County notified employees that the effective date of their layoff would be changed to December 31, 1983. This action had the effect of extending the health benefits of all migrant center employees to January 31, 1984. Although CSEA apparently was

not consulted about the change in the effective date of the layoff, it raised no objection after it learned of the action.

Ultimately, 94 unit members were laid off from their jobs in the migrant program. Of those, eight had been reemployed in other County programs as of the date of the hearing.

The parties held no meetings about the layoff during the remainder of 1983. On January 16, 1984, Ms. Maya wrote to Mr. Francis declaring that CSEA had reached the conclusion that the County's plan to get out of the migrant program actually was the subcontracting of bargaining unit work. In her letter, Ms. Maya asserted that the County's action was negotiable and she demanded that the County meet and negotiate on the subject. She also demanded that the County rehire the affected employees and restore the status quo prior to the commencement of negotiations.

In response to the CSEA demand, the parties met on February 10, 1984. CSEA offered two alternatives. The County should either rehire all of the laid off employees and continue its operation of the migrant program or it should require the new operator to adhere to the terms of the contract between the County and CSEA. The County rejected the alternatives. Mr. Francis responded that the County had not gone through all the difficulty of the layoff in order to simply rescind it. Regarding the proposed transfer of the contract to the new

operator, Mr. Francis took the position that the County had no legal authority to make such a requirement.

On March 2, 1984, the County made a written proposal in a letter from Mr. Francis to Ms. Maya. Under the proposal, the laid off County employees would have preferential hiring rights at the new delegate agency. The County would provide training to laid off employees to make them eligible for vacancies within remaining unit jobs as vacancies developed. Re-employment rights for laid off migrant program employees would be extended from 39 months to 45 months. The County would pay each laid off employee $100 as compensation for lost health benefits and CSEA would be given an opportunity to review and offer comments regarding the organizations under consideration to take over the program.

CSEA did not respond to the proposal, prompting a follow-up letter from Mr. Francis to Ms. Maya. In that letter he accused CSEA of a lack of cooperation in trying to reach an agreement and said that Ms. Maya did not return his calls or make herself available for a meeting. Ms. Maya responded in writing on April 2 saying that she did not understand how further meetings would be useful because of the County's refusal to discuss the CSEA proposals of February 10.

Despite their differences the parties did meet twice more. At a meeting on April 13, the County offered to pay some college costs for laid off employees and proposed to increase

compensation for lost health benefits from $100 to $150. The parties met again on April 18 and the County increased to $200 the amount it was willing to pay employees for lost health benefits. At both meetings, CSEA maintained its insistence that the County either rehire all of the laid off migrant employees or ensure that the new operator of the program adhere to the terms of the County-CSEA contract. No agreement was reached.

The parties are in disagreement about when during these negotiations CSEA first demanded to bargain about the contracting out of unit work. The County asserts that the issue was not raised until Ms. Maya's January 16 letter. CSEA contends that the issue was raised considerably earlier. Regarding the August 5, 1983, negotiation session, Mr. Francis testified that the parties discussed the busing situation in nearby Oakdale "because Nancee had raised the issue of whether or not what we were doing was contracting out of services."[3] Because of CSEA's continued inquiries about the question of contracting out, the County on October 11, 1983, wrote to federal authorities requesting clarification about the status of persons employed by an organization which operates a migrant program. On November 14, 1983, the County sent to Ms. Maya the response it received from administrators in the Department of

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[3]See reporter's transcript at pp. 120-121.

Health and Human Services. Ms. Maya believed that the response actually strengthened her position that the County's action was contracting out unit work and advised Mr. Francis of her belief. Mr. Francis acknowledged on cross-examination that prior to the County's November 7 decision to cease its participation in the migrant program he clearly knew of CSEA's opposition.

In early 1984 the County placed a newspaper advertisement soliciting proposals from organizations seeking to administer the migrant child development program. The application deadline was set for March 7. The County's request for proposals offered an award of $1,070,000 to an agency or contractor which would provide services to some 440 children aged 6 weeks to 5 years from May 1, 1984, through November 15. Shortly after the application deadline the County awarded a contract to Stanislaus County Child and Infant Care, Inc., a private, nonprofit corporation.

The migrant program opened on or about May 1, 1984, in the same three farm labor camps where the County formerly had operated it. However, in 1984 the County's relationship with the operator was the same as its relationship with the operators of migrant child development programs in the other six counties for which the Stanislaus County office is the regional administrator. The County awarded the contract, monitored the operation and funneled the monies to the

organization which actually provided the services, Stanislaus County Child and Infant Care, Inc. The County did not hire the employees, set their salaries or provide care to the children. The only County role was that of an agent for the federal government.

LEGAL ISSUES

1. Did CSEA waive any rights it may have had to negotiate about the County's decision to cease its direct operation of the migrant child development program?

2. Was the County's decision to cease direct operation of the migrant program a matter within the scope of representation and if so, did the County act unilaterally?

3. Did the County refuse to negotiate about the effects of its decision to cease direct operation of the migrant program?

CONCLUSIONS OF LAW

Waiver.

The County argues that CSEA waived any right it may have had to negotiate about the decision to cease operation of the migrant program by failing to make a timely demand to negotiate. The County contends that while CSEA knew of the possibility of the change as early as May of 1983, it was not until January 16, 1984, that the CSEA field representative made a request to negotiate. Prior to that time, the County argues, the CSEA representative had questioned whether the County's

proposed decision was contracting out but had never made a demand to bargain about that subject.

CSEA rejects the claim of waiver, noting that under PERB precedent a waiver will not be lightly inferred. CSEA argues that in order to show waiver the County must produce evidence of clear and unmistakable language or behavior indicating an intent to waive bargaining rights. No such language or demonstrative behavior has been shown, CSEA contends. To the contrary, CSEA asserts, the evidence shows that the CSEA field representative raised the issue of contracting out on numerous occasions. More significantly, the union argues, the parties actually negotiated the issue, although they did not reach agreement on it.

The PERB has consistently held that the waiver of bargaining rights by a union will not be lightly inferred. Oakland Unified School District (8/31/82) PERB Decision No. 236. For an employer to show that a union waived its right to negotiate, the employer must produce evidence of:

> . . . either clear and unmistakable language, Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74, or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. San Mateo County Community College District (6/8/79) PERB Decision No. 94; Sutter Union High School District (10/7/81) PERB Decision No. 175.

Demonstrative behavior sufficient to waive the right to bargain has been found where a union failed to demand negotiations in a manner that adequately signified its desire to negotiate. Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223. However, the determination about whether a particular communication constitutes a proper request to bargain "is a question of fact to be determined on a case-by-case basis." Delano Joint Union High School District (5/5/83) PERB Decision No. 307. To be effective, "a request to negotiate need not be specific or made in a particular form." Gonzales Union High School District (9/28/84) PERB Decision No. 410. The significant determination is whether the union's request was sufficient to make its desire known.

It is abundantly clear that CSEA raised the issue of contracting out long before the District's final decision to cease operation of the migrant child centers. The County's chief negotiator acknowledged that his CSEA counterpart had raised the issue of subcontracting as early as the August 5, 1983, negotiating session. In an attempt to dissuade the CSEA negotiator from her contention that the County was contracting out, the County wrote to federal authorities on October 11 to secure an opinion about the issue. At the negotiating session of October 26, the County again sought to convince Ms. Maya that it was not contracting out union work. County negotiator Francis testified that as of November 7, the

date the County reached its final decision, he knew of CSEA opposition to the action.

Moreover, as CSEA argues in its brief, there is uncontroverted evidence that the parties in fact negotiated about the County's decision to cease operation of the migrant child centers. The negotiating sessions of October 26 and November 1 involved CSEA proposals designed to head off a County decision to get out of the program. These are precisely the type of proposals which one might expect following a demand to bargain about a proposal to contract out unit work. It seems inconceivable that the County would have negotiated about the decision to cease operation of the migrant centers if CSEA had waived its claim to bargain by failing to make a comprehensible demand. It is true that CSEA made no written request to negotiate about contracting out until January 16, 1984. But the organization earlier had made oral demands to bargain and by January 16, the issue had been long raised and much discussed. To read the fall 1983 negotiations any other way would be, as CSEA argues, the exaltation of form over substance.

For these reasons, the County's assertion that CSEA waived any rights it may have had to negotiate about contracting out is rejected.

Scope of Representation.

CSEA recites the familiar rule that absent a valid defense, it is a per se violation of the EERA for an employer to make a

unilateral change in a matter within the scope of representation. It is equally well settled, CSEA continues, that a decision to subcontract bargaining unit work is within the scope of representation and thus negotiable when that decision changes an existing employment policy. Analogizing to Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609], CSEA argues that the "existing" policy of the County was to use its own workers to operate the migrant centers. Like the employer in Fibreboard, CSEA continues, the County then unilaterally laid off its workers and subcontracted the work to an outside organization. CSEA argues that the action did not alter the basic operation of the migrant program. CSEA contends that the County retains the ultimate responsibility for the migrant program and that it has merely replaced its own employees with those of another agency to do the same work under similar conditions.

The County argues that its decision was a basic managerial prerogative not subject to bargaining. Citing Otis Elevator Co. (1984) 269 NLRB No. 162 [115 LRRM 1281, corr. at 116 LRRM 1075], the County contends that an employer may unilaterally elect to change the nature and direction of its business. Where the purpose of the action is to change the nature of the business and not merely to save labor costs, the County argues, there is no obligation to bargain about the decision itself. Here, the County continues, its decision to cease operation of

the migrant centers was predicated upon a fundamental change in its direction. It wanted to cease direct operation of a program it found "exceedingly troublesome and uncertain." Thus, the County argues, federal precedent supports the unilateral nature of its decision to cease direct operation of the migrant centers. The County finds PERB precedent for deciding scope questions to be consistent with the federal rules and under either standard the County's action was lawful.

Although CSEA portrays this case as a straight-forward matter of contracting out, the issue actually is somewhat more complicated. This case does not involve a school district which abandons its transportation program and hires a private bus company or lays off its custodians and employs a janitorial service. The program which the County has given up is not a regular function of a county superintendent of schools. The operation of the migrant education centers is a federal activity which the County had undertaken on behalf of the United States Government. Thus the question presented here is whether the decision of a public school employer to drop its operation of a federal program is a matter within scope of representation under the EERA.[4]

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[4]The scope of representation under the EERA is set forth at section 3543.2 which, in relevant part, provides as follows:

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

Under the EERA, a public school employer is obligated to negotiate about matters relating to wages, hours of employment and nine specifically enumerated terms and conditions of employment. The PERB will find a subject negotiable even though not specifically enumerated in section 3543.2 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 negotiation is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge the employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission. Anaheim Union High School District (10/28/81) PERB Decision No. 177; test approved in

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> conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548,8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code . . .

San Mateo City School District v. PERB (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800].

The decision on whether the County should have ceased its direct operation of the migrant education centers unquestionably involved the employment relationship. It was a decision of such concern to both management and employees that conflict was likely to occur. Because of the nature of the decision, however, it is doubtful that the negotiations process was the appropriate vehicle for reaching a decision.

The program in question is not a County program prescribed by the Education Code as the responsibility of a county superintendent of schools. It is a program of the federal government created to meet a need discerned by federal authorities. The program operates under strict federal guidelines (see, Title. 45, Chapter XIII, of the Code of Federal Regulations) and its ultimate continuance or discontinuance has little to do with whether the County stayed in or stepped out. Even if the County ceased entirely to participate in the program and dropped its role as regional administrator, the program would continue if federal authorities elected to continue it. The federal government could select a new regional administrator to either operate the program or find an organization that would. That the County elected to continue its role as regional administrator of the migrant program does not change the essential nature of the

operation. In this role the County, as described in its brief, is merely a "pipeline" through which the funding flows. When it acts as administrator, the County is the agent of federal authorities. The County's role as agent does not somehow transform what is fundamentally a federal program into a local one.

The question before the County was whether it should continue to operate a federal program that presented it with both administrative and financial difficulties. The County was uncomfortable with the operational calendar of the migrant program and with the regulations governing it, both of which in the County's view were geared more toward a nonprofit community organization than a governmental agency. Moreover, the County was faced with a loss of $139,166 from operation of the program in 1984 and projected losses of nearly twice as much in subsequent years. The question before the County was a fundamental one. Whether a school employer continues to operate a program on behalf of the federal government is a basic managerial prerogative. Negotiation was not required.[5]

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[5]The County's action is distinguishable from that of the school board in Arcohe Union School District (5/16/84) PERB Decision No. 360. In Arcohe, a school employer lost the federal CETA funding that it had used to pay its custodians. After the cut-off of federal funds, the district elected to maintain the same level of custodial services through subcontracting the unit work to a janitorial service. The PERB found the decision to contract out work to be negotiable and, because it was taken unilaterally, a violation of the EERA. The present case does not present the situation where federal funds were used to finance what is essentially a local program,

Accordingly, it is concluded that the County's decision to cease operation of the migrant children centers was outside the scope of representation under the EERA. Even though the County did meet and discuss the decision with CSEA, it had no obligation to secure an agreement. Because the matter was outside the scope of representation, the County was entitled to act unilaterally.

Negotiations Over Effects.

It is alleged in the complaint that the County failed to negotiate about the effects of its decision to cease operation of the three migrant education centers. In its brief, CSEA does not specifically address the allegation that the County failed to negotiate about the effects of its decision, concentrating instead on the theory that the decision itself was negotiable.

The County concedes the negotiability of the effects of its decision but argues that CSEA never requested to negotiate about that subject. The County notes that it negotiated the effects of the layoff and reached agreement with CSEA on

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like the cleaning of classrooms. Here, federal funds were provided to a local employer to run a federal program. The migrant education program was initiated by the federal government and tightly controlled by it. Unlike the cleaning of classrooms, operation of the migrant program is an activity which did not exist before the arrival of federal funds and might well cease should those funds ever be withdrawn.

July 15. The County argues that it was further willing to negotiate about the effects of its decision to turn operation of the migrant centers over to another organization. However, the County argues, CSEA steadfastly refused to negotiate about such effects despite specific County proposals on that subject. Accordingly, the County concludes, it met its obligation to negotiate about the effects of its decision.

In accord with the County's argument, any contention that the County refused to negotiate about the effects of its decision is easily overcome by the record. The parties negotiated on July 15, 1983, and entered into what they described as an "agreement in relation to the effect of layoff of classified and certificated employees in relation to the possible termination of the Child Development Program operated by the Department." The agreement set out eligibility for unemployment insurance benefits and provided for continuation of health insurance coverage.

It seems probable that once the July 15 agreement was reached, the County had met its obligation to negotiate about the effects of its decision. Even if it be assumed, however, that the July 15 agreement did not discharge the County's obligation, the record also is clear that after July 15 CSEA never requested to negotiate about the effects of the County's decision. As in Newman-Crows Landing, supra, PERB Decision No. 223, CSEA demanded only to negotiate about the underlying

decision itself and not about its effects. A succession of County proposals dealing with the effects of the decision were steadfastly ignored by CSEA. Each County proposal on effects was met on by a counterproposal about the underlying decision. CSEA's persistent failure after July 15 to request negotiation about the effects of the decision to cease operation of the federal program was sufficient to constitute a waiver of any right to bargain about that subject.

For these reasons, the allegation in the complaint that the County failed to negotiate about the effects of its decision to cease operation of the migrant centers must be rejected.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge S-CE-742, California School Employees Association and its Stanislaus Chapter No. 668 v. Stanislaus County Department of Education, and the companion PERB complaint is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 13, 1984, 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 Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on November 13, 1984, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing 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, section 32300 and 32305.

Dated: October 23, 1984

Ronald E. Blubaugh

Ronald E. Blubaugh
Hearing Officer

PROOF OF SERVICE BY MAIL
C.C.P. 1013a

I declare that I am employed in the County of Sacramento, California.

I am over the age of 18 years and not a party to the within entitled cause; my business address is

1031 18th Street, Suite 200 Sacramento, California 95814

On December 31, 1985 (Date), I served the enclosed

PERB Decision No. 556
Stanislaus County Department of Education
Case No. S-CE-742

(Describe Document)

on the parties to this case by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail, Sacramento (City or Town), California, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on

December 31 (Date), *19* 85 *at* Sacramento (City or Town), *California.*

Teresa Stewart
(Type or print name)

Teresa Stewart
(Signature)