

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES	)	
ASSOCIATION and its	)	
CHAPTER #33,	)	
	)	
Charging Party,	)	Case No. SF-CE-224, 245
v.	)	
	)	
SAN MATEO COUNTY COMMUNITY	)	PERB Decision No. 94
COLLEGE DISTRICT,	)	
	)	
Respondent.	)	June 8, 1979
	)	
	)	

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Appearances: Charles Morrone, Attorney for California School Employees Association and its Chapter #33; William Brown and Nancy Osogomonian, Attorneys (Brown and Conradi) for San Mateo County Community College District.

Before Gluck, Chairperson; Gonzales, Member.\*

DECISION

This case concerns the response of one community college district to the June 6, 1978 passage of Proposition 13, California's state-wide tax-relief initiative. A certified employee organization claims that the district's adoption of new policies on wages and other terms of employment constituted unilateral changes that breached the district's statutory duty to negotiate about the actual or anticipated effects of the financial roll-back. The district defends the measures taken on the grounds, among others, that business and legal necessity compelled the changes and that, in any event, the employee

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\*Member Moore did not participate in this case.

organization waived negotiations after having been given notice and opportunity to negotiate with the district. Similar issues were raised in nearly two hundred cases filed with the Public Employment Relations Board (hereafter PERB or Board) after voter approval of Proposition 13. In light of the importance of the issues, the Board approved direct review of the testimony in this matter, without the customary hearing officer decision. We have concluded that the district in this case adopted two unilateral, unexcused changes: salaries of its classified employees were reduced 6.25%, and annual step increments were frozen. We have also concluded, however, that the employee organization waived negotiations over two other subjects: involuntary leaves without pay after cancellation of summer school, and payment of health and welfare insurance premium increases.

#### FACTS

This proceeding arises out of the aftermath of Proposition 13, the California election initiative that based property taxes on 1975 property assessments. Community college district revenues are derived largely from these taxes, and, without assistance from the Legislature, losses resulting from Proposition 13 might have reached 50% in 1978-1979 relative to prior years. On June 24, the Legislature approved a "bail-out" measure (S.B. 154) to help local agencies (counties, cities, special districts, school and community college districts) by distribution of surplus funds in the state treasury and by permitting a one-month extension beyond normal budget

deadlines. The bill also included a prohibition on any local agency granting its own employees a wage increase greater than that received by State employees. Subsequently, State worker wages were frozen for the fiscal year commencing July 1, 1978.<sup>1</sup> On June 30 the Legislature approved another measure (S.B. 2212) to clarify the scope of the bail-out legislation. This bill was signed by the Governor on the same day and, among other provisions, it exempted benefit and longevity payments from the restriction on salary increases contained in S.B. 154.

The parties to this proceeding are the San Mateo County Community College District (hereafter District) and the California School Employees Association and its Chapter #33 (hereafter CSEA or Association), the exclusive representative of the District's classified employees. The parties negotiated a collective agreement that went into effect in April 1978 and will expire in June 1980. The agreement permits the parties to reopen negotiations on wages and on health and welfare benefits in each of the fiscal years 1978/79 and 1979/80, and on one other subject at the option of either party. The agreement does not specify a salary schedule during the reopener period.

Before and after the passage of Proposition 13, the District took a number of actions related to the potential

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<sup>1</sup>The California Supreme Court recently held that the condition linking local to state salary levels was an unconstitutional impairment of contractual obligations, as well as a violation of the state's home-rule principles. The court found that the Legislature's action was not premised on a showing of emergency sufficient to override pre-existing contracts. Sonoma County Organization of Public Employees v. Sonoma County (1979) 23 Cal.3d 296.

though still uncertain impact of the initiative.

Between May 31 and June 21 the chancellor of the District had four meetings with various employee organization representatives in order to informally discuss the District's budgetary prospects. Original projections of an \$8 to \$9 million shortfall from anticipated revenues if Proposition 13 passed were gradually scaled down as the District speculated about possible program cuts and eventual legislative assistance. Once the decisions on bail-out distribution were made, the District projected a \$4.5 million reduction. The level of operations that was ultimately attained, about 85% of the District's budget, was known with an increasing degree of probability from the end of June to mid-July. This amount, by the District's admission, was sufficient to meet existing employee salary levels. In addition, the District entered the new fiscal year with an uncommitted reserve carry-over of about \$2 million.

One of the first cost-related steps taken by the District was the cancellation of summer school on June 14, five days before it was scheduled to begin, because of rumors that bail-out money might be denied if the District maintained its summer program. This led to a District determination, at least partially concurred in by CSEA representatives, that certain classified employees would not be needed over the summer. About June 22 District and Association officials informally considered alternatives for workers affected by the closure, including use of vacation or compensation time, leave without

pay, or temporary transfer to other job classifications. District officials claim that they wanted to displace only a minimal number of workers. The District also claims that in the last week of June an arrangement had been worked out with CSEA to by-pass the strict terms of the collective agreement by assigning out-of-classification work without extra pay, thereby minimizing the number of leaves. Regardless of this possible solution, on June 28 the governing trustees approved an emergency resolution creating a new policy of involuntary leaves without pay. This action presumably enabled the District to maximize its summer cost-savings by releasing surplus employees without the 30-day "lay-off" notice required by statute.

However, any proposed arrangement the District hoped would reduce leaves of absence fell through in the first week of July. During that week, Association members reportedly rejected the District's suggestion of out-of-classification transfers coupled with a nominal number of involuntary leaves without pay. CSEA maintained that any previous arrangement was a misunderstanding, and told the District it wanted to abide by the contract terms requiring full payment for out-of-class work. On July 12, relying on the June 28 trustee resolution, the District placed seventeen workers on involuntary leave without pay for periods ranging from two to thirty days. (Three of these leaves were modified later in July.)

A second major cost revision was presented June 21. On that date the District's 6.25% unilateral reduction of

classified employee salaries was disclosed to CSEA at a governing board meeting in the form of a proposed emergency resolution. The following day, during informal talks with Association representatives, the District proposed a trade-off of increased hours of work from 37.5 to 40 hours per week in order to avoid salary level reductions. The talks continued on June 23. On June 27 CSEA told the District that the salary for hours trade-off was rejected. On June 30 the governing trustees acted on the emergency resolution introduced nine days before, cutting salaries 6.25% and freezing annual step increments in pay. An Association spokesman objected to the action taken, claiming that the District had committed an unfair practice. This charge had not been resolved when, nearly a month later on July 26, with the parties at impasse five days after negotiations began, the District restored the 6.25% salary reduction, but did not lift the step freeze. (At the same time, though, the step freeze was removed for supervisors, managers and confidential employees.)

At the June 30 trustee meeting, a third cost measure was approved regarding payment of health and welfare insurance premium increases set to go into effect on July 1. A written resolution stated that the cost increase would be passed on to employees. However, testimony and the minutes of the meeting indicate that the trustees instead approved the District's 90-day absorption of the cost increases pending negotiations between the parties. The District claims that the 90-day absorption was agreed to on June 29 by CSEA's chapter

president. This claim was not controverted by that official's testimony.

Testimony was offered on past practices in the District relevant to those aspects of employment at issue in this case. There has been no past practice by the District of withholding salary or step increases. There has been past history of the District absorbing health and welfare cost increases, although the recent collective agreement expressly supercedes that practice and limits District payment to a flat amount. Finally, there has been no past practice in the District of giving notice to the Association, prior to trustee meetings, of forthcoming negotiating proposals; here, for example, the District did not give notice to CSEA prior to the meeting at which the June 21 salary reduction resolution was introduced.

CSEA, however, did receive an offer to negotiate about all the changes eventually made by the District. In addition to the informal talks described above, there was at least one negotiating inquiry, and probably a second, extended by District representatives. On June 20, the District's attorney telephoned an Association business agent to invite negotiations on a new agreement. They set a tentative meeting for June 28, which later was not confirmed by CSEA and therefore never took place. The Association did not call the business agent as a witness. A second comment, which could be construed as an invitation to negotiate, was made by the chancellor to a local Association official at the informal meeting of June 21. The Association representative testified that he told the

chancellor that CSEA did not want to formally negotiate until the Legislature had determined what funds would be available to help local districts. The chancellor testified that the Association told him that negotiations should be deferred until July. The Board does not find this testimony of the parties to be inconsistent, as both sides were aware that legislative action to soften the impact of Proposition 13 was pending during the last part of June.

Formal negotiations between the parties did take place in July. On July 12 the Association submitted its own proposal and the District put forward its offer on July 21. The parties met on July 21 and July 25, with the District conditioning restoration of salaries and step increases on CSEA's dropping the unfair practice charge. On July 26 the District declared impasse in order to seek the assistance of a mediator.

Two unfair practice charges were filed by the Association challenging the District actions described above. (The second charge was amended in August 1978, supplementing the initial allegations.) Specifically, the Association claims that the District violated section 3543.5(c) of the Educational Employment Relations Act (hereafter EERA) by unilaterally adopting resolutions and taking action with respect to:

1. the involuntary leaves without pay;
2. the 6.25% salary cutback;
3. the step increment freeze;
4. the health and welfare cost pass-on to employees;
5. the health and welfare 90-day cost increase absorption by the District;

6. the rescission of the salary reduction.

In its brief to the Board the Association withdrew its charge regarding the salary cut rescission, and also withdrew a charge that all of the measures taken by the District violated the organization's rights under section 3543.5(b) of the EERA.

The District offers three main defenses to the charges filed. The first defense is that the income loss flowing from Proposition 13, in light of budgetary legal requirements facing the District, created a business necessity to take unilateral actions.<sup>2</sup> One legal argument relied upon is a California constitutional prohibition against public agency indebtedness. The other legal argument is premised on a theory that employee salary contracts would have been automatically created in July at the salary level then in force, and any subsequent salary reduction would have been precluded. In support of this "necessity" argument the District states it acted in good faith on the advice of its lawyers. The District also makes a general argument that the rules of restraint on employer unilateral actions in private sector labor relations should not apply as strongly, or at all, in the public sector.

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<sup>2</sup>The District raises a related argument that its unilateral actions were excused or mitigated because the governing board's resolutions of June 28 and June 30 stated that the District would be available for negotiations with exclusive employee representatives. For this reason, the District asserts that its unilateral actions were "qualified." However, the June 30 resolution covering the salary reduction and the step freeze also stated that the District could continue to take unilateral actions if financially required to do so.

The District's second defense is that the Association waived its right to negotiate about the changes that were adopted, after having been given notice and opportunity to negotiate.

Finally, the District contends that the public interest justified the partial contractual rescission approved by the District, citing Civil Code section 1689(b)(6) as support for this position.<sup>3</sup>

DISCUSSION

A. The District's "Necessity" Defense.<sup>4</sup>

It is unlawful for a public school employer to "refuse or fail to meet and negotiate in good faith with an exclusive representative"<sup>5</sup> about a matter within the scope of

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<sup>3</sup>Civil Code section 1689(b)(6) states:

(b) A party to a contract may rescind the contract in the following cases:  
.....  
(6) If the public interest will be prejudiced by permitting the contract to stand.

<sup>4</sup>The District makes a threshold claim that restoration of the 1977-78 salary level on July 26 mooted the earlier cutback. But, the District's mootness argument can be dismissed at the outset. The defense is not available where the governing board, as here, has expressly reserved its right to take further unilateral action in the future. Amador Valley (10/2/78) PERB Decision No. 74. Also see NLRB v. Allied Products (6th Cir. 1977) 548 F.2d 644 [94 LRRM 2433].

<sup>5</sup>Government Code section 3543.5, a provision of the EERA, Government Code section 3540, et seq. (Hereafter, all references are to the Government Code and EERA unless otherwise indicated.)

representation.<sup>6</sup> The District does not deny that the employment terms and conditions on which they took action are within the mandatory scope of negotiations. The District nevertheless argues that special circumstances, particularly business and legal necessity, excused the District's duty to negotiate prior to approval of unilateral changes.

The Board has previously determined that the duty to negotiate derived from section 8(a)(5) of the Labor-Management Relations Act (hereafter LMRA) may be used to guide interpretation of similar language in the EERA.<sup>7</sup> See Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51, citing Sweetwater Union High School District (11/23/76) EERB Decision No. 4.<sup>8</sup> Also see Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608. In Pajaro Valley, PERB dismissed

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<sup>6</sup>Section 3543.2 states:

The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits..., leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security..., and procedures for processing grievances..., and the layoff of probationary certificated school district employees....

<sup>7</sup>29 U.S.C. 151, et seq. LMRA, Section 8(a)(5), 29 U.S.C. 158(a)(5), states:

It shall be an unfair practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . .

<sup>8</sup>Prior to July 1, 1978, PERB was known as the Educational Employment Relations Board, or EERB.

an unfair practice charge based on a district's unilateral deduction of dental and vision care costs from employee pay. The Board found that the deductions were consistent with past practice and the status quo in the district, and therefore did not constitute unlawful unilateral action. Pajaro Valley, however, does establish the EERA general rule barring an employer's unilateral change of matters within the scope of representation, relying on the holding of the United States Supreme Court in NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].

In Katz the court affirmed a National Labor Relations Board finding that a unilateral grant of benefits, prior to any negotiating impasse, without notice to or consultation with the union, and without any showing of special circumstances justifying the action, constituted an illegal refusal to bargain. The court held that an employer's good faith or subjective bad faith is irrelevant to finding a refusal to bargain:

Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of 8(a)(5), without also finding the employer guilty of overall subjective bad faith. [NLRB v. Katz, supra, 369 U.S. at 747-748.]

The federal rule against unilateral changes has also been applied in cases where an employer has asserted financial necessity as a justification for its action. Although an employer may be free to exercise its management prerogative to close all or part of its business for financial reasons, the employer must still give the employee organization notice and opportunity to negotiate over the effects of the decision; for example, the order and timing of employee layoffs, severance payments, relocation, retraining, re-employment rights, and so on. Oak Cliff-Golman Baking Co. (1973) 207 NLRB No. 1063 [85 LRRM 1035]; NLRB v. Royal Plating & Polishing Co. (3rd Cir. 1965) 350 F.2d 191 [60 LRRM 2033]. As a basis for these negotiations the employer must be willing to provide an employee organization with information supporting the employer's claim of financial inability. NLRB v. Truitt Mfg. Co. (1956) 351 U.S. 149 [38 LRRM 2024]; NLRB v. Palomar Corp. (5th Cir. 1972) 465 F.2d 731 [80 LRRM 3217]. However, a party may also defer negotiations, maintaining the status quo, until information is secured about the effects of a serious financial change. NLRB v. Minute Maid Corp. (5th Cir. 1960) 283 F.2d 705 [47 LRRM 2072).

In sum, under federal law, inability to pay is a negotiating position rather than an excuse to avoid the negotiating obligation entirely.

The facts of this case, however, arguably raise issues of special concern to public sector employers seeking an exception to the full-blown negotiating obligations of Pajaro Valley and

Katz. The District was confronted with the prospect of a substantial budget reduction, brought on by an upsurge of taxpayer unrest expressing itself through the ballot-box. In comparison, the power of large corporation shareholders is rarely exercised, as a legal or practical matter, in as upsetting a fashion in the private business world. Here, these problems were compounded because the District was operating within a web of constitutional and statutory provisions affecting a variety of employment matters, with but brief experience in the field of collective negotiations touching many of the same issues. Additionally, speculation and rumors about financial prospects contributed to a sense of urgency about the future.

But these considerations will not prevent an unfair practice finding against a public employer. As in Katz, subjective "good faith" is not sufficient excuse, "for it is circumvention of the duty to negotiate which frustrates the objectives of section 8(a)(5) much as does a flat refusal." NLRB v. Katz, supra, 369 U.S. at 743. There are several reasons for this general principle, stemming from the potential inherent dangers of unilateral conduct, including those specifically relevant to the public sector. These reasons are convincing even though case-by-case determinations of employer intent might reveal, as in this proceeding, that the employer did not act with subjective bad faith.

One reason unilateral changes are disfavored is their destabilizing and disorienting impact on employer-employee

affairs. Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203, 211. This rationale applies when times are bad as well as when times are good. An employer's single-handed assumption of power over employment relations can spark strikes or other disruptions at the work place. Similarly, negotiating prospects may also be damaged as employers seek to negotiate from a position of advantage, forcing employees to talk the employer back to terms previously agreed to. This one-sided edge to the employer surely delays, and may even totally frustrate, the process of arriving at a contract.

A second reason to prohibit unilateral changes of employment conditions is to protect employer-employee freedom of choice in selecting an exclusive representative. Employer unilateral actions derogate the representative's negotiating power and ability to perform as an effective representative in the eyes of employees. Such action may divide one group of workers from another group seeking special favors from management, thereby undermining the principle of "exclusivity" as well as organizational ability to fairly represent all members of a single unit. NLRB v. Katz, supra, 369 U.S. at 744.

Third, the rule against unilateral changes promotes negotiating equality consistent with the statutory design. EERA compels negotiations with an exclusive representative (section 3543.5), gives employee organizations negotiating rights prior to final budget-making by management (section 3543.7), establishes public notice procedures to prevent behind-closed-doors decision-making (section 3547), and,

provides for neutral third party mediation and factfinding when impasse has occurred (sections 3548, 3548.3). Given this statutory structure and the sometimes delicate political framework within which public sector labor relations takes place, an employer's unilateral act prior to negotiations inherently tips the negotiating balance so carefully structured by the various provisions of the EERA. In short, the bilateral duty to negotiate is negated by the assertion of power by one party through unilateral action on negotiable matters.

Finally, when carried out in the context of declining revenues, an employer's unilateral actions may also unfairly shift community and political pressure to employees and their organizations, and at the same time reduce the employer's accountability to the public. This type of potential competition is unique to the public sector and may occur even though public employees "are not basically different from private employees: on the whole, they have the same sort of skills, the same needs, and seek the same advantages." Abood v. Detroit Board of Education (1977) 431 U.S. 209, at 229-230 [95 LRRM 2411]. An important purpose of public sector collective bargaining is recognition of these employee similarities and the related public employee need for effective collective representation in a political system where there is competition with other claims upon limited funds. The Legislature's enactment of EERA attempts to deal with the reality of possible conflict by establishing a balance of rights and obligations between the parties. It was certainly

not the Legislature's intent to permit the employer, through its use of economic power, to upset this balance, intentionally or innocently, and thereby pit one social interest against another. Summers, "Public Employee Bargaining: A Political Perspective," 83 Yale Law Journal 1156, 1192 (1974).

This reasoning in support of the unilateral change prohibition applies fully to the constitutional and statutory framework within which public school employers and employee organizations must operate. The District's invitation in its brief to follow those jurisdictions that have excepted public employers from the unilateral change prohibition after a contract has expired and/or prior to negotiations is not persuasive. See, e.g., Board of Cooperative Educational Series of Rockland County v. N.Y. State PERB (1977) 41 N.Y.2d 753 [95 LRRM 3046]. We also find no special justification in this case to upset the collective negotiations structure and expectations created by EERA.<sup>9</sup>

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<sup>9</sup>To the extent the District has impliedly put forth a claim of fiscal "emergency" as the ultimate reason for its actions, the District has failed to offer an adequate foundation and the assertion must be rejected. Sonoma County Organization of Public Employees v. Sonoma County, supra; Poschman v. Dumke (1973) 31 Cal.App.3d 932. Nor may the District find special excuse with its argument that the trustee resolutions "qualified" the unilateral actions by the possibility of future negotiations. This qualification language was meaningless in the context of the additional clause that reserved the District's unilateral authority to act in the future. The qualification did not have metamorphic powers, transforming the trustee's refusal to negotiate into some "technical," de minimus violation of the EERA. Instead, the language supports the view of this decision that the District interfered with the negotiations process by

The District argues, for example, that article XIII, section 40 of the California Constitution prohibits public agency operations on a deficit budget and that therefore the District was required to take prompt cost reduction measures in response to information it was receiving about anticipated revenues for the next fiscal year. The need for a balanced budget and debt limitation is only a general directive, however, and may not be asserted to avoid a mandatory obligation imposed by law, as distinguished from one voluntarily incurred. Los Angeles County v. Byram (1951) 36 Cal.2d 694; Wright v. Compton Unified School District (1975) 46 Cal.App.3d 177; cf. Goleta Educators Association v. Dell'Armi (1977) 68 Cal.App.3d 830. In this proceeding there were lawful obligations imposed on the District to pay employee salaries (Ed. Code section 88160, et seq.); to negotiate in good faith with the exclusive representative (sections 3540.1(h), 3543.5(c)); and, to comply with the collective agreement's reopener and step increase provisions.

The District did not abide by these obligations. Indeed, first, the District did not assert indebtedness as a bar to all salary claims, but objected to only a portion of the salary obligation, partially cutting wages on the basis of a speculative indebtedness that might arise in the future. Second, although the statutory and contractual negotiating duty on the parties did not compel the District and CSEA to reach a

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qualifying a statutory right CSEA already possessed, and by setting itself up as the sole judge of the timing and nature of unspecified changes in the future.

final agreement,<sup>10</sup> the parties were required to make a sincere collective effort.<sup>11</sup> The negotiating obligation imposed on both parties would have permitted modification of salary levels adopted in the school employer's final budget, taking into account available revenues or a change in financial circumstances (Ed. Code sections 88162 - 88163). Rather than pursue alternatives with CSEA that might have resolved its potential financial problems expeditiously and lawfully, the District acted on its own. Third, the District disregarded the employees' vested contractual right to step increases. The employees' lawful interest had accrued over time and was incorporated in the collective agreement. California League of City Employee Associations v. Palos Verdes Library District (1978) 87 Cal.App.3d 135.

The District also argues in support of its "necessity" defense that unless the cutbacks were in effect by July 1, the start of the second year of the collective agreement, the existing contract salary level would remain in force at the time the "publication budget" was approved in late July, and that there would be no way to reduce salaries after that date.

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<sup>10</sup>Federal law does not "compel either party to agree to a proposal or require the making of a concession...." LMRA, section 8(d), 29 U.S.C. section 158(d).

<sup>11</sup>Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9, 25; NLRB v. Herman Sausage Co. (5th Cir. 1960) 275 F.2d 229, 231-232 [45 LRRM 2829]; Cox (1958) The Duty to Bargain in Good Faith 71 Harv.L.Rev. 1401, 1416 (1958).

Fearful of being locked into a salary schedule it could not meet, the District chose to lower salaries by 6.25%, roughly approximating the speculative revenue loss for the next fiscal year. To support this position the District relies, first, on the Education Code requirement that classified salaries be fixed by the date of the publication budget,<sup>12</sup> and, second, on an analogy to teacher contract cases interpreting the Education Code as a bar to lowering next year's teacher salaries after July 1.<sup>13</sup>

However, for either reason, there is no basis to assume, as the District does, that the previous year's salary would remain inflexible. The statutes relied upon by the District to fix a salary schedule by the date of the publication budget also permit deferral of a final decision as well as eventual reduction of salaries already approved.<sup>14</sup> In this regard the District was simply not under the time pressure it describes, but, instead, expressly declined to take advantage of the one-month budget extension provided in the bail-out legislation. Had the District acted with less haste, in light of the money available, the salary reduction and step freeze

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<sup>12</sup>Education Code section 88162.

<sup>13</sup>ABC Federation of Teachers v. ABC Unified School District (1977) 75 Cal.App.3d 332, 337-338, and cases cited therein. The cases relied upon by the District refer to former Education Code sections 5101, and 13510, now sections 79000 and 87806 following reorganization of the code.

<sup>14</sup>Education Code sections 88162-88163.

could have been considered in negotiations.<sup>15</sup> Too, those cases cited by the District, establishing next year's individual teacher contracts and salaries as of July 1, were all decided prior to EERA's passage, and have only applied to teachers, not to classified employees. There are no parallel statutory grounds or decisions setting the classified employee school year and salary as of July 1. Finally, the employer and CSEA had a potential negotiating duty arising out of the contract reopener clause as well as a duty to negotiate over the effects of prospective revenue cuts within the scope of representation. For all of these reasons, the District's actions were not justified.

As a last argument in support of its "necessity" defense the District asserts that it acted in good faith on the advice of its legal counsel. "Good faith" is not a defense in a unilateral change situation because such actions are inconsistent with the statutory duty to negotiate and are equivalent to a refusal to negotiate. NLRB v. Katz, supra. There is also no authority for the proposition that a lawyer's counseling may be relied upon to avoid this express statutory duty.

B. The District's "Waiver" Defense.

In order to prove that the Association waived its right to

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<sup>15</sup>We do not reach the question of whether the District had a good faith obligation to dip into its uncommitted reserves, a position the District firmly resists. We observe, however, that it appears the school employer is free to draw upon those funds if it wishes. Education Code section 85443; California School Employees Association v. Pasadena Unified School District (1977) 71 Cal.App.3d 318.

negotiate over the changes adopted by the District, the employer must show either clear and unmistakable language, Amador Valley, supra, or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. NLRB v. Cone Mills (4th Cir. 1967) 373 F.2d 595 [64 LRRM 2536]; Caravelle Boat (1977) 227 NLRB No. 162 [95 LRRM 1003]; Textron, Inc. (1973) 180 NLRB No. 96 [73 LRRM 1097]. In this regard, the Board is mindful of the particular burdens that public sector finances may impose on employee representatives to reach speedy resolution of hard economic problems. Employee organizations may not shield themselves behind a restraint on unilateral employer actions as a way of avoiding a measure of responsibility for mitigating or resolving financial dilemmas confronting a public employer.

As a threshold concern relevant to the District's "waiver" defense, both parties concur that their meetings in late June were only informal efforts to work out interim arrangements, and were not true negotiations. These informal talks may have provided CSEA with some notice of possible changes (as did other events during that period), but they cannot be construed as waiving the employer's duty to negotiate over the salary reduction or the freeze on yearly step increments. The testimony shows that the Association responded to the District's negotiating invitation and expression of interest by stating CSEA's preference to wait a reasonable amount of time to secure the information needed for actual negotiations. NLRB v. Minute Maid Corp., supra. The District was not under any

legal compulsion to adopt its policies on salaries and step increases, or to reject the Association's request for time and information prior to negotiations. Indeed, the District freely admits that its resolution was predicated on speculation and rumor about amounts to be available as a result of bail-out legislation. And, once money was available, it is also evident the District had enough to get by without cutting salaries at all. In the end the facts did not justify the salary measures taken by the District.<sup>16</sup>

Our analysis differs, however, on the issue of the Association's waiver of negotiations regarding the policy of involuntary leaves without pay. CSEA had actual notice of the District's exercise of its management prerogative to cancel summer school and agreed the closing would have consequences for employees in the District who would not be needed over the summer. It was the Association's burden to demand negotiations over the effects of that cancellation once the District had extended the invitation to negotiate. U.S. Lingerie (1968) 170 NLRB No. 77 [67 LRRM 1482]. This burden to take up the

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<sup>16</sup>The District contends that maintenance of the step freeze after the July 26 negotiating impasse was excusable because the Association had rejected a package offer to rescind the District's unilateral measures. Impasse did not relieve the District of responsibility to correct its misdeed (Cf. California League of City Employee Associations v. Palos Verde Library District, supra), an error that was aggravated by reinstating step allowances to non-unit employees. Additionally, the District improperly coupled its negotiating offer with a condition that CSEA dismiss its unfair practice charge. This proposed condition casts another shadow of illegality over the District's conduct. Morris, The Developing Labor Law (1971) p. 301, n. 205 and cases cited therein.

District's offer was not relieved by the need for information relevant to the salary cutbacks. This is so because time was of the essence in order to release surplus employees by by-passing the 30-day "layoff" notice requirement -- a necessary step if summer school closure was to have meaningful cost-saving benefit, regardless of any future legislative action to ease the revenue losses associated with Proposition 13.<sup>17</sup>

At the very least CSEA could have negotiated over the non-economic aspect of the leave of absence policy and its impact on employees, even if the Association did not have information needed to negotiate over wages. The failure of CSEA to call its own business agent as a witness leaves the Association without any explanation, beyond a need for information, of why the organization did not respond to the District's negotiating invitation. CSEA's claim that it misunderstood the terms of an apparent arrangement with the District that would have minimized the involuntary leaves by shifting workers to other classifications, does not excuse the

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<sup>17</sup>Education Code section 88017(c) permits layoffs without 30-day notice "for lack of funds in the event of an actual and existing inability to pay salaries of classified employees, [or] for lack of work resulting from causes not foreseeable or preventable by the governing board." There is no evidence of record that the District could have or did rely on this provision. Rather, the evidence shows that the District acted on the basis of its management prerogative to allocate programmatic resources because of rumors that bail-out funds might be denied to schools maintaining summer sessions. Once the decision was made the District arrived at its new leave policy to get around the statutory notice requirement (see Education Code section 88017(b)) in order to maximize the cost-saving effect of summer school cancellation.

Association's inaction, but actually argues that CSEA had a full opportunity to negotiate and declined. This conclusion is also supported by the District's timely institution of involuntary leaves once the Association gave the District official rejection of the informal trade-off previously worked out.

The Association also waived its negotiating right over the District's 90-day health and welfare cost increase absorption pending negotiations. Uncontradicted testimony as well as the minutes of the June 30 meeting at which the action was adopted, indicate that the governing board's formal motion to pass on all fringe costs to the employees was altered to reflect the District's readiness to absorb the costs for 90 days. A CSEA official agreed to the District's 90-day proposal the day before the trustee action and knew of the need for speedy decision in light of the July 1 effectiveness of the cost increase. The Association official did not testify on the issue, thereby leaving uncontroverted the District's claim that she agreed to the 90-day proposal.<sup>18</sup>

C. The District's "Public Interest" Defense.

The District takes an additional tack in its effort to

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<sup>18</sup>Our conclusion would be different, however if the 90-day absorption was not a formal substitution for the total cost pass-on language in the original resolution. Although a total pass-on would have been consistent with the terms of the contract between the parties, which expressly superseded previous understandings and provided for a specific employer dollar contribution figure (Pajaro Valley, supra; Motor Car Dealers Association (1976) 225 NLRB No. 168 [93 LRRM 1474]), the original resolution on its face constituted a prospective refusal to negotiate. (Ante, fn. 9.)

support the salary cutbacks and step freeze, claiming that the public interest would have been prejudiced if certain portions of the existing collective agreement had not been unilaterally rescinded. The District cites Civil Code section 1689(b)(6) as authority for this view. (See ante, fn. 3.) This argument is essentially the same as the "necessity" defense already discussed and the District offers no additional legislative declaration or public policy rationale for applying this code provision. Some showing of legislative or public interest policy has been required to support contract rescission. 1 Witkin, Summary of Cal. Law, (8th ed. 1973) section 373, pp. 314-315. Nor does the District explain how it justifies rescinding only certain provisions of a complex, interrelated employment contract that does not appear to be severable. Lessing v. Gibbons (1935) 6 Cal.App.2d 598. For these reasons we reject the District's so-called public interest defense.

#### REMEDY

Section 3541.5(c) provides that:

The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The District violated section 3543.5(c) by refusing to negotiate with the exclusive representative regarding changes of employee wages and increment benefits.

Although the District's salary reduction has been restored by the governing board resolution of July 26, the freeze on the yearly step increases has not been removed. It is appropriate to order lifting of the freeze on step increments, and payment with interest of any step increases that have not been paid during the period of the freeze. See Sanders v. Los Angeles (1970) 3 Cal.3d 252; Isis Plumbing and Heating Co. (1962) 138 NLRB No. 97 [51 LRRM 1122]. Additionally, it is appropriate to order that the District refrain from any unilateral reduction or freeze of employee wages without providing the exclusive representative with notice and opportunity to negotiate. To publicize this decision, the District should post notice of the Board's order. Individual notice of the order should also accompany one round of District salary payments to all employees as well as payment of the improperly withheld step increases. This step will insure that employees are directly informed in a relevant context (that is, the pay envelope) of the reasons for previous wage losses as well as current benefit restoration.

The remaining unfair practice charges should be dismissed.

#### ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is hereby ORDERED that the San Mateo County Community College District and its representatives shall:

(1) Cease and desist from taking unilateral action regarding proposed changes of employee wages, hours or terms and conditions of employment as defined in Government Code

section 3543.2, without providing the exclusive representative with notice and opportunity to negotiate.

(2) Take the following affirmative action which is necessary to effectuate the policies of the Educational Employment Relations Act:

(a) Reinstate step increment payments for classified employees, with payment of interest at 7% for the amount due from the date of suspension of said increments to the date of reinstatement.

(b) Post at all school sites, and all other work locations where notices to employees customarily are placed, immediately upon receipt thereof, copies of the notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 consecutive days from receipt thereof. Reasonable steps should be taken to insure that said notices are not altered, defaced or covered by any other material.

(c) Mail or distribute to classified employees a copy of the notice attached as an appendix hereto by giving individual notice accompanying one round of District salary payments and payment of step increases.

(d) Notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, within 20 days from the date of this Decision, of what steps the District has taken to comply herewith.

(3) It is further ordered that the remaining alleged violations of section 3543.5(c), regarding involuntary leaves without pay and health and welfare costs, are hereby dismissed.

This order shall become effective immediately upon service of a true copy thereof on the San Mateo County Community College District.

By: / Harry / Gluck, Chairperson      / Raymond J. González, Member

Appendix: Notice.

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD,  
An Agency of the State of California

After a hearing in which all parties had the right to participate, it has been found that the San Mateo County Community College District violated the Educational Employment Relations Act by taking unilateral action regarding proposed changes of employee wages and step increments, without providing the exclusive representative, California School Employees Association, with notice and opportunity to bargain. (Other alleged violations, regarding involuntary leaves without pay and health and welfare costs, were dismissed.) As a result of this conduct, we have been ordered to post this notice as well as mail or distribute this notice with one round of salary and step increment payments. We will abide by the following:

(a) Cease and desist from taking unilateral action regarding proposed changes of employee wages, hours or terms or conditions of employment, without providing the exclusive representative with notice and opportunity to negotiate.

(b) Reinstate step increment payments for classified employees, with payment of interest at 7% for the amount due from the date of suspension of said increments to the date of reinstatement.

SAN MATEO COMMUNITY COLLEGE DISTRICT

By: \_\_\_\_\_  
Superintendent

Dated:

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