Management Rights Clause Did Not
Waive Union's Right To Negotiate

By William Kay

ERB ruled that a comprehensive management rights clause – specifically, retaining the right to "contract out work" – did not excuse the Long Beach Community College District from negotiating over the decision to contract out its police force. In doing so PERB overruled its long-standing decision.

The District's small police force entered into a collective agreement that included a comprehensive management rights clause that retained a list of 14 management prerogatives, including the right to contract out work. When the District expressed its intention to contract with the City of Long Beach for police services, the Union demanded to bargain that decision.

Even though the District offered to negotiate the effects and to provide employment with the City police force, the Union filed an unfair practice alleging the College refused to bargain the decision. The PERB Agent originally dismissed the charge, determining that the management rights clause constituted the Union's waiver of the right to bargain the contracting out of unit work. The PERB Board reversed that decision with the following significant conclusions.

- The employer’s replacement of a significant group of employees with contractors is a mandatory subject of bargaining, regardless of the employer’s motivation.
- The management rights clause did not meet the "clear and unmistakable" standard for a waiver of the right to bargain, even though it specifically retained the right "to contract out work."

In reaching this decision, the Board drew several conclusions about the management rights clause. First, the agency could not "retain" a right that it never had. Because contracting out is a bilateral decision, the agency could never have possessed the right in the first place. The

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Board compared the retention of contracting out to the other 13 enumerated items in the management clause that were "all functions traditionally reserved for management" that are nonnegotiable. But contracting out did not belong in this list of reserved rights.

Second, "contract out" is an ambiguous term. It refers to both practices that are negotiable and some practices that are not subject to bargaining. Therefore, the use of the term "contract out" cannot constitute a "clear and unmistakable" waiver of the Union's right to bargain.

Finally, the Board overruled a PERB precedent that allowed the public agency to contract out without negotiating the decision because of a similar management rights clause. The prior decision had guided practitioners for the previous eight years. (Summary of Long Beach Community College District (2003) PERB Decision No. 1568)

SIGNIFICANCE TO ALL AGENCIES COVERED BY PERB

1. Although this decision arose under the Educational Employment Relations Act, the decision applies to all agencies covered by PERB.
2. A management rights clause that "retains" a right involving a mandatory subject cannot be used to excuse bargaining over the matter.
3. PERB has established a new higher standard for "clear and unmistakable" waiver of a union's right to negotiate.
4. This decision neither applies to nor impairs management rights clauses in grievance/arbitration cases. In interpreting a contract, the management rights clause is always important in determining whether a management right prevails over an ambiguous working conditions clause.