STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS LODI CHAPTER #77, Charging Party, v. LODI UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SA-CE-1873-E PERB Decision No. 1452 June 28, 2001

Appearances: California School Employees Association by Madalyn J. Frazzini, Attorney, for California School Employees Association and its Lodi Chapter #77; Pinnell & Kingsley by Kim Kingsley Bogard, Attorney, for Lodi Unified School District.

Before Amador, Baker and Whitehead, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by California School Employees Association and its Lodi Chapter #77 (CSEA) of a PERB administrative law judge's (ALJ) proposed decision (attached) dismissing its unfair practice charge. The charge alleged that the Lodi Unified School District (District) violated the Educational Employment Relations Act (EERA) [1] by unilaterally modifying the pay rate for its food service workers. CSEA alleged that this conduct constituted a violation of Section 3543.5 (a), (b) and (c).[2]

[1]EERA is codified at Government Code section 3540 et seq.

[2]Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:

The Board has reviewed the entire record in this case, including the unfair practice charge and complaint, the briefs of the parties, the ALJ's proposed decision, CSEA's exceptions and the District's response to the exceptions. The Board finds the ALJ's proposed decision to be free from prejudicial error and adopts it as the decision of the Board itself.[3]

ORDER

The unfair practice charge and complaint in Case No. SA-CE-1873 are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Amador joined in this Decision.

Member Baker's concurrence begins on page 3.

> (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.

[3]Throughout the proposed decision the document dated May 25, 1989 is mistakenly referred to as the March 25, 1989 document. The Board corrects this typographical error wherever it appears in the proposed decision.

The Board orders that the last complete sentence on page 26 of the proposed decision be deleted. This sentence reads: "It merely remains in effect until such time as one side or the other asks to negotiate a modification and/or to insert it into the CBA."

The Board orders that the phrase, "on May 9, 1995," contained in the first full paragraph on page 27, be deleted from the proposed decision.

BAKER, Member, concurring. I agree with the majority's dismissal of this charge; however, this case is materially distinguishable from Marysville Joint Unified School District (1983) PERB Decision No. 314 (Marysville), which the proposed decision of the administrative law judge and the majority relied upon in dismissing the charge.

In Marysville the Public Employment Relations Board (Board) held that:

> The mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so.

To the extent that Marysville holds that regardless of the conduct of the parties, the employer can, ipso facto, return to a written agreement, it is wrong and should be overruled. The Board is concerned with a unilateral change in established policy which represents a conscious or apparent reversal of a previous understanding, whether the latter is embodied in a contract or evident from the party's past practice. (Grant Joint Union High School District (1982) PERB Decision No. 196.) It is no stretch of collective bargaining law to hold that a written collective bargaining agreement may be modified through the mutual consent of the parties. (Speedrack, Inc. (1989) 293 NLRB 1054, 1055 [131 LRRM 1347]; Hydrologics, Inc. (1989) 293 NLRB 1060, 1061 [131 LRRM 1350].) This is true even where a collective bargaining agreement does not explicitly provide a mechanism for modification. (Ibid.) Based upon the facts of a specific case, including a review of the language of the parties collective bargaining agreement, it is entirely possible this mutual consent could be reflected in the conduct of the parties.

If in this case the parties had "agreed" to modify the written language through nine years of knowingly paying a different wage, I would very easily find a violation and overrule Marysville as the parties agreement on the bargained for wage was not subject to a provision

which provided that its terms and conditions may be altered, changed, added to, deleted from, or modified only through the voluntary and mutual consent of the parties in an expressed written amendment to the agreement. However, in the instant case there was no knowing "agreement" of the parties evidenced by a course of conduct. The record instead reflects an "honest mistake" as the reason a wage other than the bargained for wage was paid. Upon discovery of this honest mistake, it is appropriate to revert to the parties' written agreement and the bargained for wage. It is upon these facts I concur in the decision to dismiss the charge.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS LODI CHAPTER #77,	)	
Charging Party,	)	Unfair Practice Charge No. SA-CE-1873
v.	)	
LODI UNIFIED SCHOOL DISTRICT,	)	PROPOSED DECISION (6/29/2000)
Respondent.	)	

Appearances: Linda A. Norman, Labor Relations Representative, and Sharon R. Furlong, Senior Labor Relations Representative, for the California School Employees Association and its Lodi Chapter #77; Pinnell and Kingsley, by Robert E. Kingsley and Kim Kingsley Bogard, Attorneys, for Lodi Unified School District.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On December 10, 1998, the California School Employees Association and its Lodi Chapter #77 (CSEA) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Lodi Unified School District (District). The charge alleged violations of the Educational Employment Relations Act (EERA or Act).[1]

On January 6, 1999, the Office of the General Counsel of PERB, after an investigation of the charge, issued a complaint alleging violations of subdivisions (a), (b) and (c) of section

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

3543.5.[2]

On February 2, 1999, the District answered the complaint denying all material allegations and propounding various affirmative defenses. An informal conference was held on March 9, 1999, in an unsuccessful attempt to reach a voluntary settlement. Three days of formal hearing were held before the undersigned on October 19 and 20, 1999 and February 7, 2000. With the filing of briefs by each side, the matter was submitted on May 15, 2000.

INTRODUCTION

Starting with the 1985-86 school year, the District began the transition from a traditional school calendar to a predominantly year round education (YRE) calendar. This change affected many bargainable issues, which required the parties to participate in extensive negotiations. One substantial issue was

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[2]Subdivisions (a), (b) and (c) of section 3543.5 state, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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.

the rate of pay for employees who substitute while (1) in an off-track or (2) non-service status, (3) in the same classification, (4) but at a site other than their regular assignment.[3] The primary issue was whether these employees should receive (1) their regular hourly rate, (2) the traditional substitute rate, or (3) something in between.

From the start of YRE until July 1998, the off-track substituting food service workers received their regular hourly rate of pay. In July 1998 the District began to pay these employees the lower substitute rate, insisting such action was consistent with the terms of a March 25, 1989, written agreement between it and CSEA. This entire case hinges on the efficacy of this document. For the remainder of this proposed decision it will be referred to as the March 25 Document. CSEA disputes the authenticity of this document.

CSEA objected to the District's action, demanded to negotiate the matter, and eventually filed this unfair practice charge. It charged the District with unilaterally modifying the pay rate for its food service workers.

FINDINGS OF FACT

Jurisdiction

The parties stipulated, and it is therefore found, that CSEA is both an employee organization and an exclusive representative,

[3]In the interests of brevity, situations that meet all four of these criteria will be referred to as off-track substitutions.

and the District is a public school employer, within the meaning of the EERA.

Background

The respondent is a large school district with approximately 1,100 classified bargaining unit employees, of whom approximately 140 are food service workers. The issue in this case affects approximately 14 of these workers.

Overtime Reporting Procedures

With the exception of the transportation department, all classified employees record overtime hours in one of two ways. Regular assignment overtime hours are reported on a white time card. Off-track substitute hours are reported on a goldenrod time card. Prior to July 1998, the head of each department (except food service) submitted both white and goldenrod time cards to the director of classified personnel, Elliott Grauman (Grauman). The food service department, however, submitted its goldenrod time cards directly to payroll and only its white time cards were sent to Grauman.

Grauman reviews these goldenrod time cards and determines the appropriate rate of pay for each employee. After designating the appropriate pay rate, Grauman forwards the goldenrod time cards to payroll for payment.

In July 1998, a payroll clerk came to Grauman's office for a determination of the appropriate pay rate for a cafeteria assistant who had substituted while off-track. The payroll clerk

was directed to pay the employee in accordance with page eleven of the Ladybook.[4] Page eleven of the Ladybook is a retyped, smooth version of the March 25 Document.

Upon investigating the matter, Grauman discovered that food service employees had been correctly recording their off-track substitution time on goldenrod time sheets. However, Carol Sidman (Sidman), director of food services, had not been basing the appropriate pay rate on the March 25 Document. Instead, she had been approving and submitting the goldenrod time cards designating the employee's regular pay as the appropriate rate. Consequently, the payroll department had been paying food service employees their regular pay rate for off-track substitution work. Grauman directed Sidman to modify her method of approving time cards and to begin complying with what the District believed was the proper procedure.

From 1989 to the present, all non-food service worker classified employees who engaged in off-track substituting have been paid in accordance with the March 25 Document.

CSEA denies any knowledge of the March 25 Document. It correctly contends there is no collective bargaining agreement (CBA) language that permits the District to pay food service workers anything other than their regular wage for substitute work.

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[4]The Ladybook is an informal District compilation of YRE documents. Both the book and its page eleven will be described in detail below.

In order to determine the efficacy of this document, it is necessary to examine the parties' 1988-89 YRE negotiations.

Negotiating History

In 1985, the parties began to discuss, in a general sense, YRE issues when one school began to operate on the new calendar. The issue of all non-track substituting employees, both instructional assistants[5] and other classified employees, was of vital interest to both parties. At that time non-track instructional assistants were paid the substitute rate when performing off-track substitute work. Commencing in April 1988 the parties began a series of negotiating sessions. Both sides agreed that the YRE concept disproportionately concerned instructional assistants. Therefore, the parties bifurcated their YRE negotiations, designating one set for instructional assistants, and the other for all other classified employees.

1. On April 20, 1988, CSEA proposed that non-track substituting employees receive pay at a specified rate. The proposed rate was less than their regular pay, but greater than the substitute rate.[6]

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[5]The parties use the terms "aides" and "assistants" interchangeably. For purposes of this decision these employees will be called instructional assistants.

[6]There was no evidence proffered as to the actual amount of the existing "substitute" rate. However, all parties agreed that in most cases such rate was lower than the individual employee's regular rate. Later, the March 25 Document created an off-track substitute rate for six employee classifications.

2. On April 29, 1988, the District proposed that off-track substituting instructional assistants be paid the substitute rate of pay.

3. Almost one year later, on April 18, 1989, CSEA proposed that instructional assistants "who choose to substitute when off-track, shall be paid not less than 5% of his/her regular rate of pay."

4. On April 21, 1989, the District's proposal for all off-track substituting classified employees, other than instructional assistants, included a paragraph 4, which stated that they were to receive the substitute rate plus fifty cents per hour.

5. On May 9, 1989, at 10:05 a.m. the District submitted a written proposal with regard to all classified employees, other than instructional assistants. It had a series of handwritten corrections and deletions on it. One of the deletions included all of paragraph 4 - substitute pay, as described above.

Assistant Superintendent for Personnel Claudette Berry (Berry) testified that the reason for this deletion was because "we subsequently agreed with CSEA to the salary schedule that's in question here." In other words, she contends paragraph 4, in the District's April 21 proposal, was deleted because CSEA and the District had agreed to a substitute pay plan that would eventually become the May 25 Document.

6. The District's second May 9 (no time listed) proposal with regard to classified employees other than instructional

assistants was a retyped version of its May 9, 10:05 a.m. proposal. It incorporated the handwritten corrections and deletions. This proposal contained a handwritten "T.A." (Tentative Agreement), as well as the initials, "MB" and "C. Berry."[7]

As described above, this "TA'd" proposal contained no language with regard to substitute pay for classified employees.

7. The District offered into evidence what purports to be a 9:09,[8] May 25, 1989, management offer. The document is entitled "Substitute Pay For Regular Employees During Off-Track Or Non-Service Time." The document purported to cover all classified employees, instructional assistants as well as all others. It is, in its entirety, as follows:

> 1. An employee shall receive their regular rate of pay provided they substitute:
>
> a. in the same classification;
> b. at the same site;
> c. in the same "work area" as their base assignment.
>
> 2. A substitute assignment that does not meet the criteria in #1 shall be compensated as follows:
>
> a. at the regular sub rate, unless:
> b. at the following adjunct rate or employee's regular rate of pay, whichever is less, provided the assignment is ten

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[7]MB refers to Mike Branham (Branham), the CSEA labor relations representative assigned to the District at that time.

[8]There is no a.m. or p.m. designation.

or more consecutive work days retroactive to the first day:

Instructional Asst-Gen	$7.00
Instructional Asst-S.H.	$7.30
Cafeteria Asst	$6.00
Clerical	$7.50
Campus Supervisor	$8.00
Custodial	$8.00

3. Additional Contracted Days

At the employee's regular rate of pay

In paragraph 2.b. the words "ten or" are crossed out and the words "than 5" are inserted after the word, "more." These modifications are initialed by "MB" and "CB." This interlineation modifies paragraph 2.b. to read as follows:

> at the following adjunct rate or employee's regular rate of pay, whichever is less, provided the assignment is more than 5 consecutive work days retroactive to the first day:

At the top of this 9:09, May 25, 1989, document someone has inserted "TA" and the initials "MB" and "CB." This is the document that became the March 25 Document. It is this document the District relies upon to pay its food service workers less than their regular rate of pay when they are non-track substituting.[9] It is a retyped version of this document that became page eleven of the Ladybook.

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[9]This agreement created a conflict with an April 29, 1988, agreement (see p. 7, para. 2, supra), since both agreements purported to set off-track substitute pay for Instructional Assistants. Eventually, the parties agreed Instructional Assistants were to paid in accordance with the March 25 Document. This new agreement was signed on June 27, 1989 (see p. 11, para. 10, below).

CSEA points out a number of what it characterizes as inconsistencies in this document, as compared to other District proposals. It points out that (1) there is no typed date and space for the time at the top of the document, (2) the written "TA", "CB" and "MB" are in a different pen than that of the written date and time, and (3) there is a flowered border on the bottom left side of the document.

8. On June 15, 1989, at 12:05 p.m., the District submitted a proposal entitled "INSTRUCTIONAL ASSISTANTS ASSIGNED TO TRACKS." The document had two attachments, A and B. Its preamble is as follows:

> The following material shall supersede and replace all prior agreements regarding YRE except the memorandum of understanding dated November 22, 1988 which addresses child/employee track placement.

The text of the document contains no language that would suggest it relates to any employees other than instructional assistants. Paragraph D.5. of this document states:

> Instructional Assistants who choose to substitute when in unpaid status will be paid according to Attachment B.

Attachment B is the March 25 Document. CSEA acknowledges that the language of Attachment B and the March 25 Document are identical. However, it points out two differences between the documents. First, unlike the March 25 Document, Attachment B reflects a submission date of June 15, 1989, with a line for the time, but with no time inserted. Second, neither the designation

"TA" nor the initials MB or CB are on Attachment B. In addition, the March 25 Document's interlineations which changed "'ten or more' to 'more than 5' consecutive work days" have been incorporated into the text of Attachment B. In other words, Attachment B is a retyped version of the March 25 Document.

Therefore, it is understandable the "TA" and the "MB" and "CB" initials would be missing from the retyped document.

9. On June 21, 1989 CSEA proposed its own version of "Instructional Assistants Assigned to Tracks for 1989-90 School Year." In it, CSEA agrees that Instructional Aides who choose to substitute when in an unpaid status will be paid according to Attachment B (also known as the March 25 Document.)

10. Shortly thereafter, on June 27, 1989, the parties "TA'd" a slightly revised version of the June 15, 12:05 p.m. District proposal.[10] However, it also stated off-track substituting instructional assistants will be paid at the Attachment B (the March 25 Document) rate.

11. Berry states that this June 27 document was ratified by the District's governing board on July 11, 1989. She cites the governing board's minutes for that meeting, stating that the YRE tentative agreements were attached to this board agenda item for ratification. However, the board minutes merely state:

> Motion was made, seconded, and carried by a unanimous roll call vote to ratify the

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[10]This document, like its June 15, 12:05 p.m. predecessor was equally clear that it applied only to instructional assistants.

contractual agreement between the District and the California School Employees Association concerning salary reopeners for the 1988-89 school year.

There is no direct reference to YRE agreements in these governing board minutes. Berry attempted to obtain copies of the backup material for this governing board agenda item. However, she learned that agenda back-up material is routinely discarded after five years.

12. On February 6, 1990, the District submitted a "Package Counter Proposal" to CSEA in "complete satisfaction of the bargaining obligation for 1989-90, . . . " On the last page of this proposal are the following paragraphs:

YEAR ROUND EDUCATION ISSUES

1. As noted above, all Year Round Education economic issues have been finally resolved for the 1989-90 school year.

2. Changes necessitated by program changes or unforeseen events shall be negotiated upon request of either party.

This document had a "TA" signed by Berry for the District and by Jean May (May), CSEA's YRE negotiating team chair. It also had numerous modifications throughout that were initialed by "CB" and "JM."

Ladybook

Following YRE negotiations, Berry created the Ladybook. She admits it was not a negotiated agreement, but rather a compilation of negotiated agreements, documents and informal explanations to enable the employees to better understand YRE

rules. The cover shows a woman holding a book entitled, "YRE for Classified Employees." Berry created the front cover and wrote the introduction. She also wrote the history of YRE, developed the question and answer section, and determined which documents should be inserted into the book.

The book starts with (1) an introduction, (2) table of contents, and (3) the District's YRE history (pp. 1-3). It next includes a workday schedule and medical benefit entitlement for instructional assistants (p. 4). At some time later, this document was incorporated as Addendum No. 1 to the parties' 1991-94 CBA. Next it includes payroll procedures (pp. 6-9) describing the transition from traditional to YRE calendars. Page 10 is entitled "VII. SUBSTITUTES." It describes the amount of money each YRE site has available to pay for classified substitutes and describes the manner in which employees may volunteer for off-track substituting.

The next document, page 11, is the March 25 Document. Following are "Most Commonly Asked Questions" (pp. 12-14). The next three documents (pp. 15-25) are copies of memoranda of understanding between the District and CSEA. These memoranda cover various topics concerning instructional assistants, drivers and "OTHER YRE EMPLOYEES." The last four pages of the Ladybook (pp. 26-29) are various forms of the District's 1989-90 instructional calendar.

1998 Resulting Events

For nine years, from 1989 to 1998, the food service workers were paid their regular wages for off-track substituting. In July 1998, as more fully described supra, the District paid these workers at the March 25 Document rate.

Once the employees learned of the lowered salary they contacted CSEA. At the next 1998-99 reopener negotiation session, Linda Norman (Norman), CSEA labor relations representative, asked Berry about the matter and insists she said CSEA wanted to negotiate it.[11] Berry declined to do so, stating that a policy was in place. Norman asked for a copy of the policy. Berry referred her to the Ladybook.

Norman and the CSEA negotiators asked Berry what a Ladybook was. Berry described it, obtained a copy and gave it to them. The CSEA negotiators said they had never seen the book prior to that time. Both Berry and Grauman insist the book had been

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[11]The parties spent a certain amount of time discussing whether or not Norman made a demand to bargain. Under the circumstances a demand to bargain was not necessary. In Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro), the Board, when citing NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177] (Katz), stated:

> . . . just as an outright refusal to bargain with respect to wages, hours and other terms and conditions of employment violates the duty to bargain, so does a unilateral change in the terms and conditions of employment, for such a change is "a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) much as does a flat refusal. . . .

distributed to all classified employees in 1989 and had been in regular and constant use since that time. Berry also insists May reviewed and approved the book prior to it being sent to the employees.

On May 7, 1990, and again on February 14, 1991, Berry sent a memorandum to all classified employees reporting on the most recent contract negotiations. In both memoranda she included the following sentence:

> YRE - There were no changes made to the current memorandums of understanding contained in your YRE handbook.

Carol Sidman

Sidman has been the director of food services since 1989. In that capacity she has served continuously on the District's negotiations team, including the 1989 YRE negotiations. Sidman testified that she had not seen or read the Ladybook until July 1998, when the food service off-track substitution issue arose. When asked why she had not applied the March 25 Document pay rate for non-track substitute work from 1989 to July 1998, she stated she had not been aware of that document.

CSEA President Patricia Calderia

Patricia Calderia (Calderia) is the current chapter president and has held that office since 1991. She had no involvement in chapter affairs prior to that time. She was not involved in negotiating either the 1988-91 CBA nor the YRE agreements. Nor was she involved in the negotiations for the

1991-94 CBA, although it was signed shortly after she became president.

Immediately after the parties reached a tentative agreement on the 1997-2000 CBA, and while they were still at the table, Calderia asked Berry to provide her with copies of all outstanding side letters. Calderia requested these documents in anticipation of incorporating them into the 1997-2000 CBA. She wanted the documents to prevent the District from claiming there was some outstanding agreement that had been negotiated prior to her assuming the presidency. Although Berry sent her numerous documents, she did not send her a copy of the March 25 Document.

Berry insisted that she sent "a copy of everything that we had signed between '94 to '97." Berry testified that "anything else I did not provide her with. I mean, it was either in the contract or it was in a handbook." She went on to state that there are items outside of the CBA which affect wages, hours and terms and conditions of employment for classified employees. She described these items, as follows:

> First of all, salary schedules. Salary schedules are not in the contract. We have Board policies on catastrophic leave, on family care leave, on smoking. We have a handbook on drug testing, and then, of course, the YRE handbook.[12]

[12]The YRE handbook she references is the Ladybook.

Once Calderia had the material provided by Berry, the two of them decided which documents would be incorporated into the body of the 1997-2000 CBA.

Calderia admitted that off-track substitute instructional assistants were paid at a substitute rate. She admitted that, despite CSEA's interest in an all-inclusive CBA, the agreement for this reduced rate was not incorporated in the CBA. She does not know when this reduced rate was negotiated, or even if it was negotiated. She admitted that it initially became controlling policy "before my time."

1995 Substitute Food Service Worker Salary Increase

In March 1995, the March 25 Document was revised on May 9, 1995, to reflect an increase in the substitute pay for cafeteria workers from $6.00 to $7.59 per hour, to be effective September 1, 1998.[13] It was the only classification amended. This amended version of the March 25 Document, according to Grauman, was sent to the food service department at the time it became effective. Sidman does not recall receiving it in 1995, or at any other time. She does remember the cafeteria assistants' substitute pay being increased from $6.00 to $7.59.

[13]There was no evidence proffered as to why there was a three-year delay between the revision and effective dates.

ISSUE

Did the District, when it modified the off-track substitution pay for its food service workers, violate subdivision (a), (b) or (c) of section 3543.5?

CONCLUSIONS OF LAW

A unilateral modification of terms and conditions of employment within the scope of negotiations that has a generalized effect or continuing impact is a per se refusal to negotiate. (Katz.) PERB has long recognized this principle. (Pajaro; San Mateo County Community College District (1979) PERB Decision No. 94; and Grant Joint Union High School District (1982) PERB Decision No. 196.)

Under subdivision (c) of section 3543.5, the public school employer is obligated to meet and negotiate in good faith with an exclusive representative about matters within the scope of representation. This section precludes an employer from making unilateral changes in the status quo, whether it is evidenced by a CBA or past practice. (Anaheim City School District (1983) PERB Decision No. 364; Pittsburg Unified School District (1982) PERB Decision No. 199.)

The EERA's scope of representation is found in subdivision (a) of section 3543.2, which states:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. . . .

As the facts of this case involve the appropriate salary for off-track substituting food service workers, the matter falls within the category of wages, a specifically enumerated item within section 3543.2.

This law in this case is very clear. If the March 25 Document is valid, the District has the right to pay off-track substituting food service workers the $7.59 per hour listed in that document.[14] If this document is invalid, the subject employees are entitled to their regular pay for their off-track substituting hours.

CSEA's Position

CSEA propounded a number of reasons to support its contention the March 25 Document is invalid. They are:

1. Both parties in their YRE negotiations proposed that the off-track substituting food service workers be paid at rates higher than those listed in the March 25 Document. Therefore, it is inconsistent to expect CSEA to have eventually agreed to a rate lower than either side initially proposed.

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[14]The fact that the District, for approximately nine years, failed to enforce its right to pay off-track substituting food service workers the lower wage, does not preclude it from doing so in July 1998. In Marysville Joint Unified School District (1983) PERB Decision No. 314, the Board said:

> . . . The mere fact that an employer has not chosen to enforce its contractual rights in the past does not mean that, ipso facto, it is forever precluded from doing so. . . .

2. The format of the original version of the March 25 Document is markedly different from any other District proposal, in that (a) it has no typed date or space for the time at the top of the document, (b) the written "TA," "CB" and "MB" are in a different pen than that of the written date and time, and (c) it has a flowered border on the bottom left of the document.

3. Attachment B to the District's June 15, 1989, proposal is not identical to the March 25 Document, as the District claims. Admittedly, they are similar, but there are a number of inconsistencies, which support a claim of invalidity.

4. The District's claim that the March 25 Document was ratified by its governing board on July 11, 1989, is not supported by its minutes. There is no reference to YRE negotiations; they merely mention the ratification of 1988-89 salary reopeners.

5. The fact that a document is in the Ladybook provides no evidence of validity. It is a book unilaterally created and maintained by the District.

6. When Berry first mentioned the Ladybook as the source of the District's off-track substitution policy, none of CSEA's negotiators knew what it was or where it came from.

7. Sidman, the District's food service manager, was not aware of either the March 25 Document or the Ladybook prior to July 1998.

8. Calderia asked Berry for copies of all side letters. Although Berry produced some documents, she did not produce the March 25 Document.

9. The March 25 Document, even if originally valid, is no longer in effect due to the EERA's prohibition on CBAs in excess of three years. It cites section 3540.1(h)[15] in support of its position. It contends that the March 25 Document was automatically terminated when three years passed without the District inserting it into any CBA.

10. The District's June 27, 1989, proposal (Proposal Nos. 8, 9 and 10 on pp. 10-11), which was later TA'd by the parties, on its face states it supersedes all prior YRE agreements. Therefore, CSEA contends, the March 25 Document was rendered null and void.

Analysis of CSEA's Positions

1. CSEA's argument that both parties initially proposed off-track substitution food service worker salary rates higher

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[15]Section 3540.1(h) states, in pertinent part:

> "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, . . . become binding upon both parties . . . . The agreement may be good for a period of not to exceed three years. [Emphasis added.]

than the eventual $6.00 per hour is supported by the evidence. However, many weird, unusual and often contradictory things happen in the give-and-take of the negotiation process. Both parties admitted that the instructional assistants bore the brunt of the YRE impact; therefore, this classification's interests had to be balanced and consistent with those of the other classifications. There are just too many reasons that could have caused CSEA to agree to a lower rate than the parties originally proposed. This lower rate does not support an inference of invalidity for the March 25 Document.

2. CSEA's "inconsistencies" are more illusory than substantive. To anyone who has spent time in negotiations, the "different" pen argument is ludicrous. There are so many papers and comments, as well as verbal and written "proposed" proposals, floating around a negotiating table, it is a surprise when the original proposal can be found, much less the identical pen to initial TA's.

CSEA is correct the subject proposal had a different format from other District proposals, i.e., it did not have a typed date and underlined space for the time. This, along with the use of flowered stationery, could lend some support to an inference of invalidity of the document.

On the other hand, if the District had unilaterally prepared and surreptitiously forged Branham's initials to a bogus

document, it is unlikely it would have used a modified format, flowered stationery and multiple pens in the endeavor.

On balance, these inconsistencies do not provide support for an inference of invalidity.

3. The fact that the March 25 Document and Attachment B are not identical fails to lend support to CSEA's case. Attachment B was a "cleaned up," typed version of the March 25 Document. It omitted the deleted language and inserted the newly inserted language. The original document needed the "TA" and the negotiators' initials to establish its validity. The "cleaned-up," typed version of the document did not.

The discrepancies between the documents do not support an inference of invalidity.

4. The ratification language, as set forth in the governing board minutes, was less than conclusive. However, the reason given for the unavailability of the supporting material was reasonable. In addition, if the board agenda item did, in fact, include the March 25 Document, it is unlikely that the board would have ratified it without a previous ratification from CSEA.

The failure of the governing board minutes to specifically mention that its ratification included YRE agreements lends some support to an inference of invalidity.

5. CSEA is correct when it states that the fact that a document is included in the Ladybook provides no indicia of

validity. The Ladybook was not negotiated in any manner, shape or form. The fact that some of the documents had been negotiated does not give "negotiated" status to the rest of the book. Each document in the Ladybook must stand or fall on its own merits as to whether it was negotiated. The fact that the March 25 Document was in the Ladybook, a District controlled and unilaterally prepared book, does not lend any support to an inference that it was a negotiated document.

6. The fact that the CSEA negotiators were not previously aware of the Ladybook lends some support to CSEA's contentions. However, the book's contents would seem to support a conclusion that it was not used very often by the rank-and-file. The book's contents were more likely used by the District's personnel (Grauman) and labor relations (Berry) departments. Certainly, the very size of the District would suggest that issues would occasionally arise that would dictate the use of the book as a resource. It does not include much information that would lend itself to be used on a daily basis.

In the final analysis, the CSEA negotiators' unfamiliarity with these two documents does lend some minimal support to an inference of invalidity.

7. The fact that Sidman was also not familiar with either the March 25 Document or the Ladybook does lend some support to CSEA's contentions. She was a credible witness who tried very hard to recall events that occurred eleven years previously. The

fact that she only attended approximately 15 percent of the YRE negotiations explains a large degree of her inability to recall those events. This minimal attendance level would also explain her unfamiliarity with the March 25 Document, but does not explain why she was unfamiliar with the Ladybook. Her failure to be aware of this book could suggest that its use was not as prevalent as Berry and Grauman contend. On the other hand, Sidman's job is providing food and managing 140 employees at a variety of sites throughout the District. The idiosyncracies of off-track substitution rules would not seem to be a large part of that job. Berry and Grauman's duties would cause them to have a much higher degree of contact with the YRE rules than Sidman. In the final analysis, Sidman's unfamiliarity with these two documents does lend some support to an inference of invalidity.

8. Berry's failure to provide the March 25 Document in response to Calderia's request for side letters, absent further evidence, does little to support CSEA's contentions. A side letter is an agreement of the parties that occurs during a CBA term. It usually modifies or interprets an existing CBA provision and remains in effect until that particular CBA term ends. When that CBA term expires, the side letter expires unless, by its own terms, it continues.

Berry stated that she gave Calderia "everything that we had signed between '94 and '97." The March 25 Document was not created during this time. It was developed in 1989 as a response

to a major upheaval of the District's calendar. Objectively speaking, perhaps it should have been made a part of the CBA. However, the failure to take this action can be attributed to both parties. To some extent, it was more incumbent upon CSEA to make sure that it was placed into the CBA. The District had no problem with letting it remain where it was placed, in the Ladybook. It was satisfied with its rights, as set forth in the March 25 Document. It was CSEA that was interested in changing it.

Berry's failure to provide the March 25 Document in response to Calderia's request for side letters provides only a minimal level of support for an inference of invalidity.

9. CSEA's argument is interesting, but unpersuasive. Section 3540.1(h) does not require all negotiated agreements on any issue, no matter how insignificant, be automatically voided after three years, unless it is inserted into the parties' comprehensive CBA. To do so would raise havoc with educational employment relationships throughout the state.

In this case, the parties had an agreement on off-track substitution rates for six separate employee classifications. There is no evidence that CSEA asked that this agreement be placed in the parties' CBA. It merely remains in effect until such time as one side or the other asks to negotiate a modification and/or to insert it into the CBA.

On a somewhat related matter, the evidence shows that the March 25 Document's cafeteria worker substitution rate was revised from $6.00 to $7.59 per hour, on May 9, 1995, to be effective September 1, 1998.

There was no evidence proffered as to how this revision was effected. As wages are an enumerated item in the scope of representation (see sec. 3543.2 on p. 18) any modifications must be negotiated. The increase could have been part of an across-the-board salary increase, but the rate (+26.5 percent) is too high.

The only other two possibilities are that (1) the increase was negotiated, or (2) the District unilaterally increased the rate. If it were the former, CSEA could hardly be heard to complain that the food service workers were being paid at a rate that was more than three years old. If it were the latter, CSEA sat on its rights with regard to the implementation of a salary modification for some of its members. Once again, under these circumstances, CSEA could not claim a salary increase that had occurred less than four months before it filed its charge violated section 3540.1(h).

10. The June 27, 1989, document (Proposal No. 10, p. 11) was a slightly revised version of its June 15 proposal (Proposal No. 8, pp. 10-11) which admittedly stated that it superseded specified YRE agreements. However, it must remembered that the parties bifurcated their negotiation sessions, although there was

some overlap. However, the June 15 and 27 documents made it very clear that they pertained exclusively to YRE rules for instructional assistants. Therefore, it had no impact on the March 25 Document, which dealt primarily with classified employees, other than instructional assistants. In fact, one of the reasons for the June 27 agreement was to resolve a conflict between an earlier agreement regarding off-track substituting instructional assistants.

This allegation of supersession does not provide any support for an inference of invalidity.

The District's Position

The District propounds its own reasons to support its contention that the March 25 Document is valid. These reasons are:

1. The March 25 Document has Berry and Branham's initials, not only next to the "TA," but next to interlineations in paragraph 2.b.

2. CSEA admits agreeing to off-track substituting instructional assistants being paid according to Attachment B, which is substantively identical to the March 25 Document. CSEA's position that the March 25 Document is an invalid and contrived document is inconsistent with its agreement to permit this same document to control the off-track substitution pay of instructional assistants.

3. CSEA's claims that it never saw the Ladybook or the March 25 Document are inconsistent with (a) its 1989 YRE negotiating team chair's approval of the book, (b) the book's 1989 distribution to all classified employees, (c) the 1990 and 1991 memoranda sent to all classified employees referencing the book as a source of YRE information, and (d) the District's February 6, 1990, 1989-90 proposal which states, ". . .all YRE economic issues have finally been resolved."

4. The District contends that the Ladybook is a negotiated agreement between CSEA and the District. It further contends that PERB, in Lodi Unified School District (1991) PERB Decision No. 883, made a determination that the Ladybook constituted a separate agreement for YRE issues.

Analysis of District's Positions

1. This is probably the strongest of all the arguments presented in this case. It is this argument that CSEA attempts to rebut with circumstantial evidence. On its face, the March 25 Document appears to be exactly what the District says it is -- a District proposal that was modified and TA'd on March 25, 1989. The initials appear to resemble other initials that CSEA does not dispute. Berry testified that Branham signed it. Neither he nor CSEA's chief YRE negotiations chair, nor anyone else on behalf of CSEA, testified that he did not. The cited irregularities, i.e., absence of typed time and date, differences in pens and use of

flowered paper are de minimis, absent strong evidence that it is a contrived document.

This position presents a very strong argument in favor of an inference of validity.

2. CSEA's agreement to an off-track substitution rate for instructional assistants is not necessarily inconsistent with its contention it did not agree to such a rate for its food service workers. However, the fact that the March 25 Document is the source for the rates for both classifications is a definite inconsistency on CSEA's part. It is incongruous for it to argue that it (a) agreed to an off-track substitution rate of $7.00 for instructional assistants - general, and (b) has no knowledge of an agreement for an off-track substitution rate of $6.00 for cafeteria assistants, when the two agreements are in the same document.

This inconsistency supports an inference of validity of the March 25 Document.

3. The District's claims with regard to (a) the approval of CSEA's YRE negotiation team chair and (b) the 1989 distribution of the Ladybook are uncorroborated claims by involved District personnel. This is not to say that they did not testify in a credible manner, but this argument does little more that provide one more instance of each side insisting its position is correct.

However, the 1990 and 1991 memoranda sent to all classified employees, referencing the Ladybook, and its February 6, 1990, 1989-90 proposal regarding the final resolution of all YRE economic issues, does lend some support the District's claim that the classified employees and CSEA should have known about this book.

The 1990-91 memoranda were sent out within two years of the YRE negotiations. It is reasonable to assume that YRE salary issues were still being addressed on a fairly regular basis. It is unlikely two memoranda describing a source of YRE information would have been overlooked or ignored by either the employees or CSEA.

The District's statement regarding the final resolution of YRE economic issues should have created an immediate negative response, if the issue of non-track substitutions rates was still unresolved.

These three contemporaneous documents provide support for an inference of validity of the subject document.

4. Lodi Unified School District, supra, PERB Decision No. 883, concerned pre-layoff time lines for bus drivers. The case was decided on a warning letter issued by a Board agent, who based his determination on unsworn statements given him by the parties. In summarizing the information he received, he said, "The parties also have an agreement for year-round education issues."

It is unreasonable to elevate this one comment in an unrelated case to a res judicata level, thereby creating an impact on this case.

This position provides no support for an inference of validity.

Summary

After analyzing the positions of the parties, it is clear the evidence weighs heavily in favor of the validity of the March 25 Document. Given this validity, it is clear that the District has sufficient authority to pay its food service workers the rate found therein, rather than their regular rate. Therefore, it is found that there is insufficient evidence to support an allegation that the District, when it modified the off-track substitution pay for its food service workers, violated subdivision (c) of section 3543.5.

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Lodi Unified School District did not violate subdivision (c)[16] of Government Code section 3543.5 of the Educational Employment Relations Act, when it modified the off-track substitution pay

[16]Given the insufficient evidence in support a violation of subdivision (c) of section 3543.5, the allegations of violations of subdivisions (a) and (b) must also fail. There was no evidence proffered regarding an independent violation of either of these subdivisions.

for its food service workers. Therefore, it is ORDERED that all aspects of the charge and complaint in the case are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within twenty days of service of this Proposed Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 958-4174
FAX: (916) 327-7960

In accordance with PERB Regulations, the statement of exceptions should identify by page, citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (See Cal. Code of Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, section 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last

day for filing, together with a Facsimile Transmission Cover sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original together with the required number of copies and proof of service in the U.S. mail. (Cal. Code Reg., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, sec. 32300, 32305, 32140 and 32135(c).)

Allen R. Link
Administrative Law Judge