STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATION OF CALIFORNIA STATE ATTORNEYS AND HEARING OFFICERS,	)	
Charging Party.	)	Case No. S-CE-137-S
v.	)	PERB Decision No. 574-S
STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION).	)	June 3 1986
Respondent.	)	

Appearances: Ernest F. Schulzke, Attorney for Association of California Attorneys and Hearing Officers; Christopher W. Waddell, Attorney for State of California (Department of Personnel Administration).

Before Hesse, Chairperson; Morgenstern and Burt. Members.

DECISION

BURT. Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the State of California (Department of Personnel Administration) (DPA) to a decision of the administrative law judge (ALJ) finding that DPA violated section 3519(b) and (c) of the State Employer-Employee Relations Act (SEERA)[1] by its refusal to meet and confer with the Association of California State

[1]SEERA is codified at Government Code section 3512 et seq. All statutory references herein are to the Government Code unless otherwise noted.

Section 3519 provides, in pertinent part:

It shall be unlawful for the state to:

Attorneys and Hearing Officers (ACSA) about decisions to subcontract. ACSA filed exceptions to the ALJ's finding that it wished to negotiate about decisions to contract out. It is ACSA's position that it sought to negotiate the criteria for doing so.

The Board has reviewed the proposed decision in light of the parties' exceptions and the entire record in the case. For the reasons outlined below, we affirm the ALJ's proposed decision.

FACTS

The ALJ's findings of fact are essentially undisputed, and we adopt them for purposes of this Decision.

In March 1982, ACSA was certified as the exclusive representative for employees in bargaining Unit 2. This unit consists of approximately 1,727 attorneys, hearing officers and deputy labor commissioners employed in various agencies throughout the State.

> (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 confer in good faith with a recognized employee organization.

The negotiations between the parties opened on May 5. 1982. and lasted through June 1982. Eventually, a memorandum of understanding covering the period from July 1. 1982 to June 30. 1984. was signed by the parties. In addition to representatives of the parties, negotiations were attended by a representative of the State Personnel Board (SPB). There is no indication that any party objected to the presence of the SPB's representative. Negotiations were also attended by representatives of various State departments and agencies whose employees comprise Unit 2.

In April 1982. during the "sunshine" process for these negotiations. ACSA proposed to "prohibit contracting out." DPA's written response was as follows:

> The State Employer proposes to keep total discretion over the decision of when to "contract out" in accordance with applicable law. The State Employer will notify ACSA of its decision to "contract out" and negotiate over the impact of its decision on terms and conditions of employment.

No discussions followed the sunshining process.

At the May 5 and May 24 meetings. ACSA offered proposals on contracting out. The second differed from the first principally in that ACSA proposed to use the contract grievance procedure rather than arbitration to resolve disputes under the proposed contract language. For purposes of this discussion.

the two proposals are in essence the same. ACSA's second and final proposal was as follows:

> Services which can be or have been performed by employees in existing classifications shall not be contracted to or performed by the private sector or other public agencies. Services shall be contracted out only if it can be clearly demonstrated (based on a preponderance of the evidence) that existing classifications are not capable of performing the work (even if additional employees are hired); it would be more economical to contract out the services; the quality of the work will be higher under contracting out, as opposed to creating the capability in state service; ACSA is provided a minimum of sixty days written notice in advance of any decision to contract out; and the meet and confer process is utilized to resolve matters relating to the impact of the contracting out on bargaining unit employees. Disputes regarding any of the above shall be resolved through the Grievance Procedure prior to implementation of contracting out.

At the June 2 meeting, DPA presented the following counterproposal on contracting out:

> The State agrees to notify ACSA of any decisions to contract out which will have an impact on the working conditions of Unit 2 employees. The State also agrees to meet and confer on the impact of these decisions.

Discussions of this proposal were minimal. Throughout negotiations. DPA took the position that the decision to contract out was a management right and therefore nonnegotiable, but that it would meet and confer on the impact of decisions to contract out. According to ACSA's negotiator. Bruce Blanning, the SPB took the position that contracting out

was within SPB's jurisdiction. ACSA made no further counterproposals on the grounds that that would have been futile.

During negotiations, on May 20. 1982. ACSA filed the instant unfair practice charge alleging that DPA violated SEERA section 3519(b) and (c) by its refusal to negotiate about salary compaction, staffing ratios, and contracting out. In its answer, DPA admitted that it refused to negotiate about these subjects, but asserted as a defense that the subjects of salary compaction and staffing ratios were within the exclusive jurisdiction of the SPB, and that all three subjects were within the State's managerial prerogative and thus outside the scope of representation.

Hearing in this case was delayed due to a lawsuit filed on November 9, 1982, by the SPB against PERB, challenging PERB's right to conduct a hearing in this and similar cases. On October 24, 1983, the formal hearing in this case was conducted by a PERB ALJ. Post-hearing briefs were filed by the parties and by the SPB. On July 5, 1984, the parties were informed that the matter was transferred to another PERB ALJ for decision, pursuant to PERB Regulation 32168(b).[2] Both DPA

2PERB Regulations are codified at California Administrative Code, title 8, section 31001 et seq.

Regulation 32168(b) provides:

> A Board agent may be substituted for another Board agent at any time during the

and ACSA filed exceptions to the ALJ's decision, and DPA filed a response to ACSA's exceptions. The SPB has not filed a brief before the Board itself.

DPA did not except to the ALJ's disposition of the salary compaction and staffing ratio issues. Therefore, this Decision deals only with ACSA's proposals concerning subcontracting.

The ALJ found that ACSA's proposal was within the scope of representation set out in SEERA section 3516. He also found no statutory conflict that would render the proposal nonnegotiable, and he found no conflict with the SPB's constitutional authority.

On exception. DPA contends that contracting out is not within the scope of negotiations under SEERA. It argues that the scope language of SEERA conforms to that in the National Labor Relations Act, and that private sector precedent is therefore controlling. It also argues that ACSA never demonstrated in negotiations that contracting out is of sufficient concern to its members to meet PERB's scope test.

ACSA excepts to a footnote in the ALJ's decision implying that it wished to negotiate decisions to contract out rather

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proceeding at the discretion of the Chief Administrative Law Judge in unfair practice cases or the General Counsel in representation matters. Substitutions of Board agents shall be appealable only in accordance with section 32200 or 32300.

than the criteria for doing so. although it does not concede that the decisions themselves are outside of scope.

DISCUSSION

The Scope of Representation Under Section 3516

The scope of representation under SEERA is set forth in section 3516:

> The scope of representation shall be 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.

In State of California (Department of Transportation) (1983) PERB Decision No. 361-S. at p. 10, the Board articulated its scope test under section 3516. Thus, matters are within scope under section 3516,

> . . . if they involve the employment relationship and are of such concern to both management and employees that conflict is likely to occur, and if the mediatory influence of collective negotiations is an appropriate means of resolving the conflict.
>
> Such subjects will be found mandatorily negotiable under SEERA unless imposing such an obligation would unduly abridge the State employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the State's mission.

The Board determined that the statutory language that excludes "the merits, necessity, or organization of any service or activity" reflects the same principle as that portion of the scope test adopted by the Board in Anaheim Union High School

District (1981) PERB Decision No. 177 which recognizes that essential management prerogatives are outside the scope of representation. In sum, the Board's decision in State of California (Department of Transportation), supra, concluded that the scope test under SEERA is parallel to the Anaheim test for analyzing whether or not issues are within the scope of negotiations under the Educational Employment Relations Act (EERA).[3]

In Anaheim, supra, the Board determined that a subject which was not enumerated in the scope section of EERA would be found to be negotiable if: (1) it is logically and reasonably related to wages, hours, 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 its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the district's mission.

This test was approved by the California Supreme Court in its decision in Healdsburg et al. v. PERB (1983) 33 Cal.App.3d 850. and was subsequently applied by the Board in its

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3EERA is codified at Government Code section 3540 et seq.

decision in Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375.

Using this test, the Board found that the decision to subcontract was within the scope of representation under EERA, and that the employer must therefore negotiate over proposals concerning that decision. See Arcohe Union School District (1983) PERB Decision No. 360; Oakland Unified School District (1983) PERB Decision No. 367; Healdsburg, supra, at pp. 85-87. In Healdsburg, for example, the Board found negotiable a proposal providing that the employer district would not contract out without the approval of the representative of its classified employees and providing for notice to the representative as well.

Applying the SEERA scope test here, we reach a similar conclusion. Clearly, the decision to subcontract involves the employment relationship. As the Board has stated previously in Arcohe, supra:

> Subcontracting . . . work formerly performed by unit employees is a subject logically and reasonably related to wages, hours, and transfer and promotional opportunities for incumbent employees in existing . . . classifications. Actual or potential work is withdrawn from unit employees, and wages and hours associated with the contracted-out work are similarly withdrawn. Further, such diminution of unit work weakens the collective strength of employees in the

> unit and their ability to deal effectively with the employer. Such impact affects work hours and conditions, and thus is logically and reasonably related to specifically enumerated subjects within the scope of representation.

We also find, based on the foregoing discussion, that the subject of subcontracting is of such concern to management and employees that conflict is likely to occur. In so concluding, we must dismiss DPA's argument that the subject of subcontracting was not of great concern to the members of the unit represented by ACSA since its negotiators could not come up with specific examples of subcontracting that were problematic.

To the contrary, the record contains testimony about instances of subcontracting in the State Public Defender's Office that were of concern to members of the Unit. Moreover, we find it immaterial whether specific examples of objectionable subcontracting were offered during negotiations.[4] As noted above, we previously have had the opportunity to consider other subcontracting situations and we find it reasonable to conclude that, in general, subcontracting is the kind of issue that tends to cause labor relations conflict.

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[4]The ALJ found it unnecessary to resolve a dispute in the record as to whether ACSA had presented concrete examples of contracting out in Unit 2. in view of DPA testimony that concrete examples would not have changed DPA's position.

DPA argues that the ALJ erred in finding that negotiations are an effective manner of addressing these concerns just because subcontracting is of concern to employees. It claims that this analysis runs together two parts of PERB's scope test. We agree that the fact that an issue is of concern to the parties does not necessarily mean that it is amenable to resolution by negotiations. Here, however, we find that the meet and confer process is the appropriate place to consider the "ground rules" for subcontracting. Clearly, the subject is important to the parties, and it is in the interest of fostering stable relations between them to determine in advance the procedures they will use to resolve the problems that will certainly arise.

This conclusion is the same as that reached by the National Labor Relations Board (NLRB) in private sector cases, finding that subcontracting is a mandatory subject of bargaining. See Fibreboard Paper Products Corporation v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609]. In Fibreboard, the NLRB and the U.S. Supreme Court found that the employer was required to negotiate over the decision to contract out maintenance work which had previously been done by the employer's own employees. In reviewing the NLRB's action, the Court found that:

> To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the

> fundamental purpose of the [NLRA] by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.

In his concurrence in that case. Justice Potter Stewart expressed reservations about the breadth of the Court's decision, suggesting that "such managerial decisions, which lie at the core of entrepreneurial control," should fall outside the duty to bargain. He agreed, however, that the subcontracting decision in the case at issue was subject to the duty to bargain.

It is DPA's contention that cases decided subsequent to Fibreboard suggest that the decision to subcontract is within the prerogative of management to make without negotiating with the employees' representative and that, under SEERA, imposing an obligation to meet and confer over the decision to subcontract would "unduly abridge the State employer's freedom to exercise [its] managerial prerogatives."

DPA cites Westinghouse Electric Corp (Mansfield Plant) (1965) 150 NLRB 136 [58 LRRM 1257] as a subsequent case in which the NLRB found that the employer may unilaterally decide to contract out when certain conditions are met. We note, however, that that case concerned an alleged unlawful unilateral change, and the NLRB's inquiry focused on whether or not the subcontracting at issue was in fact a change, or simply

action taken in line with past practice. Indeed, the NLRB there affirmed the negotiability of subcontracting as follows:

> We do not mean to suggest that, because subcontracting in accordance with an established practice may stand on a different footing from that of subcontracting in other contexts, an employer is any less under an obligation to bargain with the union on request at an appropriate time with respect to such restrictions or other changes in current subcontracting practices as the union may wish to negotiate.

DPA also argues that, under the most recent NLRB precedent, the decision to contract out is a managerial prerogative unless the decision turns upon a direct modification of labor costs, citing United Technologies (Otis Elevator Company) (1984) 269 NLRB No. 162 [115 LRRM 1281], That case marks the NLRB's reexamination of those managerial decisions that must be bargained in light of the U.S. Supreme Court's decision in First National Maintenance v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705].[5]

5m First National Maintenance, the Court found that an employer's decision to close down part of its business without negotiating was not an unlawful unilateral change. The employer was not required to negotiate over the decision to close down part of its business because:

> [B]argaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the

Otis Elevator involved a charge that the employer made an unlawful unilateral change by transferring and consolidating work from one facility to another without negotiating. Two members of the NLRB held that the decisions "which affect the scope, direction and nature of business" need not be negotiated, but that only those decisions that turn on labor costs are subject to negotiation, citing Fibreboard as an example of the latter category. In her concurrence. Member Dennis advocated a balancing test requiring that, in order to find a management decision negotiable, it must be proved that: (1) a factor over which the union has control was a significant consideration in the employer's decision; and (2) the benefit to the collective bargaining process outweighs the burden on the business. In his concurrence. Member Zimmerman found management decisions to be negotiable when a decision is "amenable to resolution through collective bargaining." The

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> collective bargaining process, outweighs the burden placed on the conduct of the business.

The Court noted that the Fibreboard Court had "implicitly" engaged in this analysis in finding the decision to subcontract in that case subject to negotiation. The Court in First National Maintenance also noted the fact that in Fibreboard, the employer's desire to reduce labor cost, a matter "peculiarly suitable for resolution with the collective bargaining framework." was the basis of the employer's decision to subcontract. The Court specifically declined to speculate about the negotiability of other kinds of management decisions, such as subcontracting.

Following this decision. Otis Elevator was remanded to the NLRB for reconsideration in light of First National Maintenance.

NLRB. then, was unanimous in its conclusion that some management decisions, such as the decision to close one facility and transfer work to another, need not be negotiated and such unilateral action will not be found to be a violation. There was, however, no majority on the test to be applied in categorizing those decisions.

We agree with the NLRB and the Court that there are some management decisions that are not negotiable -- decisions so fundamental to the direction of the enterprise that they do not require negotiation with the elected representative. We are persuaded, as well, that there is no need for negotiation when there is nothing useful that the representative can offer. To that extent, we agree with DPA's contention that not all decisions to subcontract are negotiable.

However, it should be obvious by this point that, in its effort to prove that not all decisions to subcontract are negotiable under federal law, DPA has succeeded in firmly establishing that at least some decisions to subcontract are indeed mandatory subjects of negotiation even under the federal law upon which it relies. This Board has had little occasion to consider the negotiability of unilateral management decisions to subcontract under SEERA, and we have no need to do so here, since the heart of this case is not a unilateral change but a negotiating proposal to meet and confer. There are no specific issues of economics or motivation to address

because we are not dealing with a specific situation in which action was taken, but a preliminary proposal to structure how the parties will make those decisions in the future. Under the circumstances, we have no difficulty determining that ACSA's broadly worded proposal was within scope, and that DPA violated SEERA by its flat refusal to negotiate about a proposal involving the decision to subcontract. As the Board noted in a similar situation in Healdsburg, supra, the proper means to address broadly-worded proposals is to utilize the give-and-take of the bargaining process to resolve the ambiguities in bargaining proposals.

> This requires the objecting party to make a good faith effort to seek clarification of questionable proposals by voicing its specific reasons for believing that a proposal is outside the scope of representation and then entering into negotiations on those aspects of proposals which, following clarification by the other party, it finally views as negotiable. Where a proposal is arguably negotiable in whole or in part, a failure to seek clarification is. in itself, a violation of the duty to negotiate in good faith, and will result in an order requiring the objecting party to return to the negotiating table and seek clarification of the ambiguous proposal. Healdsburg, supra, at pp. 9-10.

Here, DPA flatly refused to discuss proposals concerning the decision to subcontract, never acknowledging in negotiations that some decisions to contract out might be within scope or that ACSA's proposal contained both negotiable

and nonnegotiable elements. It simply maintained the position that the decision to contract out was a management prerogative. We find that such a posture fails to satisfy SEERA's direction to meet and confer in good faith.[6]

Based on the foregoing discussion, we conclude that DPA unlawfully refused to meet and confer with ACSA over its proposal concerning subcontracting. Such conduct constitutes a violation of section 3519(c) of SEERA and. derivatively, section 3519(a) and (b).[7]

ORDER

Upon the foregoing facts, conclusions of law, and the entire record in this case, and pursuant to section 3514.5(c), it is hereby ORDERED that the State of California (Department of Personnel Administration) and its representatives shall:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and confer in good

6Having found the general subject of subcontracting to be within scope, and having found as well that DPA refused to negotiate at all about the decision to do so, it is unnecessary to consider ACSA's assertion that the ALJ erred in finding that ACSA wished to negotiate over individual decisions to subcontract rather than the criteria to do so.

[7]Although the original charge alleged only that DPA violated section 3519(b) and (c). the ALJ found that the refusal to meet and confer in good faith which violated section 3519(c) was derivatively a violation of section 3519(a) and (b) as well. This conclusion follows the Board's precedent under EERA, articulated in San Francisco Community College District (1979) PERB Decision No. 105. See also Healdsburg, supra. DPA did not separately except to the finding of an (a) violation, and we see no reason to overturn the ALJ's conclusion.

faith with the Association of California State Attorneys and Hearing Officers about proposals on subcontracting, staffing ratios and salary compaction.

(2) By the same conduct, denying the Association of California State Attorneys and Hearing Officers rights guaranteed by the State Employer-Employee Relations Act, including the right to represent its members.

(3) By the same conduct, interfering with employees in the exercise of rights guaranteed by the State Employer-Employee Relations Act, including the right to be represented.

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

(1) Upon request, meet and confer in good faith with the Association of California State Attorneys and Hearing Officers about subcontracting, staffing ratios and salary compaction.

(2) Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are 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.

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

Member Morgenstern joined in this Decision.

Chairperson Hesse's Dissent begins on page 20.

Hesse, Chairperson, dissenting: I dissent. The majority decision that ACSA's proposal is negotiable essentially turns on whether the proposal, as presented, intrudes on an inherently managerial prerogative. As the U.S. Supreme Court has noted, some management decisions are not negotiable if the burden placed on the conduct of business outweighs the benefit to labor-management relations and the collective bargaining process.[1] I agree that, under some circumstances, a decision to subcontract may be negotiable. But I reject the majority's decision that the broadly worded proposal in this case was necessarily subject to bargaining. To reach that conclusion, the majority cites the "duty to seek clarification" imposed on negotiators in Healdsburg, supra.

Imposition of a duty to clarify, in effect, places the burden of explaining a proposal on the party to whom the proposal is made, not on the author of the proposal. While I agree that a refusal to bargain on a matter in scope is unlawful, I find it anomalous that a party could be guilty of refusing to bargain in good faith merely because it guessed, correctly, that a subject was out of scope and, thus, it did not seek "clarification."

Here, the broadly worded proposal, on its face, appears to intrude on management's right to manage. If the proposal was meant to be narrower and fit within the confines of the Anaheim

[1]See majority text, footnote 5, and accompanying discussion.

test, it was ACSA's duty to so structure the proposal so that it was within scope.

The "duty to clarify," while seemingly innocuous on its face, results in an imbalance at the bargaining table: all proposals made will be considered in scope until enough information is gathered that makes one party refuse to bargain further because the subject then appears out of scope. Clearly, the statutes never envisioned that the duty to bargain would be so all-encompassing. Interestingly, neither did the original decision by Member Barbara Moore adopt the "duty to clarify."[2] By the time Healdsburg again reached the Board after remand, a new author was assigned and the Board adopted the duty to clarify. I believe that imposition of such a broad duty is in error, and results in the parties negotiating about subjects outside scope. The duty to clarify belongs to the author of the proposal. Just as a responding party risks an unfair practice when it refuses to negotiate about a subject this Board finds in scope, so too the party who drafts an overbroad proposal risks having the other side refuse to negotiate unless the proposal is presented in such a manner as to lead a reasonable person to believe that the subject is within scope.

Because of the ambiguity and overbreadth of the proposal on

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[2]With regard to some proposals which contained no limitation in the language, the overbreadth is fatal, and I have found them nonnegotiable." Decision of Member Moore, page 9, (1980) PERB Decision No. 132.

contracting out, I would hold that DPA was under no duty to negotiate until ACSA made clear that the proposal was within the limits of Anaheim.

APPENDIX

NOTICE TO 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. S-CE-137-S. Association of California State Attorneys and Hearing Officers v. State of California (Department of Personnel Administration), in which all parties had the right to participate, it has been found that the State of California (Department of Personnel Administration) violated the State Employer-Employee Relations Act, Government Code section 3519(a). (b) and (c) by refusing to meet and confer with the Association of California State Attorneys and Hearing Officers about proposals on subcontracting, staffing ratios and salary compaction.

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 confer in good faith with the Association of California State Attorneys and Hearing Officers about proposals on subcontracting, staffing ratios and salary compaction.

(2) Denying the Association of California State Attorneys and Hearing Officers rights guaranteed by the State Employer-Employee Relations Act, including the right to represent its members.

(3) Interfering with employees in the exercise of rights guaranteed by the State Employer-Employee Relations Act. including the right to be represented by their chosen representative.

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

Upon request, meet and confer in good faith with the Association of California State Attorneys and Hearing Officers about those subjects enumerated above.

Dated:

STATE OF CALIFORNIA (DEPARTMENT OF PERSONNEL ADMINISTRATION)

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 ALTERED, REDUCED IN SIZE, DEFACED OR COVERED BY ANY MATERIAL.