STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN FRANCISCO COMMUNITY COLLEGE FEDERATION OF TEACHERS, AFT 2121,	)	
Charging Party,	)	Case No. SF-CE-1146
v.	)	PERB Decision No. 703
SAN FRANCISCO COMMUNITY COLLEGE DISTRICT,	)	October 28, 1988
Respondent.	)	

Appearances; Robert J. Bezemek and Katherine Riggs, Attorneys, for the San Francisco Community College Federation of Teachers, AFT 2121; Ronald A. Glick for the San Francisco Community College District.

Before Porter, Craib and Shank, Members.

DECISION

SHANK, Member: This case is before the the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Francisco Community College District (District) to the decision of the administrative law judge (ALJ). San Francisco Community College Federation of Teachers, AFT 2121 (Federation), exclusive representative of certificated employees, alleged that the District, by Chancellor Hsu, unilaterally adopted a policy barring classified personnel who worked in the District from also serving, as they had in the past, as part-time certificated employees in violation of sections 3543.5(a), (b), and (c) of the Educational Employment

Relations Act (EERA or Act).[1] The ALJ found that the District unlawfully eliminated the use of part-time certificated staff who also held classified positions within the District by refusing to first negotiate the change with the Federation while it was still a proposal in violation of section 3543.5(c) and, derivatively, (a) and (b) of the Act.

PROCEDURAL HISTORY

On July 21, 1986, the United Public Employees, Local 790, SEIU, AFL-CIO (SEIU), exclusive representative for classified employees, filed a charge alleging unfair practices by the District. On November 26, 1986, the Federation filed a separate charge alleging unfair practices by the District based on the same set of operative facts, discussed below. Both associations alleged that the District unilaterally adopted a

[1]The EERA is codified at Government Code section 3540, et seq., and is administered by PERB. Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3543.5 provides in relevant part:

It shall be unlawful for a public school employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

policy barring classified personnel working in the District from also serving as certificated employees. A consolidated hearing was held on January 29, 1987. Separate decisions were issued for each case.[2]

FACTUAL SUMMARY

The District governing board had, for a number of years, employed as part-time certificated employees individuals who also were civil service employees of the City and County of San Francisco holding full-time classified positions within the District.

The subject of this dispute is a policy statement issued by Chancellor Hsu on June 24, 1986. The policy prohibited full-time classified employees from part-time employment as certificated employees. This new policy had three parts: (1) classified employees without certificated Spring 1986 assignments would not be granted any such assignments in the future; (2) classified staff who worked in certificated positions in Spring 1986 could be given such assignments in Fall 1986 only, with none thereafter; and (3) certificated assignments for classified employees in Fall 1986 could not exceed the number of hours assigned in Spring 1986. Full implementation of the

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2This decision is limited to Case No. SF-CE-1146 which was filed by the Federation. The Board, in San Francisco Community College District (1988) PERB Decision No. 688, dismissed the charge filed by SEIU and held that classified employees are employed by the City and County of San Francisco, thereby overruling San Francisco Community College District (1986) PERB Order No. Ad-153 to the extent that it found that the District is the joint employer of classified employees.

policy was delayed to Spring 1987 because "staffing difficulties" were anticipated.

The Chancellor, in unilaterally foreclosing the opportunity for classified employees to work in the certificated positions, sought to avoid the payment of overtime and/or a higher rate of overtime pay for the classified employees under the Fair Labor Standards Act (FLSA) which was implicated by this Board's now overruled decision in San Francisco Community College District (1986) PERB Order No. Ad-153. The Board's holding in the latter San Francisco Community College District case, coupled with the FLSA's dual-capacity salary and overtime pay requirements, would have caused adverse overtime pay consequences where full-time classified employees also worked part-time in certificated positions.

ALJ'S FINDINGS AND CONCLUSIONS

The ALJ found that the unilateral decision to bar classified staff from holding part-time certificated positions without notice or negotiations, constituted a refusal to negotiate in violation of EERA section 3543.5(c) and, derivatively, (a) and (b).

The District presented various defenses in support of its position that no violation occurred, including the following: (1) there was no obligation to bargain the change because the subject of part-time certificated employment is not within the scope of representation until the part-time employees are actually hired; (2) managerial, statutory and contractual

prerogatives constituted a waiver of the bargaining obligation, if any; and (3) the District could restrict classified employees from certificated positions.

The ALJ concluded that the policy restricting part-time certificated teaching opportunities was negotiable, citing Anaheim Union High School District (1981) PERB Decision No. 177; San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d. 850.

With regard to the District's defense that it had no obligation to bargain the change because the part-time status of the affected employees meant they were not guaranteed a teaching assignment and was an issue of future employment, which was outside the scope of representation, the ALJ relied upon The Regents of the University of California (1983) PERB Decision No. 359-H; Mt. San Antonio Community College District (1983) PERB Decision No. 297; Oakland Unified School District (1983) PERB Decision No. 367; and Holtville Unified School District (1982) PERB Decision No. 250.

The ALJ rejected the District's defense that managerial, contractual, and statutory prerogative constituted a waiver of its bargaining obligation.

The District filed the following exceptions to the ALJ's proposed decision: (1) the District has the right to unilaterally determine the assignments of civil service employees working at the District pursuant to charter, administrative ordinances, rules and regulations, and civil

service provisions of the City and County of San Francisco; (2) the proposed decision would result in an overtime obligation to the District for both classified and certificated work; and (3) the proposed decision would create a "classification" of part-time certificated employees with unique job and tenure rights.

DISCUSSION

The principal issue for resolution by the Board is whether the Chancellor's unilateral decision, to preclude full-time classified employees working within the District from also working part-time in certificated positions, constitutes a violation of EERA section 3543.5(c) and, derivatively, (a) and (b).

The Board held in Oakland Unified School District (1983) PERB Decision No. 367, that it is unlawful for a public school employer to refuse or fail to meet and negotiate in good faith with an exclusive representative about a matter within the scope of representation. Furthermore, a unilateral change in terms and conditions of employment within the scope of representation is a per se refusal to negotiate absent a valid defense. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; Fountain Valley Elementary School District (1987) PERB Decision No. 625.)

An unlawful unilateral change will be found when an employer unilaterally alters an established policy. (Grant Joint Union High School District (1982) PERB Decision No. 196.) The change in policy must have a generalized effect or

continuing impact upon the terms and conditions of employment of bargaining unit members before it constitutes a violation of the duty to bargain. (Modesto City Schools and High School District (1985) PERB Decision No. 552.)

Finally, an employer's unlawful failure and refusal to negotiate also violates an exclusive representative's right to represent unit members in their employment relations and interferes with employees because of their exercise of representational rights. (San Francisco Community College District (1979) PERB Decision No. 105.)

The District contends that it has not violated section 3543.5(c) for failing to bargain over the change because the Chancellor has the right, pursuant to charter, administrative ordinances, rules and regulations and civil service provisions of the City and County of San Francisco, to determine whether civil service employees working at the District may also occupy certificated positions.

In order to adjudge whether the Chancellor is authorized to unilaterally prohibit outside work by civil service employees working at the District, we must not only determine the extent of the Chancellor's authority, but also whether he was acting under the civil service provisions of the City and County of San Francisco or for the governing board, as a public school employer under EERA, when the policy was adopted.

The San Francisco Community College District is quite unique in that it is composed of two separate and distinct entities. One entity is a public school employer under EERA

section 3540.1(k)[3] with respect to the certificated employees. The governing board[4] with the Chancellor as its chief executive officer deals with and controls the hiring, discipline, wages, hours, and other terms and conditions of employment as to the certificated employees, and is obligated to negotiate with the certificated unit's exclusive representative on matters within the scope of representation.

The other entity is not a public school employer under EERA, with respect to the classified employees, but is a separate "department" of the City and County of San Francisco. The "appointing officer" and "department head" for the City and County of San Francisco also happens to be the Chancellor.[5] Control and regulation over the hiring, discipline, wages,

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3EERA section 3540.1(k) states:

> . . . . . .
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> (k) "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

[4]section 5.104 of the Charter of the City and County of San Francisco provides that the community college district of the city and county shall be under the management control of a governing board composed of seven members elected at large. (Dist. Exh. 1)

5section 3.501 of the Charter of the City and County of San Francisco provides that the chief executive officer shall have the powers and duties of the department head, except as otherwise specifically provided, and shall act as the appointing officer under the civil service provisions of this Charter.

hours, and other terms and conditions of employment of the city and county civil service employees working in the "classified" positions in the District "department" are governed by the City and County of San Francisco's: Charter, Board of Supervisors, Civil Service Commission, Civil Service Rules, Salary Ordinance, etc.[6] This city and county department is administered and controlled at the San Francisco Community College District by the Chancellor in his distinct role as a department head and appointing officer for the City and County of San Francisco. Civil service employees working at the District are paid by and receive their pay warrants from the City and County of San Francisco.

While civil service employees of the City and County of San Francisco may be hired or assigned by the City and County to work in the District (in what the Education Code and EERA would identify as "classified" positions), they are not public school employees, nor does the City and County of San Francisco or its appointing officer (the Chancellor) become a public school employer thereby. (San Francisco Community College District (1988) PERB Decision No. 688.)

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[6]Civil service employees of the City and County of San Francisco are "local employees" under the Meyers-Milias-Brown Act (MMBA), and the City and County of San Francisco must negotiate with their respective exclusive representatives as to matters within the scope of representation under the MMBA. Such negotiated agreements with respect to additional employment, overtime, etc., would have to be observed by the Chancellor in his capacity as department head and appointing officer.

Section 29 of the Civil Service Commission Rules for the City and County of San Francisco provides that no civil service employee holding a full-time position may engage in any additional part-time employment without the approval of the respective appointing officer of his or her department and the approval of the Civil Service Commission. No additional employment may be approved which is not in the best interests of the City and County of San Francisco in any respect. The approvals must be reobtained every six months. Thus, in order for civil service employees of the City and County of San Francisco to engage in additional employment or to work overtime, they must obtain the approval of their appointing officer, who must act in accord with the Charter, Civil Service Rules, and the Salary Ordinance.

Here, civil service employees working in "classified" positions in the District had to obtain approval from the department head or appointing officer (the Chancellor) in order to engage in part-time employment as "certificated" teachers for the District.

Natalie Berg, Director of Personnel Relations for the District, gave uncontroverted testimony that the Chancellor adopted the policy relative to the right of classified employees to work overtime as certificated employees in his capacity and under his authority as the appointing officer of the classified employees for the City and County.

City and County control over its civil service employees is not a matter within the scope of representation or negotiable between the public school employer and the certificated unit.[7]

Likewise, PERB is without jurisdiction to force or require the City and County of San Francisco, or its department head and appointing officer to negotiate with the certificated unit.

ORDER

For the foregoing reasons, the unfair practice charge in Case No. SF-CE-1146 is DISMISSED.

Member Porter joined in this Decision.

Member Craib's dissent begins on page 12.

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[7]While agreeing that the Chancellor's policy decision to restrict the overtime hours of classified employees is not negotiable, our dissenting colleague contends that the District, as a public school employer, owes a duty to bargain the "effects" of its decision with the Federation. We disagree. The Federation requested to bargain a non-negotiable policy decision of the Chancellor acting within his capacity and under his authority as the appointing power and department head of the civil service classified employees of the City and County of San Francisco. It was not a policy decision of the public school employer as to one of its public school employee units (classified) having bargainable effects on its other public school employee unit (certificated). (San Francisco Community College District (1987) PERB Decision No. 688; cf. Lake Elsinore School District (1987) PERB Decision No. 646.) Assuming, arguendo, that the Chancellor had made the non-negotiable policy decision on behalf of the public school employer, there was no demand by the certificated unit to bargain the effects of the decision, nor was there a refusal by the public school employer to bargain the effects. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223, pp. 8-11.)

Member Craib, dissenting: Although I agree that our decision in San Francisco Community College District (1988) PERB Decision No. 688 grants the District, as a department of the City and County of San Francisco, the right to refuse to allow its civil service (classified) employees to work part-time as District certificated employees, I cannot agree that the District, as a public school employer, does not owe a duty to bargain the effects of its decision on the certificated unit with the Federation.

The majority concludes that "PERB is without jurisdiction to force or require the City and County of San Francisco, or its department head and appointing authority to negotiate with certificated unit." (Majority Decision at p. 11.) PERB is not without jurisdiction to require the District, as a public school employer, subject to the EERA, to negotiate with the certificated unit. Although it recognizes the "unique" nature of the San Francisco Community College District, the majority conveniently focuses solely on the District's capacity as a department of the City and County of San Francisco, thus, skirting the more complex issue of the relationship between the District's capacity as a public school employer and its capacity as a department of the City and County (nonpublic school employer). Even the Chancellor, in the June 24, 1986 memorandum adopting the policy, recognized the District's dual roles. The policy was specifically adopted to clarify the confusion regarding the application of the Fair Labor Standards

Act "to certain of [the District's] certificated employees" (emphasis added). The memorandum from the Chancellor specifically restricted both classified and certificated employees.[1] The nonpublic school employer's decision was intended to reduce the amount of overtime the City and County was obligated to pay under FLSA regulations; the public school employer's decision was to restrict those certificated unit members, who also worked full-time as classified employees, from any future certificated positions with the District. If the unique dual capacity situation did not exist, the Chancellor could not, as a nonpublic school employer representative, restrict the employees of the District, a

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[1]The specific language used by the Chancellor is as follows:

> 1. Classified personnel who did not have certificated assignments in Spring 1986 shall not be granted any such assignments in the future.
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> 2. Classified personnel who had certificated assignments in Spring 1986 may be granted such assignments for the 1986 Fall semester only. (These persons should be informed that they cannot receive certificated assignments after the 1986 Fall Semester.)
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> 3. Certificated assignments granted classified personnel in Fall 1986, may not exceed the number of hours of the assignments held in Spring 1986; i.e., no additional hours are to be granted these individuals in Fall 1986.

(Emphasis in original.)

public school employer. Therefore, even though the Chancellor, in his capacity as appointing authority for a department of the City and County of San Francisco, had the authority to restrict the overtime hours of classified employees, he also retained statutory and contractual obligations to negotiate with the certificated unit over the effects of the change in past practice.

The Board has consistently held that, even where a decision is solely within management's prerogative, where a decision impacts on wages, hours, and working conditions, an employer must give notice and an opportunity to bargain over the effects of that decision. (Mt. Diablo Unified School District (1983) PERB Decision No. 373 (layoffs); Alum Rock Union Elementary School District (1983) PERB Decision No. 322 (establishment or abolition of classifications).) Recently, the Board held that an employer who makes a decision regarding one unit of employees which impacts on another unit, may be required to negotiate the effects of that decision with the affected unit. (Lake Elsinore School District (1987) PERB Decision No. 646.) One issue decided by the Board in Lake Elsinore was whether the District should have given the certificated unit notice and an opportunity to bargain over the effects of a reduction in hours of classified employees' classroom time. The Board held that the District was not obligated to negotiate the effects because the state-mandated program was for the benefit of students, not teachers, and because the potential effects on the certificated

unit were speculative, at best. (Ibid at p. 16.) Implicit in this decision is a recognition that, in appropriate circumstances, a district may be required to negotiate the effects of such a decision. Today we are presented with that situation.

Even though there was testimony indicating that part-time certificated employees, prior to the District's new policy, did not acquire tenure, permanency, or any guarantee of continued employment, nor did they accrue any seniority rights, there is an insufficient record to determine that there were not crucial impact issues which could have been bargained over. Since this new policy significantly impacted upon the wages of part-time certificated employees, the parties could have bargained over proposals to ameliorate that impact. For instance, the parties could have negotiated a hiring list for new full-time certificated positions which gives preference to those part-time certificated employees who were ineligible for future part-time employment.

Once it is determined that a duty to negotiate over the effects of a decision arose, we must decide when it arose and whether sufficient time was available prior to implementation to bargain in good faith. The District received notice of the Department of Labor's new regulations in April of 1986. At that time, the District realized that changes in its policies may be necessary for financial reasons. The new policy was drafted in June 1986; however, the full implementation date was not until the 1987 Spring semester. Although this is not a

situation in which the implementation date was mandated by some outside constraint such as that presented in Mt. Diablo Unified School District, supra, PERB Decision No. 373 (final notice of layoff must be given by May 15 or employees are automatically reemployed pursuant to Education Code sections 44949 and 44955), it is analogous to that of layoffs, where a delay in implementation of an important managerial decision would effectively undermine the employer's right to make the nonnegotiable decision. (See, e.g., Oakland Unified School District (1985) PERB Decision No. 540.)

Notice of the decision and the proposed implementation date was given in the June 24, 1986 memorandum adopting the new policy. The Federation received such notice and requested to bargain over the proposal. The District refused to negotiate, stating that the District had not "imposed a change on any employee 'employed in a certificated staff' position." The District took the untenable position that part-time certificated staff could not be represented by the Federation until they had received a certificated staff appointment, a determination within the sole discretion of the District. Thus, despite the request to bargain by the Federation, the District refused to enter into good faith effects bargaining as required by section 3543.5(c), supra.[2]

[2]The majority argues that even if the Chancellor's decision was made on behalf of the public school employer, the District had no duty to bargain with the certificated unit because the Federation never demanded to bargain the effects of

Therefore, I would find that, despite the District's ability to unilaterally make the decision to restrict the overtime hours of classified employees, it had an obligation under the EERA to negotiate in good faith over the effects of that decision with the certificated unit.

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the decision. (Majority decision at p. 11, fn. 7.) This argument is specious. First of all, at the time the Federation requested negotiations, the District, as both an employer of classified and certificated employees, was a public school employer according to a PERB decision. (San Francisco Community College District (1986) PERB Order No. Ad-153.) To now require the Federation to have anticipated the change in the District's status, resulting from the Board's decision in San Francisco Community College District, supra, PERB Decision No. 688, is both improper and unfair under these circumstances. The Federation properly requested to bargain the decision. Furthermore, the District's own memorandum instituting the change in policy specifically indicated that it was clarifying the status of certain certificated employees. (See, supra, discussion at pp. 12-13.) As I indicated, the District did not reject the request to negotiate because of the District's status as a nonpublic school employer, but rather because it believed that without a current appointment, the part-time certificated employees were not entitled to representation by the Federation.

Secondly, the majority's reading of Newman-Crows Landing Unified School District (1982) PERB Decision No. 223 is overly expansive. The Board in Newman-Crows Landing specifically indicated that "it is not essential that a request to negotiate be specific or made in a particular form," only that the party "have signified its desire to negotiate to the employer by some means." (Ibid at pp. 7-8, citations omitted.) Although the Board did hold that the employee organization failed to indicate that it wished to negotiate the effects of the employer's decision to lay off certain employees, the facts of that case are sufficiently unusual to restrict any broad implications which might be inferred. The Board emphasized that the employee organization was solely interested in negotiating the decision.

Therefore, I would hold that the Federation properly requested that the District negotiate, and that the District violated its duty to negotiate in good faith over the effects of its decision.