STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. HEALDSBURG UNION HIGH SCHOOL DISTRICT and HEALDSBURG UNION SCHOOL DISTRICT, Respondent.	
SAN MATEO ELEMENTARY TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. SAN MATEO CITY SCHOOL DISTRICT, Respondent.	Case No. SF-CE-36 Request for Reconsideration PERB Decision No. 375 PERB Decision No. 375a June 20, 1984

Appearances; Kirsten L. Zerger, Attorney for San Mateo Elementary Teachers Association, CTA/NEA; Penn Foote, Attorney (Brown & Conradi) for San Mateo City School District; M. Mari Merchat, Attorney (Kronick, Moskowitz, Tiedemann & Girard) for the California School Boards Association, as Amicus Curiae.

Before Hesse, Chairperson; Tovar, Jaeger, Morgenstern and Burt, Members.

DECISION

The Public Employment Relations Board (PERB or Board), having duly considered the San Mateo City School District's

(District) request for reconsideration,[1] hereby grants that request consistent with the discussion below.

DISCUSSION

In the underlying Decision, the Board found that the District violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (Act) by unilaterally reducing teachers' preparation time and increasing the length of their instructional day. The Board ordered a restoration of the status quo ante and required the District to negotiate, upon request, with the San Mateo Elementary Teachers Association, CTA/NEA (Association) concerning preparation time and the length of the instructional day. The Board's Order did not indicate the significance, if any, of a negotiated agreement reached subsequent to the unilateral change.

The District asserts that, subsequent to the issuance of the hearing officer's proposed decision in the original unfair practice proceeding, the parties twice negotiated and reached agreement concerning the subject matter of the unilateral change. The District cites a declaration to this effect signed by its negotiator, Rajendra Prasad. The District urges the Board to grant reconsideration of the remedy so as to excuse restoration of the status quo ante in light of these subsequently negotiated agreements.

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[1]See PERB rule 32410. PERB rules are codified at California Administrative Code, title 8, section 31001 et seq.

The Association denies that the District's liability should be terminated at the point at which the parties reached a negotiated agreement or that these agreements settled the parties' dispute. It supplies its negotiator's declaration in opposition to that furnished by the District.

Subsection 3541.5(c) of the Act empowers the Board "to issue . . . [an] order directing an offending party to . . . take such affirmative action . . . as will effectuate the policies of [the Act]." The Board has previously found that, where a remedy will not effectuate the purposes of the Act, reconsideration is justified. Pittsburg Unified School District (4/2/84) PERB Decision No. 318a; Rio Hondo Community College District (5/16/83) PERB Decision No. 279a.

In Pittsburg Unified School District, supra, and Rio Hondo Community College District, supra, the Board granted reconsideration in order to clarify the Order so as to terminate liability at the point the parties subsequently reached agreement concerning the subject matter of the unilateral change. Both cases involved situations, as in this case, where an employer had violated its duty not to make unilateral changes until it had afforded an exclusive representative notice and an opportunity to negotiate.[2] In

[2]Pittsburg Unified School District, supra, involved an employer's failure to maintain neutrality in the face of a pending question concerning representation (QCR). However, the Board found that the policy underlying its decision to clarify

both cases, the Board concluded that if, subsequent to the employer's unlawful conduct, the parties reached agreement concerning the subject matter of the unilateral change, it would not effectuate the purposes of the Act to extend the terms of the remedy beyond that point.

Consistent with the Board's position in Rio Hondo Community College District, supra, and Pittsburg Unified School District, supra, we grant reconsideration of the Board's remedy for the purpose of clarifying the Order. Accordingly, we shall order the District to restore the status quo ante from the date of the unilateral change until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the unlawful unilateral change. However, the status quo ante shall not be restored if, subsequent to the District's actions, the parties have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure concerning the subject matter of the unilateral change.[3]

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the order was the same in the QCR context as in a case involving an employer's violation of its duty to negotiate in good faith.

[3]AS the Board noted in Pittsburg Unified School District, supra, the determination of whether, as a factual matter, the District has complied with the Board's Order, in whole or in part, is properly raised in a compliance hearing, should one be required.

We disagree with the position espoused in the concurring opinion that the Board should take administrative notice of the

In addition, we note that, in the Order accompanying the underlying Decision, we failed to require the District to make employees whole for the increase in hours which resulted from the District's unilateral elimination of preparation time and its requirement that employees perform those preparation time duties outside of the normal work day.[4] We find this omission to have been an error and, therefore, pursuant to our authority to fashion appropriate remedies, we shall amend the Order to require the District to make employees whole for the loss of preparation time. Fresno Unified School District (4/30/82) PERB Decision No. 208. The back pay portion of the

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subsequent agreements of the parties to determine whether the District has complied with the Board's Order. In our view, disagreements as to whether such subsequent agreements constitute compliance with the Board's Order are best left to a compliance hearing, where the parties may present their possibly differing interpretations of those agreements in circumstances which afford them full due process rights. Otherwise, the Board is left to resolve factual disputes between the parties concerning the interpretation of subsequent agreements based upon declarations neither part of the original case record nor subject to the rigors of cross-examination. Moreover, if such a determination were to be made routinely by the Board, we would be entertaining requests for reconsideration in virtually every case where a party asserted that it had complied with the Board's Order. Such is not the purpose of reconsideration requests.

[4]The record reflects, and the District does not deny, that, at certain schools, the District unilaterally substituted instructional time for time which had previously been allotted for teacher preparation time. Moreover, the District instructed teachers that if they were unable to complete the necessary preparation for classroom work during the instructional day, it was expected that teachers would use time outside of the regular work day to prepare.

remedy shall run from the date of the District's unlawful conduct to the point at which the parties reach agreement or negotiate through completion of the statutory impasse procedure pursuant to our bargaining order. However, if subsequent to the District's unlawful actions, the parties have, on their own initiative, reached agreement or negotiated through completion of the statutory impasse procedure concerning the subject matter of the unilateral change, liability for back pay shall terminate at that point. Thus, the wronged employees will be made financially whole for their losses from the time the District made the unlawful unilateral change until the parties bargained in good faith.

ORDER

The Order in San Mateo Elementary Teachers Association, CTA/NEA v. San Mateo City School District, Case No. SF-CE-36, is AMENDED to read as follows:

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to Government Code subsection 3531.5(c), it is hereby ORDERED that the San Mateo City School District and its representatives shall:

A: CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the San Mateo Elementary Teachers Association, CTA/NEA, with respect to teacher preparation time and length of the teacher's instructional day;

(2) Interfering with the rights of employees to be represented by failing and refusing to meet and negotiate in good faith;

(3) Denying the San Mateo Elementary Teachers Association, CTA/NEA the right to represent employees by failing and refusing to meet and negotiate in good faith.

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

(1) Upon request, meet and negotiate with the exclusive representative concerning preparation time and the length of the instructional day.

(2) Reinstate the schedule in effect prior to January 1, 1977 with respect to the preparation time and length of the teachers' instructional day until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the unlawful unilateral change. However, the status quo ante shall not be restored if, subsequent to the District's actions, the parties have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure concerning the subject matter of the unilateral change.

(3) Pay to affected employees an amount sufficient to make them whole for the loss of preparation time which resulted from the employer's unilateral change from January 1, 1977 until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure

concerning the subject matter of the unlawful unilateral change. However, if subsequent to the District's unlawful actions, the parties have, on their own initiative, reached agreement or negotiated through completion of the statutory impasse procedure concerning the subject matter of the unilateral change, liability for back pay shall terminate at that point. Any payment shall include interest at the rate of 7 (seven) percent per annum.

(4) Within thirty-five (35) days following the date of service of this final Decision, post at all work locations where notices to employees are customarily placed, copies of the Notice attached as an appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

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

This Order shall become effective immediately upon service of a true copy thereof upon the San Mateo City School District.

By the BOARD

Chairperson Hesse's concurrence begins on page 9.

Chairperson Hesse, concurring: While I am in agreement with the amended order in general, I would go even further and take notice of any subsequent collective bargaining agreement that serves to limit the remedy.

Under PERB Regulation 32120, each employer that enters into a written agreement or memorandum of understanding with an exclusive representative must file a copy of that agreement with PERB. Surely one purpose of that regulation is to provide this Board with information concerning contracts negotiated subsequent to a charge of unfair practices. It is a particularly appropriate practice for the Board to take notice of such agreements when the respondent has been found guilty of a refusal to bargain, as the Board did in Delano Union Elementary School District, PERB Decision No. 213a (10/15/82).

To determine whether a subsequent collective bargaining agreement acted as a settlement of a prior refusal to bargain, the majority is unwilling to rely upon the declaration of Dr. Rajendra Prasad. In that declaration, Dr. Prasad states that the District did, subsequent to the hearing officer's decision in this case, negotiate teacher's preparation time and the length of the instructional day. Because of PERB's Regulation 32120, however, I find no need to rely upon that declaration. An independent reading of Article 6 of the 1979-82 Agreement shows that the subjects of teacher's preparation time (sec. 6.1.3.1) and the length of the

instructional day (sec. 6.1.3.2) were negotiated. Therefore, any harm done by the initial refusal to bargain about those subjects was cured as of July l_f 1979.

I am not suggesting that the charge of refusal to bargain is mooted by subsequent negotiations. I do believe, however, that the remedy may be mooted. (See e.g., Cagles, Inc. v. NLRB 588 F.2d 943 [100 LRRM 2590] (5th Cir. 1979).)

Nor do I believe that a compliance hearing is inappropriate. Rather, I believe that we should direct the compliance officer to examine any potential losses suffered as a result of the respondent's actions up to July 1, 1979. Any liability beyond that point is, I suggest, terminated by the execution of the collective bargaining agreement for the term July 1, 1979 through June 30, 1982.

A compliance hearing officer, in limiting liability up to 1979, might also conclude that the collective bargaining agreement for the term July 1, 1977 through June 30, 1979 also served as a settlement, in that the parties adequately negotiated hours and preparation time in that agreement. Because the language concerning preparation time (sec. 6.1.3.1) and instructional time (sec. 6.1.3.2 and 6.1.3.3) in the 1977-79 agreement is not as clear and unambiguous as the 1979-82 agreement, testimony of the negotiators would be appropriate to determine whether negotiations were adequate to establish settlement.

In conclusion, I would find that the clear and unambiguous language of the 1979-82 agreement establishes that the parties did negotiate about the issue of instructional time and preparation time. Therefore, any compliance hearing should be limited to the time between when the District first refused to bargain about instructional and preparation time, and July 1, 1979. The compliance officer can determine what, if any, financial liability was suffered by the teachers during this time, and whether any collective bargaining agreements reached prior to July 1, 1979 acted as a settlement of the unfair practice charge and further reduced the respondent's liability.

APPENDIX

NOTICE TO ALL 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-36, San Mateo Elementary Teachers Association, CTA/NEA v. San Mateo City School District, in which all parties had the right to participate, it is found that the San Mateo City School District violated the Educational Employment Relations Act, Government Code subsections 3543.5(a), (b), and (c), by unilaterally reducing teachers' preparation time and increasing the length of their instructional day without affording the exclusive representative notice and an opportunity to negotiate.

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

A: CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the San Mateo Elementary Teachers Association, CTA/NEA, with respect to teacher preparation time and length of the teacher's instructional day;

(2) Interfering with the rights of employees to be represented by failing and refusing to meet and negotiate in good faith;

(3) Denying the San Mateo Elementary Teachers Association, CTA/NEA the right to represent employees by failing and refusing to meet and negotiate in good faith.

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

(1) Upon request, meet and negotiate with the exclusive representative concerning preparation time and the length of the instructional day.

(2) Reinstate the schedule with respect to the preparation time and length of the teachers' instructional day in effect prior to January 1, 1977 until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the unlawful unilateral change. However, the status quo ante shall not be restored if, subsequent to the District's actions, the parties have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure concerning the subject matter of the unilateral change.

(3) Pay to affected employees an amount sufficient to make them whole for the loss of preparation time which resulted from the employer's unilateral change from January 1, 1977 until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the unlawful unilateral change. However, if subsequent to the District's unlawful actions the parties have, on their own initiative, reached agreement or negotiated through completion of the statutory impasse procedure concerning the subject matter of the unilateral change, liability for back pay shall terminate at that point. Any payment shall include interest at the rate of 7 (seven) percent per annum.

Dated: SAN MATEO CITY SCHOOL DISTRICT

By: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED, REDUCED IN SIZE OR COVERED BY ANY OTHER MATERIAL.