STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. OAKLAND UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-469 Request for Reconsideration PERB Decision No. 367 PERB Decision No. 367b May 23, 1984

Appearances; Andrew Thomas Sinclair, Attorney for Oakland School Employees Association; Nancy Lowenthal, Attorney for Oakland Unified School District.

Before Hesse, Chairperson; Tovar and Morgenstern, Members.

DECISION

MORGENSTERN, Member: The Public Employment Relations Board (PERB or Board), having duly considered the request for reconsideration[1] filed by the Oakland Unified School District (District), hereby denies that request.

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[1]PERB rules are codified at California Administrative Code, title 8, section 31001 et seq. PERB rule 32410(a) provides:

> Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision . . . . The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

DISCUSSION

Claiming that the Board committed prejudicial errors of fact constituting extraordinary circumstances under rule 32410(a), the District requests reconsideration of that portion of Oakland Unified School District (12/16/83) PERB Decision No. 367 in which we found that the District unilaterally changed its subcontracting policy in violation of subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).[2]

In the disputed portion of Decision No. 367, PERB affirmed the Administrative Law Judge's findings that the subject of subcontracting unit work is negotiable (Arcohe Union School District (11/23/83) PERB Decision No. 360), and that the extent

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

Section 3543.5 provides, in relevant part:

> It shall be unlawful for a public school employer to:
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> (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.

of the District's subcontracting increased substantially during the 1979-80 school year. Citing figures provided by the District of monthly expenditures for temporary services during the 1979-80 school year, the Board found specifically as follows:

> The evidence indicates that expenditures for subcontracting increased almost tenfold during this period. We find that an increase of this magnitude evidences a change in the quantity and kind of subcontracting in the District and constitutes a unilateral change in established policy. Grant Joint Union High School District (2/26/82) PERB Decision No. 196.

In addition, we found that adverse impact on employees in the unit is demonstrated, and that the conditions listed in Westinghouse Electric Corp. (Mansfield Plant) (1965) 150 NLRB 1574 [58 LRRM 1257] as rendering subcontracting lawful are not present in the instant case. We, therefore, ordered the District to "Restore the status quo ante with regard to the subcontracting of white collar unit work to the level which existed in June 1979 prior to the District's unilateral increase in subcontracting activity."

The District first objects to PERB's alleged finding "of an almost tenfold increase in subcontracting activity." It argues that such finding is erroneous because the data showing a tenfold increase in expenditures for subcontracting represents amounts paid rather than services performed in a given month and does not take into account seasonal fluctuations.

The District's argument is fallacious. PERB did not make the finding to which the District objects. Rather, we found (p. 24) that "the extent of the District's subcontracting increased substantially during the 1979-80 school year," and that "The evidence indicates that expenditures for subcontracting increased almost tenfold during this period." (Emphasis added.) Inasmuch as the District does not contest the findings actually made by PERB, its contention is frivolous.

The District next claims that PERB erred by failing to consider and make factual findings regarding the District's past practice of subcontracting in the 1977-78 and 1978-79 school years. According to the District, evidence "ignored by PERB" demonstrates a significant decrease in the growth rate of temporary use.[3]

The Board fully considered the figures cited by the District and determined that they were not necessary to our decision for several reasons. First, the decision is based on a substantial increase within the 1979-80 school year. Secondly, the District's figures themselves demonstrate a substantial increase in the 1979-80 school year as compared to

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[3]The District cites the following total annual expenditures for subcontract employees:

1977-78	$ 96,349
1978-79	150,862
1979-80	208,937

either 1977-78 or 1978-79, thereby supporting, not refuting, our decision. Thirdly, if the District is implicitly arguing that, because it increased its subcontracting in 1978-79, therefore, the additional increase in 1979-80 was not a unilateral change or the Oakland School Employees Association (Association) acquiesced to the change and waived its right to negotiate, such argument must be rejected. No acquiescence or waiver on the part of the Association can be found, inasmuch as the Association had no notice of the earlier increase because, as we found, and the District does not contest, the District unlawfully refused to provide information about its subcontracting. Further, the Westinghouse line of cases expressly address the duty to negotiate about a specific subcontracting decision given a history of subcontracting. These cases relieve an employer of the duty to negotiate only in the limited circumstances where the five enumerated conditions exist. We expressly found that those conditions are not satisfied here, not only because the subcontracting does "vary significantly from prior established practices," but also because it does have a "demonstrable adverse impact on employees in the unit," and the Association did not have an "opportunity to bargain about changes in existing subcontracting practices at general negotiating sessions." For all of these reasons, explicit findings about the District's practice in 1977-78 and 1978-79 could not affect the result

reached. Therefore, such findings are unnecessary, and their absence is not prejudicial to the District.[4]

The District next argues that PERB's finding of a change in the kind of subcontracting is without support in the decision or the record.

Contrary to the District's contention, our finding of a change in the kind of subcontracting is amply supported by the record. In addition to the magnitude of the increase itself, the increased use of temporary employees in order to maintain 100 vacancies constitutes a change in the kind of subcontracting.

Finally, the District claims that PERB's order to "Restore the status quo ante . . . to the level which existed in June 1979 prior to the District's unilateral increase in subcontracting activity" is vague, ambiguous and unenforceable. We do not find our order deficient. The order was so phrased because it is impossible, on the evidence presented, to calculate the precise number of hours contracted out in the white collar unit in 1979. That is, we recognized the problems with the data provided by the District—namely, lag time between employment and payment, seasonal fluctuations, and the fact that a sizeable majority but not all of the

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[4]Prejudicial error is error which causes substantial injury and probably affects the result reached. The Regents of the University of California (UCLA) (5/17/83) PERB Decision No. 267a-H; and see California Code of Civil Procedure section 475.

expenditures are attributable to the white collar unit. The data supplied by the District provided no means of calculating in these factors.

However, these deficiencies in the record should not deprive employees of a remedy and in no way prevent full consideration of these factors and any additional data offered by the District for the purpose of arriving at an accurate number of hours at a compliance hearing. (See, e.g., Alum Rock Union School District/Mt. Diablo Unified School District (9/22/81) PERB Order No. Ad-115; Brawley Union High School District (4/7/83) PERB Decision No. 266a; American Distributing Co. v. NLRB (9th Cir. 1983) 115 LRRM 2046.)

ORDER

Having shown no "extraordinary circumstances" within the meaning of rule 32410(a), the request for reconsideration of PERB Decision No. 367 is hereby DENIED.

Chairperson Hesse and Member Tovar joined in this Decision.