STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND SCHOOL EMPLOYEES ASSOCIATION,	)	
Charging Party,	)	Case No. SF-CE-321
v.	)	PERB Decision No.178
OAKLAND UNIFIED SCHOOL DISTRICT,	)	November 2, 1981
Respondent.	)	

Appearances: Andrew Thomas Sinclair, Attorney for Oakland School Employees Association; Michael S. Sorgen, Attorney for Oakland Unified School District.

Before Gluck, Chairperson; Moore and Tovar, Members.

DECISION

The Oakland Unified School District (hereafter District) excepts to a proposed hearing officer's decision finding the District in violation of the Educational Employment Relations Act (hereafter EERA) section 3543.5(c) and (e)[1] by refusing

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

Section 3543.5(c) and (e) reads:

> It shall be unlawful for a public school employer to:
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

to negotiate over the Oakland School Employees Association's (hereafter OSEA or Association) proposal that classified employees be notified of layoffs by March 15 of each year in which layoffs are to occur.[2]

FACTS

This dispute arose during the negotiations for the 1978-1979 contract for classified employees of the District. The parties met throughout the summer and, by mid-September, had reached agreement on 75 percent of the provisions for a new contract. On September 18, 1978, the Association submitted a new proposal which would have required that the District notify by March 15 all classified employees who were to be laid off at the end of the school year. Layoffs could occur only at the end of a school year and, if the employees were not so notified, they would be considered rehired for the following year.

After consulting with the superintendent, the District's negotiators rejected the proposal and asserted that they would make no counterproposal. However, according to the testimony,

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[2]During the course of the dispute over the layoff proposal, the Association filed four unfair practice charges, three of which were withdrawn. The hearing officer partially based his finding of bad faith on an allegation which is the subject of one of the withdrawn charges, viz., that the employer conditioned its participation in mediation on the withdrawal of one of the charges. Because this charge was withdrawn, we make no determination concerning that issue.

at subsequent meetings they offered the following explanation for the rejection of the layoff proposal:

> A. And I believe I stated some reasons why the board . . . did not want to submit a counterproposal. (R.T. p. 14:23)
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> . . . . . .
>
> One has to do with the [Education] Code [it] calls for a 30-day notice for lack of funds and lack of work.
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> Q. (By Mr. Sinclair) And you're speaking about the Education Code requiring only 30 days notice of layoff for permanent classified employees, is that correct?
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> A. That is correct.
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> . . . . . .
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> A. . . . I believe I further said that in the light of the uncertainty of state funding . . . the board needed as much flexibility as they possibly could have to run the District, and that because the teachers had this type of provision did not necessarily follow that we needed to do it for the classified employees . . . the District . . . was a service to the children for their education . . . which was relative to the fact that the teachers would have the priority. (R.T. p. 15:2)
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> . . . . . .
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> A. . . . I said that if such a proposal was agreed to and was a part of the contract, and even though we had advisory arbitration, we were interjecting a third party into the decision of the board as it relates to the matter of layoff. (R.T. p. 16:4)

The Association requested, to no avail, that the District substantiate with facts and figures how its proposal would interfere with the District's flexibility.

By September 21, the parties were at impasse on this issue, and a mediator was called in. The District maintained its position, reiterating its reasons for refusing to make a counterproposal. As a result, no progress was made in the first two mediation sessions and the mediator withdrew. Subsequently, the Association modified its proposal to provide for notice by March 15, or alternatively, within 120 days of the layoff date. The District rejected this proposal and stated that it would not submit a counterproposal. At no time did the District contend that the proposal was out of the scope of negotiations nor did it ever refuse to discuss the proposal.

DISCUSSION

A. Negotiability of the Association's Proposal

The District claims for the first time in its exceptions to the proposed decision that the notice and timing of layoffs are not within the scope of representation,[3] arguing that the

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[3]Section 3543.2 provides in pertinent part:

> 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, 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

Education Code preempts negotiating on that subject. In addition, the employer claims that negotiating over notice and timing of layoffs would interfere with management prerogatives.

As we determined in Healdsburg Union High School District (6/19/80) PERB Decision No. 132, the parties are permitted to seek agreement as to a proposal concerning layoff notices to the extent that such a proposal does not conflict with mandates of the Education Code,[4] since

> [A]dvanced notice of the employer's plans to implement a layoff will permit the effective

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> 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.

[4]Education Code section 45117(b) and (c) reads:

> (b) When, as a result of a bona fide reduction or elimination of the service being performed by any department, classified employees shall be subject to layoff for lack of work, affected employees shall be given notice of layoff not less than 30 days prior to the effective date of layoff, and informed of their displacement rights, if any, and reemployment rights.
>
> (c) Nothing herein provided shall preclude a layoff for lack of funds in the event of an actual and existing financial inability to pay salaries of classified employees, nor layoff for lack of work resulting from causes not foreseeable or preventable by the governing board, without the notice required by subsection (a) or (b) hereof.

> exchange of ideas and possible alternatives to the layoff. (p. 73.)

The District is therefore obligated to negotiate the general subject of the notice and timing of layoffs.

Since the Education Code requires only that a minimum of 30 days' notice be given, the Association's proposal for a longer period is not in conflict with the Code. The exception to the notice referred to in section 45117(c) permits the employer to avoid notice under certain circumstances. The District could not rely on this provision to find the Association's proposal totally out of scope; rather it could legitimately object to the absence of an emergency provision in the proposal.

B. The Alleged Section 3543.5(c) Violation

The Association avers that, by refusing to offer any counterproposals to the Association's layoff proposal, the District failed to negotiate in good faith. While acknowledging that the District's desire to retain full authority and flexibility with regard to classified employees was "understandable," the hearing officer seemed to sustain the charge based on the fact that the District's outright rejection of the proposal and its refusal to offer counterproposals effectively thwarted further negotiations. We disagree with his conclusion that such conduct rose to the level of bad faith.

Both the National Labor Relations Board (hereafter NLRB) and this agency have held that the question of good faith must be based on the totality of the parties' conduct.[5] In weighing the facts, we must determine whether the conduct of the parties indicates an intent to subvert the negotiating process or is merely a legitimate position, adamantly maintained.

Nothing in EERA requires parties to reach agreement or make concessions on every proposal. The NLRB and the courts have consistently ruled that adamant insistence on a bargaining position is not necessarily a refusal to bargain in good faith. NLRB v. American National Insurance Co. (1955) 343 U.S. 392 [30 LRRM 2147]. See also NLRB v. Wooster Division, Borg-Warner Corporation (1958) 356 U.S. 342 [42 LRRM 2034]. They have also ruled that the failure to make a counterproposal is not, by itself, a violation of the National Labor Relations Act. In NLRB v. Arkansas Rice Growers Assn. (8th Cir. 1968) 400 F.2d 569 [69 LRRM 2119, p. 2123], the Court said:

> Although as the company suggests, it may not be bound to make counterproposals, nevertheless, evidence of its failure to do so may be weighed with all other circumstances in considering good faith.

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[5]NLRB v. Truitt Mfg. Co. (1956) 351 U.S. 149 [38 LRRM 2042]; NLRB v. Alva Allen Industries, Inc. (8th Cir. 1966) 369 F.2d 310 [63 LRRM 2515]; Muroc Unified School District (12/15/78) PERB Decision No. 80; Fremont Unified School District (6/19/80) PERB Decision No. 136.

See also West Hartford Education Assn. v. DeCourcy (1972) 80 LRRM 2422. And in NLRB v. Herman Sausage (5th Cir. 1958) 275 F.2d 229 [45 LRRM 2829], the Court said:

> The obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained.

A flat refusal to reconcile differences by failing to offer counterproposals could be construed to be in bad faith if no explanation or rationale supports the employer's position. As we stated in Jefferson School District (6/19/80) PERB Decision No. 133 at p. 11:

> [the] obligation to negotiate includes expression of one's opposition in sufficient detail to permit the negotiating process to proceed on the basis of mutual understanding.

In this case, the employer steadfastly refused to make any concessions on the notice-of-layoff proposal, but explained that it was unwilling to hamper its flexibility in light of the fiscal uncertainties caused by Proposition 13 and unwilling to interject the decisions of a third party into the layoff process. We cannot conclude that this "hard bargaining" posture evidences bad faith, especially in light of the fact the parties had reached agreement on most of the contract proposals at the time this controversy arose.[6] Without

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[6]See NLRB v. General Tire and Rubber Co. (1st Cir. 1964) 326 F.2d 832 [55 LRRM 2150]; Dierks Forests, Inc. (1964) 148 NLRB 923 [57 LRRM 1087]. In both cases the employer's refusal

passing on the merits of the District's position, we find that it was supported by "legitimate and, in the main, reasonable arguments." Kohler Co. (1960) 128 NLRB 1062 [46 LRRM 1389]. Understandably, the Association was frustrated at not being able to extract a concession from the District on the notice issue, but it does not follow that the District's refusal to compromise was undertaken for the purpose of frustrating or subverting the negotiating process as a whole. The District's response was not, on its face, spurious or superficial, but calculated to inform the Association of the problems posed by the proposal.

Nor does the District's failure to provide precise information on how the proposal would interfere with flexibility amount to wrongdoing.[7] It was the very uncertainty of the long-range fiscal effects of Proposition 13 that led, in part, to the District's position. It is unclear what more information the District could have provided.

Neither does the District's failure to respond differently to the Association's counterproposal demonstrate that it

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to agree to a few of the union's proposals was vindicated where agreement had been reached on the majority of other articles and the employer gave cogent reasons for its position.

[7]But see Stockton Unified School District (11/3/80) PERB Decision No. 143, for example of employer's duty to furnish information.

refused to bargain in good faith. By thus altering the original proposal, the District's asserted need for flexibility was met by a proposal that left the District with the option of abiding by the March 15 notice date or giving four months advance notice of impending layoffs. In view of the District's stated objection to the original proposal, the Association's counterproposal was predictably unacceptable and the District was not obligated to respond in any manner other than it did.

The charge alleging the District violated section 3543.5(c) is dismissed.

C. The Alleged Section 3543.5(e) Violation

The District continued to stand firm in mediation on its refusal to alter the layoff notice requirements prescribed by the Education Code, offering the same explanation it had set forth in negotiations. OSEA's charge implies that a negotiating position which was lawful during negotiations becomes unlawful if maintained in mediation. Reaching impasse does not convert good faith negotiations into unlawful conduct. The Association has failed to provide additional evidence of circumstances which would tend to establish that the District refused to utilize mediation in good faith.

For the reasons we dismiss the section 3543.5(c) charge, we hereby dismiss the section 3543.5(e) charge.

ORDER

It is hereby ORDERED that the Oakland School Employees Association's charges against the Oakland Unified School District are hereby DISMISSED.

By: Harry Gluck, Chairperson

Barbara D. Moore, Member

Irene Tovar, Member

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND SCHOOL EMPLOYEES ASSOCIATION,	)	
Charging Party,	)	Unfair Practice Case No. SF-CE-321 78/79
v.	)	
OAKLAND UNIFIED SCHOOL DISTRICT,	)	PROPOSED DECISION
Respondent.	)	(6/8/79)

Appearances: Andrew Thomas Sinclair, Attorney for Oakland School Employees Association; Michael S. Sorgen, Attorney for Oakland Unified School District.

Before Gerald A. Becker, Hearing Officer

PROCEDURAL HISTORY

On October 12, 1978, the Oakland School Employees Association (hereafter Association) filed an unfair practice charge (SF-CE-321 78/79) against the Oakland Unified School District (hereafter District) alleging that the District failed to negotiate in good faith with the Association on two contract proposals. The first proposal dealt with the dismissal of probationary employees. The second dealt with a March 15 layoff notice for classified employees. The Association alleged that the District's failure to negotiate violated Government Code section 3543.5(c) and (e)[1].

At the same time, the Association filed a second unfair practice charge (SF-CE-322 78/79) against the District alleging that, in violation of section 3543.5(e), the District refused to

[1]All statutory references are to the Government Code unless otherwise specified.

participate in good faith in the mediation process by conditioning its participation upon withdrawal of an earlier unfair practice charge. The hearing in this matter was held before the undersigned hearing officer on December 11, 1978. At the hearing, the Association orally amended the first charge (SF-CE-321) to delete the allegation concerning the negotiations proposal respecting dismissal of probationary employees.

On the day of the above hearing, the Association filed a third unfair practice charge (SF-CE-331 78/79) alleging that in reprisal for filing the first two unfair practice charges the District unilaterally rescinded an agreed-upon extension of the previous negotiations agreement in violation of section 3543.5(a), (b), (c) and (e). This third charge was submitted on briefs and stipulated facts and by agreement of the parties was consolidated for decision with the two prior charges.

In its brief, the District for the first time raised the issue that the Association's negotiation proposal concerning layoffs was non-negotiable. On March 7, 1979 the hearing officer granted the Association 10 days within which to file an additional brief on the issue of negotiability of the proposal.

On May 1, 1979, prior to issuance of this proposed decision, the parties withdrew unfair practice charge numbers SF-CE-322 78/79 and SF-CE-331 78/79 by written stipulation, leaving only charge number SF-CE-321 78/79 remaining for decision. The parties further stipulated that evidence introduced with regard to

all three charges could be considered by the hearing officer in determining whether the Association's layoff proposal is within the scope of negotiations, and if so, whether the District negotiated in good faith.

FINDINGS OF FACT

The Association represents a negotiating unit of approximately 1100 classified employees in the District. On June 30, 1978, the one-year, 1977-78 collective negotiations agreement between the Association and the District expired. Negotiations for a new agreement continued after expiration of the old agreement. On August 16, 1978, the 1977-78 agreement was extended for one week, again on September 20 for another week, and finally on September 27 for the period of mediation.

The Association and the District had reached agreement on approximately three-fourths of the provisions for a new contract by mid-September 1978. On September 18, the Association submitted to the District two new negotiations proposals. One proposal dealt with the procedure for dismissal of probationary employees. The second proposal provided for a March 15 notice of layoff and hearing for classified employees similar to that statutorily provided to certificated employees in the Education Code. The stated purpose of the proposal was to force the District to consider all of its employees, certificated and classified, in future budgetary planning.

After passage of the Proposition 13 ballot initiative in June 1978, the District laid off or demoted classified employees in an effort to balance its reduced budget. However, no certificated employees could be laid off because no March 15 layoff notices were given to certificated employees and under Education Code sections 44949 and 44955, they all were deemed rehired for the ensuing school year.

The proposals were rejected by James R. Wilson, chief negotiator for the District, at the September 19 negotiation session. Wilson at first testified that he rejected the proposals prior to presenting them to the District Board of Education. He then stated he could not remember whether the proposals were presented to the school board. After checking his notes, Wilson indicated that he was unsure, but would not normally reject proposals without prior review by the school board.

Anne Sprague, a member of the Association negotiating team, testified that Wilson flatly rejected the two proposals, telling the Association that Dr. Ruth Love, the superintendent, had made the decision to reject the proposals, and that the District had no room to bargain on these proposals. Sprague further testified that Wilson said he "assumed" Love had "polled" the members of the school board.

Sprague's testimony as to the District's response was corroborated by William Freeman, the Association president. The parties stipulated that the testimony of two other members of the Association negotiating team, Alamares Walker and Sam Mason, also would corroborate this testimony.

In light of Wilson's equivocal testimony, it is found that before rejecting the two proposals, he presented them only to Love, and not to the school board.

On September 21, 1978 the parties agreed that they were at impasse on the two proposals. The PERB confirmed the existence of an impasse and appointed a mediator. Prior to mediation, a negotiating session was held on September 26. At that time, Wilson stated the basis for the District's rejection of the proposals: (1) Education Code section 45117(b) requires only 30 days notice of layoff for classified employees; (2) agreeing to the proposal would interfere with the District's flexibility to lay off classified employees; (3) certificated employees had priority over classified employees when layoffs or cut-backs were necessary; (4) the layoff proposal would interject a third party into the layoff procedure, since the proposal called for advisory arbitration. At no time during the negotiation process did the District allege that the proposal was not within the scope of representation under section 3543.2.

At the September 26 meeting, and at all subsequent meetings, the Association requested substantiation of the District's contention that the layoff notice proposal would interfere with or restrain the flexibility of the District regarding layoff of classified employees. Wilson testified that no response to these requests ever was made by the District.

Throughout negotiations, the Association stressed that the

layoff notice proposal was a non-monetary item which would not affect the ability of the District to lay off classified employees. The Association indicated that it would be flexible in negotiating the proposal.

On September 27, 1978, the Association filed an unfair practice charge (SF-CE-315 78/79) alleging the District failed to bargain in good faith on the proposals.

The initial mediation session with the mediator was scheduled on October 5, 1978. Prior to that session, Wilson informed the Association in writing that the District would refuse to participate in mediation unless the unfair practice charge was withdrawn. The District additionally threatened to revoke the extension of the expired contract if the charge was not withdrawn. The Association agreed to withdraw the unfair practice charge in return for good faith participation by the District in mediation. The unfair practice charge (SF-CE-315 78/79) was withdrawn by the Association without prejudice to refiling and, except as background, it is not relevant herein.

A second mediation session was held on October 10, 1978. The District was unwilling to make any change in its position on both proposals. At the beginning of the afternoon session, the Association expressed its intention to refile the withdrawn refusal to bargain charge. The District's response was that if a charge was

filed, the District would withdraw from mediation. The Association requested orally and in writing that mediation continue despite the anticipated filing, but no response was made to these requests by the District. The District then refused to participate further in mediation and the mediator withdrew, but held the case open.

The District's response to the charges, at the school board meeting of October 11, was to revoke the previous extension of the expired contract. The minutes of the board meeting indicate that this was in reprisal for the filing of the unfair practice charges:

> [Superintendent] Love: In view of the fact that OSEA has filed another unfair labor practice and in view of the fact that the Board voted to revoke the contract and discontinue negotiations last week if indeed we were not able...if they did not withdraw...it would seem appropriate for the Board to follow its policy.
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> [Board Member] Rose: What you're saying is...well, the Board policy was that if they did in fact maintain the status of having an unfair labor practice, they took it away and reinstated it...that we would withdraw recognition of the contract.
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> Love: We can't negotiate and have an unfair labor practice.
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> Rose: I so move.

The motion was moved, seconded and unanimously carried. After recission of the contract, the District refused to process

employee grievances on the ground that the contractual grievance procedure no longer existed.

On October 12, 1978, the Association filed the first two of its three unfair practice charges, alleging the District refused to bargain on the proposals and to participate in mediation.

On November 9, 1978, the Association offered a modified proposal in an effort to rekindle negotiations. The modified proposal asked for the same March 15 notice of layoff, or in the alternative, 120 days. The testimony conflicts on the question of whether Wilson promised on November 9 to recommend the reopening of negotiations based on the modified proposal. Wilson testified that he agreed only to take the proposal to the school board. Loma Reno, classified personnel assistant, testified that Wilson gave no assurances at the November 9 meeting that he would support the modified proposal. Freeman, the Association president, testified to the contrary that Wilson gave assurances it would be recommended that negotiations be reopened.

According to Freeman, the modified proposal was flatly rejected by Wilson at a November 10 negotiating session. Freeman testified that Wilson stated that the modified proposal had been discussed with Love, and again he "assumed" she had "polled" the members of the school board.

On November 29, the modified proposal was submitted by Wilson to the school board without any recommendation. A November 30, 1978 letter from Wilson to the Association stated that the District would not submit a counterproposal on the layoff notice issue. No reason was given.

At no time did the District tell the Association why the proposal would be incompatible with the efficient operation of the school district. Wilson testified that the District understands that the proposal has no effect, on its face, on the basic right of the District to lay off classified employees.

ISSUES

1. Is notice and timing of classified employee layoffs within the scope of representation under section 3543.2?

2. Did the District violate section 3543.5(c) and (e) by failing to negotiate in good faith on the layoff proposal?

DISCUSSION AND CONCLUSIONS OF LAW

A. Negotiability of notice and timing of classified employee layoffs.

Throughout negotiations and this hearing, the District did not claim that the proposal concerning layoff of classified employees was non-negotiable. The scope of representation issue was first raised by the District in their post-hearing brief.

Even though belatedly raised, the hearing officer finds it necessary to make a determination on this issue. Section 3543.2 prohibits negotiations on any subject not specifically enumerated as within the scope of representation. Section 3543.2 provides in pertinent part that:

> All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating,...(Emphasis added.)

It would be inconsistent with this clear statutory mandate, and would not "effectuate the policies of [the EERA]" (section 3541.5(c)), for PERB to order a party to negotiate in good faith over a non-negotiable item. Section 3541.3(b) authorizes PERB "...to determine in disputed cases whether a particular item is within or without the scope of representation."

Furthermore, in their stipulation withdrawing the last two charges, the parties specifically authorized the hearing officer to make a finding on the negotiability of the Association's layoff proposal.

The scope of representation under EERA is defined under section 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, 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....

For a subject to be negotiable, the EERA requires a relationship to wages, hours or to items specifically enumerated in the definition of "terms and conditions of employment."

The Public Employment Relations Board (hereafter PERB), in Fullerton Union High School District (7/27/77) EERB Decision No. 20, at p. 3, stated that the EERA has a restricted scope of negotiations.

In the present case it is unnecessary to decide whether classified employee layoffs in general are negotiable. The Association only has requested to negotiate notice and timing of the layoffs.

To the extent that notice and timing of layoffs have an effect on negotiable subjects, the effects are negotiable. See Garment Workers v. NLRB (D.C. Cir. 1972) 463 F.2d 907 [80 LRRM 2716, 2723] and cases cited therein.

The Association argues that notice and timing of employee layoffs is related generally to wages, hours and health and welfare benefits. The logic of this argument seems to be that a laid off employee has no more wages, hours or benefits. Thus, layoff is directly related to these negotiable items.

Stated in such general terms, the hearing officer declines to accept this reasoning. Carried to the extreme, it would make almost any subject negotiable. As stated by the PERB in Fullerton, supra, the EERA has a restricted scope of negotiations. Also cf., Los Angeles County Civil Service Com. v. Superior Court (1978) 23 Cal.3d 55, at 63 [100 LRRM 2854] in which it is stated that under the Meyers-Milias-Brown Act,[2] layoffs are encompassed under the open-ended clause "conditions of employment" in that act, rather than "wages" and "hours" as the Association contends.

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[2]Government Code section 3500 et seq.

Nevertheless, the Association's proposal does present some negotiations possibilities. It is possible that a reassignment policy applicable to a post-layoff situation could include when during the year employees will be reassigned, which of course would depend upon the timing of the layoffs. Reassignment policies are negotiable under section 3543.2.

Alternatively, if given the chance to develop or further modify its proposal, the Association might have proposed severance pay to compensate for less than 120 days notice of layoff. Such pay clearly is related to wages and is negotiable. Similarly, the Association might have proposed that the health and welfare benefits of laid off employees continue for a specified duration after layoff. This too would be a negotiable effect of a layoff. Thus, to the extent that the Association's layoff proposal affects reassignment policies or some other negotiable item, it would be negotiable.

B. Bad faith negotiations by the District.

As set forth above, the Association's negotiations proposal possibly could relate to certain negotiable side-effects of employee layoffs. In the course of negotiations it did not attempt to relate it to reassignment policies or some other relevant negotiable item. Indeed, since the District did not take the position that the proposal was nonnegotiable, the Association was under no compulsion to modify it to make it clearer how it relates to negotiable items. Nevertheless, since the proposal does present some negotiations possibilities, the District's behavior must be examined to determine whether the District negotiated in good faith.

The determination of whether a party has negotiated in good faith must be made in the context of the "totality of the conduct" of the negotiations. Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51 at pp. 4-5; NLRB v. Stevenson Brick & Block Co. (4th Cir. 1968) 393 F.2d 234 [68 LRRM 2086].

The Association presented no evidence that the District negotiated in bad faith on other negotiations topics. To the contrary, the testimony indicated that the two sides had reached agreement on about three-fourths of the negotiations topics. Also in the District's favor is the fact that in the context in which the proposal was made, the District's motives for refusing to negotiate the proposal were not unreasonable. In view of the uncertainties of post-Proposition 13 school financing, its desire to retain the right to lay off classified employees anytime during the year is understandable.

On the other hand, the District rejected the proposal outright. Not only did it not offer a counterproposal, but its complete inflexibility effectively thwarted modification of the proposal by the Association or any further bargaining on the subject. For example, in its brief the Association suggests that its proposal would have permitted the District to provide pay in lieu of 120 days notice of layoff. As stated above, severance pay certainly is negotiable. There is no evidence that this possible interpretation was mentioned in negotiations. Had the District not immediately closed off discussion on the subject there would have been opportunity to explore such possibilities in a good faith effort to reach common ground, which effort lies at the heart of the collective negotiations process.

While the employer need not necessarily make concessions to comply with its obligation to negotiate in good faith:

> ...the employer is obliged to make some reasonable effort in some direction to compose his differences with the union,...[Emphasis in original.]
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> (NLRB v. Reed & Prince Mfg. Co. (1st Cir. 1953) 205 F.2d 131, 134-5 [32 LRRM 2225]; see also, Los Angeles County Civil Service Comm. v. Superior Court, supra, 23 Cal.3d 55, at pp. 61-62.)

In the present case, the District made no effort to reconcile its differences with the Association on the notice of layoff proposal.

Furthermore, in considering the totality of the District's conduct in the negotiations, it is appropriate to assess its other actions during negotiations which were the subject of the two withdrawn unfair practice charges. If the charges were not withdrawn, the District's unilateral rescission of the contract extension and its refusal to enter mediation until withdrawal of an Association unfair practice charge, probably would have constituted separate unfair practice violations during the course of these negotiations.

Federal precedent clearly prohibits an employer from conditioning participation in negotiations on the withdrawal of an unfair practice charge. See, e.g., Griffin Inns (1977) 229 NLRB 199 [95 LRRM 1072]. The employer similarly is prohibited from interfering with the right to file unfair practice charges. NLRB v. Scrivener (1972) 405 U.S. 117 [79 LRRM 2587]. These actions by the District thus are further evidence of lack of good faith.

On balance, therefore, it is concluded that the District's summary rejection of the Association's layoff proposal, viewed in the context of the entire negotiations, constituted a failure to negotiate in good faith in violation of section 3543.5(c). In addition, since the District assumed the same posture on the proposal in mediation, it also refused to participate in good faith in the impasse procedure in violation of section 3543.5(e).

REMEDY

When it is found that a party has not negotiated in good faith, it is appropriate to order the party to cease and desist from failing or refusing to do so. See, e.g., Fullerton Union High School District (5/30/78) PERB Decision No. 53, at p. 11. In the present case, the District will be ordered to cease and desist from failing or refusing to negotiate in good faith and from failing to participate in good faith in the impasse procedure with the Association regarding notice and timing of classified employee layoffs to the extent there is an effect on matters within the scope of representation.

The District also will be ordered to post copies of the Notice set forth in the Appendix. Posting serves to notify employees of the disposition of this charge and how their rights are affected thereby. Placerville Union School District (9/18/78) PERB Decision No. 69.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Oakland Unified School District violated Government Code section 3543.5(c) and (e). Pursuant to Government Code section 3541.5(c), it is hereby ordered that the District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Failing or refusing to negotiate in good faith with the Oakland School Employees Association in violation of Government Code section 3543.5(c) on the subject of notice and timing of classified employee layoffs to the extent that there is an effect on matters within the scope of representation.

(b) In like manner, failing to participate in good faith in statutory impasse procedures in violation of Government Code section 3543.5(e).

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:

(a) Post copies of the Notice set forth in the Appendix, for 30 working days after this Proposed Order becomes

final, at its headquarters office and in all locations where notices to classified employees are customarily posted;

(b) Notify the San Francisco Regional Director of the Public Employment Relations Board of the actions it has taken to comply with this Order.

Pursuant to California Administrative Code, title 8, part III, secton 32305, this Proposed Decision and Order shall become final on June 28, 1979 unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this decision. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on June 28, 1979 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 proceedng. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.

Dated: June 8, 1979

Gerald A. Becker
Hearing Officer

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS BOARD

An Agency of the State of California

After hearings in which all parties had the right to participate, it has been found by the Public Employment Relations Board that the Oakland Unified School District violated the Educational Employment Relations Act (EERA) by:

1.) Failing or refusing to negotiate in good faith with the Oakland School Employees Association, in violation of Government Code section 3543.5(c) on the subject of notice and timing of classified employee layoffs, to the extent there is an effect on matters within the scope of representation.

2.) Failing to participate in good faith in statutory impasse procedures in violation of Government Code section 3543.5(e).

WE WILL NOT:

1.) in any manner fail or refuse to negotiate in good faith with the Oakland School Employees Association on the subject of notice and timing of classified employee layoff to the extent that there is an effect on matters within the scope of representation.

2.) in any manner fail to participate in good faith in statutory impasse procedures.

Oakland Unified School District

_____

By Superintendent

Dated:

This is an official notice. It must remain posted for 30 consecutive days from the date of posting and must not be defaced, altered or covered by any material.