

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SAN FRANCISCO COMMUNITY COLLEGE
DISTRICT FEDERATION OF TEACHERS,
LOCAL 2121, CFT/AFT, AFL-CIO,

Charging Party,

v.

SAN FRANCISCO COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case Nos. SF-CE-448
SF-CE-461

PERB Decision No. 278

December 31, 1982

Appearances; Robert J. Bezemek, Attorney (Bennett & Bezemek)
for San Francisco Community College District Federation of
Teachers, Local 2121, CFT/AFT, AFL-CIO.

Before Gluck, Chairperson; Tovar and Jensen, Members.

DECISION

JENSEN, Member: These consolidated cases are before the
Public Employment Relations Board (PERB or Board) on exceptions
filed by the San Francisco Community College District
Federation of Teachers, Local 2121, CFT/AFT, AFL-CIO
(Federation) to the attached hearing officer's decision. In
Case No. SF-CE-448, the hearing officer found that the
San Francisco Community College District (District) violated
subsections 3543.5(a), (b) and (c) of the Educational

Employment Relations Act (EERA)¹ by its refusal to arbitrate a grievance regarding the District's suspension of Professor George F. Fuller (Fuller) and by its failure to honor certain other contract provisions relating to grievance arbitration to the extent to which they do not conflict with the Education Code. The hearing officer found further that the Federation was not entitled to attorney's fees occasioned by the District's refusal to arbitrate and by the District's related court and administrative actions in furtherance of its attempt to limit the Federation's recourse to the contractual grievance and arbitration procedure. The District filed no exceptions. The Federation excepts only to the hearing officer's denial of its claim for attorney's fees.

¹EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise specified. Subsections 3543.5(a), (b) and (c) provide as follows:

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.

(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.

In Case No. SF-CE-461, the Federation alleged that the District's postponement of Fuller's sabbatical leave was a refusal to comply with the Board's order in San Francisco Community College District (10/12/79), PERB Decision No. and that such refusal to comply violated subsections 3543.5(a) (c) and (d). The hearing officer dismissed these allegations in their entirety and the Federation excepted to the failure to find a violation of subsection 3543.5(a), (b) or (c). As in Case No. SF-CE-448, supra, the District filed no exceptions.

FACTS

We have carefully reviewed the hearing officer's findings of fact in light of the Federation's exceptions and the record as a whole. We find them to be free of prejudicial error and adopt them as the findings of the Board itself.

DISCUSSION

Case No. SF-CE-448

As noted previously, neither the District nor the Federation excepted to the hearing officer's findings that the District violated subsections 3543.5(a), (b) and (c) as alleged in the above-captioned charge. Thus, the only issue before the Board in Case No. SF-CE-448 is the hearing officer's denial of attorney's fees. The Federation seeks to recoup its legal expenses incurred in resisting the District's attempt to enjoin the Federation and its members from recourse to the contractual grievance machinery and for filing a petition to compel

arbitration, both of which actions were entertained in Superior Court. Further, the Federation seeks its costs and fees connected with its participation in a hearing on Fuller's grievance before the Office of Administrative Hearings and for its processing of the instant cases before PERB. All of these legal fees were engendered by the District's refusal to honor portions of the collective bargaining agreement regarding grievance and arbitration of disciplinary grievances.

In King City Joint Union High School District (3/3/82) PERB Decision No. 197, the Board held that a charging party would be awarded attorney's fees where the defense to the unfair practice charge was "without arguable merit." Likewise, in Unit Determination for the State of California (12/31/80) PERB Decision No. 110c-S, we held that fees would be awarded where there was a showing of "frivolous or dilatory litigation" and would be denied ". . . if the issues are debatable and brought in good faith."

The District based its refusal to arbitrate Fuller's grievance upon the argument that Education Code sections 87600 et seq. supersede the grievance and arbitration provisions of the collective bargaining agreement insofar as they relate to suspension grievances. The District argued that the statutory scheme embodied therein provides the exclusive and mandatory grounds for dismissal, that the notice provisions set forth in the Education Code are mandatory, and that the Education Code

provisions regarding review of the arbitrator's award, payment of the arbitrator, and procedural rules governing arbitration differ from the provisions of the collective bargaining agreement. Thus, argued the District, the Education Code conflicts with and cannot be harmonized with the collective bargaining agreement's provisions, and therefore it supersedes the grievance and arbitration provisions of that agreement. The merits of those arguments are not before us on appeal, and we therefore decline to rule on them. However, an interpretation of Education Code sections 87600 et seq. was an issue of first impression.² Therefore, we cannot conclude that the District's positions and attendant legal actions were frivolous, purely dilatory, or brought in bad faith. Rather, as the hearing officer's lengthy discussion of these issues indicates, the District's position that the collective bargaining agreement's grievance and arbitration provision is inapplicable to disciplinary actions against certificated employees was certainly "arguable." We further cannot conclude that the District's decision to attack the collective bargaining agreement's provisions in court was undertaken in

²The Federation did not allege that the District's challenge of the contractual clause regarding grievance and arbitration, which it had previously agreed to, constituted bad faith negotiating on the part of the District. It is only because the Federation did not raise this issue that we do not consider whether such action by an employer might affect a request for attorney's fees.

bad faith such as to warrant an award of attorney's fees. For the reasons set forth above, we affirm the hearing officer's decision to decline to award attorney's fees to the Federation.

Case No. SF-CE-461

The facts, as set forth by the hearing officer and adopted by the Board, may be summarized as follows: In San Francisco Community College District, supra, the Board held, inter alia, that the District had unilaterally deferred sabbatical leaves for some 50 certificated employees, including Fuller, and ordered the District to offer the affected employees the earliest opportunity to take those leaves. That order issued on October 12, 1979. In compliance therewith, the District scheduled sabbaticals for the affected employees. Fuller's sabbatical was initially scheduled for the beginning of the spring semester in 1980. However, during late 1979 and culminating in January of 1980, a conflict arose between Fuller and the District regarding Fuller's use of leave, and the District determined that he should be suspended without pay. Rather than imposing the suspension immediately, the District delayed implementation of the suspension until September 1980, and delayed the effective date of approval of Fuller's sabbatical until that same date. This gave Fuller the opportunity to appeal the suspension and perhaps resolve it prior to his sabbatical leave.

Without expressly stating, the Federation alleges two alternative bases upon which the District's postponement of Fuller's sabbatical constituted a violation of subsections 3543.5(c) and (a).³ Initially, the Federation generally alleges that the sabbatical postponement constituted failure to comply with the Board's order in San Francisco Community College District, supra, and that such refusal to comply amounts to a per se separate, new violation of subsections 3543.5(a) and (c). The Federation cites no authority for the proposition that failure to comply with a prior Board order constitutes a per se violation of EERA.

We affirm the hearing officer's dismissal of the subsection 3543.5(c) and (a) allegations insofar as they are set forth above. Failure to comply with a Board order may be addressed in compliance proceedings on the case in which such order issued. Subsection 3542(d) sets forth the authority of the Board to seek compliance with final orders.⁴ It would

³AS appears from the face of the charge in Case No. SF-CE-461, the Federation initially alleged a violation of subsection 3543.5(d) as well, but advanced no theory or evidence in support of that allegation. The hearing officer dismissed the charge in its entirety, without more specificity, and the Federation failed to except to the dismissal of the subsection (d) allegation. Thus, the dismissal as to that allegation is not before us.

⁴Subsection 3542(d) provides as follows:

If the time to petition for extraordinary relief from a board decision has expired, the board may seek enforcement of any final

constitute an undue burden upon PERB's resources to entertain a new unfair practice charge upon the bare allegation that a prior final order has not been complied with. We are unaware of any case authority in the public or private sectors supporting the proposition that a failure to comply with a prior Board order constitutes a per se separate, new violation of statute. Unless it can be shown that an alleged failure to comply was undertaken for discriminatory reasons or is in some other manner part of a discrete course of violative conduct, we see no reason to entertain such an allegation as a distinct charge. Rather, such compliance failure can constitute only a matter for compliance and enforcement proceedings in the

decision or order in a district court of appeal or a superior court in the district where the unit determination or unfair practice case occurred. The board shall respond within 10 days to any inquiry from a party to the action as to why the board has not sought court enforcement of the final decision or order. If the response does not indicate that there has been compliance with the board's final decision or order, the board shall seek enforcement of the final decision or order upon the request of the party. The board shall file in the court the record of the proceeding, certified by the board, and appropriate evidence disclosing the failure to comply with the decision or order. If, after hearing, the court determines that the order was issued pursuant to procedures established by the board and that the person or entity refuses to comply with the order, the court shall enforce such order by writ of mandamus. The court shall not review the merits of the order.

underlying case. Insofar as the Federation's charge in the instant case alleges a discriminatory failure to comply, it is discussed, infra.

The charge contains the allegation that the District violated subsection 3543.5(a) by postponing Fuller's sabbatical " . . . because of his membership in and activities for and on behalf of Charging Party." This amounts to an allegation that the District discriminatorily took reprisals against Fuller. In Novato Unified School District (4/30/82) PERB Decision No. 210, the Board set forth a test for such allegations. Under the Novato test, a party alleging discrimination within the meaning of subsection 3543.5(a) has the burden of making a showing sufficient to support the inference that protected conduct was a motivating factor in the employer's decision to take adverse personnel action.

To justify such an inference, charging party must demonstrate, initially, that the employer had knowledge of the employee's protected activities. NLRB v. South Shore Hospital (1st Cir. 1978) 571 F.2d 677 [97 LRRM 3004]. The hearing officer found, and we agree, that the Federation presented no evidence that Fuller engaged in any protected activity other than filing a grievance after the District's decision to suspend him and postpone his sabbatical. He was not shown to be a union activist, nor were any other facts presented which would raise the inference that his protected conduct was a

motivating factor in the District's decision to delay his sabbatical. Thus, insofar as the Federation's subsection 3543.5(a) allegation in Case No. SF-CE-461 is predicated upon a discrimination theory, the Federation has failed to make a prima facie case under Novato.

We thus affirm the results reached by the hearing officer in Case Nos. SF-CE-448 and SF-CE-461, for the reasons set forth above.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the Public Employment Relations Board ORDERS as follows:

1) The request for attorney's fees in Case No. SF-CE-448 is hereby DENIED;

2) The hearing officer's decision and order with respect to the allegations in Case No. SF-CE-448, not having been excepted to, is final as to the parties.

3) The unfair practice charges in Case No. SF-CE-461 are DISMISSED in their entirety.

Chairperson Gluck and Member Tovar joined in the Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



SAN FRANCISCO COMMUNITY COLLEGE)
DISTRICT FEDERATION OF TEACHERS,)
LOCAL 2121, CFT/AFT, AFL-CIO,)

Charging Party,)

v.)

SAN FRANCISCO COMMUNITY)
COLLEGE DISTRICT,)

Respondent.)

Unfair Practice

Cases Nos. SF-CE-448
SF-CE-461

PROPOSED DECISION
(10/16/81)

Appearances: Robert Bezemek (Bennett and Bezemek) and Vincent A. Harrington, Jr. (Van Bourg, Allen, Weinberg & Roger) attorneys for San Francisco Community College District Federation of Teachers, Local 2121, CFT/AFT, AFL-CIO; Ronald Glick, representative for San Francisco Community-College District.

Before: Fred D'Orazio, Hearing Officer.

PROCEDURAL HISTORY

Unfair Practice Charge No. SF-CE-448.

On March 5, 1980, the San Francisco Community College District Federation of Teachers, Local 2121, CFT/AFT, AFL-CIO (hereafter charging party or Federation) filed an unfair practice charge against the San Francisco Community College District (hereafter District) alleging violations of sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (hereafter EERA or Act).¹ The charge alleges that the

¹The EERA is codified at Government Code, section 3540 et seq. All references hereafter are to the Government Code unless otherwise noted.

District refused to process a grievance involving a suspension, as provided for in the parties' collective bargaining agreement. The charge further alleges that the District filed an action in superior court seeking to enjoin the Federation from proceeding under the contract and to have the contract clauses requiring binding arbitration of suspensions declared void.

An answer and a motion to dismiss were filed by the District on March 26, 1980. The District denied the charges and asserted by way of affirmative defense that the Education Code governed the matter at issue. The motion to dismiss was based on two grounds. First, the District contended that the Federation had failed to exhaust the contractual grievance procedure, and therefore no complaint should issue. Second, the District argued that the exclusive procedure to resolve such disputes is a motion to compel arbitration in the superior court under section 3548.7. These grounds will be considered below.

After a settlement conference on April 4, 1980, the charge was placed in abeyance pending the outcome of the District's superior court action and a petition to compel arbitration pursuant to section 3548.7 by the Federation.²

²The status of these respective actions is unclear from

Unfair Practice Charge No. SF-CE-461.

On April 28, 1980 the Federation filed another unfair practice charge against the District alleging a violation of sections 3543.5(a), (c) and (d) of the Act. The charge alleges that the District postponed the sabbatical leave of one employee, thereby refusing to comply with the Board's order in San Francisco Community College District (10/12/79) PERB Decision No. 105. That order directed the District to reinstate sabbatical leaves that had been unilaterally frozen by the employer. The charging party contends that the Board's compliance procedure cannot provide an adequate remedy for the increased hardship caused by the District's actions.

On May 12, 1980, the District filed an answer, denying the charges. A motion to dismiss was made on the same grounds as raised in the motion to dismiss SF-CE-448, and, alternatively, a motion to consolidate unfair practice charges SF-CE-448 and SF-CE-461 was also filed.

An informal conference was held on May 29, 1980 at which

the record. However, it appears that the District's complaint for injunctive relief was denied, and the request for declaratory relief taken under submission by the court. There is no indication that any ruling was ever made. The Federation's motion to compel arbitration was apparently dismissed when the grievant won his appeal before the Office of Administrative Hearings (OAH), a state agency. In any event, the outcome of these court proceedings is irrelevant to the resolution of the instant charges.

the parties agreed to consolidate the charges and to hold both in abeyance.

Both charges were eventually taken out of abeyance and set for formal hearing pursuant to a request by the Federation. A hearing on the consolidated charges was conducted on January 22, 1981. The briefing schedule was completed on March 27, 1981 and the case was submitted.

FINDINGS OF FACT

Unfair Practice Charge No. SF-CE-448.

The first collective bargaining agreement between the District and the Federation was ratified in December 1979. The agreement was made retroactive to July 1, 1978 and remained in effect through June 30, 1981.

Two articles in the collective bargaining agreement are relevant to the current unfair practice charge. Article 10 provides:

No suspension or disciplinary action shall take place except for just and sufficient cause.

Article 22 sets out a detailed procedure to be followed for processing grievances. The procedure has several steps, with the last step being binding arbitration.³

³The arbitration section of the collective bargaining agreement reads as follows:

Within fifteen (15) days after receipt of the

Under this procedure, a grievance is defined as follows:

A formal written allegation by a grievant that the grievant has been adversely affected by a violation of a specific article, section or provision of this agreement.

The procedure further states:

A grievance as defined by this Agreement shall be brought only through this procedure.

decision of the Chancellor, the Union may, upon written notice to the Chancellor, submit the grievance to arbitration under, and in accordance with, the prevailing rules of the American Arbitration Association. Upon mutual agreement, the AAA rules governing expedited arbitration may be utilized.

Power of the Arbitrator

It shall be the function of the arbitrator, and he is empowered except as his powers are herein limited, after investigation and hearings, to make a decision in cases of alleged violation of the specific articles and sections of this Agreement.

The arbitrator shall have no power to:

Add to, subtract from, disregard, alter or modify any of the terms of this Agreement;

Establish, alter, modify or change any salary schedule or salary structure;

Rule on any of the following:

Any matter involving evaluation and other than compliance with procedures;

Termination of services of, or

On January 22, 1980, the District's governing board voted to suspend George D. Fuller, a District employee, for one year without pay. The reason for the suspension was Fuller's allegedly improper use of leave. The operative date of the suspension was postponed until September 1, 1980.

Fuller, being a member of the Federation and within the bargaining unit, filed a grievance on January 31, 1980 complaining that his suspension was proposed without just and sufficient cause. The grievance was filed under the terms of the agreement described above.

On February 13, 1980, the District filed a complaint for injunctive and declaratory relief in the San Francisco Superior Court against Fuller and the Federation, seeking to restrain Fuller and all others from contesting his suspension through

failure to reemploy any
probationary, temporary or part-time
certificated employee.

Where any grievance is appealed to an arbitrator on which he has no power to rule, it shall be referred back to the parties without decision or recommendation on its merits.

The decision of the arbitrator shall be final and binding on all parties.

All fees and expenses of the arbitrator shall be shared equally by the Board and the Union. All other expenses shall be borne by the incurring party, and, neither party shall be responsible for the expense of any witness called by the other.

the contractual grievance process and to have the collective bargaining agreement declared null and void to the extent it provided a procedure to grieve and arbitrate suspensions. The basis of the District's complaint was that the statutory procedures for suspensions (Ed. Code secs. 87660-87684) preempt the negotiated procedure.

On February 21, 1980, Fuller again objected to the District's decision to suspend him and demanded a hearing pursuant to the statutory procedures.⁴ At this point Fuller's grievance had proceeded through the two steps prior to binding arbitration.

Pursuant to the negotiated grievance procedure the Federation on March 13 demanded that the District submit Fuller's grievance to arbitration. On March 19 the District refused on the ground that Article 10 of the collective bargaining agreement was null and void.

Subsequent to the District's refusal, by a letter dated March 21, Fuller offered to withdraw his request for a hearing at the Office of Administrative Hearings on the condition that the District agree to arbitrate the matter. The District again refused.

⁴As is more fully discussed below, an employee has a right under the Education Code to appeal a suspension through arbitration or through a hearing conducted by the Office of Administrative Hearings.

Because of the District's continued refusal to arbitrate the suspension decision, a hearing was held on June 10 and 11 before an administrative law judge of the Office of Administrative Hearings.

The administrative law judge rendered a decision on July 17 holding that no cause for disciplinary action against Fuller existed under the relevant provisions of the Education Code. The District did not appeal; Fuller's suspension was lifted. Unfair Practice Charge No. SF-CE-461.

San Francisco Community College District, supra, PERB Decision No. 105 involved a refusal to negotiate charge filed by the Federation against the District. The essence of the charge was that the District took certain unilateral actions on negotiable terms and conditions of employment. One such action involved the deferral of sabbatical leaves for several employees. The Board held that the District's actions violated the EERA. As part of the remedy, PERB ordered the District to:

. . . offer to employees whose sabbatical leaves for 1978-79 were deferred the next available opportunity to take sabbatical leaves.

Fuller was one of about 50 certificated employees whose scheduled sabbatical had been suspended by an emergency resolution of the District governing board. Pursuant to the PERB order all affected employees were scheduled for their sabbaticals, Fuller's to begin at the start of the 1980 spring semester.

During the time the Board was deciding Decision No. 105, an unrelated series of events occurred. On May 18, 1979, Fuller received word that his father, who lived in Austria, was ill and required hospitalization. Unable to obtain any information about his father's illness, Fuller told the chairman of his department that it was necessary for him to go to Europe at once. The assistant dean of instruction told Fuller that his leave would be classified as "care for a relative," but instructed Fuller that, if he failed to obtain the president's approval prior to leaving, his job would be in jeopardy.

Fuller completed the necessary leave forms, but failed to obtain the approval of the president prior to leaving on June 2. Apparently, Fuller attempted, unsuccessfully, to reach the president by telephone on one occasion.

Prior to leaving, Fuller arranged for a substitute to cover his remaining classes and to administer and grade his exams. Although Fuller made these arrangements, his few remaining classes were cancelled. The final exam was administered and graded by the substitute.

Fuller remained in Austria until July 7. While he was in Europe he did not contact the District regarding his leave.

Sometime during August the governing board requested documentation of the reasons for Fuller's absence. By letter dated August 5, Fuller informed the governing board that his

father and stepmother had been involved in an automobile accident and as a result had suddenly become seriously ill.

In November Fuller provided the governing board with documents to substantiate his use of leave. Since the documents were written in German, Chancellor Herbert Sussman requested that Fuller appear before the governing board in December, when the translation of the documents would be available. On December 14, Fuller informed the governing board that he would not be able to appear at the meeting because of other commitments.

The failure to appear was followed by a letter from Chancellor Sussman on January 8, 1980 notifying Fuller that his scheduled sabbatical would be postponed pending clarification of his earlier absence.

On January 22 the governing board voted to suspend Fuller. The suspension was to be effective in September 1980, and Fuller's sabbatical postponed to the same date. This gave Fuller the opportunity to appeal the suspension and possibly resolve the matter before his sabbatical began.

This suspension resulted in the grievance and the Education Code hearing described above. The ALJ rendered his decision on July 17, 1980 and Fuller was granted a one year sabbatical beginning September 1980.

DISCUSSION AND CONCLUSIONS

Unfair Practice Charge No. SF-CE-448.

The Federation's position, as stated in its brief, is essentially that the District unilaterally changed a term and condition embodied in the collective bargaining agreement by refusing to process Fuller's grievance through the negotiated grievance procedure to binding arbitration, and by seeking a court order preventing the charging party and others from carrying grievances regarding suspensions through the negotiated procedure to arbitration.

The District's basic position is that the contractual grievance procedure, culminating in binding arbitration, cannot be used to process a suspension grievance. The District stated its position as follows:

The statutory procedure is the only appropriate procedure whenever a governing board of a community college district seeks to impose penalties (suspension) upon a certificated employee. (District's brief, p. 4.)

With respect to this position, the Federation argues that the District, by agreeing to the contract, waived its right to assert scope of bargaining as a defense, and, in any event, the negotiated provisions at issue here are within the scope of representation.⁵ The Federation also asserts in its brief

⁵Since the hearing officer has concluded that the

that the negotiated provisions at issue are not in conflict with the Education Code.⁶

In resolving this charge, the District's obligation to arbitrate will be discussed. Thereafter, the District's supersession defense will be considered.

The District's Obligation to Arbitrate.

Article 10 provides that suspensions will not be imposed except for "just and sufficient cause." The grievance procedure, which culminates in binding arbitration, defines a grievance as an allegation that an employee has been "adversely affected by a violation of a specific article, section or provision of this Agreement." Thus, it is clear that the parties expressly agreed to arbitrate disputes concerning suspension of employees, and the District has an obligation to

contractual provisions at issue here are not in conflict with the Education Code, it is unnecessary to reach the question of whether an employer violates the Act when it negotiates a contract and later correctly asserts that all or part of the agreement is superseded by the Education Code.

⁶The District has not argued that a grievance procedure with binding arbitration and the clause covering suspensions do not meet the test of negotiability as enunciated by the Board in San Mateo City School District (5/20/80) PERB Decision No. 129. It argued only that these contractual provisions are superseded by the Education Code. It is noted, however, that a grievance procedure with binding arbitration is negotiable under the Act (sections 3543.2, 3543.5-3548.7), and Article 10 is also within scope as suspensions relate to at least wages. See Healdsburg Union High School District (6/19/80) PERB Decision No. 132, pp. 81, 125.

arbitrate Fuller's suspension grievance. Service Employees International Union v. County of Napa (1979) 99 Cal.App.3d 946 [160 Cal.Rptr. 810]; Taylor v. Crane (1979) 24 Cal.3d 442, 450 [155 Cal.Rptr. 695]. The District argues that the arbitration of such matters is illegal because this subject is covered by the Education Code, which supersedes negotiations under the EERA. This argument is rejected. Questions regarding the scope of coverage of the arbitration agreement are appropriately resolved by the arbitrator, not unilaterally determined by the employer. Taylor v. Crane, supra, 24 Cal.3d 442, 450; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507; 87 LRRM 2453]; Morris v. Zukerman (1968) 69 Cal.2d 686, 690 [72 Cal.Rptr. 880]. In fact, the parties have negotiated a provision giving the arbitrator the authority to reject a grievance beyond the scope of the contract. The contract provides that:

Where any grievance is appealed to an arbitrator on which he has no power to rule, it shall be referred back to the parties without decision or recommendation on its merits.

Thus, the agreement shows that the parties contemplated the arbitrator, not the employer, making such decisions. If the arbitrator exceeds his or her powers, the award may be vacated pursuant to an appropriate statutory appeal procedure. See Taylor v. Crane, supra, 24 Cal.3d 442, 452; Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d 608, 615; (footnote 15, infra).

This conclusion is consistent with public policy considerations. Arbitration is a favored means of resolving labor disputes in this state. It eases the burden on the courts and resolves disputes quickly and inexpensively. See Taylor v. Crane, supra, 24 Cal.3d 442, 452; Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d 608, 622 [116 Cal.Rptr. 507, 526].

Thus, it is concluded that the District expressly agreed to arbitrate suspension grievances. By refusing to arbitrate Fuller's grievance, it unlawfully reneged on a negotiated term and condition of a collective bargaining agreement.

In an earlier motion to dismiss, the District argued that PERB has no jurisdiction to hear this case. The issues presented here, according to the District, should be litigated by a motion to compel arbitration under section 3548.7. It is recognized that when one of the parties to a contract which contains an arbitration clause refuses to arbitrate on the ground that the particular dispute is beyond the agreement, the determination of that issue is usually referred to a court. See Code of Civil Procedure, section 1281.2; Steelworkers v. Warrior and Gulf Co. (1960) 363 U.S. 574 [46 LRRM 2416]. In fact, section 3548.7 of the EERA provides that either party may seek a petition to compel arbitration under Code of Civil Procedure, section 1280. However, the EERA does not establish the section 3548.7 remedy as the exclusive procedure in such matters. A union is free to seek to enforce arbitration

clauses in existing collective bargaining agreements via the unfair practice procedures under a refusal to bargain theory. This approach seems especially appropriate here. The charge does not involve the interpretation of the agreement. Rather, the charge involves an attempt by the District to unilaterally alter a clear contractual obligation to arbitrate, as well as Education Code supersession questions under section 3540. Such matters are appropriately brought before the expert agency established to administer the Act. This is consistent with NLRB precedent, which holds that an employer violates the NLRA when it unilaterally modifies a contract or otherwise repudiates its contractual undertakings before the term of the contract has expired. The fact that the action constitutes a breach of contract for which the injured party may have another remedy, such as a suit under section 301 of the LMRA, does not displace the authority of the NLRB to remedy the unfair labor practice. Rego Park Nursing Home (1977) 230 NLRB 725 [96 LRRM 1185]; See also NLRB v. Independent Stove Co. (CA 8 1979) 591 F.2d 443 [100 LRRM 2644] cert. den. 444 U.S. 829 [102 LRRM 2360].

The District's Supersession Defense.

Section 3540 of the Act states in relevant part:

Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a

merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

One PERB member has interpreted this so-called supersession language as follows:

. . . [d]oes supersession occur where the negotiated provision is permitted by the Education Code, even though that provision's terms may vary from those of the Code? Where the Code sets forth wage, hour or working conditions matters, but neither explicitly, nor by inference, precludes a negotiated variance, would section 3540 be violated? We hold that it would not be. The distinction lies between a statutory provision which mandates a specific and an unalterable policy and one which authorizes certain policy but falls short of being absolutely obligatory. As we read section 3540, those proposals, which otherwise meet our test of negotiability are within scope, unless a conflicting Education Code provision precludes variance from its terms. (Jefferson School District (6/19/80) PERB Decision No. 133, p. 8.)

On this point, another PERB member stated:

I therefore conclude that, where a provision of the Education Code impels the public school employer to take certain action or where the statutory language evidences an intent to set an inflexible standard or to insure immutable provisions, the parties are prohibited from negotiating a provision which directly conflicts with the imperative portions of the Education Code. Id., p. 68.

When faced with a similar supersession issue involving

arbitration under a city charter, the California Supreme Court stated:

. . . [u]nless the charter expressly prohibits the city from agreeing to arbitrate whether Crane's conduct was sufficient cause for his discharge, the city retains the power to do so. (Taylor v. Crane (1979) 24 Cal.3d 442, 451 [155 Cal.Rptr. 695].)

It is these principles which must be applied to the relevant Education Code provisions and negotiated clauses in the instant case to determine if the provisions of the collective bargaining agreement between the Federation and the District are lawful, as the Federation contends, or null and void, as the District argues.

The statutory scheme set forth in the Education Code, in a general sense, governs the suspensions of employees.⁷ Within this statutory scheme, there may be areas which are mandatorily

⁷Education Code section 87600 states:

The provisions of this article govern the employment of persons by a district to serve in positions for which certification qualifications are required and establish certain rights for such employees. Other provisions of the law which govern the employment of persons in positions requiring certification qualifications by a community college district or establish rights and responsibilities for such persons shall be applied to persons employed by community college districts in a manner consistent with the provisions of this article.

exempted from the bargaining process by the language of the Education Code itself. On the other hand, there may be many areas within this general scheme which are clearly within the scope of representation. But, a subject is not rendered non-negotiable simply because it is covered by the Education Code. On the contrary, it promotes sound employer-employee relations when statutory rights are incorporated in an agreement.

. . . [i]ncorporating a statutory mandate in the agreement, assuming the subject matter is or relates to a subject specified in section 3543.2, certainly does not constitute supersession of that statute whether it is the Education Code or any other statute. On the other hand, there is a clearly recognizable value to the "improvement of personnel management and employer-employee relations" in permitting inclusion of such matters within the negotiated contract. Employees are entitled to know the rules, regulations, and policies which govern their employment rights and obligations. Employer-employee relations are inherently improved when the respective parties are well informed as to their mutual rights and obligations. There can be little doubt that employees will be more easily and fully informed when pertinent matters are to be found in a single document such as a collective agreement rather than in a plethora of statutory provisions which are not readily accessible to them. Certainly, the inclusion of such provisions in the agreement cannot be seen as an interference with management's necessary freedom to direct the enterprise. The employer's obligation to adhere to statutory requirements is not magnified by their inclusion in a negotiated agreement. (Jefferson School District, supra, pp.9-10.)

Each individual Education Code provision placed in issue by the District's refusal to arbitrate must therefore be carefully examined.

An employee faced with a suspension has two statutory remedies. He or she can seek a hearing either before the Office of Administrative Hearings⁸ or before an arbitrator.⁹ Although the contract provides for binding arbitration of suspension grievances, it does not, on its face, preclude an employee from electing to have a hearing at OAH in lieu of arbitration. In fact, Fuller appealed his suspension to OAH without objection from the Federation. Thus, to the extent that the collective bargaining agreement here incorporates the substantive right of arbitration, while not precluding election of the alternative remedy, it is consistent with the Education

⁸Education Code, sections 87678, 87679.

⁹Education Code section 87674 states:

Within 30 days of the receipt by the district governing board of the employee's demand for a hearing, the employee and the governing board shall agree upon an arbitrator to hear the matter. When there is agreement as to the arbitrator, the employee and the governing board shall enter into the records of the governing board written confirmation of the agreement signed by the employee and an authorized representative of the governing board. Upon entry of such confirmation, the arbitrator shall assume complete and sole jurisdiction over the matter.

Code. And, since the Education Code does not expressly preclude the parties from incorporating this right into an agreement, the parties were free to do so. Jefferson School District, supra, PERB Decision No. 133.

The District's brief conveniently glosses over this point. It focuses instead on alleged procedural and other assorted conflicts between the Education Code and the agreement while losing sight, indeed denying, the statutory right to arbitrate which had already been negotiated into the contract. Each of the District's arguments along this line will be considered in the order raised in its brief.

First, the District asserts that the statutory scheme provides for "exclusive" and "mandatory" grounds for dismissal.¹⁰ It further asserts that penalties are expressly

¹⁰Education Code section 87732 states:

No regular employee shall be dismissed except for one or more of the following causes:

- (a) Immoral or unprofessional conduct.
- (b) Commission, aiding, or advocating the commission of acts of criminal syndicalism, as prohibited by Chapter 188, Statutes of 1919, or in any amendment thereof.
- (c) Dishonesty.
- (d) Incompetency.
- (e) Evident unfitness for service.
- (f) Physical or mental condition unfitting him to instruct or associate with children.
- (g) Persistent violation of or refusal

defined in the Code.¹¹ According to the District, these sections conflict with and thus supersede the agreement. This argument is not persuasive.

Granted, Education Code section 87732 states in mandatory language that "no regular employee shall be dismissed except for one or more" of the enumerated causes. This language makes clear that no other grounds may be used to discipline an employee. But this section, on its face, is not necessarily inconsistent with Article 10 of the contract, which permits

to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the board of governors or by the governing board of the community college district employing him.

(h) Conviction of a felony or of any crime involving moral turpitude.

(i) Conduct specified in Section 1028 of the Government Code, added by Chapter 1418 of the Statutes of 1947.

(j) Violation of any provision in Sections 7000 to 7007, inclusive.

(k) Knowing membership by the employee in the Communist Party.

The statutory grounds for imposing penalties are the same as those for dismissals.

¹¹Education Code section 87668 states:

A governing board may impose one of the following penalties:

(a) Suspension for up to one year.

(b) Suspension for up to one year and a reduction or loss of compensation during the period of suspension.

discipline for "just and sufficient cause." The contract does not define "just and sufficient cause," nor does it provide for reasons beyond those cited in section 87732. Given the mandatory language in section 87721, it is clear that the contractual standard of "just and sufficient cause" must be defined by the limits found in that section of the Education Code. See Healdsburg Union High School District, supra, PERB Decision No. 132, p. 88. The District certainly has every right to argue this before an arbitrator, and it seems unlikely that the Federation would argue in favor of expanding the list of grounds of potential discipline already found in section 87732. If the Federation sought to redefine or limit these grounds, the District could offer argument in opposition to this attempt. However, there has been no attempt by the Federation to do so, and there is no indication that this clause will be interpreted by an arbitrator inconsistent with the Education Code. In any event, the interpretation of this clause should be left to the arbitrator, since that is what the parties bargained for, subject to appropriate judicial review. See Taylor v. Crane, supra, 24 Cal.3d 442, 450; Fire Fighters Union v. City of Vallejo, supra, (1974) 12 Cal.3d 608.

Additionally, the District's argument that Education Code section 87668 conflicts with Article 10 is equally without merit. That section provides that the governing board may impose one of two specific penalties. (See footnote 10,

ante.) The language of the Code does not expressly require the District to impose a penalty, nor does it expressly prevent the District from imposing a lesser penalty than the one-year suspension it proposed for Fuller. In fact, Fuller's grievance argued for no penalty, or, alternatively, for a lesser penalty than the one-year suspension. Thus, it is difficult to see how section 87668, which provides for specific penalties, conflicts with Article 10, which provides only a just cause standard.

Second, to support its argument that the statutory scheme totally preempts negotiations in this area, the District points to Education Code sections 87672 and 87673 which deal with notice of proposed action to an employee and the employee's obligation to respond.¹² Once again, after closely reading

¹²Education Code, sections 87672 and 87673 state:

87672.

If a governing board decides it intends to dismiss or penalize a contract or regular employee, it shall deliver a written statement, duly signed and verified, to the employee setting forth the complete and precise decision of the governing board and the reasons therefor.

The written statement shall be delivered by serving it personally on the employee or by mailing it by United States registered mail to the employee at his address last known to the district.

A governing board may postpone the operative date of a decision to dismiss or

these sections and comparing them with the contract, one is hard pressed to see a conflict between the negotiated provisions and the Education Code. Specifically, Education Code section 87672 provides that the District give an employee timely notice of dismissal or other penalty. The agreement says nothing about the District's obligation in this regard and there is no evidence that the Federation has ever interpreted the agreement in a manner which would conflict with the District's obligation under this section. Therefore, aside from the fact that there is no conflict, its relevance to this proceeding escapes the hearing officer.

Education Code section 87673 covers the employee's obligation to timely respond to a notice of disciplinary action. It says, in mandatory terms, that an objecting employee shall notify the employer of his objection. The Code

impose penalties for a period not to exceed one year, subject to the employee's satisfying his legal responsibilities as determined by statute and rules and regulations of the district. At the end of this period of probation, the decision shall be made operative or permanently set aside by the governing board.

87673.

If the employee objects to the decision of the governing board or the reasons therefor on any ground, he shall notify in writing the governing board, the superintendent of the district which employs him, and the president of the college at which he serves of his objection within 30 days of the date of the service of the notice.

does not say how the employee is to object, except that the objection must be in writing and filed within thirty (30) days of service. Therefore, the District is free to negotiate a procedure for employee response within these statutory requirements. Under the contract an objection is delivered in the form of a grievance. Pursuant to the terms of the grievance procedure, the employee must orally inform the employer of his dissatisfaction within twenty (20) days and a written communication, in the form of a grievance, would be forthcoming no later than forty (40) days from the date of service, or sooner if the employee waived the oral step of the procedure, as Fuller did here. Since the Education Code mandates a written response within thirty (30) days, there may exist, in some circumstances, a slight conflict between the statutory obligation to object timely and the contractual obligation to timely respond via the grievance procedure. However, this is not to say that a conflict would exist in every instance. If the objecting employee elects not to utilize the full time periods under the grievance procedure, or elects to waive the informal step, the written grievance may very well be filed within thirty (30) days from service and the Education Code provision thus satisfied. If the employee fails to object in writing within thirty days, the District is free to raise this matter at that time. Thus, the question of whether the Education Code conflicts with the agreement on this

point can only be determined on a case-by-case approach. Here, for example, Fuller received his notice of proposed suspension on or about January 22, 1980, and he filed his written grievance on or about January 28, 1980, informing the District of his objection. This was consistent with the requirements of the Code and the contract.

Therefore, it is concluded that, while the possibility exists that the contract could be applied in a manner inconsistent with the Education Code, the negotiated language by no means establishes that this will occur in all situations. Where the contract is followed in a manner inconsistent with the mandatory directive in the Education Code, the District is free to raise a timeliness objection. In the situation presented here, however, the agreement has been applied in a manner consistent with the Education Code. The District cannot be permitted to raise a speculative procedural conflict as grounds for denying the substantive right to arbitration.

Third, the District argues that there are differences between the Education Code and the agreement regarding review of the arbitrator's award. Specifically, the District contends that,

The Education Code does provide arbitration, but, such arbitration is not final and binding as contemplated and mandated by the negotiated agreement. (District Brief, p. 3, emphasis in original.)

The District apparently bases this argument on Education Code section 87682, which provides for independent review of the arbitrator's decision by a court of competent jurisdiction.¹³ This argument is not persuasive.

The relevant statutory language does not require judicial review of all arbitration awards. The Education Code only gives the parties the option of seeking judicial review. Thus, the District is free to agree not to seek judicial review and be bound by an arbitrator's award, thus waiving its option. It is also free to enter into an agreement retaining the option. Since the contract is silent on this point,¹⁴ the District

¹³Education Code section 87682 states:

The decision of the arbitrator or hearing officer, as the case may be, may, on petition of either the governing board or the employee, be reviewed by a court of competent jurisdiction in the same manner as a decision made by a hearing officer under Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code. The court, on review, shall exercise its independent judgment on the evidence. The proceeding shall be set for hearing at the earliest possible date and shall take precedence over all other cases, except older matters given by law.

¹⁴The contract provides only that the arbitration will be conducted in accordance with the rules of the American Arbitration Association (AAA), and the District has introduced no evidence that these rules conflict with the Education Code with respect to the scope of review of the arbitrator's award. The hearing officer finds it highly unlikely that the AAA would

has apparently retained the option of seeking judicial review of an arbitrator's award.¹⁵ Such an agreement is within the District's authority and is not expressly precluded by the Education Code. Thus, it is concluded that the contractual provisions providing for final and binding arbitration of suspensions does not conflict with the Education Code provisions regarding judicial review.

Similarly, there is no apparent conflict between the contract and the Education Code on the scope of review question. Even if a question arose as to the appropriate scope of judicial review at some later date the District would be free to assert its argument at that time. It is premature at best to assert this argument at such an early stage of the grievance procedure.¹⁶

promulgate rules which attempt to dictate the scope of judicial review to state courts.

¹⁵Although not directly in issue here, it is noted that the Education Code mandates the independent judgment scope of review on such cases (see fn. 12). The District would thus be on solid ground in later arguing for this standard as opposed to the standard found in Title 9, Part Three, Code of Civil Procedure, section 1280 et seq. Although the standards for vacating an arbitrator's award generally applied under the EERA are those found in the Code of Civil Procedure (see sec. 3548.7), under the circumstances presented here, the standard of review incorporated by reference into section 3548.7 is superseded by the standard of review set forth in the Education Code.

¹⁶In this connection, as part of its argument, the District states that it considers the Education Code scope of

Fourth, the District correctly argues that the Education Code provides that the District shall pay the costs of the arbitration, while the agreement calls for "shared costs of the arbitrator."¹⁷ As I understand the District's argument, sharing arbitration costs conflicts with the Education Code, and this is further evidence of preemption.

The express language of the Education Code does require payment by the District. Thus, to the extent that the District wants to invoke this Education Code provision and pay for the entire costs of the arbitration, it could do so, probably with little or no objection by the Federation. But this, in itself,

judicial review a greater benefit to the employee than that provided for in the agreement and a right not provided for in the contract. But the fact that the right to judicial review is not provided for in the contract does not mean that that right does not exist. Parties do not waive statutory rights by not including them in collective bargaining agreements. Also, the fact that the District considers this a greater benefit is irrelevant to these proceedings. It is not for the District to make determinations as to whether a particular statutory provision is or is not of benefit to employees in a collective bargaining context. It is the prerogative of the exclusive representative to make such determinations, subject to challenge by employees in a duty of fair representation charge.

¹⁷Education Code section 87677 states:

The district alone shall pay the fees of the arbitrator, his expenses, and such expenses as he shall determine are a cost of the proceedings. The "cost of the proceedings" does not include any expenses paid by the employee for his counsel, witnesses, or the preparation or presentation of evidence on his behalf.

is not reason to deny arbitration under the negotiated provision.

Fifth, the District points out that the Education Code mandatorily sets forth the procedures under which the arbitration proceeding shall be conducted,¹⁸ while the

¹⁸Education Code section 87675 states:

The arbitrator shall conduct proceedings in accordance with the provisions of Chapter 5 (commencing with Section 11500) of Part 1, Division 3, Title 2, of the Government Code except that the right of discovery of the parties shall not be limited to those matters set forth in Section 11507.6 of the Government Code but shall include the rights and duties of any party in a civil action brought in a superior court. In all cases, discovery shall be completed prior to one week before the date set for hearing. He shall determine whether there is cause to dismiss or penalize the employee. If he finds cause, he shall determine whether the employee shall be dismissed and determine the precise penalty to be imposed, and he shall determine whether this decision should be imposed immediately or postponed pursuant to Section 87672.

No witness shall be permitted to testify at the hearing except upon oath or affirmation. No testimony shall be given or evidence introduced relating to matters which occurred more than four years prior to the date of the filing of the notice. Evidence of records regularly kept by the governing board concerning the employee may be introduced, but no decision relating to the dismissal or suspension of any employee shall be made based on

agreement provides for the grievance being submitted to arbitration in accordance with the rules of the American Arbitration Association.

The District's argument on this point is two-fold. It first argues that the Education Code provides a method for selecting an arbitrator which conflicts with the contract. Education Code section 87674 states that:

. . . an employee and the governing board shall agree on an arbitrator to hear the matter.

The Code does not say how this agreement is to be accomplished, nor does it expressly say that the District is not free to agree to select an arbitrator with the employee's representative, in this case the Federation, rather than the employee himself. Thus, it is concluded that the parties' agreement to select an arbitrator under the rules of the AAA does not conflict with the Education Code.

The District next argues that there are conflicts between the agreement and the Education Code with respect to the procedure to be utilized in the hearing. Granted, the express language of the Education Code mandates the exclusive procedure for the arbitration, and the rules of the AAA, to the extent

charges or evidence of any nature relating to matters occurring more than four years prior to the filing of the notice.

they conflict with the Code, are superseded.¹⁹ However, since the District did not introduce into evidence the rules of the AAA, it is impossible to determine the precise extent, if any, of the conflict. To the extent such a procedural conflict exists, the District is certainly free to raise such a conflict at the arbitration hearing. But speculative disputes as to how the hearing is to be conducted as a procedural matter do not authorize the District to refuse arbitration outright. In the absence of concrete evidence as to the extent of the conflict, or of any actual prejudice arising in this case, such matters are appropriately presented to the arbitrator for decision subject to judicial review. See Fire Fighters Union v. City of Vallejo, supra, 12 Cal.3d 608.

Sixth, the District argues that, pursuant to the Code of Civil Procedure,²⁰ it had no obligation to arbitrate because

¹⁹It is noted, however, that it is unlikely that the rules of the AAA differ in substantial respect to the Education Code requirements. It seems more likely that the rules of the AAA would provide for conducting a hearing under the same basic structure as that contemplated by the Education Code, i.e., calling of witnesses, introduction of documents, etc.

²⁰Code of Civil Procedure, section 1281.2 states:

On the petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate

Fuller elected to have a hearing at the OAH, thereby waiving his right to arbitration. It is true that Fuller proceeded through the OAH procedure. However, shortly after he requested a hearing at OAH he asked the District to arbitrate his case and offered to withdraw the OAH request. The District refused. While the Education Code may be interpreted to mean that an employee is entitled to either an OAH hearing or an arbitration hearing, the hearing officer is aware of no legal authority which would prevent an employee from changing his mind as to this election, provided he does so prior to the time either of these proceedings take place. It was only after the District refused to arbitrate under the agreement that he proceeded with the hearing at OAH in an apparent attempt to secure some forum to air his dispute. The District cannot now argue that Fuller's election, made after it refused arbitration

the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

- (a) The right to compel arbitration has been waived by the petitioner; or
- (b) Grounds exist for the revocation of the agreement.
- (c) A party to the arbitration agreement is also a party to pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rules on a common issue of law or fact.

and under at least arguably coercive conditions, constitutes a waiver of the right to arbitrate.

Seventh, the District argues that an employee may not waive the benefits provided by Education Code sections 87000-87864.²¹ According to the District, since the contract denies Fuller certain statutory benefits, it is tantamount to a waiver and therefore invalid. This argument need not even be addressed. As has been determined above, the contract is not in conflict with the Education Code. Fuller has not been denied benefits, and there has been no waiver.

In sum, the contractual provisions at issue here present several issues as they relate to the Education Code and section 3540 of the EERA. As has been found, many of the contractual provisions are not superseded by the Education Code. Only two, the negotiated procedures under which arbitration hearings are to be conducted and the time an employee has to object to the District's decision to suspend, may arguably conflict with the Education Code. It is not uncommon for negotiated clauses to be legal in part and superseded in part by the Education Code.

²¹Education Code section 87485 states:

Except as provided in Section 87744, any contract or agreement, express or implied, made by any employee to waive the benefits of this chapter or any part thereof is null and void.

See Jefferson School District, supra (6/19/80) PERB Decision No. 133; Healdsburg Union High School District, supra (6/19/80) PERB Decision No. 132.

To the extent the District refused to arbitrate Fuller's suspension grievance and honor those provisions which have not been found to be in conflict with the Education Code, it breached its obligation to negotiate in good faith in violation of section 3543.5(c). This conduct also constitutes concurrent violations of sections 3543.5 (a) and (b). San Francisco Community College District, supra, PERB Decision No. 105, pp. 18-19.

Unfair Practice Charge No. SF-CE-461.

The thrust of this unfair practice charge is that the District, by delaying Fuller's sabbatical, refused to comply with the Board's order in San Francisco Community College District, supra, PERB Decision No. 105, thus denying Fuller and the Federation rights guaranteed by the Act.²² The District's position is that it has fully complied with the Board's order. The District asserts that Fuller's sabbatical was delayed due to potential disciplinary action stemming from the earlier leave incident and related scheduling problems

²²It is noted that the parties settled all outstanding disputes involving compliance with the Board's order in PERB Decision No. 105 during the informal stage of the compliance procedures before a PERB hearing officer. Thus, the delay in implementing Fuller's sabbatical is considered here strictly in the context of an unfair practice charge.

presented by the uncertainty of Fuller's employment status. The sabbatical was granted immediately upon the OAH ruling in Fuller's favor.

Since the District has complied with the order in PERB Decision No. 105, the issue does not involve compliance. Rather, it involves the separate question of whether the delay in implementing the order was a distinct violation of the Act. Thus, to resolve this unfair practice charge, it must be determined if the delay in granting Fuller's sabbatical was justified. For the following reasons, it is concluded that the District, by postponing Fuller's sabbatical, did not violate either Fuller's rights or the Federation's rights under the Act.

Fuller's sabbatical was postponed because of the pending disciplinary action stemming from his use of leave during the previous year. This action was completely unrelated to PERB Decision No. 105, although Fuller was scheduled to begin his sabbatical at about the same time as the District was preparing to suspend him.

At that particular time, January 1980, the District had several options. It could have done nothing. Another option was to discharge Fuller. If this occurred, it is arguable that Fuller's sabbatical would have had to be cancelled, since the Education Code requires an employee to serve at least twice the length of the sabbatical after it is over (Ed. Code, sec. 87770). Yet another option was to suspend Fuller, effective

immediately (Ed. Code, sec. 87735). By deciding to suspend Fuller, rather than discharge him, the District avoided the post-sabbatical issue. Further, by postponing the suspension, the District gave Fuller the opportunity to resolve the matter through the hearing process before the fall semester. Fuller prevailed in the hearing and the District did not appeal. It immediately implemented the sabbatical leave effective September 1980. While one may reasonably disagree with the District's decision to suspend Fuller and with the choice of discipline, it cannot be concluded that, by postponing the sabbatical pending the outcome of the proposed suspension, the District acted improperly. This is especially so in light of the fact that the proposed suspension was based on an unrelated series of events which began long before October 12, 1979, the date of the Board's order in PERB Decision No. 105. The governing board's decision to suspend was obviously made prior to Fuller's grievance and several months after the Board's order. Thus, there can be no unlawful motive inferred from the timing of these events. Also, this is a stipulated record and there is no evidence that Fuller engaged in any other protected activity, or that the District engaged in any other conduct from which an unlawful motive can be inferred. In order to find a violation here, one must conclude that postponing the implementation of a PERB order is a per se violation of the Act. Under the circumstances presented here, the hearing officer declines to do so.

Additionally, it is noted that the District has apparently complied with the order in PERB Decision No. 105 in all other respects. Fuller's sabbatical was only one of several similar cases, all of which were apparently resolved during the compliance proceeding.

Based on the foregoing, it is concluded that Fuller's sabbatical was delayed for a legitimate reason, and the record does not lend itself to an inference of unlawful motive. Therefore, it is concluded that there has been no violation and Unfair Practice Charge No. SF-CE-461 is dismissed.

REMEDY

Under Government Code section 3541.5(c) PERB is given:

. . . 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.

With respect to Unfair Practice Charge No. 448, it has been found that the District refused to process a grievance to arbitration under the terms of a collective bargaining agreement. In doing so, the District unilaterally refused to recognize valid provisions in the negotiated agreement, thus changing that agreement in violation of sections 3543.5(a), (b) and (c). It is appropriate to order the District to cease and desist from all such activities in the future, and to recognize

and honor the terms of the negotiated agreement in accordance with this proposed decision.

Fuller's suspension grievance has been presented to an OAH administrative law judge, who overruled the suspension. Since the District has not appealed that decision, it is unnecessary to order any affirmative remedy with respect to Fuller's individual grievance. Therefore, an order to arbitrate Fuller's grievance will not be a part of this remedy.

It is also appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

The Federation's request for attorneys' fees is denied.

The District's arguments were not frivolous, but rather were at least "debatable." See D & H Manufacturing Co. (1978) 239 NLRB 51 [99 LRRM 1624].

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in the case, Unfair Practice Charge No. SF-CE-461 is hereby DISMISSED.

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(c), it is hereby ordered that the SAN FRANCISCO COMMUNITY COLLEGE DISTRICT, its governing board and its representatives in Unfair Practice Charge No. SF-CE-448 have violated Government Code sections 3543.5 (a), (b) and (c) and shall:

1. CEASE AND DESIST FROM:

(a) Refusing to negotiate in good faith with the exclusive representative, San Francisco Community College Federation of Teachers, Local 2121, CFT/AFT, AFL-CIO, under the Educational Employment Relations Act by unilaterally declaring lawfully negotiated provisions of a collective bargaining agreement null and void and refusing to process grievances of bargaining unit members, represented by the exclusive representative, under those provisions.

(b) Interfering with employee rights under the Educational Employment Relations Act by unilaterally declaring null and void lawfully negotiated provisions of a collective

bargaining agreement with the exclusive representative, San Francisco Community College District Federation of Teachers, Local 2121, CFT/AFT, AFL-CIO, and refusing to process grievances of bargaining unit members, represented by the exclusive representative, under those provisions.

(c) Interfering with employee organization rights under the Educational Employment Relations Act by unilaterally declaring null and void lawfully negotiated provisions of a collective bargaining agreement negotiated with the exclusive representative, San Francisco Community College Federation of Teachers, Local 2121, CFT/AFT, AFL-CIO, and refusing to process grievances of bargaining unit members, represented by the exclusive representative, under those provisions.

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

(a) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty (30) workdays at its headquarters offices and in conspicuous places at the location where notices to certificated employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(b) Within twenty (20) workdays from service of the final decision herein, give written notification to the

San Francisco Regional Director of the Public Employment Relations Board, of the actions taken to comply with this Order. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the charging party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 5, 1981, unless a party files a timely statement of exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on November 5, 1981, 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: October 16, 1981

FRED D'ORAZIO
Hearing Officer