

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN A. BROADWOOD, E.C. (BEVERLY) )  
CHAMBERLAIN, and BARBARA J. NUTT, )  
 )  
Charging Parties, ) Case Nos. SF-CO-30  
 ) SF-CO-31  
v. ) SF-CO-32  
 )  
LOS ALTOS TEACHERS ASSOCIATION, )  
 )  
Respondent. )  
 )  
----- ) PERB Decision No. 190  
 )  
JOHN A. BROADWOOD, E.C. (BEVERLY) ) December 29, 1981  
CHAMBERLAIN, AND BARBARA J. NUTT, )  
 )  
Charging Parties, ) Case Nos. SF-CE-139  
 ) SF-CE-140  
v. ) SF-CE-141  
 )  
LOS ALTOS SCHOOL DISTRICT, )  
 )  
Respondent. )  
----- )

Appearances: David T. Bryant, Attorney (National Right to Work Legal Defense Foundation, Inc.) for John A. Broadwood, E. C. (Beverly) Chamberlain, and Barbara J. Nutt; Joseph Schumb, Jr. and James Keller, Attorneys (La Croix and Schumb) for Los Altos Teachers Association.

Before Gluck, Chairperson, Moore and Tovar, Members.

DECISION

The Los Altos Teachers Association (hereafter LATA or Association) excepts to a hearing officer's proposed decision that the negotiation and application of a retroactive service fee provision violated subsections 3543.5(a) and 3543.6(a)

and (b) of the Educational Employment Relations Act (hereafter EERA or the Act).<sup>1</sup> For the reasons which follow, we reverse the hearing officer's decision and dismiss all aspects of the unfair practice complaint.

#### FACTS

The facts in this case are simple and uncontested. After being voluntarily recognized by the Los Altos School District (hereafter District) in the spring of 1976, the Association

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<sup>1</sup>The EERA is codified at Government Code section 3540 et seq. All references herein will be to the Government Code unless otherwise noted.

Subsection 3543.5(a) reads:

It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Subsections 3543.6(a) and (b) read:

It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause a public school employer to violate Section 3543.5.

(b) 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.

commenced negotiations with the District on July 1 of that year. Ten months later, on May 16, 1977, the parties signed a contract which was, by its terms, made retroactive to July 1, 1976. The contract included a provision requiring nonmembers to pay an annual service fee of \$75.00.<sup>2</sup>

Believing that they could be legally charged only a pro rata portion of the annual fee, the charging parties tendered to LATA approximately \$10.00 which represented the portion of the annual fee calculated from the execution of the contract to the end of the fiscal year. The Association refused to accept this payment and requested that the District initiate termination proceedings pursuant to Article II-F 1.3 of the collective bargaining agreement.<sup>3</sup> On June 22, 1977, the District informed charging parties that it would be forced to terminate them if they failed to join LATA or refused to pay \$75.00 in service fees by June 30, 1977. Faced with these alternatives, the charging parties paid the fee under protest and filed the instant charges against the District and the Association.

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<sup>2</sup>The annual membership fee in LATA is \$202.00.

<sup>3</sup>The relevant portion of Article II-F reads:

The parties agree further that a failure by any unit member to . . . pay the service fee during the term of this agreement shall constitute just and reasonable cause for discharge from employment.

## DISCUSSION

The Public Employment Relations Board (hereafter PERB or Board) has not, until now, been called upon to consider whether the retroactive enforcement of a service fee clause<sup>4</sup> violates the right of employees specifically granted by section 3543 ". . . to refuse to join or participate in the activities of

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<sup>4</sup>Subsection 3540.1(i) reads:

"Organizational security" means either:

(1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him, as a condition of continued employment, if he does join, to maintain his membership in good standing for the duration of the written agreement.

However, no such arrangement shall deprive the employee of the right to terminate his obligation to the employee organization within a period of 30 days following the expiration of a written agreement; or

(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first.

Subsection 3546(a) and (b) read:

Subject to the limitations set forth in this section, organizational security, as

employee organizations. . . ."

Charging parties acknowledge that an organizational security agreement does constitute an exception to the right to refrain from participating or joining, but claim that that right cannot be abrogated by an agreement which did not exist during the period in question. They argue that by retroactively applying the service fee provision, employees are penalized for exercising their right not to participate.

Charging parties urge that the private sector law which supports their position should control our interpretation of

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defined, shall be within the scope of representation.

(a) An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not be deemed to either ratify or defeat the remaining provisions of the proposed agreement.

(b) An organizational security arrangement which is in effect may be rescinded by majority vote of the employees in the negotiating unit covered by such arrangement in accordance with rules and regulations promulgated by the board.

the Act's pertinent provisions.<sup>5</sup> Courts and the National Labor Relations Board (hereafter NLRB) have consistently interpreted section 8(a)(3) of the National Labor Relations Act (hereafter NLRA) as prohibiting the retroactive application of any union security arrangement.<sup>6</sup> However, we find these cases distinguishable.

Virtually all of the cases relied on by the charging parties and the hearing officer involved either maintenance of membership or union shop clauses. In the principal case concerning retroactive security agreements, the parties included in their agreement a maintenance of membership clause which applied retroactively to cover a hiatus period between contracts. During this time, a rival organization mounted an unsuccessful decertification campaign. In disallowing the retroactive application of the clause, the NLRB offered two

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<sup>5</sup>Fire Fighters v. City of Vallejo (1974) 12 Cal.3d 608, 617 concludes that federal precedent "may properly be referred to for enlightenment" in the interpretation of public sector statutes which parallel the NLRA.

<sup>6</sup>The relevant portion of the NLRA section 8(a)(3) reads:

Provided, that nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . .  
(emphasis added).

explanations. First, to permit retroactive maintenance of membership would be to effectively establish a permanent closed shop<sup>7</sup> for those employees who had been members prior to the execution of the agreement. Second, such a provision covering a period during which the status of the exclusive representative was in question would discourage employees from supporting rival organizations, Colonie Fibre (1946) 69 NLRB 589, [18 LRRM 1256], enforced (2d. Cir. 1947) 163 F.2d 65 [20 LRRM 2399] . As the NLRB said:

. . . for us to hold otherwise would induce in employees desirous of changing their bargaining agent . . . such a fear of subsequent reprisal in the event that their efforts were unsuccessful that they would never evoke their right in these circumstances to a change of representatives. (p. 59.)<sup>8</sup>

In New York Shipbuilding Corp. (1950) 89 NLRB 1446 [26 LRRM 1124], the board invalidated a union shop clause<sup>9</sup> that

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<sup>7</sup>A closed shop provision requires that the employer hire only persons who are already members of the contracting union.

<sup>8</sup>In the NLRB's supplemental Colonie Fibre decision, (1946) 71 NLRB 354, [18 LRRM 1500], it discusses at greater length the chilling effects retroactive maintenance of membership would have on the rights of employees to express freely their right to select an exclusive representative during a window period. This leaves little doubt that a significant part of the rationale in Colonie Fibre was based on the need to protect employees' right to freely select an exclusive representative during a period when there was a valid question concerning representation.

<sup>9</sup>A union shop clause requires all employees to become members of the union within 30 days after hire or after the contract is executed.

would require retroactive membership to a period ante-dating the effective date of the contract. Citing Colonie Fibre, the NLRB held that the Act did not "sanction a contract which requires past membership in the union as a condition of employment." (p. 1447.)<sup>10</sup> Moreover, the NLRB noted that the 8(a)(3) proviso of the Taft-Hartley amendments

specifically defers the lawful application of a union security agreement until "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement whichever is later."

Since the Taft-Hartley amendments, the NLRB, supported by the courts, has guarded the grace period, refusing to enforce union shop clauses which deny employees the full 30 days.<sup>11</sup>

As the board noted in Adams Division, Le Tourneau Westinghouse Co. (1963) 143 NLRB 827 [53 LRRM 1421]:

. . . the denial of the grace period leaves Respondents with no legal agreement to justify Kellam's discharge for nonpayment of dues. (Emphasis added.)

Other cases which do not specifically rely on the grace period for finding retroactive security clauses illegal seem to

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<sup>10</sup>See also Namms, Inc., (1953) 102 NLRB 466 [31 LRRM 1328] and International Chemical Workers (American Cyanamid) (1978) 237 NLRB 864 [99 LRRM 1152].

<sup>11</sup>Associated Machines (1955) 114 NLRB 390 [36 LRRM 1582]; Seaboard Terminal v. Refrigeration (1955) 114 NLRB 1391 [37 LRRM 1136]; Anderson Express Co. (1960) 126 NLRB 798 [45 LRRM 1188].

be based on "settled law." For example, in Namms, Inc., supra, the NLRB said:

It is settled law that a union shop contract may not be retroactively applied to effect the discharge of an employee for failing to [pay] dues that accrued during a time when he was under no contractual obligation to do so as a condition of employment. p. 469.

See also Teamsters, Local No. 25 (Tech Weld Corp.) (1975) 220 NLRB 76 [90 LRRM 1193]; United Mine Workers, Dist. 50 (Ruberoid) (1968) 173 NLRB 87 [69 LRRM 1241]; Eclipse Lumber Co., Inc. (1951) 95 NLRB 464, [28 LRRM 1329]; General American Transportation Corp. (1950) 90 NLRB 239 [26 LRRM 1188].

As discussed above, Namms did not involve a retroactive security clause, but an attempt by the union, pursuant to a newly negotiated union shop clause, to force members to pay back dues for a period during which there was no contract. This case is not on point and we therefore decline to apply it to the case before us.

In cases which are factually similar to the instant case (i.e., where the contract itself has been made retroactive), the NLRB has, in some instances, without analysis, applied Namms to find such clauses illegal. This subsequent reliance on Namms to support conclusions in factually different cases is inappropriate. We are also unpersuaded by those cases which, while analogous to the instant case and not relying on Namms, lack analysis or rationale to support their conclusions.

NLRB law which addresses retroactive union security clauses is based, in part, on the protection of the 30-day statutory grace period which must be available at the "beginning of employment" or "following . . . the effective date of such agreement, whichever is later." No such requirement exists in EERA's service fee provision. EERA's only mention of a 30-day withdrawal period appears in the definition of maintenance of membership (subsection 3540.1(i)(1)), and there it is available only at the expiration of a written agreement.

Significantly, EERA, unlike its federal counterpart, contemplates the agency fee being in force

for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first.<sup>12</sup> (Emphasis added.)

The effective date is that on which the contract provisions become operative. The duration of a contract covers that period commencing with the effective date and ending on the expiration date. Collective bargaining agreements frequently contain retroactive provisions, a fact the Legislature was surely aware of.

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<sup>12</sup>Counterposed to the phrase "for the duration of the agreement," the words "three years from the effective date of the agreement" takes into account that security agreements cannot exceed the permitted term of the collective bargaining agreement. Subsection 3540.1(h) prohibits any collective bargaining agreement from exceeding three years.

The policy considerations which undoubtedly led to the inclusion of organizational security in EERA lead us to conclude that the retroactive clause negotiated in Los Altos does not violate the Act. Unions must fairly represent all unit members from the time the organization is certified or recognized, regardless of whether there is a collective bargaining agreement.<sup>13</sup> During the pre-contract period, the organization incurs expenses while negotiating with the employer, a process that produces the wages, hours, and terms and conditions of employment which benefit members and nonmembers alike. Section 3544.9 obligates the exclusive representative to process meritorious grievances which may arise before a contract is signed without regard to the grievants' membership status. To exempt nonmembers from a retroactive application of the service fee would defeat the very purpose of the fee. Ironically, the longer negotiations took, the more difficulty in arriving at a settlement, the less

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<sup>13</sup>Section 3544.9 states:

The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

Fremont Unified District Teachers Association (Janet King) (4/21/80) PERB Decision No. 125; Rocklin Teachers Professional Association (Thomas Romero) (3/26/80) PERB Decision No. 124; Vaca v. Sipes 379 U.S. 650 [58 LRRM 2193].

nonmembers would be obligated to pay, and the greater would be their subsidy from members. Since the Legislature has decided that the purposes of EERA are furthered by distributing the representational costs among all employees in the unit, it is logical that the nonmembers' financial obligations be congruent with the organization's representational obligations.

In accord are at least five other public sector jurisdictions.<sup>14</sup> Westbury, supra, is particularly persuasive, as the pertinent provisions of New York's Taylor Act closely resemble EERA's. Neither statute specifically prohibits retroactive security agreements; both omit the NLRA 30-day grace period with respect to agency fee clauses; and both render organizational security specifically negotiable.

The New York Public Employment Relations Board rejected private sector precedent, viewing all of the post-1947 cases as rooted in the protection of the grace period. The Colonie Fibre rationale was rejected as good authority because it was based in significant part on the presence of a question concerning representation, a fact not present in the New York

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<sup>14</sup>See Westbury School District (7/13/79) 12 New York PERB 4570; Berns v. WERC, Wisconsin Circuit Court Branch No. 2, #470-606 (4/2/79) 804 GERR 15; Milwaukee Board of Education Wisconsin Court of Appeals (12/11/79) 2 NDER 11018 affirms Berns, supra; Oregon City School District (12/27/76) OERB Decision No. 162, 688 GERR B-1; Leominster (1/24/80) 6 MLC 1809; Hawaii Fire Fighters, Local 1463, IAFF, (1973) HPERB Decision No. 35.

case. But, possibly the most powerful argument made by the New York board, in our view, dealt with the very purpose of the service fee, i.e., that policy considerations dictate imposing mutual obligations on the parties involved. Since unions must fairly represent all unit members during the pre-contract period, it is only fair to require all unit employees to contribute to the costs necessarily incurred by the union in fulfilling its duty.

Finally, the collective bargaining scheme of EERA as a whole supports retroactivity in several other respects. Organizational security is specifically within the scope of mandatory negotiations. Nothing in the Act indicates that the negotiability of organizational security agreements is subject to treatment different from other negotiable items such as wages, hours or appropriate terms and conditions of employment. All of the latter may be and frequently are given retroactive effect by collective negotiating agreements.

Charging parties' contention that allowing retroactivity would violate principles of constitutional law which generally disapprove of the retroactive application of statutes is without merit. We are concerned here not with a retroactive statute but a retroactive contract, which did not ante-date the effective date of the statute.

The Association and the District did not violate EERA by negotiating and enforcing an agency fee provision retroactive to the effective date of their contract.



STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN A. BROADWOOD, E.C. (BEVERLY) )  
CHAMBERLAIN, and BARBARA J. NUTT, )  
 )  
Charging Parties, )  
 )  
v. ) UNFAIR PRACTICE CHARGE  
 )  
 ) Case Nos. SF-CO-30, 31, &  
 ) 32-77/78  
LOS ALTOS TEACHERS ASSOCIATION, )  
 )  
Respondent. )  
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JOHN A. BROADWOOD, E.C. (BEVERLY) )  
CHAMBERLAIN, and BARBARA J. NUTT, )  
 )  
Charging Parties, )  
 )  
v. ) Case Nos. SF-CE-139, 140,  
 ) 141-77/78  
 )  
 ) PROPOSED DECISION  
LOS ALTOS SCHOOL DISTRICT, ) (9-6-78)  
 )  
Respondent. )  
 )  
----- )

Appearances: David T. Bryant, Attorney (National Right to Work Legal Defense Foundation, Inc.) for John A. Broadwood, E.C. (Beverly) Chamberlain, and Barbara J. Nutt; Joseph Schumb, Jr. and James Keller, Attorneys (La Croix and Schumb) for Los Altos Teachers Association; Maureen McClain, Attorney (Littler, Mendelson, Fastiff and Tichy) for Los Altos School District.

Before Gerald A. Becker, Hearing Officer.

PROCEDURAL HISTORY

On August 1, 1977, three certificated employees of the Los Altos School District (hereafter District), John A. Broadwood, E.C. (Beverly) Chamberlain, and Barbara J. Nutt (hereafter Charging Parties) each filed separate unfair practice charges

against the District and against the Los Altos Teachers Association (hereafter Association) alleging that the District violated Government Code section 3543.5(a)<sup>1</sup> and that the Association violated section 3543.6(a) and (b) by negotiating a retroactive service fee for non-members of the Association. Both the District and the Association filed answers to the charges not denying the factual allegations, but denying any unfair practice violation.

The six charges were consolidated and in lieu of a hearing, the parties agreed to submit the matter to this hearing officer for a proposed decision based on a stipulated statement of facts and written briefs.

#### ISSUE

May an organizational service fee arrangement under sections 3540.1(i) and 3546 be made retroactive to the date of commencement of negotiations?

#### FINDINGS OF FACT

The essential stipulated facts are summarized as follows:

On May 3, 1976, the District recognized the Association as the exclusive representative of a unit of certificated employees which includes each of the Charging Parties. On July 1, 1976 the

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<sup>1</sup>All references are to the Government Code unless the context indicates otherwise.

District and the Association commenced negotiations resulting in execution of a collective negotiations agreement on May 16, 1977.

The agreement had a two-year term, retroactive to July 1, 1976 and running through June 30, 1978. An organizational security provision in the agreement provides for payment to the Association of a \$75 annual service fee by non-member employees in the unit employed 35 percent or more ("agency shop" fee), and further provides that an employee shall be terminated for non-payment of the service fee. Dues for Association members are \$202 per year. Both membership dues and service fees were made retroactive to July 1, 1976.

The Charging Parties at no time were members of the Association. Each tendered \$10.07 to the Association representing the prorated portion of the service fee for the period May 16, 1977 to June 30, 1977, and refused to pay the remainder of the \$75 fee covering the period July 1, 1976 to May 16, 1977. The Association refused to accept the tendered payment and requested payment in full of the \$75 service fee by June 30, 1977. The District notified the Charging Parties that unless they tendered the \$75 service fee to the Association or authorized a payroll deduction in this amount by June 30, 1977, it would be forced to commence dismissal proceedings in accordance with the organizational security provision of the agreement. Charging Parties then paid the full service fee under protest.

## DISCUSSION AND CONCLUSIONS OF LAW

### A. In General

In addition to the right to participate in organizational activities, public school employees have the right under section 3543 "to refuse to join or participate in the activities of employee organizations." This right is protected by sections 3543.5(a) and 3543.6(b) which respectively prohibit actions by an employer and an employee organization to:

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.

Section 3543.6(a) further makes it unlawful for an employee organization to cause or attempt to cause a public school employer to violate section 3543.5.

But for its retroactive application, the Charging Parties do not contest the validity of the organizational security provision agreed to by the District and the Association. The sole question presented is whether the retroactive application of this provision to the date of commencement of negotiations constitutes unlawful interference, restraint or coercion of non-members of the Association.

B. The Organizational Security Provisions of the Educational Employment Relations Act 2 are Silent as to Retroactivity.

Organizational security is defined in Government Code section 3540.1(i) as follows:

(1) An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him, as a condition of continued employment, if he does join, to maintain his membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the employee of the right to terminate his obligation to the employee organization within a period of 30 days following the expiration of a written agreement; or

(2) An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first.

Government Code section 3546(a) provides as follows:

(a) An organizational security arrangement, in order to be effective, must be agreed upon by both parties to the agreement. At the time the issue is being negotiated, the public school employer may require that the organizational security provision be severed from the remainder of the proposed agreement and cause the organizational security provision to be voted upon separately by all members in the appropriate negotiating unit, in accordance with rules and regulations promulgated by the board. Upon such a vote, the organizational security provision will become effective only if a majority of those members of the negotiating unit voting approve the agreement. Such vote shall not be deemed to either ratify or defeat the remaining provisions of the proposed agreement.

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<sup>2</sup>Government Code section 3540 et seq. (hereafter EERA or Act).

Charging Parties argue that the clause, "in order to be effective," in the first sentence of section 3546(a) should be construed as a temporal limitation prohibiting an organizational security provision from becoming effective prior to the date of agreement by the parties. Charging Parties attempt to buttress this interpretation by reference to the fact that a severed organizational security provision becomes "effective only if" a majority of unit members vote in favor of it.

The hearing officer does not find this interpretation persuasive. The first sentence of section 3546(a) above indicates that an organizational security provision is not mandatory, but is permitted only if agreed to by the parties. The clause "in order to be effective" therefore refers to the means of effectuating an organizational security provision rather than the time it becomes effective. Similarly, a severed organizational security provision becomes effective if, and not when, approved by the unit members.

Thus, on its face, section 3546(a) neither permits nor prohibits the retroactive application of an organizational security provision.

However, although not directly in issue, it is noted that retroactive imposition of the other organizational security arrangement, maintenance of membership, clearly is prohibited by the statute in certain situations.

Under section 3540.1(i)(1), an employee under a maintenance of membership provision has a 30-day escape period after expiration

of a negotiations agreement within which to resign from the employee organization. If an employee were to exercise this option upon expiration of an agreement and then, say six months later, the employer and the employee organization reached a new agreement which again has a maintenance of membership provision, it is clear that the provision cannot be made retroactive to the date of expiration of the old agreement because the retroactivity would conflict with the employee's statutory right to withdraw from the organization.

In addition, in a situation prior to negotiation of a first agreement, before a maintenance of membership provision has been negotiated, an employee organization member clearly has the right to resign. If an employee were to do so, if a retroactive maintenance of membership provision subsequently were negotiated, it would obviously conflict with the employee's previously-exercised right to resign his membership.

Although maintenance of membership is different from a service fee arrangement, and different policy considerations might apply, nevertheless, there is no indication in the EERA that the Legislature intended that the two organizational security arrangements be treated differently with respect to retroactivity.

C. Retroactive application of an organizational security provision is prohibited under the Labor Management Relations Act. 3

The LMRA authorizes the negotiation of an organizational security provision in the proviso to section 8(a)(3) which states in pertinent part as follows:

Provided, that nothing in this Act, or any other statute of the United States, shall preclude an employer from making an agreement with a labor organization...to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later....

Though the proviso does not expressly bar retroactivity, the National Labor Relations Board (hereafter NLRB), with judicial affirmance, has consistently prohibited the retroactive application of an organizational security provision on policy grounds. The issue has arisen in a variety of factual contexts involving both union shop and maintenance of membership provisions.

Unions and employers have been prohibited from demanding dues retroactively for the interim period after expiration of a contract containing an organizational security provision and before execution of a new contract containing the same provision where a

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<sup>3</sup>29 U.S.C. section 151 et seq. (hereafter LMRA).

strike occurred during the hiatus (New York Shipbuilding (1950) 89 NLRB 1446 [26 LRRM 1063]) (union shop); Aeronautical Industrial District Lodge 751 (1968) 173 NLRB 450 [69 LRRM 1363] (maintenance of membership); where a representation election was held during the hiatus (Namms, Inc. (1953) 102 NLRB 466 [31 LRRM 1328]) (union shop); Colonie Fibre Co. Inc. (1946) 69 NLRB 589 [18 LRRM 1256], supplemented 71 NLRB 354 [18 LRRM 1500] enfd. (2d Cir. 1947) 163 F.2d 65 [20 LRRM 2399] (maintenance of membership); and despite the fact that the new contract has a retroactive effective date eliminating the hiatus between contracts (Colonie Fibre Co. Inc., supra).

Unions and employers have not been permitted to collect dues for the period between the effective date of a contract and the later effective date of a severed organizational security provision, nor for a period prior to the date of hire by the contracting employer (Cottman Builders Supply Co. Inc. (1952) 101 NLRB 327 [31 LRRM 1077]) (union shop); International Union of Operating Engineers, Local 139 (1968) 172 NLRB 173 [68 LRRM 1301] (maintenance of membership); nor prior to entry into the bargaining unit (Teamsters Local Union No. 174 (1964) 149 NLRB 1570 [57 LRRM 1524]) (maintenance of membership).

In those cases like the instant case, concerning a first contract between the parties, the NLRB has prohibited the collection of dues retroactively for the period between the date of execution of the contract and its retroactive effective date

(Anderson Express Ltd. (1960) 126 NLRB 798 [45 LRRM 1388]) (union shop), despite the fact that salary increases were retroactive to an even earlier date (Teamsters Local Union No. 25 (1975) 220 NLRB 76 [90 LRRM 1193] (union shop)).

The reasoning behind these decisions is set forth most fully in a leading early case, Colonie Fibre Co., Inc. (1946) supra, 71 NLRB 354, 355-356:

[T]he proviso to Section 8 (3) of the Act...in sanctioning contracts which require membership in a union as a condition of employment, does not sanction contracts which require past membership as such a condition. A construction permitting such a retroactive requirement would be inconsistent both with the terms of the Act and with the principle of free self- organization which the Act is designed to protect.

The Act grants employees the right to self-organization and the right to membership or non-membership in labor organizations. ...The proviso permits contracts which require union membership during their terms of all employees including those who have not joined the contracting union prior to execution of the contract. But to construe the proviso as also permitting contracts which require membership in the past would...penalize employees for not having belonged to the victorious union at a time when they were within their rights in not belonging....

Approval of a contract which made it possible for the contracting union to require payment of past dues as a condition of future employment would have a seriously detrimental effect upon freedom of organization... Legalization of this practice would provide a device for effectively constraining those who have not remained members of the dominant union at a time when they are under no obligation to do so. In all cases where it appeared likely, or even possible, that a maintenance-of-membership or closed-shop contract might follow the selection of a representative, the employees would be impelled to speculate as to which organization would ultimately win the support of the majority in order to avoid the possibility of being faced with the requirement

of paying a large sum in back dues. Hence in actual practice the employee's right to support and select the bargaining representative he wanted would largely be reduced to the right to guess which of two or more competing unions would ultimately be chosen by the majority. Thus, approval of the contract before us would substantially impair freedom of choice at a time when the statute requires such freedom. To permit this impairment would make it difficult for advocates of a change in representation to present their case to their fellow employees.

This reasoning, articulated in an abbreviated form and emphasizing the lack of contractual obligation during the period for which the dues are sought, is followed consistently throughout the line of cases cited above. For example, in Namms, Inc. (1953) supra, 102 NLRB 466, the NLRB stated at page 469:

It is settled law that a union-shop contract may not be retroactively applied to effect the discharge of an employee for failing to maintain membership in good standing by paying dues that accrued during a time that he was under no contractual obligation to do so as a condition of employment. Such back dues are not periodic dues within the meaning of Section 8(a)(3) and Section 8(b)(2) of the Act.

The Association argues that the freedom of organization which the NLRB sought to protect in Colonie Fibre is subject to infringement only when a question of representation exists, and that the holding of that case should be restricted to such situations. The Association contends that in the line of cases cited above, the Colonie Fibre rule has been blindly applied in factual situations where, as in the present case, this underlying rationale does not exist, and therefore these cases are wrongfully decided and are not persuasive authority.

The hearing officer cannot accept this argument. The wide variety of factual situations in which these cases have arisen demonstrates that the NLRB considers freedom of organization subject to infringement by the retroactive application of an organizational security provision not only when a question of representation exists, but in many other situations as well. It would be presumptuous to assume that this long line of cases prohibiting retroactive application of organizational security provisions is the result of a mistake.

Although the hearing officer is aware of no case applying the Colonie Fibre reasoning to an agency shop provision,<sup>4</sup> since section 8(a)(3) governs all forms of organizational security sanctioned by the LMRA (NLRB v. General Motors (1963) 373 US 734 [53 LRRM 2313]), the same rule would clearly apply to agency shop provisions under that Act.

Therefore, the hearing officer finds that NLRB precedent clearly prohibits the retroactive application of any form of organizational security provision. Thus, the remaining question to be decided in the instant case is whether NLRB precedent should be followed in interpreting the organizational security provisions of the EERA.

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<sup>4</sup>The only agency shop case cited by the Charging Parties was decided on other grounds. Adams Div., Le Tourneau Westinghouse Co. (1963) 143 NLRB 827 [53 LRRM 1421].

D. NLRB precedent provides reliable authority in interpreting the organizational security provisions of the EERA.

The California Supreme Court in Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608,616-617 [116 Cal.Rptr. 507], stated that where the LMRA does not contain specific wording comparable to the state act, if the rationale that generated the language "lies embedded in the federal precedents under the NLRA" and "the federal decisions effectively reflect the same interests as those that prompted the inclusion of the [language in the EERA], [then] federal precedents provide reliable if analogous authority on the issue."

Despite differences in language between the organizational security provisions of the EERA and section 8(a)(3) of the LMRA, the hearing officer finds for the reasons discussed below, that under Vallejo the federal precedents provide authority on this issue.

The Association argues that NLRB precedent is not persuasive in the instant case because, in their view, both the language and policies underlying section 8(a)(3) are distinguishable from those of sections 3546(a) and 3540.1(i).

The Association points to the inclusion in section 8(a)(3) and the absence in section 3540.1(i) of a 30-day grace period before employment may be conditioned on compliance with an organizational security provision.<sup>5</sup> The Association argues that the NLRB policy

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<sup>5</sup>Section 3540.1(i)(2) requires no grace period for a service fee arrangement, while section 3540.1(i)(1) requires a 30-day escape period following the expiration of an agreement containing a maintenance of membership provision.

of disallowing retroactive application of organizational security provisions is based on the need to give effect to this grace period, and that this policy is not applicable in the absence of a similar grace period under the EERA.

The Association is correct that federal cases prohibiting retroactive application of an organizational security provision on the sole ground of the statutory grace period are distinguishable from the instant case. See, e.g., Kress Dairy Inc. (1952) 98 NLRB 369 [29 LRRM 1348]; Associated Machines Inc. (1955) 114 NLRB 390 [36 LRRM 1582] enf. (6th Cir. 1956) 239 F.2d 858 [39 LRRM 2264]; Adams Div., Le Tourneau Westinghouse Co. (1963) supra, 143 NLRB 827 [53 LRRM 1421]. However, the line of cases discussed in section C above is not similarly distinguishable. The policy grounds on which those decisions were based were first stated in the Colonie Fibre case before the 30-day grace requirement was added to section 8(a)(3) in 1947. Cases following the Colonie Fibre rationale which mention the grace period requirement rely on it merely for additional support. See, e.g., New York Shipbuilding (1950) supra, 89 NLRB 1446, at 1447.

Section 3540.1(i) also differs from section 8(a)(3) in that section 8(a)(3) sanctions compulsory union membership (union shop) while section 3540.1(i) provides only for a service fee (agency shop) or maintenance of membership arrangement.

But under the LMRA, a second proviso to section 8(a)(3) specifies that the only membership obligation upon which employment

can be conditioned is the payment of uniformly required membership dues and initiation fees.<sup>6</sup> The Supreme Court has held that for these purposes, membership is limited to its "financial core" and the payment of agency fees by nonmembers is "the practical equivalent of membership." NLRB v. General Motors (1963) supra, 373 US 734 [53 LRRM 2313].

Therefore, the lack of a membership requirement in section 3540.1(i) is not a relevant distinction.

The Association argues that the retroactive application of an agency fee provision furthers the objectives of the EERA by ensuring that costs incurred during collective negotiations are shared equally by all members of the negotiations unit, thereby preventing "free riders." This argument does not support respondent's position since, as discussed below, section 8(a)(3) itself was intended to prevent "free riders," yet, as we have seen, the retroactive application of organizational security provisions has not been found permissible.

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<sup>6</sup>The proviso states in full as follows:

Provided further, that no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

In Oil Workers v. Mobil Oil Corp. (1976) 426 US 407 [92 LRRM 2737, at 2240], the court discussed the legislative history of section 8(a)(3) as follows:

. . . Congress' decision to allow union security agreements at all reflects its concern that...the parties to a collective bargaining agreement be allowed to provide that there be no employees who are getting the benefits of union representation without paying for them.... The Senate Committee Report ... observed that section 8(a)(3) gives 'employers and unions who feel that [union security] agreements promoted stability by eliminating 'free riders' the right to continue such arrangements.' S. Rep. No. 105, 80th Cong., 1st Sess., 7, 1 Leg. Hist. 413.

The Supreme Court has found that a state agency fee provision similar to that of the EERA served the same purposes as section 8(a)(3) of the LMRA. After noting the legislative history of section 8(a)(3), the court stated in Abood v. Detroit Board of Education (1977) 431 US 209 [95 LRRM 2411, at 2416-17]:

The governmental interests advanced by the agency shop provision in the Michigan statute are much the same as those promoted by similar provisions in federal labor law... The desirability of labor peace is no less important in the public sector, nor is the risk of 'free riders' any smaller.

Finally, the Association argues that prohibition of retroactive service fees will be destructive of the negotiations process because the exclusive representative will be financially weakened during negotiations and this will encourage the employer to prolong negotiations while at the same time the exclusive

representative will be pressured either to seek a quick agreement which includes an agency shop fee but which otherwise may be unsatisfactory, or to engage in militant concerted activities. The Association argues that in the private sector this employer advantage is offset by the right to strike while public school employees have no such right.<sup>7</sup>

The simple answer to this argument is that the right of public employees to strike is a question for the Legislature. There is no indication in the EERA that the Legislature intended to compensate for this lack of the right to strike by permitting an organizational security provision to be applied retroactively.

Since the Association has failed to show that either the language or policies underlying section 8(a)(3) are distinguishable from those of sections 3546(a) and 3540.1(i) of the EERA, it is found that the rationale that generated the EERA's organizational security provisions "lies embedded in the federal precedents under the NLRA" and "the federal decisions effectively reflect the same interests as those that prompted the inclusion of the (language in the EERA)" so that "federal precedents provide reliable if analogous authority on the issue." Fire Fighters Union v. City of Vallejo (1974) supra, 12 Cal.3d 608, at 616-617. As federal precedent clearly prohibits the retroactive application of

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<sup>7</sup> See e.g., Pasadena Unified School Dist. v. Pasadena Federation of Teachers (1977) 72 Cal.App.3d 100 [140 Cal. Rptr.41, 96 LRRM 23631]; Trustees of Cal. State Colleges v. Local 1352, S.F. State etc. Teachers (1970) 13 Cal.App.3d 863 [92 Cal. Rptr. 134, 76 LRRM 22651]; City of San Diego v. American Federation of State etc. Employees (1970) 8 Cal.App.3d 308 [87 Cal. Rptr. 258, 74 LRRM 2407].

organizational security provisions, the same rule should apply in interpreting the organizational security provisions of the EERA.<sup>8</sup>

By requiring the Charging Parties to pay retroactive service fees for the period prior to the date of execution of the service fee provision, at a time when the Charging Parties were under no obligation to pay such fees, the District and the Association interfered with, restrained and coerced these employees in the exercise of their right guaranteed by section 3543 to refuse to join or participate in the activities of employee organizations, and thereby violated sections 3543.5(a) and 3543.6(b) of the EERA respectively. In addition, by seeking District enforcement of, and by negotiating the retroactive agency shop provision, the Association caused the District to violate section 3543.5(a), thus the Association also violated section 3543.6(a).

#### REMEDY

Section 3541.5(c) authorizes the PERB to issue a decision and order in an unfair practice case directing an offending party to

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<sup>8</sup>Though California case law under the Meyers-Milias-Brown Act (Gov. Code, sec. 3500 et seq.) and the Winton Act (formerly Ed. Code, sec. 13080 et seq., repealed June 30, 1976) holds that a public employer and an employee organization may agree on salary and other provisions having retroactive effective dates (San Joaquin County Employees' Association Inc. v. County of San Joaquin (1974) 39 Cal.App.3d 83 [113 Cal.Rptr. 912]; Goleta Educators Association v. Dall'Armi (1977) 68 Cal.App.3d 830 [137 Cal.Rptr 324]) these cases are not dispositive of the issue presented here as neither the Meyers-Milias-Brown Act nor the Winton Act permits the negotiation of an organizational security provision. (City of Hayward v. United Public Employees (1976) 54 Cal.App.3d 761 [126 Cal.Rptr. 710, 91 LRRM 2898].)

cease and desist from the unfair practice and to take such affirmative action as will effectuate the policies of the EERA.

In cases where retroactive dues and fees have been collected under the LMRA, the NLRB has required reimbursement to employees of such dues. See, e.g. Intl. Union of Dist. 50, UMW (1968) 173 NLRB 87 [27 LRRM 1188], enf. (7th Cir. 1952) 194 F.2d 298 [29 LRRM 2433]. Such a remedy obviously is appropriate in this case.

With respect to the matter of interest, under section 10(c) of the LMRA, upon which section 3541.5(c) is patterned, the NLRB customarily awards interest on monetary awards. See, e.g., Isis Plumbing and Heating Co. (1962) 138 NLRB 716 [51 LRRM 1122]; Reserve Supply Corp. v. NLRB (2d Cir. 1963) 317 F.2d 785 [53 LRRM 2374].

Under California law, pursuant to Civil Code section 3287(a),<sup>9</sup> school districts and other public employers have been ordered to pay interest on back pay awarded to employees. Mass v. Board of Education (1964) 61 Cal.2d 612 [39 Cal. Rptr. 739];

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<sup>9</sup>Civil Code section 3287(a) provides:

Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor from paying the debt. This section is applicable to recovery of damages and interest from any such debtor, including the state or any county, city, city and county, municipal corporation, public district, public agency, or any political subdivision of the state.

Burgess v. Board of Education (1974) 41 Cal.App. 3d 571 [116 Cal.Rptr. 183]; Sanders v. City of Los Angeles (1970) 3 Cal.3d 252 [90 Cal.Rptr. 169]; see also Tripp v. Swoap (1976) 17 Cal.3d 671, 677-85 [131 Cal.Rptr. 789].

Thus, although section 3541.5(c) does not expressly authorize interest, based on the above NLRB and state precedent, it is appropriate to add interest at the legal rate to the reimbursements.<sup>10</sup>

Lastly, the Association and the District will be ordered to post copies of this order. A posting requirement effectuates the purposes of the EERA in that it informs employees of the disposition of the charge and announces the respondents' readiness to comply with the ordered remedy.<sup>11</sup>

#### PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to section 3541.5(c) of the EERA, it is hereby ordered that the Los Altos Teachers Association and its representatives and the Los Altos School

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<sup>10</sup>California Constitution, article XV, section 1 prescribes a rate of interest of seven percent per annum. Although the National Labor Relations Board imposes six percent interest (the current adjusted prime rate) on back pay awards (Florida Steel Corp. (1977) 231 NLRB #117) [96 LRRM 1070], the California legal rate is the appropriate one to be applied.

<sup>11</sup>

Posting has been held to effectuate the purposes of the LMRA. Pennsylvania Greyhound Lines, Inc. (1935) 1 NLRB 1 [1 LRRM 303], enf. (1938) 303 U.S. 261 [2 LRRM 600]; NLRB v. Empress Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

District, its governing board, superintendent and other representatives shall:

A. CEASE AND DESIST FROM:

Taking any action to enforce the service fee provision in their negotiations agreement for the period July 1, 1976, to May 16, 1977.

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

1. Refund to each of the Charging Parties John A. Broadwood, E. C. (Beverly) Chamberlain and Barbara J. Nutt the amount of \$64.93, representing the prorated portion of service fees for the period July 1, 1976 to May 16, 1977, plus interest at the rate of seven percent per annum.

2. Prepare and post copies of this order for twenty (20) working days at the Association's and the District's headquarters offices and at conspicuous locations in each school where notices to certificated employees are customarily posted.

3. At the end of the posting period, notify the San Francisco Regional Director of the actions taken to comply with this Order.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on September 26, 1978 unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this decision. Such statement of exceptions and supporting brief must be actually

received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on September 26, 1978, in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.

Dated: September 6, 1978

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GERALD A. BECKER  
Hearing Officer