STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FREMONT EDUCATION ASSOCIATION, CTA/NEA, Charging Party, v. FREMONT UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. SF-CE-779 PERB Decision No. 651 December 30, 1987

Appearances: Ramon E. Romero, Attorney, for Fremont Education Association, CTA/NEA; Littler, Mendelson, Fastiff & Tichy by Patricia P. White for Fremont Union High School District.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION

PORTER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Fremont Union High School District (District) to the attached proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(c) and, derivatively, section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA)[1] by failing to give

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in pertinent part, as follows:

> 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

the Fremont Education Association (FEA) notice and an opportunity to negotiate the effects of its nonnegotiable decision to lease facilities to the University of La Verne, a private institution, so that the latter could conduct summer school classes. For the reasons which follow, we reverse the ALJ.

Procedural History

On June 14, 1982, the FEA filed an unfair practice charge (SF-CE-667) alleging that the District violated EERA by entering into an agreement to lease facilities to La Verne in order to enable the latter to conduct summer school classes at the District's Cupertino High School. This charge was dismissed and deferred to arbitration. An arbitration decision subsequently issued finding that the lease agreement with La Verne did not violate the contract. FEA then filed another unfair practice charge (SF-CE-779) alleging that the arbitration decision was repugnant to EERA. FEA subsequently amended this charge to allege that one of the actual effects of the lease agreement was a layoff of certificated personnel on or about May 10, 1983.

> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
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> (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 his proposed decision on the repugnancy charge, the PERB ALJ ordered that a partial complaint should issue on the District's failure to negotiate the foreseeable effects of its decision to enter into the lease agreement with La Verne. A hearing thereupon followed, conducted by ALJ Allen Link. The case was subsequently transferred for decision to ALJ Manuel Melgoza.

FACTS

FEA is the exclusive representative of a unit of certificated employees of the District, which includes teachers employed during the regular school year and during summer school.

Prior to 1978, the District operated a "comprehensive" summmer school in which teachers employed during the regular school year were able to obtain summer school teaching positions pursuant to established contractual criteria and procedures. This pre-1978 comprehensive summer school offered the same broad range of courses which were included in the regular school year curriculum.

Due to budgetary cuts caused by the passage of Proposition 13 in 1978, the District ceased operating its comprehensive summer school. The District was statutorily precluded from charging students fees for summer school to make up for losses in revenue occasioned by cutbacks associated with Proposition 13. After the passage of Proposition 13, however,

the state continued to fund three programs which the District was statutorily mandated to provide. This limited, or "state-mandated," summer school was available only for students meeting one of the following specific eligibility criteria: (1) seniors within ten credits of graduation; (2) special education students whose individual educational plans specified the need for an extended year program; or (3) students who had not yet mastered the District's minimum competencies. Inasmuch as, with the passage of Proposition 13, the state would no longer fund summer programs not specifically statutorily mandated, it was not feasible for the District to provide a comprehensive summer school curriculum. Even had the District not leased its facilities to La Verne, it still would <u>not</u> have operated a summer school other than that mandated and funded by the state, because the state would not reimburse the District for such a school. Indeed, absent the prospect of new state funding, money would have to be taken from the District's general fund (the same fund from which teachers' salaries were drawn) in order to provide funding for comprehensive course offerings. Both the District and FEA understood this not to be a reasonable alternative.

<u>Initial Contacts With La Verne</u>

Richard Baker, the District's curriculum coordinator, was requested in February or March 1982 (four years after the cessation of the 1978 comprehensive summer school) by his

superior, Kathleen Hulburd, the District's assistant superintendent of curriculum, to contact public and private institutions outside the District to explore the possibility of one of them offering a self-supported summer school which could be utilized by District students. Baker communicated with representatives of the University of La Verne to discuss their interest in leasing District facilities and providing a self-supported summer school.

After an initial telephone conversation, Baker met with a representative of La Verne. According to Hulburd's testimony, Baker was not instructed by her to "negotiate" salaries for La Verne teachers, nor was he instructed to draft the lease agreement with La Verne. His general instructions were simply to meet with La Verne officials and discuss their interest in leasing facilities. Baker testified that he and the La Verne representative "costed out" La Verne's expenses to determine what tuition figure was reasonable. At their meeting, the collective bargining agreement between FEA and the District and the salary it prescribed for District teachers were not mentioned. At a subsequent meeting between a La Verne representative and Baker, in May of 1982, lease figures were firmed up.

FEA's Objections to Lease

The District historically met with FEA representatives at regularly scheduled "consultation" sessions. Consultation

sessions were monthly meetings typically attended by FEA's officers and chief negotiator, as well as the District's deputy superintendent, Tom Hodges, and other cabinet level personnel. Negotiations did not take place at these sessions. At a consultation session held in either February or March 1982, Dick Fulcher, FEA's president; Bill Mansfield, a member of FEA's bargaining team;[2] and Bill Empey, FEA's executive secretary, were informed by Hodges that the District was considering entering into an agreement to lease facilities to La Verne so that the latter could operate a summer school. Both Fulcher and Mansfield voiced general objections to the lease agreement on the basis that it would violate the collective bargaining agreement. After this consultation session, Fulcher, in an informal discussion with at least one board member, reiterated concerns that the District's proposed lease agreement would breach the contract.

At a board meeting on April 20, 1982, Empey addressed the Board of Trustees and voiced FEA's objections to the proposed lease agreement. This was followed by a letter in which FEA's objections were again expressed. On June 1, 1982, the lease agreement was formally adopted by the Board of Trustees.

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[2]Bill Mansfield was a member of FEA's negotiating team for the school year 1981-82. In May 1982, he was elected FEA's president. Although his term did not officially begin until July 1982, upon his election he gradually began to assume the duties of his predecessor, Dick Fulcher.

La Verne's Preparation for Summer School

A few weeks prior to the adoption of the lease agreement, La Verne representatives laid the necessary groundwork for the summer school. A representative of La Verne interviewed several administrators from the District for the position of La Verne's site administrator, and James Ehrenburg, an assistant principal at a District high school, was ultimately selected.

During May 1982, flyers were distributed in the District announcing La Verne's new summer school and soliciting teacher applications. The newly selected La Verne site administrator, Ehrenburg, was contacted in late May or June by FEA representatives Empey and Mansfield to discuss their concerns regarding how teachers at La Verne would be hired. Although Ehrenberg was still employed by the District at the time of the meeting, it took place after his normal duty hours and at a time when he had already been employed by La Verne as its site administrator. Ehrenberg testified that he was not engaged in "negotiations" with FEA and, in fact, was acting at the meeting solely in his capacity as an agent of La Verne. At the meeting, which lasted approximately 35-40 minutes, the three discussed their concerns regarding preferential treatment for District teachers.[3] The parties were especially interested

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[3]During one of the previous consultation sessions, Fulcher had requested assurance from Hulburd that teachers from the Fremont Union High School District would be given

in arriving at a means of reducing the friction between FEA and La Verne. The friction was in part caused by the fact that FEA had earlier communicated a recommendation to its constituency that they not apply to teach at the La Verne summer school.

Approximately 46 teachers applied for ten positions at La Verne.[4] Although some of La Verne's support staff were not employed by the District during the regular academic year, ultimately all teachers hired by La Verne for the 1982 summer school were otherwise employed by the District. La Verne paid a flat rate of about $1,015 for teaching two periods, and about $2,050 for four periods.[5] Because the District-paid health and welfare benefits were computed on a 12-month basis

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preferential treatment in staffing La Verne's summer school faculty. Hulburd thereafter wrote Fulcher a short memo assuring him that the District would encourage La Verne to give preferential treatment to members of the unit. She attached a copy of a letter written to La Verne requesting such preferential hiring of members of the unit.

[4]According to the terms of the 1982 lease agreement, La Verne was exclusively responsible for the hiring of its teachers. The 1982 lease agreement states, in pertinent part:

> All persons employed by the University [La Verne] shall be selected and hired solely by the University, shall be its employees exclusively and shall be subject solely to its direction, control, compensation and discharge.

[5]The compensation of unit members hired to teach the state-mandated courses in the District summer school was computed on a daily rate basis determined in part by the teacher's placement on the prior year's salary schedule. This resulted in higher wages as compared to those paid to La Verne teachers.

irrespective of summer employment, La Verne teachers were not disadvantaged in their receipt of such benefits as a result of their employment with La Verne.

In May 1982, La Verne also distributed in the District and in neighboring communities a flyer written by Ehrenburg designed to apprise prospective pupils and their parents of the summer school program, tuition rates, registration dates, etc. Under the terms of the lease agreement, La Verne was solely responsible for determining and administering the educational program. The May 1982 flyer originally offered courses in art, band, business, driver education, English, history, math, physical education, psychology, reading, science, sociology, typing and writing. However, due to insufficient enrollment, courses in art, band, business, English, physical education, science and typing, were ultimately dropped from the 1982 summer school curriculum.

The La Verne summer school operated simultaneously with the District's limited, state-mandated summer school. Both schools commenced on June 21, 1982, and approximately 268 students enrolled in the La Verne program. Of them, roughly 80-85 percent were from the District. The rest were from private schools as well as public schools in the surrounding areas of San Jose, Los Gatos, Saratoga, Mountain View and Los Altos.

La Verne was charged $13 per classroom for each day and $13 per day for office space. There were additional rental fees

assessed for the use of instructional materials, including textbooks and audio-visual equipment. The fees charged to La Verne totaled $4,762 for the 1982 summer school. Although, by the terms of lease, the charges to La Verne were designed only to cover the cost to the District of the La Verne summer school, in 1982 the District actually made a small profit on the venture.

In 1983, the District entered into another lease with La Verne, enabling the latter to once again conduct summer school at District facilities. As had been the case since 1978, the District again operated its limited, state-mandated summer school. Ehrenberg once again was selected as the site administrator of the La Verne summer school. Fourteen teachers, who were employed during 1982-83 as teachers by the District, taught in the 1983 La Verne summer program. District facilities and materials were leased by La Verne in the same fashion as had occurred the previous year. Courses taught in the 1983 program included driver education, history, math, reading, writing and a combined section of psychology, sociology and economics. As of the date of the hearing in this matter, no official decision had been made regarding leasing District facilities to La Verne for a 1984 summer program.

Contractual Issue, Arbitration Decision and PERB's Repugnancy Review

Prior to its filing of the first unfair (SF-CE-667) with

PERB, FEA filed a grievance alleging that the District's lease with La Verne violated the parties' collective bargaining agreement. The contractual provision relied upon reads as follows:

> If summer instruction is exclusively available to students on a fee basis from Adult Education or an outside agency, all provisions of this agreement pertaining to summer school are waived. The District will encourage said agency to give preferential consideration to members of the unit. (Art. 2, sec. 2.2.3.2.)

The grievance was denied by the District and went to arbitration. The arbitrator decided only the issue of whether the District violated the contract by entering into the lease agreement with La Verne. She did not consider issues relating to "subcontracting," and FEA did not introduce evidence at the arbitration hearing relevant to this issue.

Ultimately, the arbitrator rejected FEA's argument that the District's state-mandated program rendered the La Verne summer school "nonexclusive," which, in turn, would have meant that the "waiver" of section 2.2.3.2 did not apply and, thus, La Verne teachers should be paid at the rate established in the collective bargaining agreement. On the contrary, the arbitrator found section 2.2.3.2 inapplicable to the situation. With respect to FEA's argument that section 2.2.3.2 was intended to avoid differential pay between District and La Verne teachers, the arbitrator ruled that the contract could

not bind a third party (La Verne) in order to eliminate the disparity in pay between District and La Verne teachers. Thus, the arbitrator concluded that the contract had not been violated.

FEA thereafter filed an unfair practice charge alleging that the arbitrator's decision was repugnant to EERA in that it failed to consider the statutory issues raised in the charge -- namely, whether the District's actions constituted a subcontracting or transfer of bargaining unit work in violation of EERA section 3543.5(c) and, deriviatively, (a) and (b). In his proposed decision and partial determination of repugnancy, ALJ Barry Winograd found that the arbitrator's award concerning the District's decision to lease facilities to La Verne was not repugnant to EERA. However, the ALJ went on to find that the arbitrator had failed to fully consider facts needed to resolve the statutory issue relating to the District's failure to bargain the "effects" of its decision and, to this extent, her decision was repugnant to EERA. The ALJ thus ordered that a complaint should issue on the District's failure to bargain the negotiable effects of its nonnegotiable decision. Although both parties have since advanced varying interpretations of the ALJ's repugnancy decision, neither party appealed the decision.

1983 Layoff

Among the allegations of the amended charge, FEA contended that one of the actual effects of the 1982 lease agreement with

La Verne was a layoff of certificated personnel occurring on or about May 10, 1983. At the hearing, FEA attempted to prove that four of the District's teachers were laid off at the end of the 1982-83 school year because students took summer courses from La Verne, and thus did not take those courses or, at least, took fewer courses during the following school session. This, in turn, resulted in lower enrollment and the layoff.

Contrary to FEA's theory, however, the record evidence establishes that staffing of all schools within the District is based upon a negotiated formula in the collective bargaining agreement (i.e., one teacher for every 29.8 students). Therefore, the District's required number of teachers is not determined by the number of classes a student takes, but rather by the total enrollment of students in the District. Moreover, the average number of courses taken per student for the 1982-83 actually increased slightly following the first La Verne summer school and increased again following the second La Verne summer school. This increase was attributed to the fact that the District raised the minimum number of courses it required its students to take.

The record shows that on March 1, 1983, after being advised of a projected deficit of 2.7 million dollars, the District's Board of Trustees adopted a resolution to reduce certain services for the following 1983-84 school year. Among those services sought to be reduced was physical education. The

determination to reduce physical education services was made because the District was carrying extra staff above what was required by the staffing formula in the collective bargaining agreement, and because physical education was the furthest from the academic subjects.[6]

Implementation of the layoff was pursuant to Education Code section 44955, which provides that a District may not terminate the services of a permanent employee while any employee with less seniority is retained to render a service which the senior employee is certificated and competent to render. This meant that the most junior teachers were the ones identified for the layoff. Unless they were teaching in an area that was protected by the resolution, they would receive notice of layoff regardless of what subject they taught. Senior teachers were then reassigned to fill vacancies left by junior teachers who were laid off. As a result of the reduction in physical education services, and in accordance with the above process of implementation, four of the District's teachers were laid off in 1983.

Thus, the record in this case shows that the layoff was not implemented due to a decline in student attendance, but because of a reduction in certain services which were considered to be

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[6]Physical education was not included in La Verne's program. It was, at one time, offered, but then dropped from the curriculum due to insufficient enrollment.

overstaffed. These were services in which there were more teachers than the number mandated by state law and/or formulas established in the parties' collective bargaining agreement.

DISCUSSION

Transfer of Case

A threshold issue is presented in this case by the District's exception to the transfer of the case for decision from ALJ Link, who presided at the hearing, to ALJ Melgoza. The District argues that the transfer was prejudicial inasmuch as: (1) Melgoza was biased against the District's law firm because, prior to his issuance of the decision, he was personally named as a defendant in a lawsuit filed by the District's law firm;[7] and (2) Melgoza made credibility determinations without the benefit of actually hearing the testimony or observing the demeanor of witnesses.

Concerning the District's first argument that the transfer should not have taken place because Melgoza was biased against the District's law firm, we note that PERB Regulation 32155[8] provides, in pertinent part:

> (a) No Board member, and no Board agent performing an adjudicatory function, shall

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[7]The lawsuit was filed on April 3, 1985, and the proposed decision was issued on April 30, 1985. There is no indication from the record, however, that Melgoza was personally served, or otherwise had actual notice of the lawsuit prior to the date at which his proposed decision issued.

[8]Cal. Admin. Code, title 8, section 32155.

> decide or otherwise participate in any case or proceeding:
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> . . . . . .
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> (4) When it is made to appear probable that, by reason of prejudice of such . . . Board agent, a fair and impartial consideration of the case cannot be had . . . .

In the decision of Gonzales Union High School District (1985) PERB Decision No. 480, the interpretation of PERB Regulation 32155(a)(4) was at issue, and this Board enunciated the following standard as being grounds for the disqualification of an ALJ on the basis of bias: evidence of a "fixed anticipatory prejudgment" against a party by the judge. (Gonzales, supra; see Evans v. Superior Court (1930) 107 Cal.App.2d 372; Adoption of Richardson (1967) 251 Cal.App.2d 222.)

We can find no persuasive authority in support of the proposition that "bias" against a legal representative, rather than a party, is sufficient grounds for the disqualification of an ALJ. In short, we conclude that the mere existence of a lawsuit in which Melgoza was named, without any proof that Melgoza was personally served or had actual notice prior to his issuance of the proposed decision, falls short of demonstrating "prejudice" under PERB Regulation 32155(a)(4) or meeting the Gonzales standard of a "fixed anticipatory prejudgment."

The District also argues that the case should not have been

transferred because it involved important credibility determinations made by Melgoza. Although this Board has held that it may not rely on a substituted ALJ's credibility determinations based upon the demeanor of witnesses and which involve conflicting testimony of witnesses (Gonzales Union High School District (1984) PERB Decision No. 410, p. 15; Regents of the University of California (1983) PERB Decision No. 366-H), in the instant case, the ALJ made no such "credibility" determinations in the classic sense. Instead we believe that the ALJ simply weighed conflicting evidence without reference to credibility or demeanor as such.

While we do not find that this record provides sufficient basis upon which to conclude that there was prejudicial error in the transfer of the case to ALJ Melgoza, we do agree with the District's assertion that it should have been provided notice and an opportunity to state its objections prior to the transfer of the case pursuant to PERB Regulation 32168(b).[9] The parties should be provided notice of an impending substitution at a meaningful time -- e.g., before it has taken place. This procedure would permit parties to file their

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[9]Regulation 32168(b) provides, in pertinent part:

> A Board agent may be substituted for another Board agent at anytime during the proceeding at the discretion of the Chief Administrative Law Judge in unfair practice cases . . . .

objections and allow the Board and its agents to consider the transfer of a case to a particular ALJ and/or permit the ALJ sufficient opportunity to withdraw.

The ALJ's Proposed Decision

The ALJ found the District to have violated EERA by its failure to bargain actual and potential effects of the lease with La Verne. In reaching this conclusion, the ALJ rejected the District's two primary arguments raised in its exceptions and accompanying briefs. They are: (1) the District's duty to negotiate the effects of the lease never arose because FEA waived any right it had to bargain such effects; and, alternatively, (2) the lease agreement with La Verne resulted in the operation of a summer school that was completely separate from that operated by the District and, thus, there was no impact upon terms and conditions of employment of unit members. Because we reject the ALJ's conclusion that the District had an obligation under EERA to negotiate the actual and potential effects of the lease, we find it unnecessary to reach the issue of waiver.

Effects of Lease Agreement

The fundamental issue in this case is whether the District violated EERA section 3543.5(c) and, deriviatively, section 3543.5(a) and (b) by failing to negotiate the actual and "potential" effects of the lease agreement with La Verne. In finding a violation of EERA, the ALJ initially observed that

the lease agreement resembled either a subcontract or transfer of bargaining unit work.[10] In the case of either, observed the ALJ, both the decision and the effects must be bargained. The ALJ rejected the District's argument that, without the La Verne lease, there would have been no additional work to transfer or subcontract and, therefore, no effects about which to bargain. By then relying on language in PERB's layoff cases, including Mt. Diablo Unified School District, supra, PERB Decision No. 373, the ALJ concluded that the District violated EERA by failing to negotiate the "reasonably foreseeable" effects of the lease.

We disagree with the ALJ's characterization of the lease agreement as being "tantamount to subcontracting." Our precedent does not articulate a clear definition of what constitutes subcontracting. However, under the private sector's definition set forth in Justice Stewart's concurring opinion in Fibreboard Paper Products Corporation v. NLRB (1964) 379 U.S. 203, an employer's subcontracting consists of the:

> . . . substitution of one group of workers for another to perform the same task in the same [location] under the ultimate control of the same employer.
> (Id. at p. 224, emphasis added.)

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[10]Although in his findings of fact, the ALJ stated that the lease agreement was the "accomplishment of a subcontracting or a transfer of work," he ultimately concluded that the lease more closely resembled a subcontract than it did a transfer. While our discussion herein emphasizes that the lease agreement did not result in the contracting out of unit work, we also conclude that no transfer of unit work occurred.

This record does not show that teachers, while employed at La Verne, were under the ultimate control of the District, or that the District exercised any control whatsoever over La Verne teachers. The lease agreement provides that all employees hired by La Verne are to be selected by La Verne, be its employees exclusively, and be subject solely to its direction, control, compensation and discharge. Pursuant to the lease, La Verne was also to be responsible for payment of workers' compensation insurance, unemployment insurance, social security contributions and income tax withholdings. There is no evidence in the record indicating that the District interfered with La Verne's exclusive performance of these functions. Nor does there exist any evidence suggesting that La Verne was the "alter ego" of the District or otherwise functioned in less than an exclusive capacity regarding the summer school program. The evidence is thus consistent with a provision of the lease agreement in which La Verne is declared as being "solely responsible for determining and administering the educational program." (Emphasis added.)

In California Teachers Assn. v. Board of Education of the Glendale Unified School District (1980) 109 Cal.App.3d 738, a case containing underlying facts and issues strikingly similar to those of the instant case, the Glendale Unified School District also entered into a written agreement with the University of La Verne. The agreement contained terms nearly identical to those contained in the lease entered into by the

parties in this case. For example, the agreement entered into between La Verne and the Glendale Unified School District provided that the former was to pay the district a use charge and conduct classes on the school premises, which were to be under La Verne's exclusive jurisdiction and control. Also similar to the record in the instant case, before 1978, the practice of the Glendale District had been to offer a broad range of classes. However, due to a reduction in state funding, the district, in 1978, ceased to offer a broad summer program and offered instead only a limited range of courses that were mandated and funded by the state. In Glendale, the court rejected the California Teachers Association's (CTA) argument that the La Verne summer school breached the collective bargaining agreement between CTA and the Glendale District as evidenced by a disparity in wages received by district and La Verne teachers. Significantly, in not finding a violation of the collective bargaining agreement, the court stated:

> [CTA's] position would be well taken if the La Verne operation of its own summer school were a part of the district's summer school on a subcontract basis. As already indicated, the flaw in [CTA's] position is that in fact the summer programs of the district and the summer programs of La Verne were completely separate and distinct from each other. It follows that the grant of use agreement had no impact on the teachers' rights under the collective bargaining agreement. No teachers have been laid off, no salaries have been reduced, nor have any rights been lost to the teachers as a result of the grant of use agreement.
> (Glendale, supra, p. 750, emphasis added.)

In reaching our conclusion that no subcontracting or transfer of unit work occurred, we also find particularly significant the fact that, on this record (and in Glendale), the budgetary cuts associated with Proposition 13 caused the District to cease operating a comprehensive summer school as of 1978. In this regard, this Board's decision in Stanislaus County Department of Education (1985) PERB Decision No. 556 is instructive. In Stanislaus, the Board affirmed the ALJ's proposed decision, finding that the County Department of Education did not violate EERA by failing to negotiate its decision to cease operating centers for migrant children, and by selecting an outside nonprofit corporation to perform the function. The Board identified, as a principle issue, the "appropriate characterization" of the county's decision to cease direct operation of the centers. Significantly, the Board noted that the migrant education program is not one mandated by the state. It stated:

> Unlike a school district that abandons its in-house transportation program and hires a private bus company to carry the students to and from its schools, here, the migrant child centers are not part of a county program which survives as such after the county decided it no longer wished to be in the business of directly providing educational services.
> (Id. at p. 4.)

Similar to the situation in Stanislaus, here, the District's former comprehensive summer school was apparently not mandated by the state. Indeed, upon the passage of

Proposition 13, the state stopped funding the comprehensive summer school. When its source of funding was extinguished, the District entirely ceased operating the comprehensive summer program. We find persuasive the simple logic of the District's argument that the lease was not, in reality, a subcontracting of unit work inasmuch as the record clearly shows that without the lease, there would have been no comprehensive summer school. Had there, instead, been evidence that the District would have provided its own comprehensive summer school if the lease agreement option was not available, a different analysis of this issue might well be warranted. However, there was no evidence in the record indicating that the District was active in providing summer instruction other than its three state-mandated courses. Thus, absent any specific evidence that the La Verne summer school program replaced unit work which had been performed by the District, there cannot exist a subcontracting of unit work.

In the final analysis, the ALJ's characterization of the lease as some form of subcontracting of unit work is not dispositive of the issues herein. This is so because, irrespective of its categorization as a lease, or the subcontracting of unit work (or something else), questions concerning the negotiability of the decision have been eliminated by the arbitrator's decision, as well as PERB's repugnancy determination thereof, from which no appeal was

taken. What remains is the issue of whether there exists an obligation to negotiate the effects of the lease and, if so, the extent of such an obligation.

In deciding this issue, the ALJ relied on the PERB layoff cases of Mt. Diablo Unified School District (1983) PERB Decision No. 373 and Newark Unified School District (1982) PERB Decision No. 225 for their alleged proposition that management has the duty to bargain both actual and "speculative" effects of nonnegotiable decisions. We agree with the ALJ's analysis to the limited extent that he found that, irrespective of how the lease agreement is characterized, the in-scope effects, if any, of such a nonnegotiable decision are subject to negotiations. However, we disagree with the manner in which the ALJ applied the standard articulated in Mt. Diablo Unified School District, supra, to the facts of this case.

In the decision of Mt. Diablo Unified School District, supra, this Board concluded that, in order to find a violation of EERA section 3543.5(c) within the context of a layoff, it is not necessary to prove the occurrence of an actual change in employees' working conditions as a precondition to finding a duty on the part of management to negotiate the impact of the layoff. Instead,

> . . . the Association need only produce sufficient evidence to establish that the decision to lay off would have a reasonably foreseeable adverse impact on employees' working conditions and that its proposal is

> intended to address employee concerns generated by that anticipated impact. (Mt. Diablo, supra, p. 51. Emphasis added.)

Although the Mt. Diablo standard was articulated within the context of a layoff, we conclude that it may appropriately be extrapolated to the nonlayoff context of the instant case. Nonetheless, we believe that the record now before the Board underscores the manner in which the language of the Mt. Diablo test invites confusion and varying interpretations. Thus, we now take the opportunity to clarify the Mt. Diablo standard.

The ALJ found the District to have violated EERA by its failure to bargain both actual and speculative effects of the lease with La Verne. We disagree with the ALJ's expansive application of the Mt. Diablo standard so as to embrace even those effects which are purely speculative. On the contrary, in determining the lawfulness of management's failure to negotiate impact in advance, the Mt. Diablo standard, in our view, attaches a bargaining obligation only to those immediate or prospective effects which are reasonably certain to occur and causally related to the nonnegotiable decision at issue. Accordingly, we reject the ALJ's conclusion that FEA had a "right" to negotiate safeguards for unit members in case of a future layoff.

In his proposed decision, apart from his identification of purely conjectural effects, the ALJ identified effects which he described as "actual." Such impact was allegedly demonstrated

in that La Verne teachers received salaries substantially lower than they would have received under the contract between the District and FEA. Other alleged "actual effects" noted by the ALJ were that La Verne teachers did not receive the protection of contractual class size restrictions and hiring provisions.

We disagree that the facts relied on by the ALJ demonstrated actual impact. His analysis was dependent upon the mistaken conclusion that unit work was contracted out or transferred. Additionally, even though La Verne teachers were employed by the District during the school year, they were not District employees while they worked as teachers for La Verne. Indeed, the ALJ noted:

> Although the teachers hired by La Verne were employed by the District during the regular school year, they do not fit within the EERA definition of a "public school employee" <u>during the time they worked for La Verne</u> inasmuch as they received compensation from, were considered for employment and selected by, and were supervised by La Verne University. According to the agreement between the District and La Verne, the summer school teachers were to be solely La Verne's employees, subject to its direction and control.

Inasmuch as the teachers, while they worked at La Verne, were not District employees, the District is not obligated under the contract to pay contract wages to the employees of a third party. Nor is La Verne the alter ego of the District or otherwise bound by the contract between FEA and the District. As was declared by the arbitrator, it is "axiomatic" that the contract cannot bind third parties.

Concerning the 1983 layoff, had it been causally related to the La Verne (1982) lease, it would appropriately have been described as an actual effect of the lease agreement. However, we agree with the ALJ that the record clearly demonstrates that the 1983 layoff was in no way causally related to La Verne's operation of a summer school in 1982. That being the case, the record remains completely devoid of evidence of impact on conditions of employment of members of the bargaining unit at a time when such individuals were employees of the District.

In summation, we conclude that there was no obligation to negotiate speculative effects of the lease and, finding no actual effects, we reverse the ALJ and dismiss the complaint.

ORDER

The unfair practice charge in Case No. SF-CE-779 is hereby DISMISSED.

Chairperson Hesse and Member Craib joined in this decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

FREMONT EDUCATION ASSOCIATION, CTA/NEA, Charging Party, v. FREMONT UNION HIGH SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. SF-CE-779 PROPOSED DECISION (4/30/85)

Appearances: Ramon Romero (California Teachers Association) for Charging Party, and Patricia White (Littler, Mendelson, Fastiff & Tichy), attorney for Respondent.

By Manuel M. Melgoza, Administrative Law Judge.

PROCEDURAL HISTORY

In June 1982, the Fremont Education Association, CTA/NEA, (hereinafter FEA or Union) filed an Unfair Practice Charge (SF-CE-667) with the Public Employment Relations Board (PERB), alleging that the Fremont Union High School District (hereinafter District) had violated the Educational Employment Relations Act (EERA or Act)[1] by entering into an agreement with LaVerne University to conduct a summer school traditionally taught by bargaining unit members. On or about November 8, 1982, PERB dismissed the Unfair Practice Charge because the grievance machinery of the parties' collective

[1]The Educational Employment Relations Act is codified beginning at section 3540, et seq. of the Government Code. Unless otherwise stated, all statutory references are to the Government Code.

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

bargaining agreement (containing binding arbitration), had not been exhausted. Indeed, the FEA had filed a grievance over the District's action in May 1982, claiming that it violated the Agreement as well.

At the time the PERB dismissed the Charge for deferral reasons, the grievance had been heard by an arbitrator, but no decision had been rendered by her. On January 18, 1983, the arbitrator issued her opinion and award on the grievance.

On May 11, 1983, the FEA filed an Unfair Practice Charge (SF-CE-779) with PERB alleging that the arbitrator's award was repugnant to the EERA, and claiming that the District's conduct in entering into the agreement with LaVerne University violated that statute. The case was subsequently assigned to an administrative law judge for the purpose of resolving arbitration deferral and repugnancy claims pursuant to PERB Rule 32661 (Cal. Admin. Code, tit. 8, pt. III, sec. 32661).

A First Amended Charge was filed by FEA on about August 12, 1983, alleging, in addition to its claims that the arbitrator's decision was repugnant, that one of the effects of the LaVerne University venture was a layoff of certificated personnel occurring on about May 10, 1983.

After the parties submitted their positions to the administrative law judge regarding the First Amended Charge, he issued a proposed decision on September 22, 1983. He ordered that the Unfair Practice Charge be partially dismissed to the

extent that the FEA alleged an unlawful refusal to meet and negotiate over the District's decision to enter into a summer school lease agreement with LaVerne University. He found, however, that a Complaint should issue on the District's failure to negotiate over the effects of its lease agreement decision. Inasmuch as neither party appealed the proposed decision on repugnancy, it became a final decision on October 12, 1983, (HO-U-198).

On September 23, 1983, a Complaint was issued by the PERB, charging that, with the exception of the allegations dismissed by the administrative law judge, that the First Amended Charge stated a prima facie violation of the EERA. After an informal conference failed to result in a settlement of the Charge, a formal hearing was conducted by Administrative Law Judge Allen Link on April 3, 4, 5, and 6, 1984, and May 9, 1984. Post-hearing briefs were submitted by the parties in June and July 1984. The Charging Party, in July 1984, moved to reopen the record. Respondent opposed said motion.

Subsequently, the case was transferred to the undersigned for proposed decision. (See Cal. Admin. Code, tit. 8, sec. 32168(b).)

FACTS

The FEA represents a unit of certificated employees of the District having been voluntarily recognized by the latter as the exclusive representative. The unit encompasses all full

and part-time certificated personnel, including classroom teachers and summer school teachers.

Prior to 1978 the District operated a comprehensive summer school lasting an average of about 30 days. Teachers employed during the regular school year were able to obtain employment during the summer months pursuant to established contractual criteria and procedures. The summer session traditionally offered a wide range of classes that were often also taught during the regular school year. Both parties had treated teaching of summer school classes as work of the bargaining unit represented by the FEA.

Due to budgetary cuts occasioned by the passing of Proposition 13 in 1978, the District decided to cease operating its comprehensive summer school. Since the District was statutorily precluded from charging students tuition for attending, Fremont could not run its own self-supported (fee-based) summer program, either. Thereafter, from the summer of 1978 to and including the summer of 1981, the District provided summer school only for those students who were seniors within ten credits of graduating, special education students whose individual education plan specified the need for an extended program and (tutorial sessions for) students who had not mastered the minimum competencies required by law.

This limited form of summer school was referred to by the parties as the "state-mandated" summer school because state

statutes required these programs be provided. Bargaining unit members were eligible for summer employment in this "state-mandated" program pursuant to the same contractual provisions that governed the regular summer session, including provisions governing wages, class size, hours, selection criteria, etc. Only students meeting specific criteria could attend this limited form of summer school.

Although the District was unable to fund more than this limited summer school, its decision not to provide a comprehensive session was not intended to end summer school permanently.[2] Therefore, between 1978 and 1982, it searched for alternative ways to provide summer school for the general student population in the District. For example, it explored the possibility of having summer school provided by the Cupertino Parks and Recreation Department, the Saratoga/Los Gatos School District, the Campbell School District, and its own Adult Education Department.

The Contractual Issue

The financial constraints resulting from Proposition 13 and the District's desire to continue to provide students with a comprehensive summer program sparked the negotiation of a

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[2]The record indicates that, for the summer of 1984, the District planned to expand somewhat beyond its state-mandated program due to the availability of some additional state funding.

contractual provision appearing for the first time in the parties' collective bargaining agreement effective September 1, 1978 to August 31, 1979, and included also in the subsequent contract for the period of September 1981 to August 1984. The pertinent portion of the clause, which was a subsection of the Recognition Article, reads as follows:

> 2.2.3.2 Summer School - Fee Basis
>
> If summer instruction is exclusively available to students on a fee basis from Adult Education or an outside agency, all provisions of this agreement pertaining to summer school are waived. The District will encourage said agency to give preferential consideration to members of the Unit . . .

The provision was included in the interest of making it possible for summer school to be be offered through Adult Education or an outside agency. However, the language "exclusively available," was included for the purpose of preventing a situation where two summer programs were operated side-by-side with employees teaching essentially the same courses, working the same hours, and teaching basically the same students, yet being paid at different rates. Therefore, the intent of the language was that, if summer instruction was going to be offered by an outside agency <u>and</u> the District, the apparent waiver of contract terms would not apply.[3]

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[3]The dispute concerning this contract provision and the District's interpretation will be discussed further below.

The Contract with LaVerne University

Sometime in February or March 1982, Richard Baker, District Curriculum Coordinator and the administrator responsible for searching for alternative means to run a monetarily self-sufficient summer school, engaged in communications with representatives of LaVerne University (a private entity) regarding the possibility of conducting such a program for the District.[4] La Verne University (hereinafter LaVerne) had experience in conducting summer schools for other high school districts and offered, in exchange for a student paid fee, classes traditionally offered by the public schools.

After an initial telephone conversation, Richard Baker subsequently met with a representative of LaVerne and gathered data for the purpose of submitting proposals to Assistant Superintendent Hulburd on a self-sufficient summer program. Baker described the meeting as one where tuition, teachers' salaries, and lease amounts, were negotiated.[5]

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[4]There is a dispute regarding who initiated contact with LaVerne. Baker testified that he initiated the contact. District Assistant Superintendent Kathleen Hulburd testified that LaVerne initiated the communication. Resolution of this inconsistency in testimony is peripheral to the issues in this case and does not affect the undersigned's conclusions.

[5]Respondent put on testimony to show that Baker had not been given authority to negotiate teacher salaries with LaVerne and argues in its brief that such discussions regarding salaries did not take place. Respondent did not call any witnesses, including the LaVerne officials, to rebut the testimony of Baker. It argues that Baker's testimony should be discredited because, when called as a rebuttal witness, he

Subsequent to this meeting, Baker devised three separate proposals regarding a summer school package (with LaVerne) and submitted them to Hulburd. After this meeting, several phone calls transpired between Baker and LaVerne representatives in attempts to "firm-up" the tuition figures.

The Consultation Sessions with FEA

District administrators and FEA representatives historically met at regular meetings scheduled at least on a monthly basis. These meetings were not negotiation or bargaining sessions. It was in consultation sessions held some time in February or March 1982 that FEA representatives were informed that the District was considering entering into an agreement with LaVerne to provide summer school. In response, FEA representatives stated their opposition to such an idea and stated that it would be a violation of section 2.2.3.2 of the contract. During the consultation sessions and

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"changed his story" on direct testimony. A reading of the transcript indicates that Baker did not specifically recant his earlier testimony that salaries were discussed, but only that he did not give the LaVerne representative information on what teacher salaries were in the District. Respondent did not pursue the area on cross-examination. In Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626], the Supreme Court held that an administrative board must accept as true the intended meaning of uncontradicted and unimpeached evidence. Hence, because Baker's testimony is not contradictory and was unrebutted, I must credit it. Nor does the fact that Baker had some "communication problems" with his superior detract from his credibility, and there is no probative evidence from which it can be concluded that he fabricated his testimony.

subsequently at a school board meeting on April 20, 1982, FEA made known its demand that the District could not proceed with the agreement without first negotiating such a venture. The Union articulated some of the potential effects of the decision and areas where they desired protection for unit members. The demand to bargain is more fully discussed below.

William Mansfield additionally told District representatives, prior to approval of the venture, that the proposed agreement with LaVerne covered areas which were already dealt with in the collective bargaining agreement, including wages, hours and class size. Despite the Union's concerns, the District presented the LaVerne lease agreement for school board approval at the April 20, 1982, meeting.

The proposal that was presented to the board for approval was termed a "lease-agreement" for the use of space and District's facilities. In actuality, the two and one-half month agreement involved much more than a lease of facilities, as will be explained below.

After the FEA stated its position to the school board on April 20, the latter still voted to approve the lease agreement, arguing that it had a right to enter into such agreements pursuant to the case of CTA v. Board of Education of the Glendale USD (1980) 109 Cal.App.3d 738. However, the board chose not to execute the agreement, but decided to forward it to its legal counsel for screening prior to signing.

On April 26, 1982, the FEA president sent the superintendent another letter "repeating [its] concerns regarding private summer school" and "reiterating" its "desire to negotiate." The District executed the lease agreement on June 1, 1982, and implemented its terms.

The FEA thereafter filed a grievance on May 13, 1982, alleging that the District's action regarding summer school violated, inter alia, contract article 2.2.3.2, and requested the agreement be withdrawn and that any such program must be in conformity with the terms of the current collective bargaining agreement.

Nevertheless, during May, flyers were distributed within the District announcing the new summer school, soliciting teacher applications, giving figures on terms of employment (such as salaries), and indicating that LaVerne had been "encouraged to give unit employees preference in hiring."[6]

The summer school proceeded as scheduled, with classes commencing on June 21, and ending on July 30, 1982. In exchange for use of the facilities, the lease agreement required LaVerne to use them only for the purpose of conducting summer school classes of the sort that had been offered at the District prior to 1978. It was required to provide the District with a complete accounting of the enrollment of

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[6]LaVerne actually agreed to give such preference.

persons attending classes. Although the agreement specificed that LaVerne was solely responsible for determining and administering the educational program, and hiring, directing, and compensating its employees, there were "understandings" that expand the scope of the agreement and shed light on the intent of the venture.

For example, the agreement was intended to benefit the students of the District. Indeed, over 90 percent of the students ultimately enrolled in the 1982 summer session came from within the District. Additionally, the District was able to negotiate with LaVerne an agreement to give hiring preference to District teachers. In fact, all of the teachers ultimately hired by LaVerne were bargaining unit members. The District and the University arranged for the summer school courses to count toward graduation credit. The hours of operation of the summer school were identical to the hours of the District-operated summer school.

The District's state-mandated summer school and the LaVerne summer school operated, essentially, side-by-side at the District's Cupertino High School. District staff, in addition to teachers, were hired by LaVerne. James Ehrenburg, assistant principal at one of the District high schools, was hired by LaVerne as the summer school site administrator. Approximately 10 District teachers and 4 District administrators and staff persons were hired by LaVerne to conduct the summer school.

The subjects of driver education, English, science, math, and social studies were taught, areas traditionally offered in the District during the regular year and during summer school. Approximately 268 students were enrolled in the 1982 summer school. Approximately 15 of those students were from outside the District.

The textbooks used by LaVerne were those normally used in the District and rented from the latter. Other District equipment was also used in the LaVerne program.

Although unit members were given hiring preference, the seniority provisions and the "rotation" clauses in the contract between the District and FEA and specified selection criteria were not applied during LaVerne's hiring process. Similarly, although the contract specified that summer school teachers were to be paid at 2/3 their normal per diem rate, LaVerne paid a flat rate of about $1015 for teaching two periods, and about $2030 for four periods. This resulted in a substantial difference in the rate of pay between what the teachers in the LaVerne program were paid and what the unit teachers in the District-run summer school were paid. As an example, unit member Fred Keep taught social studies for four hours per day in the District summer school, worked 29 days and was paid approximately $3600-$3700, calculated by the contractual 2/3 per diem rate. Unit member Lincoln Scarper, hired by LaVerne to teach social studies for four hours per day, for 29 days,

was paid $2050. If he had been hired by the District's summer school program, he would have earned approximately $3800 based upon the 2/3 per diem method of calculation.

In addition to the difference in salary, the class size restrictions in the District's collective bargaining agreement were not applied to the LaVerne program.[7]

In 1983 the District entered into another agreement with LaVerne and conducted, once again, a summer school, side-by-side with the District's "state-mandated" summer school at Cupertino High School. Ehrenburg again acted as the coordinator of the LaVerne program. Fourteen teachers, all unit members, were hired, and taught some 19 sections in traditional District subjects (13 sections were taught the previous summer). District materials - textbooks, consumable supplies, film projectors, other machines, typewriters, and duplicating equipment -- were used in substantially similar fashion by the LaVerne program as in the 1982 summer. The hiring process for teachers was similar to the one used in 1982.

The wages paid to the teachers again were based upon a flat fee ($1093.50 for teaching one five unit class - two and one-half hours per day - and $2187 for teaching four and one-half hours per day). It was acknowledged that this

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[7]A unit member's fringe benefits, which were acquired by virtue of a 10-month assignment, traditionally covered teachers for the entire 12 months. Therefore, although LaVerne did not offer fringe benefits, no unit member lost these benefits as a result of the LaVerne/District arrangement.

was substantially less than what was paid the teachers who worked in the district-operated summer school in 1983.

There was one other event that impacted the wages paid by LaVerne in 1983. During the regular 1982/83 school year, the District had increased its unit members' wages by approximately 8 percent. Jim Ehrenburg determined that there was a need to achieve equity to prevent further disparity in wages between District-hired summer school teachers and LaVerne-hired teachers from the District. Therefore, he asked LaVerne to grant teachers hired for the summer of 1983 an 8 percent raise. Therefore, the wages for LaVerne's 1983 program differed from those paid during the previous summer.[8]

It would be a mistake to view the District's actions during the spring and summer of 1982 merely as an exercise of management's right to lease space and facilities. For what the District accomplished by its lease agreement went beyond this simple step. Part and parcel of the District's execution of a lease agreement with LaVerne was the accomplishment of a

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[8]There was some evidence presented during the hearing that the District was thinking of continuing to have LaVerne offer a summer program at the District in 1984. There was also evidence that the District intended to expand its own summer program beyond the state-mandated areas depending on what funds were made available from the state. However, the District had not, at that time, made a final decision on those matters. In July 1984 Charging Party filed a motion to reopen the record to present evidence on the 1984 program. That motion is discussed, <u>infra</u>.

subcontracting or a transfer of work (summer school teaching) out of the bargaining unit. Without such a transfer, the lease agreement would have had no meaning or purpose. The venture between LaVerne and the District served to reestablish a comprehensive summer school for the benefit of District pupils, but changed the funding mechanism as well as its administration.[9] Yet the summer school teaching jobs continued to legally belong to the FEA unit within the District.

The Arbitration Award

Complicating this matter further was the filing of a grievance by the Union in May 1982. The grievance proceeded to arbitration, and the arbitrator's opinion was issued on January 18, 1983.

The arbitrator only decided the issue of whether the District violated its contract by entering into an agreement with LaVerne to lease school district resources. She specifically avoided any issues in the area of sub-contracting as not being part of the case. She did not deal with the parties' EERA obligations, such as whether the District had a duty to negotiate.

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[9]Although the venture was intended originally to be self-sufficient and the District did not attempt to make a profit, a profit was achieved by the District. The size of the profit is not in evidence.

The arbitrator analyzed the parties' evidence regarding the meaning of contract section 2.2.3.2. She found that the provisions purported only to specify what would happen in certain circumstances if summer school is provided solely by an outside agency, not to prohibit it entirely. She found that the section was inapplicable to the case because it was only triggered if the summer school was operated entirely (exclusively) by another agency.[10] Finding the section inapplicable, and silent as to what would happen in the event summer school was offered by the District and also by an outside agency, she found no contract violation.

The FEA subsequently filed an unfair practice charge alleging that the arbitrator's award was repugnant to the purposes of the EERA because, inter alia, it failed to consider the statutory issues raised in the charge. PERB Administrative Law Judge Barry Winograd issued a proposed decision and a partial determination of repugnancy on September 22, 1983. Although the parties have interpreted his decision in different ways, neither party filed an appeal, and the proposed decision became final on October 12, 1983 (HO-U-198) .

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[10]She initially found that the 1982 summer instruction was not exclusively available on a fee basis from an outside agency. She also rejected the District's reliance on the Article to excuse its actions.

In that decision, the administrative law judge found that the statutory bargaining claims were not decided and concluded:

> That deferral to the arbitration award is appropriate in connection with the Association's claim that it had a right to bargain over the District's decision to enter into the lease agreement with LaVerne. However, deferral is not warranted in connection with the Association's further allegation; namely, that in terms of the effects of the decision, the District violated the Act because it unilaterally altered established contract terms and because it failed to negotiate over the non-contractual consequences of the lease arrangement with LaVerne. (Fremont Union High School District (10/12/83) HO-U-198 at 18; emphasis added.)

Elaborating on his conclusion that the arbitrator's award with respect to the District's decision was not repugnant, the Administrative Law Judge reasoned that:

> In keeping with the Los Angeles precedent, even if the Board were to disagree with the arbitrator's assessment of the evidence supporting the District's basic right, the PERB is bound to defer where the facts necessary to the arbitrator's holding are parallel to those that would be presented to this agency.
>
> Since the arbitrator's conclusion about management's right to enter into a lease agreement was plainly a fundamental step in her overall analysis of the contract, the Association should be barred fron arguing at this date that it did not present all of the relevant evidence and argument on the basic subcontracting issue.

With regard to the effects of the District's decision, the Administrative Law Judge found that the arbitrator had, inter

alia, failed to fully consider facts needed to resolve the statutory bargaining claim:

> It is apparent that the lease agreement decision had both immediate and potential effects on bargaining unit employees and on subjects within the scope of representation under the Act. (See sec. 3543.2.) For example, summer school instructors for La Verne were typically District teachers at other times during the year. While working for La Verne, they taught classes comparable to those given by the same teachers during the regular school year (and by District teachers hired for the District's 1982 state-mandated summer programs). Yet the La Verne teachers were paid a substantially lower wage and were not uniformly selected in accord with the terms of the collective agreement. Under similar circumstances, the Board has concluded that the effects of unilaterally altering working conditions for unit employees, and the transfer of that work beyond the reach of the contract, may be negotiable. (See, e.g., Mt. San Antonio Community College District (8/18/83) PERB Decision No. 334 at pp. 8-9, and cases cited therein.)
>
> Moreover, the long-range potential effects of the LaVerne agreement in terms of teacher layoffs or reductions in hours, were never subject to bargaining with the employer . . . . Despite the unknown or speculative impact of the lease agreement on future employment security at the time the decision was initially made, the potential effects would still be within scope for prospective bargaining. (Newark Unified School District (6/30/81) PERB Decision No. 225 at p. 5.)
>
> Once the arbitrator found Article 2.2.3.2 inapplicable as a contract waiver because of its text and bargaining history, if she were applying statutory collective bargaining principles she should have concluded that the employer had not sustained its

> contractual excuse for the resulting differential treatment. The balance of the contract terms still remained in operation unless a different defense was advanced by the employer.

The issue remaining in dispute in this case, therefore, is whether the District failed to negotiate regarding the effects of its decision to enter into the agreement with LaVerne, and whether this failure violated the EERA.

DISCUSSION

It is axiomatic that a public school employer's failure to meet and negotiate in good faith with an exclusive representative about a matter within the scope of representation is unlawful. Additionally, a unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate. Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; San Mateo County Community College District (6/8/79) PERB Decision No. 94.

An employer's duty to negotiate is violated, for example, when it unilaterally changes an established policy without affording the exclusive representative a reasonable opportunity to bargain. Grant Joint Union High School District (2/26/82) PERB Decision No. 196; Pajaro Valley, supra. Where a contract is silent or ambiguous as to a policy, its meaning may be ascertained by examining past practice or bargaining history.

Rio Hondo Community College District (5/22/78) PERB Decision No. 279.

The subject of subcontracting unit work has been found by the PERB to be negotiable and within the scope of representation. Oakland Unified School District (12/16/83) PERB Decision No. 367; Arcohe Union School District (11/23/83) PERB Decision No. 360. Similarly, transferring work from one bargaining unit to other employees out of that particular unit is negotiable. Goleta Union School District (8/1/84) PERB Decision No. 391. Subcontracting has an inherent impact upon terms and conditions of employment and, thus, proof of actual, demonstrable effects is not required in order to establish a violation. Oakland Unified School District (12/16/83) PERB Decision No. 367; and San Mateo County CCD, supra.

Under the facts of this case, the District's actions more closely resemble a subcontracting of unit work than of a transfer. In either case, however, a mandatory subject of bargaining is involved.[11] In a transfer of work out of the

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[11]Although the teachers hired by LaVerne were employed by the District during the regular school year, they do not fit within the EERA definition of "public school employee" during the time they were working for LaVerne inasmuch as they received compensation from, were considered for employment and selected by, and were supervised by LaVerne University. According to the agreement between the District and LaVerne, the summer school teachers were to be solely LaVerne's employees, subject to its direction and control. The University was to bear all liabilities and expenses "imposed by law or contract incident to such employment," including Worker's Compensation Insurance, Unemployment Insurance, Social Security contributions and tax withholdings. Additionally, the

unit situation, and in a subcontracting situation, both the decision and the effects (impact) of the decision are within the scope of representation. Rialto Unified School District (4/30/82) PERB Decision No. 209; Arcohe Union School District, supra; and Oakland Unified School District, supra. Unless a lawfully accepted excuse is established (e.g., waiver, exigent circumstances), an employer may not subcontract or transfer unit work out of the unit without providing the exclusive representative notice and a reasonable opportunity to bargain over the subject.

These principles apply to the facts of this case. Preliminarily, it must be pointed out that, both by past practice and by contractual agreement, summer school teaching was work recognized by both parties as belonging exclusively to the bargaining unit, with one exception that has been found, and I concur, inapplicable to this situation.[12] The

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summer school work was not taken over by existing District employees out of the unit, such as administration personnel, or to newly created District-paid positions out of the unit. Although the District provided the facilities and some supplies, a fee for such was charged to LaVerne and the latter was contractually required to be solely responsible for determining and administering the summer school program. See Goleta Union School District (8/1/84) PERB Decision No. 391; and Rialto Unified School District (4/30/84) PERB Decision No. 209.

[12]The arbitrator decided that the waiver in Recognition Article 2.2.3.2 did not apply because summer school was not offered exclusively by an agency outside the school district, after examining bargaining history. The PERB administrative law judge did not find that portion of the arbitrator's decision repugnant to the EERA.

collective bargaining agreement describes the unit as "all full and part-time certificated personnel excluding management, confidential, supervisory personnel, and other positions enumerated in Section 2.2.2." It also contained numerous provisions governing terms and conditions of employment of summer school employees such as employee selection criteria, hours and work-year, compensation, placement of employees, seniority, rotation, and class size. The evidence presented indicates that, prior to 1982, summer school was performed only by the bargaining unit represented by the FEA.

The fact that the District, because of lack of sufficient funds, scaled down its summer school after the passage of Proposition 13, did not automatically effectuate a removal of that work from the unit. Goleta Union High School District, supra, at p. 19, fn. 12. No unit modification was accomplished, and it was never the District's intent to permanently abolish the positions and cease the summer school function. The "hiatus" of 1978-1982 did not operate to remove work from the unit, to permanently abolish bargaining unit positions, or to excuse the district from any legal obligations to bargain.

It appears that the District provided FEA with notice of its intent to enter into a summer school agreement with LaVerne, although the date that the District informed the Union of a firm decision is less clear. The testimony of FEA

witnesses Dick Fulcher and William Mansfield indicates that, during February and March 1982, the District, in consultation sessions, informed the Union that it "might" enter into a lease agreement with LaVerne, that it was looking into the "possibility" of having LaVerne run a summer program, and that it was "seriously considering" such a venture. District witnesses, including Tom Hodges and Kathleen Hulburd, testified that they informed FEA during consultation sessions during late February and March 1982, that the District was contemplating entering into the agreement. Between late March and early April, District representatives met with LaVerne and later deliberated in a District administrator's meeting whether to offer LaVerne the lease.

In any event, via memo dated April 8, 1982, Kathleen Hulburd officially informed FEA's Dick Fulcher of the following:

> After our last consultation meeting, I met with representatives from University of LaVerne regarding their leasing our facilities to provide a private summer school program for students in this area . . . .
>
> It is our intention to recommend to the board that it approve the lease agreement with the University of LaVerne.
>
> If the lease agreement is approved, LaVerne will hire an administrator who will be responsible for selecting teachers contingent upon sufficient class enrollment.
>
> Additional questions you may have can be discussed at our next consultation meeting.

And, although the Union had requested to negotiate during and subsequent to the February and March consultation meetings (see discussion below), the District board voted to approve the agreement with LaVerne on April 20 and executed it on June 1, 1982, all, admittedly, without actual negotiations.

The District's Duty and the Demand to Bargain

Respondent raises, as one of its main arguments, that its duty to negotiate never arose because the Union made no effective or timely demand to bargain. Essentially, it is arguing that the FEA waived any right it had to bargain by failing to make a proper demand. As will be indicated below, a "clear and unmistakable waiver of a right to bargain" cannot be supported by the record in this case.

The minutes of the school governing board indicate that, prior to making the decision to enter into the lease agreement with LaVerne, Union representatives expressed concerns over the bidding procedures for jobs, over the absence of language regarding teacher salaries, over language stating that employees would be hired solely by LaVerne, that the agreement was a potential unfair practice charge if subsequent classes in September and October were reduced because of the impact of the summer school, that the agreement subverted the unit, and that the current collective bargaining agreement already contained provisions in these areas. The FEA asked the District to postpone implementation of the lease agreement.

Elaborating on what occurred at this board meeting, William Mansfield, President of the Fremont Education Association, testified that the issues of wages, hours, class size, and teacher selection were raised by the Union in response to the District's proposed action.

Prior to the board voting on the proposal, Union representatives addressed the members. According to Bill Empey's testimony, he told the board members that the pending proposal was a violation of the contract, it was bargainable, it was a potential unfair labor practice and would potentially impact on class size, and might result in a service layoff in the future.

FEA witnesses, including Dick Fulcher, testified that prior to the date the lease agreement (June 1, 1982) was executed, the Union repeatedly expressed that, if the District insisted on going ahead with the agreement, it would have to be negotiated. And, although documentary evidence such as the board's minutes of April 20, and FEA's letter of a demand to negotiate dated April 26, 1982, supports FEA's position that there was a general demand to bargain the District/LaVerne venture, it is also apparent that FEA did not use the terms of art "we demand to negotiate the effects of the decision" or "the impact of the decision" to have summer school taught by LaVerne University.

Respondent's witnesses, including Deputy Superintendent Thomas Hodges, acknowledged that there was a request to bargain, but qualified that by stating that the Union expressed a desire to negotiate only the decision and not the effects of the decision, to have LaVerne operate the summer school program.

In response to the Union's requests and protests, the District maintained that it was not a violation of the contract to proceed with the summer school arrangement, that indeed, the contract permitted such a scheme, and that the proposed summer school was in accordance with the Education Code and with a Court of Appeal case in CTA v. Board of Education of the Glendale USD (1980) 109 Cal.App.3d 738. That case upheld a similar lease agreement between LaVerne and the Glendale Unified School District, but did not address the collective bargaining obligations of the parties with respect to the issue.

While the Union's demand was not as precise as it could have been, the record reflects, and I find that FEA's protests, articulation of the possible impacts, and its general requests to negotiate were sufficient, in the facts of this case, to put the District on notice that it must bargain prior to undertaking the venture. Therefore, I find that there was a timely demand to negotiate with respect to all aspects of the lease agreement. I discredit the testimony of Hodges to the extent that it implies that FEA's representatives expressed a

desire to restrict bargaining only to the decision to enter into the lease agreement with LaVerne. Such precision in the alleged communication does not logically square with the events occurring at the time.[13]

PERB case law and the cases cited by Respondent are consistent with this conclusion. Indeed, the facts herein are far more supportive of a finding of an adequate demand to bargain than even were found by this Board to be sufficient in Goleta Union School District (8/1/84) PERB Decision No. 391. In finding that the District unlawfully transferred work out of the unit, the Board in that case considered the Respondent's argument that the Union had merely demanded that the District rescind its action and "restore the status quo," but did not make a specific request to negotiate at all. The Union argued that it did not feel that a demand to negotiate was necessary, given that they already had a contractual right to the work. Although the Union turned out to be wrong that it had a contractual right to the work, the PERB found a clear demand to

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[13]The fact that the FEA had expressed its desire to negotiate with regard to all aspects (decision and effects) of the issue is further supported by uncontroverted testimony that Bill Empey and Bill Mansfield approached James Ehrenburg in late May or early June 1982, in an attempt to obtain guarantees regarding the LaVerne hiring process, and also in an unsuccessful attempt to have Ehrenburg apply a "rotation hiring process" and to apply a seniority system of hiring. Other provisions in the FEA contract were discussed as well. Such conduct is consistent with FEA's previous expressions of intent to negotiate. Ehrenburg claimed these talks were not negotiations.

bargain in the Union's vigorous objections and demands to have the action rescinded and restore the status quo. Here, there was an expressed demand to bargain.

The Board's decision in Newman-Crow's Landing Unified School District (6/30/82) PERB Decision No. 223 does not lend support to Respondent's waiver theory. In that decision, the majority opinion held that the Union failed to demand to negotiate the effects of a layoff. The factors relied upon were expressed as follows:

> While it is clear that Marvel criticized the resolution during his presentation, claiming that it was an illegal action, the record is less than clear as to whether Marvel referred to EERA violations, as well as those under the Education Code, and whether he requested the District to negotiate over the decision to lay off and its impact upon bargaining unit employees. . . . .
>
> Here, the hearing officer found that CSEA requested to negotiate layoffs. However, he acknowledged that the record is uncontroverted and that CSEA never provided any indication that it desired to negotiate the effects of layoff. All available evidence indicates that it only requested to negotiate the decision itself, an issue which is not negotiable, infra.
>
> Even CSEA's version of Morgan's comments supports the finding that CSEA only intended to negotiate the decision itself. . . . By claiming that the District's adoption of the resolution made any further negotiations futile, CSEA further indicated that it only desired to negotiate the decision to lay off. The District did not intend to implement the decision until August 29, 1978, and a request to negotiate effects could consequently have been made during the intervening time. . . . In sum, CSEA gave no

> general notice of its interest in the effects of the layoff decision and, of course, submitted no related proposals. (Id. pp. 9-10.)

In the above-cited case, the Board reiterated its long-standing rule that it is not essential that a request to negotiate be specific or made in a particular form.

Unlike the layoff which was involved in Newman-Crows Landing, this case concerns what can fairly be characterized as subcontracting of unit work. Whereas, in a layoff, the PERB has held that the decision is not negotiable, both the decision and the effects are within the scope of representation in a subcontracting case or a transfer of work case. Necessarily, a demand to bargain in the area of layoffs would have to be tailored to express a desire to negotiate regarding the effects. The same cannot apply to a situation where both decision and effects are negotiable.

Secondly, even if one were to find that the FEA's demand must be expressed in a manner indicating a desire to negotiate the effects of the decision, the facts support a finding that such was done here. As noted above, in connection with its requests to negotiate, FEA listed several areas of concern, including potential layoffs, impact on class size, wages, and a desire to preserve contractual guarantees for unit members potentially affected by the venture with LaVerne.

In reaching the above conclusion, I am not unmindful of the administrative law judge's repugnancy decision with respect to the FEA's right to negotiate the decision to subcontract. In finding that the arbitrator's award was not repugnant to the EERA with respect to a failure to address the statutory question of whether the FEA had a right to negotiate the decision to contract for summer school with LaVerne, the administriative law judge implicitly found a waiver based apparently upon bargaining history. He found that the arbitrator had before her the facts relevant to determining whether the District had the authority to make the basic lease agreement decision without negotiating. He reasoned, inter alia, that the arbitrator concluded that side-by-side working arrangements were permissible under the contract, thereby accepting the possibility that internal District and outside agency programs could coexist.

PERB has repeatedly held that a waiver of statutory bargaining rights must be clear and unmistakable. Oakland Unified School District (4/23/80) PERB Decision No. 126; Los Angeles Community College District (10/18/82) PERB Decision No. 252; Goleta Union School District, supra; Gonzales Union High School District (9/28/84) PERB Decision No. 410. Although I would not find, based upon this precedent and upon the record before me, that FEA waived its right to negotiate the decision to subcontract work, the issue is not before me since the

administrative law judge's determination to the contrary was not appealed and became final and binding on the parties. See Cal. Admin. Code, tit. 8, sec. 32300 and 32305.

Consistent with this analysis, however, FEA did not waive its right to bargain over the actual or potential effects of the District's decision to have LaVerne operate the summer school. Therefore, notwithstanding the implied waiver found by the administrative law judge in the repugnancy case, for purposes of deciding whether there is a duty to negotiate only the effects of the venture, I find that the FEA has met its burden of proof in that regard.

In a second case cited by Respondent (Delano Joint Union High School District (5/5/83) PERB Decision No. 307), the Board considered a union's argument that it did not waive its right to bargain the effects of a layoff because: (1) it delivered a letter to the district requesting that certain events take place prior to acting on the proposed layoffs (including terminating some administrative personnel); (2) that it requested to address the school board; (3) that it requested that negotiations begin immediately on March 17 (on a successor contract); and (4) that it filed an unfair practice charge on April 11, 1980. The union, in that case, argued that this was sufficient notice of its desire to negotiate.

The Board recognized the principle that whether a particular communication constitutes a proper request to

bargain is a question of fact to be determined on a case-by-case basis. It concluded that the facts of that case amounted to a mere protest by the union and that there was never a demand to negotiate on the layoff, only on a successor agreement (which was honored). Thus, it found that the letter to the district demanding that certain events take place prior to the layoffs did not deal with effects of the layoff, and was not a demand to bargain. Further, in the union's request to address the school board, no mention was made of the intended layoffs and no one representing the union spoke at the school board meeting that night. Likewise, during the March 17 communication, there was no indication of whether the union was requesting to negotiate about the successor contract proposal or about the effects of the contemplated layoffs. Finally, the PERB held that the filing of an unfair labor practice charge alleging a refusal to negotiate is not a request to bargain and does not trigger such a duty if the employer had no preexisting obligation to bargain.

The facts in the present case are clearly distinguishable from those in Delano, as already mentioned above. The record is supported with testimony and evidence indicating a desire to negotiate all aspects of the subcontracting of summer school. Although the FEA did protest, Charging Party's witnesses' testimony indicated that it was much more than simply a protest.

Finally, the Respondent cites Healdsburg Union High School District (1/5/84) PERB Decision No. 375 in support of its waiver argument. In that situation (p. 52) the Board was considering whether a timely demand to negotiate had been made with respect to the effects of a decision to abolish classifications. As with layoffs, the Board reasoned that the decision to abolish positions is a management prerogative, and only the effects are negotiable. The Board found that the union's proposal was nonnegotiable because, by its terms, it required prior agreement before a decision to abolish has been made, and thus interfered with the District's decision to abolish. The Board found that a fair reading of the proposal indicated that it did not contain a request to negotiate the impact of the decision to abolish classifications.

The facts in Healdsburg II are inapplicable to this case. As the PERB clearly found in the prior case, the union's proposal was clearly intended to preclude a district's decision prior to reaching agreement with the union. And, the decision itself was legally within management's prerogative. No request to negotiate the impact of the decision could be reasonably inferred from that proposal, unlike the facts herein, as outlined above. Indeed, the principles outlined in Newman-Crows Landing Unified School District, supra, a case the

Respondent cites in support of its position, supports the undersigned's conclusion on this issue.[14]

Impact of the LaVerne Program

The Respondent next argues that the District's actions did not have an impact upon terms and conditions of employment of unit members, that, if the LaVerne agreement had not been implemented, there would have been no additional work for teachers apart from the mandated program, that no work was therefore transferred or subcontracted, and that no layoffs of unit members occurred as a result. Therefore, it concludes, there were no effects about which to bargain, and the only possible effect of the LaVerne agreement was a creation of opportunity for summer employment for teachers which otherwise would not have existed due to the District's earlier (1978) decision to cut back on summer school.

To accept the District's argument wholesale would be tantamount to looking, in hindsight, to see whether any impact occurred before deciding whether there was anything to negotiate. It also overlooks the Union's right to negotiate certain guarantees (job security, etc.) to protect the unit in case of a future impact. Nevertheless, FEA has sufficiently

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[14]The fact that no actual negotiations took place prior or subsequent to the implementation of the LaVerne program in 1982 is plain from the record and the parties have not argued otherwise. The consultation sessions occurring prior to June 1, 1982, were undisputedly not negotiation sessions.

demonstrated that the agreement had an impact upon the bargaining unit and that it was denied the opportunity to negotiate job guarantees for its members.

In Mt. Diablo Unified School District (12/30/83) PERB Decision No. 373, the Board, in considering an employer's duty to negotiate the effects of a decision to layoff, stated that the union need not prove that an actual unilateral change in employee's working conditions resulted from the layoff as a precondition to finding a duty on the part of the employer to negotiate the impact of the layoff. On the contrary, the Union need only produce sufficient evidence to establish that the decision to layoff would have a reasonably foreseeable adverse impact on employees' working conditions and that its proposal is intended to address that anticipated impact.

Likewise, in Newark Unified School District (6/30/82) PERB Decision No. 225, the Board upheld an administrative law judge finding that, although the impact of a proposed layoff was speculative at the time the union made a request for negotiations, the district was obligated to bargain over those admittedly speculative effects. In response to that district's argument that the union did not prove that the layoff had an effect on matters within scope and hence did not violate the Act, the Board quoted, with approval, the following language from the administrative law judge:

> [I]t would not be consistent with PERB's decisions in this area to leave the judgment of whether or not a subject is "substantially" affected (and subject to negotiations) to the exclusive and unilateral province of an employer. Leaving such a decision in the employer's hands would thwart the collective negotiations objectives set forth in EERA, the salutory purposes of which were fully discussed in San Mateo County Community College District, supra, at 14-17.

The Board reasoned that bargaining before the actual impact occurs can potentially be of the greatest value.

The District's argument that no impact has been shown ignores PERB precedent. In the context of a subcontracting situation, the Board, in Oakland Unified School District (12/16/83) PERB Decision No. 367, rejected inconsistent NLRB precedent requiring demonstrable adverse impact on the bargaining unit for finding that a decision to contract out is within the scope of bargaining. It held that the fact that employees, their representative, and employer-employee relations are adversely affected is inherent in a finding that a policy with regard to subcontracting was unilaterally changed. Inherent in subcontracting, therefore, were such effects as withdrawal of actual or potential work from unit employees, wages and hours associated with the contracted out work, and diminution of the unit resulting also in the weakening of the collective strength of employees in the unit

and their ability to deal effectively for the unit.[15]

> In addition, an employer's unilateral change has a destabilizing and disorienting impact on employer-employee relations, derogates the exclusive representative's negotiating power and ability to perform as an effective representative in the eyes of employees, inherently tips the delicate balance structured by the Act, and may unfairly shift community and political pressure to employees and their organizations and reduce the employer's accountability to the public. San Mateo County Community College, supra. Thus, adverse impact on employees in the unit is demonstrated here. Oakland, supra.

Similarly, in Rialto Unified School District (4/30/82) PERB Decision No. 209, the Board noted that, in transferring jobs from a bargaining unit, the impact was inherent, even though no demonstrable change occurred. Commenting on private sector precedent, the Board stated:

> In UAW v. NLRB, supra, the United States Circuit Court found this obligation to exist even though the affected employees were assigned other unit work and there was no demonstrable change in their wages or hours. The Court reasoned that the reduction of the whole number of jobs within the unit itself triggered the bargaining obligation. This holding is appropriate to the facts here. The loss of the counseling jobs precludes negotiations over wages, hours, and negotiable terms and conditions

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[15]It can be asserted that, because of the District's ability to obtain a convenient summer program that turned out not only to be self-sufficient, but, to an unknown degree, profitable to the District, that the collective ability of the unit employees to negotiate with the District with regard to summer school conditions in the future was weakened, as was their hope ever to regain the positions.

> of employment for work assigned to the representation unit pursuant to CTA's unit petition and subsequent recognition by the District.

The ultimate impact of a transfer of unit work, the PERB observed, is loss of work to the unit. See also Goleta USD, supra, PERB Decision No. 391 at 19.

In the case at hand, demonstrable impact has nevertheless been shown. In exchange for having their jobs traded from the unit, outside to LaVerne, the unit members received terms inferior to what they would have received under their contract. They received a substantially lower wage for performing the same work. They had no class size restrictions to protect their ability to do an effective job. The protections they enjoyed in the contract to ensure fairness in hiring (rotation system of selection and seniority) and harmony among unit members were lost. Yet, according to the contractual terms they bargained for in section 2.2.3.2, they were to waive these protections only in the event that an outside agency exclusively ran the summer school entirely on a fee basis.

Not only did unit members receive terms inferior to what they enjoyed in the past for the same work, but they also received terms inferior to their own colleagues teaching next door in the District-operated summer school. The adverse impact on morale and the collective strength of the unit were

the very things the Union had sought to avoid when negotiating the above-noted contract provision.

Aside from the impact that did occur, the District's obligation did not end there. At the very least, the FEA had a right to negotiate safeguards for unit members in case of a future layoff that may result from the substantial exchange of summer school functions from the District to LaVerne. Whether, in hindsight, such a layoff ever occurred, or will occur, does not relieve the District of its duty to negotiate potential effects, even though they may be speculative at the time. See Newark USD, supra.[16] Yet, although FEA representatives voiced their desire to negotiate protections in this area, as well as in the area of wages, class size, and hiring, they were not able to develop specific proposals because the District insisted that it had the right to go forward with its venture and proceeded with it.

It is not clear what proposals would have been exchanged had the bargaining process been developed. It is conceivable that, in the areas where FEA had voiced concerns it could have negotiated with the District for District-provided benefits to compensate the unit for inferior terms resulting from the LaVerne venture.

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[16]The FEA attempted to prove that the summer school venture in 1982 caused a layoff of unit members at the end of the following regular school year. FEA's failure to prove causation is discussed below.

Additionally, as the administrative law judge noted in his underlying decision on repugnancy, "there were ways the District could have provided for maintaining the [contractually] bargained-for standards in its lease agreement with LaVerne." The fact that this was possible is evidenced in the fact, as observes Charging Party, that the District was successful in persuading LaVerne to give special hiring preference to District teachers. Additionally, District administrators were likewise successful in negotiating an approximate 8 percent wage increase for 1983 summer school teachers who taught in the LaVerne program.

While the concept immediately above may, at first glance, appear to be the type of proposal held by PERB to be out of scope because it "seeks to regulate a District's relationship with third parties" (Davis Joint Unified School District (8/2/84) PERB Decision No. 393), a closer look reveals that it falls more analogously within the area of successorship cases, where private sector precedent establishes that a union may require an employer, who intends to go totally or partially out of business, to negotiate contractual guarantees for the unit which are binding on a successor employer. See, e.g., United Mine Workers of America (1977) 231 NLRB No. 88.[17] The

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[17]The Agricultural Labor Relations Board and the California courts have also recognized that such successorship proposals, which seek to extend contractual protection to unit employees once a successor purchases the enterprise, are a

distinguishing factor is that, unlike the situation in Davis, supra, a third party concern, namely LaVerne, did "vitally affect the terms and conditions of employment of bargaining unit employees." United Mine Workers, supra at p. 575; Harris Truck and Trailer Sales, Inc. (1976) 224 NLRB 100; and see NLRB v. Band-Age, Inc. (1976) 92 LRRM 2001 (lessor of a portion of plant held to be successor); NLRB v. Middleboro Fire Apparatus, Inc. (1978) 100 lRRM 2182; Nazareth Reg. High School v. NLRB (1977) 94 LRRM 2897 (one high school out of a nine school unit taken over by a local community group).

In sum, although the FEA probably had no legal mechanism by which to enforce a bargaining obligation upon LaVerne as a successor employer - LaVerne is a private institution and not within PERB's jurisdiction, and may not be within the NLRB's jurisdiction - the Union was entitled to negotiate future contractual guarantees for its members with the District.

The 1982-1983 Layoff

Notwithstanding my finding that the District had a duty to negotiate regarding potential layoffs, and that in failing to bargain, violated that duty, I find that the FEA has failed to

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mandatory subject of bargaining. See, e.g. William Dal Porto v. Agricultural Labor Relations Board (1/14/85) 85 Daily Journal D.A.R. 272 (C.A. 3), ___ Cal.App.3d _____. Successorship principles also apply to situations where a portion of an enterprise is leased. See NLRB v. Band-Age, infra, and NLRB v. Middleboro Fire Apparatus, Inc., infra.

carry its burden of proving that a layoff occurring at the end of the 1982-1983 regular school year resulted from the District's venture with LaVerne.

At the hearing, Charging Party attempted to prove that at least four of its unit members (Billie Spence, Richard Milam, Dale Dalton, and Ken White) were laid off at the end of the 1982-83 school year because students took summer courses from LaVerne and thus did not take those courses during the following regular school session, resulting in lower enrollment and, thus, the layoff. As Respondent notes in its brief, the record reflects that the layoff was not implemented because of a decline in attendance, but was taken because of a reduction in certain services which were overstaffed and which were unrelated to the LaVerne program (e.g., special education, etc.). The four employees were laid off because they were the most junior employees not otherwise protected by the layoff resolution. The overstaffing problem was the result of a long and gradual process pre-dating by years the LaVerne agreement.

Indeed, the average number of courses taken per student <u>increased</u> in 1982-83 school year, due in part to stricter graduation standards, and again increased for the 1983-84 year. Again, as Respondent ably points out, the 1983 layoff resolution did not reduce services in business, which was taught by Billie Spence, driver education, which was taught by Rick Milam and Ken White, or English, which was taught by Dale

Dalton. LaVerne did not even offer business courses during either its 1982 or 1983 program. In any event, Charging Party failed to carry its burden of proving this actual impact, and cannot shift the burden of proving liability, as it attempts to argue in its brief, to the Respondent.

Therefore, although I find a violation in the District's failure to negotiate the effects of transferring or contracting part of its summer school work to LaVerne, and specifically, its failure to negotiate requested guarantees to prevent future layoffs, I find that the FEA failed to prove the actual implementation of the venture caused the 1983 layoff, and thus will recommend no affirmative relief for those employees in my remedy below. See Newark Unified School District, supra, at 7.

For all the foregoing reasons, I find that the Fremont Union High School District violated EERA section 3543.5(c) and concurrently, sections 3543.5(a) and (b) in failing to negotiate with FEA the actual and potential effects of its decision to enter into an agreement with LaVerne University to perform summer school unit work prior to implementing that decision. Therefore, I will recommend the Order proposed further below.

MOTION TO REOPEN THE RECORD

On or about July 16, 1984, the Charging Party filed a motion to reopen the record in this case claiming that "new evidence came into existence after the close of the hearing on

May 9, 1984," which concerns the District's continuing refusal to meet and negotiate with the FEA regarding the decision and the impact of the decision on entering into an agreement with LaVerne for the operation of a summer school. In support of its motion, Charging Party submitted a declaration and documentary evidence indicating that FEA had made a demand to bargain the District's proposed decision (and its effects) to enter into another agreement with LaVerne for summer school during the 1984 summer. The declaration indicates that, since June 26, 1984, the District had not responded to the Union's demands and that the District had again allowed LaVerne to operate a summer school in 1984 similar to those operated in 1982 and 1983. Charging Party's representative declares further that he is informed that the District is also (summer of 1984) operating the first fully comprehensive summer school program it has offered since 1977.

Essentially, Charging Party seeks to show that the District has continued to do in 1984 what it did in 1982 and 1983. However, I have found the District's conduct to constitute a violation of EERA sections 3543.5(a), (b) and (c) even without the proffered evidence of a subsequent reoccurrence of the event, albeit in a slightly different context. The evidence, therefore, is not crucial to my finding of an unfair practice and it is unnecessary to reopen the record. Rialto Unified School District (4/30/82) PERB Decision No. 209.

Presumably, as the end of the next school year approaches, Charging Party will move to reopen again to offer evidence of what occurred during the summer of 1985, if a final, non-appealable decision has not yet been rendered. In such an event, this matter may never come to a conclusion.

Should Charging Party wish to preserve its legal position, it may refile a charge based upon the refusal to bargain regarding the 1984 summer program. Because of its filing of a timely motion to reopen, and Respondent is aware of the allegations, the statutory filing period (section 3541.5) would be tolled until resolution of the motion to reopen. See underlying rationale in State of California (Department of Water Resources) (Matta) (12/29/81) PERB Order No. Ad-122-S.

REMEDY

A unilateral subcontracting or transfer of bargaining unit work without negotiating its effects is a serious infringement of employee rights, as it, *inter alia*, denies the exclusive representative the opportunity to present proposals to offset the impact of the loss of contractual benefits and potential loss of work for the unit. It is generally appropriate under such circumstances to order a return to the status quo, order the District to meet and negotiate, upon request, over the effects, order it to cease and desist from taking further

unilateral actions, and to make employees whole for any resulting losses.

One of the effects resulting from the District's unilateral action and its failure to negotiate was a reduction of wages and a denial of contract terms for those bargaining unit members who worked under the LaVerne summer program. Therefore, it is my recommendation that the District be ordered to make those employees whole by granting them back pay measured by the difference between what they actually earned and what they would have earned according to the collective bargaining contract rate plus interest at the rate of 10 percent per annum. In addition, the District shall grant any other benefits those employees would have earned, including seniority or pension rights, if any, if the contract terms had been applied to them.

I do recognize that the PERB disfavors a remedy which may be based upon speculation. However, here, there was a collective bargaining agreement in place and a fixed rate which was unilaterally changed. Additionally, the record indicates that, historically, every time bargaining unit members worked in the District's summer program, they received that rate in 1982 and 1983, that is, all but those unit members working in the LaVerne program. Under the LaVerne program, the District essentially received the same work from the unit members, and, in exchange, the employees received less pay.

It is also appropriate that the District, in addition to being ordered to cease and desist from failing to bargain and to make the employees whole, also be ordered to rescind whatever arrangements it may currently have to operate a summer school by any entity other than the District until it has satisifed its obligation to negotiate the impact of such a venture with the FEA.

I will also recommend that the District be required to sign and post the Notice to Employees attached to this Proposed Decision as Appendix A, which incorporates the terms of the Proposed Order. Posting such a notice will provide employees with notice that the employer has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the employer's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to EERA section 3541.5(c), it is hereby ORDERED that the Fremont Union

High School District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the exclusive representative of its certified employees by taking unilateral action on matters within the scope of representation, as defined in section 3543.2 specifically with reference to the effects of its decision to enter into an agreement with another entity for the provision of a summer school program for its students.

(2) Denying the Fremont Education Association, CTA/NEA, their 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 the 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 first providing notice and the opportunity to meet and negotiate with the exclusive representative.

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

(1) Unless the parties reach a contrary agreement, the District shall rescind any current arrangements it may have to operate a summer school program by any entity other than the Fremont Union High School District until it has satisfied its obligation to negotiate with the Fremont Education Association as ordered in Number 3, below.

(2) Make those bargaining unit employees who worked under the La Verne summer program whole for any loss in pay resulting from the District's failure to negotiate, including awarding them back wages measured by the difference between what they actually earned and what they would have earned under the terms of their collective bargaining agreement plus interest at the rate of 10 percent per annum. In addition, those employees shall be granted any other benefits, including seniority or pension rights, that they would have earned if the contract terms had been applied to them.

(3) Upon request of the Fremont Education Association, meet and negotiate with the Association over the effects of the District's decision to enter into an agreement with another entity for the provision of a summer school program for its students.

(4) Within ten (10) workdays from service of the final decision in this matter, post at all school sites and all other work locations where notices to certificated employees are customarily placed, copies of the NOTICE TO EMPLOYEES attached as an appendix hereto. The notice must be signed by

an authorized agent of the District indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(5) Upon issuance of a final decision, make written notification of the actions taken to comply with the order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on May 21, 1985, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.)

on May 21, 1985, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing 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, section 32300 and 32305.

Dated: April 30, 1985

Manuel M. Melgoza
Manuel M. Melgoza
Administrative Law Judge

PROOF OF SERVICE BY MAIL
C.C.P. 1013a

I declare that I am employed in the County of Sacramento, California.

I am over the age of 18 years and not a party to the within entitled cause; my business address is

1031 18th Street, Suite 200 Sacramento, California 95814

On December 30, 1987 (Date), I served the enclosed

PERB Decision No. 651
Fremont Union High School District
Case No. SF-CE-779

(Describe Document)

on the parties to this case by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail, Sacramento (City or Town), California, addressed as follows:

Fremont Union High School District
Attn: Superintendent
589 West Fremont Ave.
Sunnyvale, CA 94087

Fremont Education Association
Attn: Wm. Empey, Exec. Director
20370 Town Center Lane
Cupertino, CA 95014

Patricia P. White, Attorney
Littler, Mendelson, Fastiff & Tichy
Sixty So. Market Street, Suite 1100
San Jose, CA 95113-2303

Ramon Romero, Attorney
California Teachers Association
1705 Murchison Drive
Burlingame, CA 94010

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on

December 30 (Date), *19* 87 *at* Sacramento (City or Town), *California.*

Teresa Stewart
(Type or print name)

Teresa Stewart
(Signature)

PERB 110 (10/85)