STATE OF CALIFORNIA
DECISION OF THE EDUCATIONAL
EMPLOYMENT RELATIONS BOARD

FULLERTON UNION HIGH SCHOOL DISTRICT PERSONNEL AND GUIDANCE ASSOCIATION, Charging Party	
and	Case No. LA-CE-28
FULLERTON UNION HIGH SCHOOL DISTRICT, Respondent	Decision No. 020

Appearances: Thomas C. Agin, Director, California Pupil Services Labor Relations, for Fullerton Union High School District Personnel and Guidance Association; Lee T. Paterson (Paterson & Taggart) for Fullerton Union High School District.

Before Alleyne, Chairman; Gonzales and Cossack, Members.

OPINION

The issue in the above-captioned matter is whether the Fullerton Union High School District unlawfully failed to meet and negotiate on the subjects of counselor and psychologist case loads. In the stipulated record, the sole evidence presented by the parties on these issues is that the District's representative refused to negotiate about counselor and psychologist case loads in several negotiating sessions, stating that the issues were not within the scope of negotiations as set forth in Government Code Section 3543.2[1].

[1] Gov. Code Sec. 3543.2: The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7 and 3548.8. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. 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 consult with any employees or employee organization on any matter outside the scope of representation.

The Educational Employment Relations Board hereby remands the matter to the hearing officer and, pursuant to 8 California Administrative Code Section 35034[2], orders the record reopened for the taking of further evidence, at a hearing or by stipulation or both. Such evidence shall indicate the nature of the work performed by counselors and psychologists, and shall demonstrate what, if any, relationship exists between counselor and psychologist case loads and the matters specifically enumerated as within the scope of representation in Government Code Section 3543.2. The hearing officer shall not render another proposed decision, but shall return the record directly to the Board itself. The parties may file supplemental briefs with the Board itself within ten calendar days after the hearing officer has closed the record.

It is possible that state and federal cases holding that the work load of

employees is a negotiable subject[3] are not applicable precedent[4] for interpretation of the Educational Employment Relations Act (EERA)[5]. These cases were decided under the Meyers-Milias-Brown Act (or local enactment with scope of representation language similar to that of the MMBA) and the National Labor Relations Act, as amended,[6] which have much broader scope of representation provisions than the EERA in that they do not[7] limit the definition of "terms and conditions of employment" as does the EERA. These cases, with little or no discussion,

[2] 8 Cal. Admin. Code Sec. 35034: Board Action on Statement of Exceptions. The Board itself may affirm, modify or reverse the recommended decision, order the record reopened for the taking of further evidence, or take such other action it considers proper.

[3] Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist. (1975) 45 Cal. App.3d 116; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608; Los Angeles County Employees Assn., Local 660 v. County of Los Angeles (1973) 33 Cal. App.3d 1; Gallenkamp Stores Co. v. NLRB (9th Cir. 1968) 402 F.2d 525, fn.4, 69 LRRM 2024, enforcing 162 NLRB 498, 64 LRRM 1045; NLRB v. Bonham Cotton Mills, Inc. (5th Cir. 1961) 289 F.2d 903, 48 LRRM 2086, enforcing 121 NLRB 1235, 42 LRRM 1542; Beacon Piece Dyeing & Finishing Co., Inc. (1958 121 NLRB 953, 42 LRRM 1489.

[4] Gov. Code Sec. 3540 et seq.

[5] Gov. Code Sec. 3500 et seq.

[6] 29 U.S.C. Sec. 151 et seq.

[7] Meyers-Milias-Brown Act, Gov. Code Sec. 3504: The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.
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find work load related to either "wages, hours, and other terms and conditions of employment" or "terms and conditions of employment". The EERA, however, requires a relationship to an item specifically enumerated in the definition of "terms and conditions of employment" or wages or hours. Given the limited language of the EERA, we are not willing to make sweeping conclusions of law regarding whether or not counselor and psychologist case loads are negotiable, absent any facts whatsoever except that the District refused to negotiate on the subjects.

ORDER

The Educational Employment Relations Board remands this case to the hearing officer and orders the record reopened for the taking of further evidence, at a hearing or by stipulation or both. Such evidence shall indicate the nature of the work performed by counselors and psychologists, and shall demonstrate what, if any, relationship exists between counselor and psychologist case loads and the matters specifically enumerated as within the scope of representation in Government Code Section 3543.2. The hearing officer shall not render another proposed decision, but shall return the record directly to the Board itself. The parties may file supplemental briefs with the Board itself within ten calendar days after the hearing officer has closed the record.

By: Raymond J. Gonzales, Member

By: Jerilou H. Cossack, Member

Date: July 27, 1977

Reginald Alleyne, Chairman, dissenting:

I dissent from the opinion and order. The stipulation reached by the charging

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National Labor Relations Act, as amended, 29 U.S.C. Sec. 158(d): For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment...

Gov. Code Sec. 3542.2, supra.

party and the District is, in my opinion, sufficient to place before the Board for a decision on the merits the issue of the negotiability of caseloads for psychologists and counselors and to conclude that the District violated the EERA as charged and as found by the hearing officer.[1] The Board's decision to the contrary is inconsistent with California appellate case law by which we are bound.

It is admitted by stipulation[2] that the District refused to negotiate on the subject of psychologist and counselor caseloads on the ground that caseloads are outside the scope of representation as defined in Government Code Section 3543.2.[3]

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[1] The majority opinion does not say what the hearing officer decided or why. I agree with the result reached by the hearing officer and with most of his reasoning.

[2] The stipulation agreed to by both parties provides in pertinent part:

> On September 18, 1976 the District's representative refused to negotiate the issue of psychologist caseload, stating that this issue was not within the scope of negotiations as set forth in Government Code Section 3543.2.
>
> On September 18, 1976 the District's representative refused to negotiate the issue of counselor caseload, stating that this issue was not within the scope of negotiations as set forth in Government Code Section 3543.2.
>
> The issues of counselor caseload and psychologist caseload have arisen in subsequent negotiating sessions. The District, however, has maintained its position that these subjects are not within the scope of negotiations as set forth in Government Code Section 3543.2.

[3] The text of Gov. Code Sec. 3543.2 is quoted in full at n. 1 of the majority opinion.

Thus, the only question before the EERB is whether the subject of caseload for counselors and psychologists is a "matter . . . relating to wages, hours of employment and other terms and conditions of employment."[4]

I think a caseload for psychologists and counselors is inextricably related to "hours" of employment, since at some caseload-level, a caseload must necessarily affect the amount of time required to handle a caseload or the amount of work required to handle the new caseload, or both.

The basic flaw in the analysis by the majority is the underlying premise that the causal connection or lack of a causal connection between caseload and "hours" or "other terms and conditions of employment", must be established by evidence presented at a hearing, when, in fact, the issue is one of law, and is so treated by courts.

All of the court cases cited at footnote 3 of the majority opinion hold that a "workload" is a negotiable subject. The majority opinion misconceives what the courts have done in "workload" decisions by stating that those cases were decided "with little or no discussion." I think my colleagues do not understand how the causal connection between the general subject of workload and "terms and conditions of employment" is regarded as established as a matter of law, as evidenced by the absence of a reliance by courts on facts beyond the refusal to negotiate workload.

That is precisely what the court cases instruct when they decide, as did the California Court of Appeal in Los Angeles County Employees Association, Local 660 v. County of Los Angeles,[5] that workload is negotiable as a term or condition of employment, without relying upon facts to establish the relationship between "workload" and "terms and conditions of employment." We are free to decide whether a "caseload" is a negotiable subject, as a "matter relating to . . . hours" or any other specified EERA Section 3543.2 subject of negotiations, without relying upon facts to establish the relationship. That is what

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[4]Ibid.

[5]33 Cal. App. 3d 1, 83 LRRM 2916 (1973).

Justice Tobriner held for the California Supreme Court in the landmark California case, Firefighters Union, Local 1186 v. City of Vallejo,[6] when he concluded:

> The proposal that the manning schedule presently in effect be continued without change during the term of the new agreement is arbitrable to the extent that it affects the working conditions and safety of the employees.[7] [Emphasis added.]

My colleagues would escape the commands of the California judiciary by reasoning that the Meyers-Milias-Brown Act (MMBA) and the National Labor Relations Act (NLRA) cases have "much broader scope of representation provisions than the EERA in that they do not limit the definition of 'terms and conditions of employment[1], as does the EERA." This reasoning entirely avoids the real issue in this case.

Actually, the EERA, the MMBA and the NLRA differ in that "terms and conditions of employment" are undefined in the MMBA and the NLRA, except that "wages" and "hours" are expressly included in the phrase "terms and conditions of

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[6] 12 C. 3d 608, 622-623; 116 Cal. Rptr. 507 (1974).

[7] 12 C. 3d at 623. The present case is a "negotiability" case and City of Vallejo is an interest "arbitrability" case. But as Justice Tobriner noted in his opinion, his reliance upon Los Angeles County Employees Association, Local 660, note 5 supra, holding that the workload of county eligibility workers is negotiable, was justifiable since "under the charter provision at issue in [City of Vallejo], the scope of negotiation and the scope of arbitration are identical.

It might appear that City of Vallejo supports my colleagues' conclusion that this case requires a remand for the taking of evidence beyond the stipulation offered by the parties. Actually, the court in City of Vallejo found manning procedures in a fire department arbitrable and remanded the case to the arbitrator for the taking of evidence on the "divergent characterizations of the [union's] manpower proposal." That remand to the arbitrator, following a general finding of arbitrability, to the extent that the manning proposal affected working conditions and safety of employees, was tantamount to a general finding of the negotiability of caseloads by this Board and a cease and desist order directing the District to negotiate with the charging party on the subject of caseloads to the extent that caseloads affect "hours" or any other "terms and conditions of employment" described in Gov. Code Sec. 3543.2. Otherwise, there would have been no finding of arbitrability, i.e., negotiability, in advance of the remand to the arbitrator in City of Vallejo.

employment";[8] the EERA limits "terms and conditions of employment" to "wages" and "hours" and other enumerated subjects. Thus, the majority opinion, in focusing on the extent to which the EERA places limits on the definition of "terms and conditions of employment" focuses, quite irrelevantly, on the limited number of enumerated provisions in Government Code Section 3543.2. In so reasoning, they refuse to cope with the question of whether a caseload is a matter related to "hours", even though that is part of the statutory definition of the scope of representation contained in the EERA.

What my colleagues overlook is that the EERA places limitations on the ~~number~~ of subjects that are negotiable, but the number of negotiable subjects itself places no limitation on the extent to which a listed subject like "hours" or a matter related to "hours" might be negotiable. Government Code Section 3540.1(h) describes what is meant by "meeting and negotiating" in respect to all subjects within the scope of representation as defined in Government Code Section 3543.2. It provides in part:

> "Meeting and negotiating" means meeting, conferring, negotiating, and discussing[9] by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties. . .. [Emphasis added.]

Thus, while the number of subjects that are negotiable under Government Code Section 3543.2 is limited in comparison to other statutes defining the scope of negotiability, under Government Code Section 3540.1(h), above, all negotiable

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[8] If the Legislature, in enacting the Meyers-Milias-Brown Act and the Educational Employment Relations Act, had intended to make "wages" and "hours" something other than "terms and conditions of employment", it would have provided as a definition of the scope of representation: "wages", hours ~~and also~~ terms and conditions of employment", rather than "wages, hours ~~and other~~ terms and conditions of employment." The National Labor Relations Act is also an "and other" statute. See NLRA Section 8(d), 29 U.S.C. 158(d).

[9] The hearing officer appropriately relied upon the District's refusal to "discuss" caseloads. Contrary to the District's argument in its exceptions and brief on appeal, Gov. Code Sec. 3540.1(h) includes "discussing" as an element of the statutory definition of "meeting and negotiating."

subjects are equally negotiable. The only relevant question now before the EERB is whether the subject of caseloads for psychologists and counselors is a matter related to a subject listed in Government Code Section 3543.2. The issue is not whether subjects not listed or not related to subjects listed in Government Code Section 3543.2 are negotiable. If the Court of Appeal, with no factual premise other than a refusal to negotiate, found that a "workload" is a term or condition of employment,[10] the EERB, with no factual premise beyond the stipulated fact that the District would not negotiate caseloads, may find that the caseload of counselors and psychologists is a "matter related to . . . hours", and hence negotiable.[11]

The majority decision, without deciding the issue one way or another, overturns the parties' stipulation, reverses the hearing officer, and remands the case for "further evidence, at a hearing or by stipulation or both". On remand, the majority seeks evidence on "the nature of the work performed by counselors and psychologists . . .." Actually, "the nature of the work performed by counselors and psychologists" is not relevant to our determination on the negotiability of caseloads; they work; they handle cases of some kind, and we know that a "load" is the amount of work, or, more specifically, the number of cases they handle. In the world of work, an attempt to negotiate caseloads

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[10] Note 5 supra.

[11] The line of scope-of-bargaining cases decided by the United States Supreme Court in recent years, deals primarily with the question of whether a proposed subject of bargaining is sufficiently related to working conditions to qualify as "terms and conditions" of employment." See Allied Chemical and Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157, 78 LRRM 2974, 2982 (1971); Teamsters Union v. Oliver, 358 U.S. 283, 43 LRRM 2374 (1959); NLRB v. Borg-Warner Corp. 356 U.S. 342, 42 LRRM 2034 (1958). The methodology of our decision-making process on the question of whether a subject like caseloads is related to a specific subject of negotiations under the EERA, should not differ materially from that used by the courts generally in determining whether a subject is sufficiently related to working conditions to qualify as "terms and conditions of employment" under Section 8 (d) of the NLRA.

always means an attempt to negotiate contract language placing some type of limit on the number of cases handled.[12] It is the amount and not the qualitative aspect of the work that dictates the negotiability of a caseload. The actual level of a caseload is an issue to be resolved at the negotiating table; and whether any agreement is reached on any caseload level, is also a matter properly left to the dynamics of the negotiating process.[13]

The majority decision will have an adverse effect on the negotiating process. The very matters which the Board majority is now remanding to a hearing officer for the taking of evidence are matters properly brought into dispute and resolved, if possible, at the negotiating table and not in an unfair practice proceeding before the EERB once it is determined, as I think it should be, that the general subject of caseloads for counselors and psychologists is a negotiable subject.[14] It will also have the adverse effect of generally discouraging stipulations, since the Board's unjustified refusal to decide this case on the basis of this stipulated record will discourage many attempts to avoid a lengthy hearing by agreeing on the facts required for the Board's resolution of a remaining question of law.

On this record, I would sustain the hearing officer and order the District to cease and desist from refusing to meet and negotiate on the subject of caseloads for psychologists and counselors to the extent that caseload is a matter related to "hours . . . and other terms and conditions of employment."

Reginald Alleyne, Chairman

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[12] Webster's New World Dictionary of the American Language defines a caseload as follows:

> The number of cases being handled as by a court, social agency, or welfare department, or by a caseworker, probationary officer, etc.

[13] See note 7 supra.

[14] Ibid.