

salaries, fringe benefits, and extra service pay for certificated employees on June 29 and August 28, 1978.

After considering the entire record in this matter the Board finds the hearing officer's findings of fact to be free from prejudicial error and, on that basis, adopts those findings as the findings of the Board itself. The Board affirms the hearing officer's conclusions of law in accordance with the following discussion.

DISCUSSION

The hearing officer found that the June 29 resolution of the District's Board of Trustees was an unlawful unilateral change of matters within the scope of representation² in

.....

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

²The parties do not dispute the fact that the subject matter of the alleged unilateral change falls within the scope of representation as defined by section 3543.2. That section 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 as defined by section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5,

violation of subsection 3543.5(c).³

The District advanced a number of defenses to its conduct, which the hearing officer rejected as failing to excuse its unilateral actions on June 29, 1978. In its exceptions, the District advances these same defenses. While we affirm the hearing officer's rejection of the District's defenses, we modify to some extent his rationale for doing so.

3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

³In addition, the hearing officer found that the District's August 28 resolution constituted a separate violation of subsection 3543.5(c). In reaching this result, he found, as a matter of law, that the duty to bargain extends through completion of the statutory impasse procedure. We need not reach this question. Since the District's conduct on June 29, 1978 constituted an unlawful unilateral change, any subsequent action by the District based upon that prior unlawful conduct would necessarily be impermissible.

A. Business Necessity Defense

The District's primary defense is that it acted on the good faith belief that it must reduce the salaries of certificated employees by July 1, or any reduction it made after that date would be unlawful. Rible v. Hughes (1944) 24 Cal.2d 437, 444 [150 P.2d 455]. Such a reduction was necessary, it argues, in light of the substantial loss of revenue which, at that time, it was predicted would result from the passage of Proposition 13 on June 6, 1978. The District relies on language in NLRB v. Katz (1962) 396 U.S. 736 [50 LRRM 2177, 2182],⁴ in which the United States Supreme Court stated:

We do not foreclose the possibility that there might be circumstances which the [NLRB] could or should accept as excusing or justifying unilateral action[.]

The District argues that, had it not acted by July 1 and had it later been forced to forego the salary reduction because of the effect of Rible v. Hughes, supra, its contingency reserve fund would have fallen to a dangerously low level.

The hearing officer, relying on the Board's decisions in San Francisco Community College District (10/10/79) PERB Decision No. 105 and San Mateo County Community College

⁴It is appropriate for the Board to take guidance from federal labor law precedent when applicable to public sector labor relations issues. Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; Los Angeles County Civil Service Commission v. Superior Court (1978) 23 Cal.3d 65 [151 Cal.Rptr. 547].

District (6/8/79) PERB Decision No. 94, held that the District's claims of inability to pay did not relieve it of its duty to bargain in good faith.

In reaching this conclusion, the hearing officer assumed, without deciding, that the District was constrained by applicable case law to reduce salaries of certificated employees by July 1. He then made a finding that the District was not legally required to maintain any reserve fund at all, thus rejecting the District's underlying rationale for imposing the salary reduction.

We feel that the hearing officer reached the right conclusion concerning the District's business justification defense, but did so for the wrong reason. It is not within the purview of this Board to determine what is the appropriate level of reserve funds for a public school employer to maintain, unless the employer's overall conduct with regard to its reserve funds evidences an unwillingness to bargain in good faith as the Act proscribes. San Mateo, supra.

Contrary to the hearing officer's determination, we find that the District was under no legal obligation to reduce certificated salaries by July 1. It is therefore unnecessary to consider the question of whether such a forfeiture would have reduced the contingency funds of the District to a dangerously low level had it occurred.

In San Francisco Community College District, supra, the Board rejected a business necessity argument nearly identical

to that advanced by the District in this case. In San Francisco, the employer argued that it was required to reduce teacher salaries by July 1 or it would be bound by the salary rate paid on that date throughout the 1977-78 academic year. Rible v. Hughes, supra; Abraham v. Sims (1935) 2 Cal.2d 698, 711 [34 P.2d 790, 42 P.2d 1029]; A.B.C. Federation of Teachers v. A.B.C. Unified Sch. Dist. (1977) 75 Cal.App.3d 332, 337-339 [142 Cal.Rptr. 111].⁵

The Board found that those cases concerned individual employment contracts and were no longer applicable in light of the passage of the Educational Employment Relations Act. As the Board noted, ". . . [O]nce an exclusive representative and an employer negotiate an agreement, that agreement supersedes individual employment contracts between the employer and members of the negotiating unit." San Francisco, supra, at p. 15, citing J. I. Case Co. v. NLRB (1944) 321 U.S. 332, 338 [14 LRRM 501].

The District concedes that the Board's decision in San Francisco, supra, disposes of its business necessity defense but argues that, since it did not have benefit of that decision in June of 1978, it should not be bound by that

⁵The employer in San Francisco argued that in addition to the constraints imposed by the above-cited cases, it was required by certain provisions of the Education Code to adopt its budget by July 1. The Board rejected that claim. Since the employer in this case has raised no similar arguments, we need not consider them. See San Francisco, supra at p. 13-15.

holding. Viewing the record in its totality we can find no reason to conclude that the employer in this case should be any less responsible for its conduct than the employer who was found to have acted unlawfully in San Francisco.⁶

B. Waiver Defense

The District argues that by delaying the beginning of negotiations until after July 1, 1978, the Anaheim Secondary Teachers Association, CTA/NEA, (Association or ASTA) waived its right to bargain over the District's proposed across-the-board reduction in salary and fringe benefits. The hearing officer rejected the District's waiver argument, finding that the parties had, on June 27, 1978, mutually agreed to delay negotiations until August 2, and that such an agreement was inconsistent with a waiver of bargaining rights. He conceded that the Association was "aware" of the July 1 deadline by which the District thought itself legally obligated to reduce salaries, but found that there was insufficient evidence to establish that frustration of the District's supposed legal obligations was the Association's motivating reason for seeking

⁶In San Francisco, supra, at pp. 10-16, the Board responded to the employer's argument that it had to reduce salaries by July 1, 1978 by noting: (1) That EERA section 3543.7 and Education Code section 87801 clearly contemplate that negotiations and the fixing of salaries may occur after July 1; and (2) that, in any case, the Proposition 13 bailout measure (SB 2212) extended local budget deadlines until September 30, 1978. Thus, the Board concluded, the employer should reasonably have known that it was not legally obligated to fix salaries and benefits by July 1.

the delay. He noted that the Association had other reasons for wanting to delay negotiations, including a desire to comply with proper public notice procedures and to have sufficient time to develop its proposals.

We can find no basis upon which to conclude that the Association waived its right to bargain over the District's contemplated salary reduction. In order to prove that the Association waived its right to negotiate over the changes adopted by the District, the District must show either clear and unmistakable contract language or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. San Mateo, supra; Amador Valley Joint Union High School District (10/2/82) PERB Decision No. 74; Timken Roller Bearing Co. v. NLRB (6th Cir. 1963) 325 F.2d 746, [54 LRRM 2785]; NLRB v. Cone Mills (4th Cir. 1967) 373 F.2d 595, [64 LRRM 2536]. As the NLRB stated in Caravelle Boat (1977) 227 NLRB 162 [95 LRRM 1003, 1006], "[t]he Board and courts have repeatedly held that a waiver of bargaining rights by a union will not be lightly inferred and must be clearly and unequivocally conveyed."

In this case, the parties mutually agreed on June 27, 1978 that they would commence negotiations in early August. This agreement was reached two days prior to the time that the District took action at its June 29 board meeting to impose the across-the-board salary reduction. It is difficult to see how

a bilateral agreement to delay negotiations can be construed as demonstrable behavior waiving the right to bargain.

The District's argument presupposes that it was, in fact, legally required to reduce salaries by July 1 or else permanently forego such a reduction. Since we have found that the District had no legal obligation to act by July 1, it would be inconsistent to bind the Association to that deadline. Moreover, we note that the parties had drafted Appendix D of the collective agreement specifically in contemplation of the passage of Proposition 13. That provision gave the District the right to withhold an agreed-upon salary increase and reopen negotiations on salaries and fringe benefits⁷ in the event that the passage of Proposition 13 caused a financial crisis in the District. Appendix D placed no July 1 deadline on the completion of the reopened negotiations. Nevertheless, the testimony of Assistant Superintendent Robert Siedel indicates that the District had been long aware of the July 1 deadline supposedly imposed upon the District by Rible v. Hughes, supra and its progeny. As the hearing officer indicates, if

⁷The hearing officer erroneously held, at pp. 19-20 of the proposed decision, that Appendix D did not grant the District the right to reopen negotiation on salaries in the event that Proposition 13 passed. This error is not prejudicial to the District, insofar as a finding that the District did have the right to reopen negotiations does not excuse its unlawful conduct on June 29, 1978.

anything, equitable considerations suggest that the District should have been bound by its contractual obligation to negotiate in good faith irrespective of its sense of urgency.

C. June 29 Resolution Was a Unilateral Change

The District argues that, since it did not immediately implement its June 29 resolution, its actions on that date amounted to nothing more than an "initial proposal." It points to its willingness to negotiate thereafter as evidence supportive of this characterization of its June 29 conduct. The hearing officer found that the June 29 resolution was official action of the District, and thus an unlawful unilateral change.

We can find no merit in the District's contentions. The fact that the June 29 resolution had a deferred effective date does not alter its official character. As the District itself pointed out in an August 24, 1978 letter to the Association, if the parties did not reach an agreement by the end of September, the salary and benefit reductions imposed by the June 29 resolution would become automatically effective. This conclusion is further reinforced by the fact that the budget which the District adopted on August 14, 1978 was based on the ten percent reduction contemplated by the June 29 resolution.

Moreover, as the District so forcefully argues in its post-hearing brief, the primary reason that it issued its June 29 resolution was that it felt itself legally obligated to

take official action reducing salaries and benefits prior to July 1, 1978 or possibly forego such reductions entirely. It is inconsistent for the District now to argue that the June 29 resolution was intended to be an unofficial initial proposal.

We can find no basis upon which to conclude that the District's actions on June 29 were not official and legally effective. Were we to characterize an employer's official action unilaterally reducing salaries as an "initial bargaining proposal" simply because it had a deferred effective date we would be legitimizing a tactic patently offensive to the statutory requirement of good faith bargaining.

On the basis of the foregoing analysis, the Board affirms the hearing officer's finding of a violation of subsection 3543.5(c) arising out of the conduct of the Anaheim Union High School District on June 29, 1978.

REMEDY

The Board affirms the appropriateness of the hearing officer's remedy of a return to the status quo ante.⁸ To effectuate the policies and purposes of the Act the employees

⁸The Board's remedial authority is found in subsection 3541.5(c), which provides:

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.

affected by the District's unlawful conduct shall be notified of its willingness to comply with the Board's Order by requiring the District to post the attached "Notice to Employees."

The Board denies the District's request, made pursuant to PERB rule 32315,⁹ that it hear oral argument of this case. Since the legal issues have been adequately briefed by the parties and the factual record is sufficient to support our decision, there is no need to hear oral argument in this matter.

ORDER

Upon the foregoing facts, conclusions of law, and entire record in this case, and pursuant to Government Code subsection 3541.5(c), it is hereby ORDERED that the Anaheim Union High School District and its representatives shall:

A. CEASE AND DESIST FROM:

Failing or refusing to meet and negotiate in good faith by taking unilateral action affecting wages, hours or

⁹PERB rules and regulations are codified at title 8, California Administrative Code section 31000 et seq. PERB rule 32315 states:

A party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file, with the statement of exceptions or the response to the statement of exceptions, a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument.

terms and conditions of employment as defined in section 3543.2 of the EERA.

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

1. Reinstate step increments for those employees represented by ASTA, with payment of interest at the rate of 7 percent per annum, for the amount due from the date of suspension of said increments to the date of reinstatement.

2. Post at all school sites, and all other work locations where notices to employees customarily are placed, within 10 workdays following date of service of this decision, copies of the Notice attached as an appendix hereto. Such posting shall be maintained for a period of at least 30 consecutive work days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by any other material or reduced in size.

3. Mail or distribute to employees represented by ASTA a copy of the Notice attached as appendix hereto by giving individual notice accompanying one round of District pay warrants.

4. At the end of the posting period, notify the Los Angeles Regional Director in writing of the actions taken to comply with this Order.

This Order shall become effective immediately upon service of a true copy thereof on the Anaheim Union High School District.

By: John W. Jaeger, Member

Barbara D. Moore, Member

Irene Tovar, Member

APPENDIX

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

After a hearing in case no. LA-CA-347 in which all parties participated, it has been found that the Anaheim Union High School District violated the Educational Employment Relations Act (Government Code subsection 3541.5(c)) by taking unilateral action regarding proposed changes of wages and step increments of employees represented by the Anaheim Secondary Teachers Association, CTA/NEA. 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 pay warrants. We will abide by the following:

A. CEASE AND DESIST FROM taking unilateral action regarding proposed changes on wages, hours or terms and conditions of employment as defined in section 3543.2 of the EERA without negotiating with the Anaheim Secondary Teachers Association, CTA/NEA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA: Reinstate step increments for those employees represented by ASTA, with payment of interest at the rate of seven percent per annum, for the amount due from the date of suspension of said increments to the date of reinstatement.

Dated:

ANAHEIM UNION HIGH SCHOOL DISTRICT

By:

Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORK DAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



ANAHEIM SECONDARY TEACHERS)
ASSOCIATION,)
)
Charging Party,)
)
v.)
ANAHEIM UNION HIGH SCHOOL DISTRICT,)
)
Respondent.)
_____)

Unfair Practice Case
No. LA-CE-347-78/79

PROPOSED DECISION
(10/29/79)

Appearances: Kyle D. Brown, Attorney (Hill, Farrer & Burrill) for Anaheim Union High School District; A. Eugene Huguenin, Jr., Attorney for Anaheim Secondary Teachers Association.

Decision by Allen R. Link, Hearing Officer.

PROCEDURAL HISTORY

On July 19, 1978, the Anaheim Secondary Teachers Association (hereafter ASTA) filed an unfair practice charge with the Public Employment Relations Board (hereafter PERB) against the Anaheim Union High School District (hereafter District). On September 15, 1978, ASTA filed an amended unfair practice charge.

The charge, as amended, alleges that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (hereafter Act)¹ in unilaterally adopting resolutions on June 29 and August 28, 1978 which adversely

¹Government Code section 3540 et seq. Unless otherwise noted, all references are to the Government Code.

altered the salary schedule and reduced fringe benefits and extra-service pay.

The District filed its answer to the unfair practice charge on August 14, 1978 and an informal conference was held on August 25, 1978. The District filed its answer to the amended unfair practice charge on September 22, 1978.

A formal hearing was held by David Schlossberg on November 21 and 22, 1978. At the hearing, ASTA further amended by deleting the alleged violations of section 3543.5(a) and (b), alleging only a violation of section 3543.5(c).²

Opening and closing simultaneous briefs were filed by the representatives, and the matter was submitted on April 9, 1979.

FINDINGS OF FACT

The District is located in Orange County and is comprised of 16 junior high schools, 9 high schools and 2 special schools. Average daily attendance is approximately 33,742. In December 1976, ASTA was recognized as the exclusive representative of a negotiating unit consisting of approximately 1300 certificated employees.

²Sec. 3543.5(c) provides that it shall be unlawful for a public school employer to:

- (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

1978-79 Contract Provisions

On February 8, 1978, the District and ASTA executed a written agreement, which expires on August 31, 1979. The contract provides for a traditional school teacher salary schedule, that is, one with yearly vertical step increases for experience and columnar movements for educational attainment. Appendix D of that contract provides as follows:

SALARY

The Board agrees that prior to September 1, 1978, it will provide a 5% across-the-board salary increase based on the 1977/78 salary schedule, retroactive to July 1, 1978. Said salary increase shall be subject to the Board's assessment of its overall financial condition and educational priorities. The Board shall have final decision on all educational priorities including control of budgetary matters.

If in the sole discretion of the Board it concludes after such assessment of its financial condition and educational priorities that such salary increase should not be paid, the Board has full power to withhold said salary increase.

In the event the above salary increase becomes effective, the parties agree to reopen negotiations on health and welfare benefits and extra-service pay. No other items will be the subject of negotiations until April 16, 1979.

In the event the above salary increase is not granted by the Board of Trustees, the parties agree to reopen negotiations on salary, health and welfare benefits and extra-service pay. No other items will be the subject of negotiations until April 16, 1979.

In the alternative, if the Association believes that more than 5% is available, and provided that written notice is given to the Board prior to August 15, 1978; [sic] the Association may reopen salary negotiations for the 1978-79 school year.

According to the District's chief negotiator, Robert Seidel, Appendix D was proposed by the District because the District desired to be able to reopen negotiations "should such an emergency condition such as that [i.e., Proposition 13] pass."

Pursuant to this provision, ASTA submitted a proposal on May 12, 1978 to reopen negotiations on health and welfare benefits and extra-service pay.

On June 6, 1978, the California electorate voted in favor of Proposition 13. This initiative added article XIII A to the California Constitution and had the effect of sharply reducing the amount of revenue local entities, including school districts, could raise by means of property taxes.

District's Initial Proposal

At its June 16, 1978 meeting, the board of trustees adopted a resolution announcing that it was unable to pay the 5 percent salary increase provided for in Appendix D. In addition, the board of trustees presented its initial proposal for the reopener on wages, health and welfare benefits and extra-service pay. This proposal called for a 20 percent

across-the-board reduction in salaries,³ and similar reductions in health and welfare benefits and extra-service pay.⁴

Mr. Seidel had a telephone conversation on June 14 with William Harju, ASTA's chief negotiator, wherein he advised Mr. Harju of the District's forthcoming initial proposal. Mr. Seidel requested at that time that the parties begin negotiations on June 23, which was one day after the second board meeting to consider its initial proposal. Mr. Harju did not agree, for three reasons: (1) He was aware of the July 1 deadline by which the District was required to act in order to reduce salaries for the upcoming school year; (2) he was concerned about the possible lack of sufficient public notice; and (3) ASTA needed time to develop its proposals. Mr. Harju advised Mr. Seidel that ASTA would not be prepared to begin negotiations until after the first board of trustees meeting in

³The decrease was 20 percent across-the-board for the fourth and subsequent step increments. The proposed salary schedule retained the \$100 differential between steps 1 and 2, 2 and 3, and 3 and 4, as well as the \$200 raise for the 20th year and the \$400 raise for the 25th year provided for in the existing salary schedule.

⁴The specific changes in health and welfare benefits and extra-service pay are not detailed in this decision. By the time the parties reached impasse, on August 11, substantial agreement had been reached on most of these issues. Moreover, unlike the salary issue, ASTA has not requested a remedy for the allegedly unlawful changes of health and welfare benefits and extra-service pay.

July. On June 27, Mr. Seidel and Mr. Harju scheduled the first three negotiations sessions for August 2, 3 and 4.

The June 29 Resolution

At its June 29 meeting, the board of trustees adopted a resolution which reduced salaries 10 percent across-the-board and altered the salary schedule in a manner which had the effect of freezing step raises based on experience.⁵ This same resolution also provided for 10 percent reductions in health and welfare benefits and extra-service pay.

The reasons cited in the resolution for its adoption were: (1) the substantial reduction in revenue caused by the passage of Proposition 13; (2) article XVIII, section 16 of the California Constitution, which prohibited a school district from incurring indebtedness exceeding its income without the consent of two-thirds of the district's eligible voters; and (3) Rible v. Hughes (1944) 24 Cal.2d 437, 444, which required

⁵Under the revised salary schedule, the amounts in the first two steps were repeated and each step thereafter was renumbered so that an employee's vertical step movement in the same column resulted in the same dollar amount of salary, less 10 percent. For example, an employee who was placed at the 17th step, 1st column on the 1977-78 salary schedule received \$18,370; under the June 29 resolution, that employee would move to the 18th step and receive \$18,370 x 90 percent, or \$16,533. Under the 1977-78 schedule, an employee at the 18th step, 1st column would have received \$18,722.

Like the June 16 initial proposal, the June 29 salary schedule was not a true across-the-board decrease. The \$100 increases were retained between steps up to the 5th step (formerly the 4th step), as were the \$200 and \$400 raises for the 20th and 25th years, respectively.

that if salaries for the 1978-79 school year were to be reduced, the new salary schedule had to be adopted before July 1, 1978.

The resolution stated that the District would engage in bargaining with ASTA with the view of making adjustments upward as monies became available through new legislation for the 1978-79 school year.

Similar resolutions calling for 10 percent across-the-board decreases were also adopted for all the other employees in the District.

Negotiations History

On July 13, ASTA presented its initial proposal on salaries. That proposal was "sunshined" at the board of trustees meeting of July 27.

At the first negotiations session of August 2, the District proposed a 5 percent decrease on the amounts contained in the 1978-79 salary schedule, but without the structural change adopted as part of the June 29 resolution. Thus, under this proposal, an employee would receive a salary increase based upon his or her step movement for the additional experience accumulated.

On August 3, the District proposed a zero percent decrease, but with the structural change depriving employees of step increases. On the average, step increases result in a raise of approximately 2.4 percent.

ASTA maintained its position for the 5 percent increase provided for in Appendix D, and also sought to include a provision for further reopening of negotiations.

No new proposals were made on salaries at the negotiations sessions of August 4, 9 and 11. On August 11, the parties agreed that they had reached impasse. At that time ASTA and the District had agreed on self-insurance of health and welfare instead of continuing with Blue Cross, although there were still some differences in the amounts and types of coverage. The self-insurance program implemented by the District cost \$192,061 more than the previous year's costs with Blue Cross. However, this amount was substantially less than what the renewed Blue Cross plan would have cost, as premiums had increased 35 percent.

As of August 11, the parties had also agreed to a zero percent increase for extra-service pay. There was still disagreement on the District's proposal to eliminate the stipend for certain special education teachers and ASTA's proposal to equalize the extra-service pay for boys' and girls' coaches.

On August 11, Mr. Harju requested PERB to declare that impasse existed, which it did, on August 29.⁶ A mediator was

⁶According to PERB case file LA-R-94A, of which official notice is taken, ASTA wrote a letter on August 14 requesting that its August 11 letter requesting an impasse be held in abeyance until August 28.

appointed, and a mediation session was held on September 11. That effort was unsuccessful, and the matter was certified for factfinding. The factfinding hearing was scheduled for November 28 (six days following the close of the hearing on this unfair practice charge).

The August 28 Resolution

Meanwhile, the board of trustees adopted a resolution on August 28 which implemented the District's last offer of August 11 on salaries, health and welfare benefits and extra-service pay. The resolution stated that the District's action was taken without prejudice to a bilateral agreement or other action which might be arrived at as the result of impasse proceedings or further negotiations with ASTA.

The District felt it was necessary to adopt the August 28 resolution for several reasons: (1) The payroll department needed sufficient notice of the amount of the salaries in order to issue the September warrants on time; (2) if the board of trustees did not act, then the June 29 resolution would have been implemented, which would have meant a 10 percent reduction in salaries instead of zero percent (not including the loss of the step increases in either case); (3) it was necessary to take some action regarding the Blue Cross policy; and (4) if the District paid the step increases, it would reduce its contingency reserves to a mere 1/2 percent.

When the new school year began in September, the District actually implemented the pay freeze. Testimony in the record demonstrates that unit members did not receive the pay increases for which they would have qualified under the District's previous practice.

The District's Financial Condition

The District's total income during 1977-78 was \$60,377,000.

After learning what its financial situation would be under SB 154 in early July, the District prepared its public budget for 1978-79. Total income was estimated to be \$57,740,000. Certificated salaries were shown as \$27,652,000; classified salaries, \$6,546,000; and employee benefits, \$7,018,000. Also included was an appropriations contingency reserve fund of \$5,605,000.

The adopted budget for 1978-79 (adopted on August 14) showed total income of \$58,340,000, including a contingency reserve fund of \$5,458,000.

The public budget and the adopted budget were both based on the 10 percent reductions and freezing of step increases contemplated by the June 29 resolution. After the 10 percent reduction was restored, the contingency reserve fund in the adopted budget was reduced to \$1,400,000. Included in the contingency reserve fund figures is approximately \$370,000 for petty cash and inventory.

The cost of paying step increases for all employees would have been \$750,000, of which \$550,000 was for certificated salaries.

In the spring of 1978, the District received a notice from the county superintendent of schools that the District's reserves were approaching a dangerously low level of 2 percent.

District's Past Practice Regarding Step Increases

Step increases have always been paid by the District. However, in June 1973 and June 1976, the board of trustees initially took action to freeze step increases for the following school year because of concerns about sufficient income. Prior to those school years, the freezes were rescinded. In June 1975, the board of trustees considered a similar recommendation by the superintendent, but rejected the proposal in executive session prior to any public meeting on it.

ISSUE

Whether the District violated section 3543.5(c) by the pay freeze which it implemented in the fall of 1978.

CONCLUSIONS OF LAW

The issue presented by this case is not new. The PERB has faced the precise question as presented here in the case of California School Employees Association, Chapter No. 33 v. San Mateo County Community College District (6/8/79) PERB Decision

No. 94. That case is controlling in the present factual setting.

Section 3543.5 (c) of the EERA provides that

It shall be unlawful for a public employer to:

.....

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

Under section 3543.5(c), it is unlawful for a public school employer to refuse or fail to meet and negotiate in good faith with an exclusive representative about a matter within the scope of representation.⁷ It cannot be disputed that the matter in question here, wages, is a subject directly within the scope of representation. Applying the federal precedent in

⁷In relevant part, Government Code section 3543.2 defines the scope of representation as follows:

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 as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code....

NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177], the PERB has held that it is a violation of section 3543.5(c) to make a unilateral change, prior to any negotiating impasse, about matters within the scope of representation. CSEA v. San Mateo, supra, PERB Decision No. 94; Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51. The specific conclusion in San Mateo was that an employer violated section 3543.5(c) by unilaterally denying expected annual pay increments.

The District contends, however, that step increases in past years have not been automatic and therefore its suspension of step increases marks no unilateral change in past practice. The District bases this argument on its assertion that in recent years the board of trustees has used its independent judgment to determine whether it could afford step increases. The fact is, however, the consistent past pattern has been to pay the step increases. They have never been withheld, and therefore are legitimately considered as part of the status quo with respect to teacher salaries.

The District Was Required To Maintain The Status Quo Pending Completion Of The PERB Impasse Procedures

In the private sector an employer violates his duty to bargain if he unilaterally institutes changes in existing terms and conditions of employment during negotiations. However,

after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of reaching an agreement with the union, the private sector employer does not commit an unfair labor practice by making unilateral changes that are reasonably comprehended within his pre-impasse proposals.⁸

In the private sector, once an impasse occurs, a union often resorts to economic force in the hope that striking and picketing will force concessions from the employer. Counsel for the District argues that the mediation and factfinding processes established by the EERA were enacted by the Legislature to accomplish in the public sector what economic force does in the private sector, that is, to break the impasse. Thus, it is argued, impasse occurs at the same time in the public sector as it does in the private sector, and the public school employer should be permitted to implement unilateral changes to the same extent its private sector counterpart would.

Nevertheless, for the reasons which follow, it is concluded that unilateral changes may not, as a general rule, be implemented until after completion of the impasse procedure established by the EERA.

⁸See Taft Broadcasting Co. (1967) 163 NLRB 475, 478 [64 LRRM 1386, 1388].

The PERB impasse procedures are set out in sections 3548 through 3548.4. Section 3548 provides that either party may declare that an impasse has been reached in negotiations and may request PERB to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable. If PERB determines that an impasse exists, a mediator is appointed. Section 3548.1 provides that if the mediator is unable to effect settlement and if he declares that factfinding is appropriate, then either party may request factfinding. Section 3548.3 provides that if the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties, within a longer period, the factfinding panel shall issue a written, advisory report recommending the terms of settlement. The public school employer is required to make the report public within 10 days after its receipt. Section 3548.4 provides that the mediator may continue mediation efforts on the basis of the factfinding report. (Emphasis added.)

This impasse procedure should be viewed in reality as an extension of the negotiating process rather than a procedure separate and apart from negotiations. This is evident from the fact that settlement during factfinding is contemplated, that factfinding is advisory only, that mediation can be resumed after factfinding and that section 3549 reserves to the public

school employer the authority to make the final decision with regard to all matters within the scope of representation. As an aid to bilateral negotiations, the success of the impasse procedure depends upon the good faith participation of the parties. Since the impasse procedure is an extension of negotiations, the question of either party's good or bad faith during impasse should be evaluated according to similar standards as those by which good or bad faith during negotiations are judged.

Therefore, just as unilateral changes in conditions of employment under negotiation frustrate the objectives of meeting and negotiating, so too do unilateral changes in conditions of employment under mediation or factfinding frustrate the objectives of the impasse procedure. Together, the meet and negotiation process and the impasse procedure constitute the collective negotiations process. It is concluded, therefore, that unilateral changes, absent a valid defense, are prohibited by the EERA until the completion of the impasse procedure. Because the impasse procedure is an extension of negotiations, the unlawful change would constitute a violation of section 3543.5(c), and not merely a violation of section 3543.5(e). The latter section provides that it is unlawful for a public school employer to refuse to participate in good faith in the impasse procedure. While a unilateral change during impasse will probably result in a violation of

section 3543.5(e), it is permissible for charging party to limit the charge to 3543.5(c).

District Defenses and Arguments

In its posthearing briefs, Counsel for the District raises several arguments to justify the District's unilateral adoption of the June 29 and August 28 resolutions. Some of these have been discussed already. The remainder are addressed below.

A. Business necessity

The District contends that business necessity required it to take the actions it did. With respect to the June 29 resolution, it is argued that the dire financial forecasts resulting from the passage of Proposition 13, coupled with the requirement under Rible v. Hughes (1944) 24 Cal.2d 437, 444 and its progeny that any reductions in salaries be taken prior to July 1, required the 10 percent reductions and loss of step increases. Concerning the August 28 resolution, the District maintains that its contingency reserve fund would have been an unacceptable 1/2 percent of budgeted income.

Similar arguments were considered by the PERB in San Mateo and found unconvincing. "(I)nability to pay," the PERB concluded, "is a negotiating position rather than an excuse to avoid the negotiating obligation entirely." An analysis of the facts in the present case provides no justification for a conclusion different from that reached by the PERB in San Mateo.

The District's position finds its authority in dictum from NLRB v. Katz, supra (1962) 369 U.S. 736 [50 LRRM 2177, 2182], where the Supreme Court stated:

[W]e do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action

Assuming, without deciding, that the case law does require the District to take action by July 1 in order to reduce salaries, and recognizing that there was a degree of uncertainty regarding the financial outlook for the upcoming school year, nevertheless the District has failed to establish a bona fide business necessity for adopting the resolutions.

At the outset, a few words about contingency funds is appropriate. Education Code sections 42124 and 42125 provide that a school district may maintain a general reserve and an undistributed reserve, respectively. But, notwithstanding the warnings of the county superintendent of schools, there appears to be no statutory or other authority requiring a school district to maintain a reserve in any amount.⁹

It appears that the District overreacted to the Proposition 13 problem, as illustrated by this analysis of the public budget:

⁹Education Code section 42637 does provide that the county superintendent of schools may conduct a review of a school district's budget and make recommendations to insure that expenditures do not exceed budgeted income.

Certificated salaries	\$27,652,000	
Classified salaries	6,546,000	
Employee benefits	<u>7,018,000</u>	
Total compensation based on 10% salary reduction and no step increases	\$41,216,000	
	divided by 90%	
Total compensation with 0% salary reduction and no step increases	\$45,795,556	
Cost of restoring 10% reduction	\$ 4,579,556	
Cost of restoring step increases	<u>750,000</u>	
Total cost of restoring 10% reduction and step increases		\$5,329,556
Total amount of reserves	\$ 5,605,000	
Less petty cash & inventory	<u>- 370,000</u>	
Net usable reserve		\$5,235,000

Thus, assuming, without deciding, that no other budget cuts were possible, only a nominal reduction in employee benefits was necessary, based on the information obtained about SB 154 in early July. Recognizing that this analysis takes advantage of hindsight, there are also other reasons for concluding that there was no business necessity for the District's drastic reduction in benefits.

At the hearing the District's chief negotiator stated that Appendix D was proposed by the District in contemplation of the passage of Proposition 13. Appendix D permits the District to withhold the bargained-for 5 percent across-the-board increase, but it did not grant the District the right to reopen salaries. If the contemplated passage of Proposition 13 only stirred the District into seeking a withholding

of a future increase at the time the contract was negotiated, it is difficult to accept that the District really believed a few months later that business necessity required the much more drastic action of June 29.

Furthermore, the evidence establishes that the income estimated under the public budget (\$57,740,000) represented only a 4.37 percent decrease from the actual income received for the 1977-78 school year (\$60,377,000). The income listed in the August 14 adopted budget (\$58,340,000) was only 3.37 percent less than that received for that year. This is significant, for in Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296, 310-312, the California Supreme Court ruled that 6 percent reduction in revenue was not a sufficient emergency to justify impairment of contracts. It should similarly be concluded that a 6 percent reduction in revenue is not a sufficient basis to justify abrogation of the statutory duty to meet and negotiate in good faith. In this case, the loss in revenue was substantially less than 6 percent.

With respect to the August 29 resolution, there was a \$1,030,000 usable contingency reserve fund after the 10 percent reduction was restored. There still would have been a \$280,000 fund if the step increases had been paid. Since the District was not required to maintain a reserve fund, there was no business necessity for abrogating its duty to negotiate.

B. Not prejudicial to future negotiations

The District maintains that the resolutions were justified by business necessity and further mitigated by its announced intention to fully participate in the negotiations and impasse procedures. The fact is, there was no business necessity and the District offered to do nothing more than it was already required to do -- negotiate!

C. Abandonment of bargaining position

The District argues that if the parties had in fact negotiated an agreement not to pay step increases after the District began paying them, the District would be unable to recoup the prior payments without severely disrupting employee relations and morale. As a matter of practicality, the District would be abandoning its bargaining position. It is suggested here that the adverse impact upon employee relations and morale would be no greater than it is in the case where, as here, the public school employer unilaterally withdraws a benefit which the employees have every reason to expect and which was negotiated as part of the contract currently in effect.

D. June 29 resolution not implemented

The District argues that the June 29 resolution was not an action at all, since that resolution was never implemented. The fact is, both resolutions were official actions of the

board of trustees. The fact that the District rescinds an unlawful action in favor of a less damaging unlawful action does not alter the character of the first action. The EERA prohibits unfair practices, not just harmful results.

E. Good faith

The District alleges that it acted in good faith in trying to maintain a contingency fund reserve and that PERB should not second-guess that effort. However, the premise underlying the United States Supreme Court's decision in NLRB v. Katz, supra (1962) 369 U.S. 736 [50 LRRM 2177] is that unilateral action is inconsistent with good faith, and such action will be permitted only in the most unusual of circumstances. A good faith belief that business necessity exists is not sufficient. CSEA V. San Mateo, supra, PERB Decision No. 94.

F. Waiver

The District contends that ASTA waived its right to insist that the District exhaust the impasse procedure because ASTA first purposely stalled, and then knowingly agreed to postpone negotiations until August. While it is true that the July 1 deadline was one of the considerations why ASTA did not agree to negotiate immediately, there were other reasons as well. Speculation aside, the evidence is insufficient to establish that that was the motivating reason. As for the delay in negotiations until August, it can hardly be said that a

bilateral agreement to set negotiations sessions for early August absolved the District of its obligation to bargain in good faith (i.e., not implement unilateral changes).

Thus, it is concluded that the District had no valid defenses for its unilateral denial of incremental pay increases in the fall of 1978 and in so doing the District violated section 3543.5(c).

REMEDY

ASTA urges that the District be ordered to implement its established practice of paying step increases for experience. ASTA also requests interest on the salaries withheld from the employees. Finally, ASTA requests that the District be required to post a cease and desist order.

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.

In the present case, the employer has unilaterally disrupted the status quo, causing economic losses to employees in the unit. A remedy requiring the employer to restore the status quo by repaying the lost wages is appropriate to effectuate the policies of the EERA because it restores the

parties to the positions they occupied prior to the unlawful act.¹⁰

With respect to interest on the back pay award, the NLRB customarily awards interest in similar circumstances. See Isis Plumbing & Heating Co. (1962) 138 NLRB 716 [51 LRRM 1122]; Reserve Supply Corp. v. NLRB (2d Cir. 1963) 317 F.2d 785 [53 LRRM 2374]. The PERB relied on this precedent in ordering payment of interest in San Mateo.

Under California law, pursuant to Civil Code section 3287(a),¹¹ school districts and other public employers have been ordered to pay interest on back pay awarded to employees. See Mass v. Board of Eduation (1964) 61 Cal.2d 612 [39 Cal.Rptr. 739]; Sanders v. City of Los Angeles (1970)

¹⁰Such a remedy is in accord with NLRB precedent. See NLRB v. Allied Products Corp. (6th Cir. 1977) 548 F.2d 644 [94 LRRM 2433].

¹¹Civil 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.

3 Cal.3d 252 [90 Cal.Rptr. 169]; see also Tripp v. Swoap (1976) 17 Cal.3d 671, 677-685 [131 Cal.Rptr. 789].

Thus, although section 3541.5(c) does not expressly authorize interest on back pay awards, based on the above NLRB and state precedent, it is appropriate to add interest at the legal rate to the back pay award.¹²

It is also appropriate that the District be ordered to cease and desist from unlawful unilateral actions and to post a notice about this decision.¹³ In addition, individual notice of the order should also accompany one round of District salary payments to all employees. This procedure will insure that employees are directly informed in a relevant context (i.e., the pay envelope) of the reason for the restoration in step increments.

ASTA did not request any remedy with respect to the unilateral changes in health and welfare benefits and extra-service pay, perhaps because substantial agreement had

¹²California Constitution, article XV, section 1 prescribes a rate of interest of 7 percent per annum. Although the National Labor Relations Board imposes 6 percent interest (the current adjusted prime rate) on back pay awards (Florida Steel Corp. (1977) 231 NLRB 651 [96 LRRM 1070]), the California legal rate is the appropriate one to be applied.

¹³See California School Employees Association, Chapter 658 v. Placerville Union School District (9/18/78) PERB Decision No. 69; and Oceanside-Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

maintained for a period of at least 30 consecutive work days. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

3. Mail or distribute to employees represented by ASTA a copy of the notice attached as appendix hereto by giving individual notice accompanying one round of District pay warrants.

4. At the end of the posting period, notify the Los Angeles 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 November 19, 1979 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the 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 November 19, 1979 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

been reached by the time of impasse (see footnote 4, supra). Therefore, no remedy is ordered.

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 Anaheim Union High School District, its governing board, superintendent and other representatives shall:

A. CEASE AND DESIST FROM:

Taking unilateral action regarding proposed changes on wages, hours or terms and conditions of employment as defined in section 3543.2 of the EERA prior to the completion of the impasse procedure set out in sections 3548 through 3548.4 of the EERA.

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

1. Reinstate step increments for those employees represented by ASTA, with payment of interest at 7 percent for the amount due from the date of suspension of said increments to the date of reinstatement.

2. Post at all school sites, and all other work locations where notices to employees customarily are placed, on the date this proposed decision becomes final, copies of the notice attached as an appendix hereto. Such posting shall be

itself. (See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

Dated: October 29, 1979


ALLEN R. LINK
Hearing Officer



APPENDIX

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

After a hearing in case no. LA-CE-347 in which all parties participated, it has been found that the Anaheim Union High School District violated the Educational Employment Relations Act (Government Code section 3541.5(c)) by taking unilateral action regarding proposed changes of wages and step increments of employees represented by the Anaheim Secondary Teachers Association prior to the completion of the impasse procedure established by the Educational Employment Relations Act. 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 pay warrants. We will abide by the following:

A. CEASE AND DESIST FROM taking unilateral action regarding proposed changes on wages, hours or terms and conditions of employment as defined in section 3543.2 of the EERA prior to the completion of the impasse procedure set out in sections 3548 through 3548.4 of the EERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA: Reinstate step increments for those employees represented by ASTA, with payment of interest at seven percent for the amount due from the date of suspension of said increments to the date of reinstatement.

Dated:

ANAHEIM UNION HIGH SCHOOL DISTRICT

By:

Superintendent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORK DAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY MATERIAL.