STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND SCHOOL EMPLOYEES ASSOCIATION Charging Party, v. OAKLAND UNIFIED SCHOOL DISTRICT Respondent.	)	Case No. SF-CE-400 PERB Decision No. 236 August 31, 1982

Appearances: Andrew Thomas Sinclair, Attorney for Oakland School Employees Association; Michael S. Sorgen, Attorney for Oakland Unified School District.

Before Jensen, Member; Gluck, Chairperson; and Morgenstern, Member.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by the Oakland Unified School District (hereafter District), and a response to those exceptions filed by the Oakland School Employees Association (hereafter OSEA). The proposed decision of the hearing officer is incorporated by reference herein. In that proposed decision, the hearing officer found that respondent violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act[1] (hereafter EERA or the

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all references shall be to the Government Code.

Subsections 3543.5(a), (b), and (c) provide as follows:

Act) by its unilateral deferral of 2 percent of an 8 percent employee tax sheltered annuity (hereafter TSA) plan with payment of the deferred amount to be made from (anticipated) reserves in the subsequent fiscal year. The hearing officer ordered the District to provide payment to the TSA fund of that amount withheld from the time of the deferral until present and ordered the District to make monthly payments at 8 percent until and unless a different timing schedule or amount is agreed upon between the parties.

The Board has carefully reviewed the record in light of respondent's exceptions and charging party's responses thereto, and affirms the hearing officer's findings of fact and conclusions of law as summarized and modified infra.

FACTS

The District employs approximately 7,000 employees. Out of approximately 3,000 classified employees, OSEA is the exclusive

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> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

representative for approximately 2,200 employees for a "white collar" unit and a paraprofessional unit. The white collar unit has a collective negotiating agreement covering the period of April 4, 1979 through June 30, 1981.

On July 24, 1979, the Governor signed the AB 8 School Finance Bill, at which time the District became aware that it was facing a budget deficit of approximately $7 to $8 million for the upcoming 1979-80 fiscal year. The District was required to submit a balanced budget to the county superintendent by September 7, 1979 or face the consequences of the county not honoring its pay warrants. The District proceeded to have a series of three budget workshops which included participation of the District budget advisory committee (hereafter DBAC).[2]

The first budget work session took place on August 2, 1979 and included 19 "recommended budget cuts" as well as 10 additional "other possible cuts." Item 19 called for the deferral in payment of approximately 3 percent of TSA for an estimated savings of $2.4 million. The TSA program had been established by the District in 1971. Article VIIB of the District's contract with OSEA sets forth the District's

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[2]DBAC is a group of representatives of employee groups, student groups, administrators, civic organizations, etc. which functions to bring community input to the board of education and also advises the board on the budget.

agreement to contribute to the TSA at the rate of an amount equal to 8 percent of the employee's salary.[3] The District's proposal was to delay payment of a percentage of the 8 percent until July 1980, at which time the District believed that it would have sufficient revenues to restore the full amount of the annuity.

The next budget work session took place on August 9, 1979. The board became concerned about the various employee organizations and rescheduled the next session from August 16 to August 23 to allow the District the opportunity to confer with them. District Business Manager W. B. Lovell testified that the board suggested that the District should advise the employee groups with regard to the 1979-80 budget and particularly with regard to the deferral of the TSA. Lovell stressed that these meetings were not for the purpose of

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[3]Article VIIB reads as follows:

> The District agrees to continue its contributions to the Annuity Program for employees covered by this Agreement at the rate of an amount equal to 8% of the employee's salary.
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> 1. The employee's money in this plan shall become available to the employee upon termination of his/her employment or upon permanent disability.
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> 2. A 3-year period of employment is required for employees hired after March 31, 1978 as a vesting period for eligibility to receive funds from this program. [OSEA Exh. 1.]

conducting negotiations with the employee organizations:

> . . . They were merely informative in nature to tell them and to get from them any ideas that they may have as to how we might solve our budget problems. . . . So in our discussions with these three bargaining units, we were asking them for any help or any assistance and they did come forth with some ideas that we did utilize in reducing the burden that we're going to have to defer because at one time we were talking about deferring four percent, another time three percent of the TSA and it was merely informative in nature to tell them what it appeared we're going to have to do, what we would be recommending to the board, and to solicit ideas from them. [Tr. pp. 22-23.]

Seymore Rose, president of the Oakland School Board, testified that the school board never instructed the District to negotiate per se, but that it was more a question of informing and soliciting opinions of the negotiating units.

Lovell testified that the District made no attempt to negotiate with OSEA over the deferral of the TSA because the District didn't feel they had to negotiate and that the only thing that prevented the District from negotiating was that it did not see the necessity for negotiating.

Ann Spraque, vice president of OSEA, testified that at one of these early budget sessions, she asked how the District could just unilaterally defer 2 percent and that she was informed by Lovell that it was the District's position that the issue was nonnegotiable. The record indicated that the District adopted and maintained this position of nonnegotiability from the very start of these budget sessions.

Lovell met with the employee organizations, meeting with Bill Freeman, the president of OSEA, on August 14, 1979. Though Lovell testified that it was his recollection that if the deferral of TSA payments were the lesser of two evils, OSEA would favor that rather than layoffs. He acknowledged that no commitment was made by OSEA to support the idea of the deferral of the TSA. Lovell testified that negotiating was never discussed at these meetings.

On August 23, 1979, the board held its third budget session. The District's proposed recommended budget cuts presented to the board at this third session incorporated the first 18 "recommended budget cuts" as set forth in the District's August 2, 1979 proposal. The District presented three alternatives, A, B and C, for the board's consideration in addition to the enumerated 18 items. In essence, the difference between the proposed alternatives was that alternative A involved no layoff but deferral of the TSA, while alternatives B and C involved layoffs but no deferral of the TSA.

Ann Sprague appeared before the board at the August 23, 1979 meeting on behalf of OSEA and questioned Lovell about the proposed deferral of the TSA, asking whether the District had some hope of recovering monies to immediately replace the TSA that was deferred. Spraque stated to the board that if the board intended to defer any TSA, the board should

adopt some sort of policy that would guarantee the replacement of any additional monies into the TSA.

In light of those questions, Sprague stated that CSEA would favor alternative A, which recommended the deferral of 2 percent of the TSA. Spraque explained that her comments to the board on August 23 were made in the context of the board having already decided to defer the TSA and that she felt that it was a hopeless situation with really no alternatives being considered other than massive layoffs. Spraque testified that she had noted from the previous work sessions that the board seemed absolutely determined to go with the deferment.

On August 29, 1979, the board adopted the District's recommendation on the budget, including the adoption of alternative A, wherein the 2 percent of the annuity payment was to be deferred until July 1, 1980, with the stipulation that there would be no interest lost to employees in the deferral plan (Dist. Exh. 5, p.2).

On September 6, 1979, OSEA filed its unfair labor practice charge against the District.

The District excepts to the hearing officer's finding of violation, asserting that the District's deferral of payments to the employees' TSA did not constitute a unilateral change on a matter within the scope of representation since it was consistent with past practices and since it had no adverse impact on the employees; that the District's action was

required by business and operational necessity; that OSEA waived its right to negotiate by never demanding negotiations and by acquiescing in the decision; and finally, that the hearing officer's proposed remedy exceeds the authority conferred by the Act and by PERB regulations.

DISCUSSION

We find that the deferral of the TSA constituted an issue within the scope of representation as defined by Section 3543.2.[4]

In Anaheim Union High School District (10/28/81) PERB Decision No. 177, the Board determined that a matter is within

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[4]Section 3543.2 provides in pertinent part as follows:

> (a) 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. . . .

the scope of mandatory negotiations where it is:

> . . . (1) logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that a conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prereogatives (including matters of fundamental policy) essential to the achievement of the [agency's] mission. (Pp. 4-5.)

The TSA fund certainly meets this test. The District's payment into the employees TSA fund represents a fixed 8 percent of the employees' salary and, as such, is part and parcel of the employees' wages. This TSA contribution is of equal concern to both management and employees whose interests are appropriately represented at the negotiating table. Furthermore, there is nothing in the record to support a finding that the District's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of its mission would be significantly abridged by a requirement that it negotiate a change in its practice and policy with respect to the TSA.

There is ample authority that an employer's unilateral change of a matter within the scope of representation, without affording the exclusive representative notice of and an opportunity to negotiate over the matter, constitutes a per se

failure or refusal to negotiate in good faith. San Francisco Community College District, (10/12/79) PERB Decision No. 105, San Mateo County Community College District, (6/8/79) PERB Decision No. 94, Pajaro Valley Unified School District, (5/22/78) PERB Decision No. 51; NLRB v. Katz (1962) 369 U.S. 736 [59 LRRM 2177]. This Board has previously stated that unilateral changes are disfavored because of their destabilizing and disorienting impact on employer-employee relations, for their derogating effects upon the representative's negotiating power and ability to perform as an effective representative in the eyes of employees, and because such action denegrates negotiations consistent with the statutory design under EERA, and finally, because such action unfairly shifts community and political pressure to employees and their organizations, and at the same time reduces the employer's accountability to the public. San Mateo County Community College District, supra, pp. 14-17.

Past Practice

The District maintains that its deferral of payments to the employees' TSA did not constitute a unilateral change on a matter within the scope of representation since it was consistent with past practices. The District maintains that the past practice of not negotiating over the timing of the payments justifies the District's action. The record

indicates that starting in the 1974-75 fiscal year the payments were generally made on a monthly basis. However, during each fiscal year there was some variation. Usually there were at least a couple of delayed payments of the TSA contribution occurring within the same fiscal year.[5]

While the District appeared to have discretion in the timing of its payments to the employees' TSA, and the timing itself was unspecified in the contract, the District was contractually obligated to contribute an amount equal to eight percent of its employees' salary into the TSA. The deferral of 2 percent of the TSA in 1979-80 was not in adherence to the District's past practices. Previously, the District had always made the full 8 percent contribution into the TSA fund. While the District may have delayed payment of the contribution within a fiscal year, never before had the District deferred a portion of the 8 percent TSA contribution into a subsequent fiscal year. This action was unprecedented and would result in the District contributing only 6 percent of its employees' salary into the TSA fund during 1979-80. Payment of this deferred amount was contingent upon the District committing

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[5]For example, in the 1977-78 fiscal year, the employer's TSA contribution for the months of July through October, 1977 was made on November 16, 1977.

monies in the 1980-81 budget to recover the 2 percent. The District's past practice defense is rejected.

Impact

The District further argues that the deferral of TSA payments did not constitute a unilateral change on a matter within the scope of representation since it had no adverse impact on the employees. Notwithstanding the District's promise to restore the funds in the subsequent fiscal year, the unilateral change did in fact result in a reduction by 2 percent of the employer contribution into the TSA fund for 1979-80. Any restoration of funds by the District was contingent on the board's willingness to encumber those reserves for payment of the amount deferred in the 1980-81 fiscal year. Though the District anticipated receiving adequate monies in 1980-81 from which to restore the 2 percent, at the time of the decision to defer the funds needed to reinstate the deferred amount did not exist. The District argues that the charge was filed prematurely and should have been filed only had there been an actual adverse impact caused by the board's renegation of its promise to reinstate the funds. This argument ignores the fact that the board did indeed take a unilateral action which would result in a 6 percent, as opposed to an 8 percent, employer contribution to the employee TSA fund for 1979-80, which has a measurable impact, putting the actual restoration of the deferred amount

into question. Furthermore, the circumvention of the negotiating obligation in itself has a direct adverse impact on the employees by denying them the opportunity to have their interests represented by their exclusive representative. We reject the District's argument.

Business Necessity

The District next argues that its action was required by business necessity. The main argument proffered by the District is that it was working within an acute time frame due to the fact that they were required to submit a balanced budget by September 7, 1979. This contention cannot withstand scrutiny. W. B. Lovell testified at length concerning the District's posture that it was not required to negotiate over the deferral of the TSA. The District became apprised of its budget deficit situation at the end of July 1979. Therefore, the District had five to six weeks time in which to negotiate. Lovell was questioned specifically on this point and testified that there could have been negotiations if the District had felt a need to negotiate. Lovell's testimony certainly undercuts the District's argument. The record bears out that negotiations were never attempted due solely to the District's position that they were not obligated to negotiate.

This Board has addressed the claim of business necessity as a defense to unilateral changes by the employer in financial crises. PERB has held that the financial uncertainty engendered by Proposition 13 did not relieve the school

districts of their obligation to negotiate proposed changes. San Mateo County Community College District, supra; San Francisco Community College District, supra. We stated quite clearly in San Francisco, supra, at pp. 10-11 that:

> Even when a District is in fact confronted by an economic reversal of unknown proportions, it may not take unilateral action on matters within the scope of representation, but must bring its concerns about these matters to the negotiating table. An employer is under no obligation at any time to reach agreement with the exclusive representative. The duty imposed by the statute is simply--but unconditionally--the duty to meet and negotiate in good faith on matters within the scope of representation. Thus the confusion bred by the passage of Proposition 13 did not excuse the District's obligation to meet and negotiate with the Federation, nor did it justify the District's unilateral action.

The District attempts to differentiate the Proposition 13 cases from its own factual situation relying solely on the presence of an acute time frame. However, the record shows that, in fact, the "acute time frame" was not truly a factor in the District's decision to take the unilateral action to defer 2 percent of the TSA payment. All along, the District took the position that it was under no obligation to negotiate over the deferral.

The District further attributes significance to the fact that it held meetings with employee representatives to discuss the proposal and to solicit suggestions. The District,

however, cannot argue that such sessions relieved it of its negotiating obligation. These sessions were not negotiation sessions and the District announced at these sessions that it had no intention to negotiate over its proposal and was merely soliciting suggestions. This falls far short of its responsibility to negotiate over the proposed change.

Waiver

The District next argues that OSEA waived its rights to bargain by never demanding negotiations and by acquiescing in the decision. The National Labor Relations Board (hereafter NLRB or National Board) and this Board have consistently held that the waiver of bargaining rights by a union will not be lightly inferred; it must be clearly and unequivocally conveyed (Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74; Caravelle Boat (1977) 227 NLRB 1355 [95 LRRM 1097]) or demonstrated by behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by employer. San Mateo County Community College District, supra; NLRB v. Cone Mills (4th Cir. 1967) 373 F.2d 595 [64 LRRM 2536]; Caravelle Boat, supra. This Board stressed in San Francisco Community College District, supra at p. 17, that ". . . we will find a waiver only when there is an intentional relinquishment of these rights, expressed in clear and unmistakable terms . . . ." Finally, silence does not constitute a clear and unequivocal manifestation of the union's

intention to waive its right to complain about such action. Caravelle Boat, supra.

In the instant case, the District at all relevant times, took a position that it was not going to bargain about the deferral of the TSA, that the issue was nonnegotiable. The District argues that OSEA's waiver is evidenced by the fact that Ann Sprague, OSEA's vice president, made a statement at a public board meeting stating that the proposal was acceptable and preferable to employee layoffs. However, the District ignores the fact that Ms. Sprague's comments at the August 23, 1979 board meeting were in response to imminent board action on the matter, after her attendance at earlier budget work sessions where she was told that the District was not going to negotiate about the deferral. Certainly, given the District's position on the nonnegotiability, and Ms. Spraque's testimony concerning the perceived inevitability of the action, her comments on the preference of deferral over employee layoffs did not concede the District's right to take action without negotiating with the exclusive representative of its employees. Ms. Spraque's August 23rd statement was that if the board intended to defer the TSA, then OSEA would favor alternative A. This is certainly not a clear and unequivocal waiver of the union's intention to waive its negotiating rights. Rather, it was an opinion expressed in the context of imminent board action on the matter. The District maintained a

position of nonnegotiability throughout the entire relevant time period and, as such, expressed its refusal to negotiate over a matter within the scope of representation which would have rendered a request to negotiate from OSEA futile.

In NHE/Michigan, Inc., d/b/a NHE Lansing and Michigan Council #58, (1975) 219 NLRB 833 [90 LRRM 1128], respondent employer had sent a letter, through its counsel, to the board agent clearly stating that it would not commence bargaining with or recognize the union. The National Board held that further requests to bargain would have been futile in light of respondent's letter, which itself constituted a refusal to bargain as of that date.[6] The National Board has also held that an explicit refusal to bargain made in order to test a certification will also be considered as a continuing refusal to bargain, making it futile and therefore unnecessary for a union to make further requests to bargain. Williams Energy Company, supra. We find the District's position in the instant case analogous to the facts confronted in NHE/Michigan Inc., supra, and Williams Energy Company, supra, in that the

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[6]There is extensive NLRB authority holding it unnecessary for a union to make further requests to bargain where it would be futile. Sewanee Coal Operations Association, et. al. (1967) 167 NLRB 172 [66 LRRM 1022]; enforcement denied on other grounds, sub nom. Tennessee Products and Chemical Corporation v. NLRB (6th Cir., 1970) 423 F.2d 169; Decker Disposal Inc. (1968) 171 NLRB 879 [68 LRRM 1306]; Williams Energy Company (1975) 218 NLRB 1080 [89 LRRM 1637]; Dardanell Enterprises Inc. (1980) 250 NLRB 377 [104 LRRM 1397]; Sunnyland Refining Company (1980) 250 NLRB 1180 [105 LRRM 1041].

District's announcement that it had no intention to bargain over the deferral from the onset made a union request to bargain futile, and therefore unnecessary. The announcement itself constituted a per se refusal to bargain over a matter clearly within the scope of representation. We therefore reject the District's argument.

REMEDY

Certain aspects of the hearing officer's order were not excepted to by either party. Except as otherwise indicated, those matters not excepted to and therefore not considered are adopted by the Board.[7] The District however, takes exception to paragraph 4(a) of the hearing officer's proposed order which directs the District to:

> . . . henceforth make monthly payments at 8 percent until and unless a different timing schedule or amount is agreed upon between the parties.

The District argues that the hearing officer exceeded his authority in ordering this remedy because the contract itself

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[7]The Board's remedial authority is found in section 3563.3, 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.

does not specify any time schedule for the employer's 8 percent contribution to the employee TSA and because subsection 3541.5(b) of EERA, in relevant part, expressly states that "the Board shall not have authority to enforce agreements between the parties. . . ."

We find merit in this exception, and find that the hearing officer exceeded his authority in directing this remedy. While the evidence adduced at hearing indicated that the District generally made monthly payments of its contribution to the TSA fund, the record demonstrated that the timing of its TSA payment was within the discretion of the District, which did not always contribute on a monthly basis to the TSA fund. We therefore order that the District make its employees whole for that amount withheld, if any, from September 1979 to present, with interest at the rate of 7 percent per annum, and henceforth make its contractually mandated payments at 8 percent in accordance with its past practice.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the Oakland Unified School District has violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act. It is hereby ORDERED that the District, its governing board, and representatives shall:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation without providing the exclusive representative an opportunity to negotiate thereon.

(2) Denying the Oakland School Employees Association its right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation.

(3) Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(1) Provide payment to the tax shelter annuity fund (TSA) for members of the units represented by OSEA, of that amount withheld, if any, from September 1979 to present, with interest at the rate of 7 percent per annum, and henceforth make its TSA contributions at 8 percent in accordance with past practice, pursuant to its collective negotiating agreement with OSEA.

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

(3) Within ten (10) workdays following the date of service of this decision, notify the San Francisco regional director of the Public Employment Relations Board, in writing, of what steps the District has taken to comply herewith. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on charging party herein.

This Order shall become effective immediately upon service.

By: Virgil W. Jensen, Member Harry Gluck, Chairperson

Marty Morgenstern, 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 which all parties had the right to participate, it has been found that the Oakland Unified School District violated the Educational Employment Relations Act by taking unilateral action to defer 2 percent of its contribution into its employees' Tax Shelter Annuity Fund, without meeting and negotiating in good faith with the exclusive representative, the Oakland School Employees Association. It has further been found that this same course of action interfered with Oakland Unified School District employees because their exercise of rights protected by the Educational Employment Relations Act. As a result of this conduct, we have been ordered to post this notice, and we will abide by the following:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation without providing the exclusive representative an opportunity to negotiate thereon.

(2) Denying the Oakland School Employees Association its right to represent unit

members by failing and refusing to meet and negotiate about matters within the scope of representation.

(3) Interfering with employees' right to negotiate collectively through their exclusive representative by unilaterally changing matters within the scope of representation without providing the exclusive representative an opportunity to negotiate thereon.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

Provide payment to the tax shelter annuity fund (TSA) for members of the units represented by OSEA, of that amount withheld, if any, from September 1979 to present, with interest at the rate of 7 percent per annum, and to henceforth make its TSA contributions at 8 percent in accordance with past practice, pursuant to its collective negotiating agreement with OSEA.

OAKLAND UNIFIED SCHOOL DISTRICT

By: _____
Authorized Representative

Dated: _____

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.