

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CHULA VISTA ELEMENTARY EDUCATION )  
ASSOCIATION, CTA/NEA, )  
 )  
Charging Party, ) Case No. LA-CE-2038  
 )  
v. ) PERB Decision No. 834  
 )  
CHULA VISTA CITY SCHOOL DISTRICT, ) August 16, 1990  
 )  
Respondent. )  
\_\_\_\_\_ )

Appearances: A. Eugene Huguenin, Jr., Attorney, for Chula Vista Elementary Education Association, CTA/NEA; Littler, Mendelson, Fastiff & Tichy by Richard J. Currier, Attorney, for Chula Vista City School District.

Before Hesse, Chairperson; Craib, Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Chula Vista City School District (District) to a proposed decision issued by a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(a), (b), (c), and (e) of the Educational Employment Relations Act (EERA or Act)<sup>1</sup> when it:

(1) interfered with the rights of employees to participate in the activities of the employee organization of its own choosing for representation purposes by making improper comments about the Chula Vista Elementary Education Association's (Association) representation of these employees in its negotiations with the District;

(2) interfered with the Association's statutory right to represent its members when it made improper comments about the Association's representation of employees in its negotiations with the District;

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

(3) failed to meet and negotiate in good faith by refusing to provide the Association with information relevant to negotiating or grievance processing;

(4) insisted to impasse on negotiating about subjects outside the scope of representation.

We have carefully reviewed the entire record, including the proposed decision, transcript, exhibits, exceptions and responses, and, in accordance with the discussion below, affirm in part and reverse in part the ALJ's conclusion that the District violated EERA.

#### INTRODUCTION

The District's exceptions to the ALJ's findings of fact and conclusions of law fall into five major groups. The discussion pertaining to the exceptions will therefore consist of the five main parts, some of which will have subparts. The factual summary pertinent to each exception, or group of exceptions, will be integrated with, or precede, the analysis of each exception.<sup>2</sup> The five groups of exceptions are as follows:

I. EXCEPTIONS RELATED TO THE PROPOSED ORDER THAT THE DISTRICT CEASE AND DESIST FROM "INTERFERING WITH THE RIGHT OF EMPLOYEES TO BE REPRESENTED IN THEIR EMPLOYMENT RELATIONS WITH THE DISTRICT BY THE EMPLOYEE ORGANIZATION OF THEIR CHOICE BY MAKING IMPROPER STATEMENTS THAT TENDED TO UNDERMINE CONFIDENCE IN THE ASSOCIATION."

II. EXCEPTIONS RELATED TO THE PROPOSED ORDER THAT THE DISTRICT CEASE AND DESIST FROM "INSISTING TO IMPASSE ON NEGOTIATING ABOUT SUBJECTS OUTSIDE THE SCOPE OF REPRESENTATION . . . ."

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<sup>2</sup>The factual summaries are based primarily on the findings of fact set forth in the ALJ's decision with clarification and elaboration where necessary. They do not include facts not pertinent to a resolution of the issues raised by the exceptions filed by the parties. Those factual findings and legal conclusions set forth in the ALJ's proposed decision that were not excepted to by the parties are binding upon the parties to this case, but have no precedential value except to the extent they are referred to and incorporated in this decision.

III. EXCEPTIONS RELATED TO THE PROPOSED ORDER THAT THE DISTRICT CEASE AND DESIST FROM "REFUSING TO PROVIDE [THE ASSOCIATION] WITH INFORMATION RELEVANT TO CONTRACT ADMINISTRATION, GRIEVANCE PROCESSING AND NEGOTIATIONS."

IV. EXCEPTIONS TO THE ALJ'S CONCLUSION THAT THE DISTRICT "DID NOT ENTER INTO THE NEGOTIATIONS WITH A BONA FIDE INTENT TO REACH AGREEMENT."

V. EXCEPTIONS RELATED TO THE ALJ'S CONCLUSION THAT THE DISTRICT IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES.

#### GENERAL BACKGROUND

The District is a public school employer within the meaning of the EERA. The Association is an employee organization and the exclusive representative, within the meaning of EERA, of a certified unit of certificated employees of the District. The bargaining unit consists of approximately 665 employees in various certificated classifications. The parties had engaged in collective bargaining for a number of years prior to the negotiations at issue in this case.

In the spring of 1984, the parties were operating under a collective bargaining agreement (Agreement or CBA) which, by its terms, expired on June 30, 1984. In accord with the provisions of the Agreement covering the reopening of negotiations, on January 31, 1984, the Association submitted to the District its initial proposal for a successor agreement. The Association proposed: (1) to maintain 22 articles from the 1981-84 CBA without change; (2) to delete two articles; (3) to change 27 articles and, (4) to add 4 new articles and an addendum.

On March 6, 1984, the District submitted its first proposal to the Association for a new article in the successor agreement pertaining to a mentor teacher program. On March 21, 1984, the District submitted the rest of its initial proposals for a

successor agreement. This set of proposals contained suggested amendments to eight articles of the Agreement. The District further proposed that all other articles in the 1981-84 CBA remain "unchanged" in the successor agreement.

The chief negotiator for the Association was Frank Buress (Buress). Buress was the executive director of the California Teachers Association (CTA), UniServ, South County Teachers United, which provided representational services to the Association. Buress commenced his employment with CTA in December 1983.

The District's chief negotiator was attorney Joseph Zampi (Zampi). Zampi was the coordinator of Communication and Staff Negotiations/Personnel Services for the District. He had been involved in District negotiations since 1973.

On or about April 23, 1984, the parties met for the first negotiation session. The parties met for further negotiations on April 25, May 9, 11, 14, 16, 21, 25, 30 and June 1, 5, 6, 11, 13, 21, and 26, 1984. At the June 26 session, the parties reached impasse. Following the filings by both parties with PERB for a declaration of impasse, on or about July 2, 1984, PERB determined that impasse existed and appointed a State mediator.

During July 1984, two mediation sessions were held, the last of which was on July 18, 1984. On or about July 26, 1984, the mediator certified the dispute to factfinding.

Factfinding sessions were held on September 5 and 17-21, 1984. The factfinding report was issued on October 15, 1984. Subsequently, the parties reached agreement on a successor

contract, on or about December 14, 1984. The term of the new agreement was 1984-87.

#### DISCUSSION OF EXCEPTIONS

I. EXCEPTIONS RELATED TO THE PROPOSED ORDER THAT THE DISTRICT CEASE AND DESIST FROM "INTERFERING WITH THE RIGHT OF EMPLOYEES TO BE REPRESENTED IN THEIR EMPLOYMENT RELATIONS WITH THE DISTRICT BY THE EMPLOYEE ORGANIZATION OF THEIR CHOICE BY MAKING IMPROPER STATEMENTS THAT TENDED TO UNDERMINE CONFIDENCE IN THE ASSOCIATION."

#### Factual Summary

Prior to the summer of 1984, the District had not offered a summer school session through the regular school program since 1977. Summer school for 1984 was a three-week session held from late July to mid-August.

At the time that negotiations between the Association and the District commenced, summer school teachers were expressly excluded from the bargaining unit represented by the Association.<sup>3</sup> Nonetheless, the parties agreed to negotiate over hours, wages, and other terms and conditions of employment for these employees. Written proposals covering these subjects were exchanged on May 9, 1984. A provision pertaining to summer school teachers was considered as a potential new article in the successor agreement.

The alleged improper statements by District administrators were made at various meetings, and encounters between the

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<sup>3</sup>PERB representation case file number LA-UM-332 shows that on May 24, 1984, the Association filed a petition for unit modification to add summer school teachers to the certificated bargaining unit. This petition was later withdrawn, on July 11, 1984.

teachers and administrators during the 1984 summer session and following fall.

1. June 21, 1984 Meeting With Summer School Teachers

On June 21, 1984, District administrators Dick Slaker (Slaker) and Emerald Randolph (Randolf) conducted an in-service meeting with the summer school teachers. Approximately 30 teachers attended the meeting. During the discussion, the question of salaries was raised by one of the teachers. In response, Slaker and Randolph stated that the District "was trying to get 85 percent of the regular teachers' per diem rate for summer school teachers, but that the salary matter was based on the outcome of negotiations with the Association." Slaker stated further that the 85 percent rate looked favorable. Randolph, who was a member of the District's negotiating team, stated that she was hopeful that the salary matter was going to be resolved, but that it was contingent upon the number of working hours per day finally agreed upon for summer school teachers. The 85 percent proposed salary rate was considerably higher than the daily rate paid to summer school teachers in 1977.

As of June 21, 1984, the District and the Association had agreed to the 85 percent of per diem rate of pay for summer school teachers; however, their differences over hours and other terms and conditions of employment were still unresolved.

2. The August 7, 1984 Meeting

On August 7, 1984, the Association's Chief Negotiator Buress and the Association President Carol Owen (Owen), met with District Superintendent Lewis Beall (Beall) concerning the status

of several pending grievances. These grievances were unrelated to summer school teachers. However, before the meeting ended, Beall brought up the subject of summer school teachers' salaries. Beall, who had begun his employment with the District approximately one month prior to August 7, stated that he was unfamiliar with the Association's position on this issue. He expressed concern that the summer school salaries had to be paid at the 1977 rate until final agreement was reached with the Association on the summer school negotiations.

After further discussion of this topic, Beall left the room and shortly thereafter returned with a written proposal that he asked Buress and Owen to sign. The proposal contained language to the effect that by agreeing to an immediate increase in the summer school teacher salary rate, the Association would forgo further negotiations with the District on the salary issue. However, since Beall would not assure Buress and Owen that the percentage of increase would be at 85 percent of the per diem rate, they refused to sign the statement.<sup>4</sup>

Superintendent Beall thereafter expressed disappointment that the Association "was keeping money from unit members' that the District wanted to pay." Owen replied, that since the District had taken the position that summer school teachers were not in the certificated bargaining unit, the Association would

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<sup>4</sup>The District excepts to some of the ALJ's factual findings pertaining to an allegation in the charge that the District acted illegally in attempting to secure a waiver from the Association on the summer school salary issue. Since the ALJ did not find any violation with respect to this allegation in the charge, any factual errors were not prejudicial.

not file an unfair practice charge if the District paid higher salaries to summer school teachers before the parties actually reached final agreement on this subject. Beall countered this remark by stating that he was uncertain about the District's right to act unilaterally in view of the ongoing negotiations.

Later that day, Buress called Beall for clarification of the proposed waiver language. Beall said the language concerned salaries only and that even if the Association signed the agreement, it did not mean that the parties recognized summer school teachers as members of the bargaining unit.<sup>5</sup>

There was an exchange of letters between Buress and Zampi on August 14 and August 16, 1984, about the District's proposed waiver. Zampi's August 16 letter indicated that the District's August 7 offer was still open to the Association. However, after August 16 there were no further discussions or meetings about the proposed waiver.

### 3. July/August Meetings With Summer School Teachers

In late August 1984 Superintendent Beall met with a group of teachers in a meeting initiated by the teachers to acquaint the superintendent with the temporary teacher situation in the District. Employees classified by the District as temporary teachers are included in the bargaining unit represented by the

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<sup>5</sup>PERB representation casefile number LA-UM-348 shows that on August 29, 1984, the Association filed a second unit modification petition proposing to add summer school teachers to the certificated bargaining unit. On September 19, 1984, the District indicated to PERB that it had no opposition to the petition provided that the requisite proof of support was met. On October 10, 1984, PERB issued a unit modification order adding summer school teachers to the unit.

Association. At the end of the meeting, Carol Clark, one of the teachers present, asked Beall if he was aware that the nine temporary teachers who taught summer school were paid at the substitute teacher rate of \$31.20 per day. Beall replied, that he did not know about this, but would look into it. He also said something to the effect that "the whole (salary) thing could have been resolved if the union (Association) had agreed to the District's offer." Clark testified that she understood Beall's comment to mean that summer school teachers could have been paid considerably more than \$31.20 per day if the Association had not rejected the District's offer.<sup>6</sup>

4. Late August/Early Fall Meetings

Sometime in late August or early September 1984, Superintendent Beall met with the regular school teachers at Mueller School during a faculty meeting. In response to a question from a teacher about salaries for summer school teachers, Beall stated, "We wanted to pay you more, but your Association would not let us." Following Beall's comment, no further remarks were made during the meeting about the salary issue.

In the fall of 1984, during a chance meeting with Slaker at her school site, Carol Clark mentioned the summer school pay issue to Slaker. Slaker replied that, "the Union's refusal of

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<sup>6</sup>We reject the District's exceptions to some of the ALJ's factual findings regarding what occurred at the meetings in July and August of 1984. In any event, since we find no violation based on statements made in these meetings, the factual errors, if any, are harmless error.

the District's offer is the reason that no settlement was reached on this issue."<sup>7</sup>

#### Analysis

In Carlsbad Unified School District (1979) PERB Decision No. 89, page 10, the Board set forth the test for determining when an employer's actions interfere with the rights of employees guaranteed by EERA. Under the Carlsbad test, a charging party establishes a prima facie case of interference under EERA section 3543.5(a) only "[w]here the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA. . . ." As more fully explained below, employer speech causes no cognizable harm to employee rights granted under EERA unless it contains "threats of reprisal or force or promise of a benefit." Therefore, a prima facie case of interference cannot be based on speech that contains no "threats of reprisal or force or promise of a benefit."

The District contends, in its exceptions, that the employer statements in question constitute protected employer free speech

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<sup>7</sup>The District excepts to conclusions of law regarding statements made by Dick Slaker on the grounds that the charge did not contain allegations about Slaker's participation in the July/August 1984 meetings. In fact, the ALJ's factual findings regarding Slaker are based on a meeting that allegedly took place in the fall of 1984, a meeting which is not specifically referenced in the charge. The District asserts that pursuant to Tahoe-Truckee Unified School District (1988) PERB Decision No. 668, Slaker's statements may not be relied upon to support a finding of a violation. However, since we find no violation based upon Slaker's statements, as discussed below, we need not decide the Tahoe-Truckee issue raised by this exception.

and therefore caused no cognizable harm to the employees. We agree.

In Rio Hondo Community College District (1980) PERB Decision No. 128, pages 18-20, this Board looked to the National Labor Relations Act (NLRA) for guidance in formulating a test for determining when employer communications will be considered violative of the provisions of EERA. Specifically, the Board examined section 8(c) of the NLRA which provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.<sup>8</sup>

Noting that EERA contains no provision parallel to section 8(c), the Board nevertheless found that "a public school employer is entitled to express its views on employment-related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate" and set forth the test to be applied as follows:

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<sup>8</sup>The Higher Education Employer-Employee Relations Act contains virtually identical language in Section 3571.3 which states:

The expression of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute, or be evidence of, an unfair labor practice under any provision of this chapter, unless such expression contains a threat of reprisal, force, or promise of benefit; provided, however, that the employer shall not express a preference for one employee organization over another employee organization.

[T]he Board finds that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. (Id. at p. 20.)

Whether the employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. (California State University (California State Employees' Association, SEIU Local 1000 (1989) PERB Decision No. 777-H, P.D., p. 8.) Thus, "the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights." The fact, "That employees may interpret statements, which are otherwise protected, as coercive does not necessarily render those statements unlawful." (Regents of the University of California (1983) PERB Decision No. 366-H, fn. 9, pp. 15-16; BMC Manufacturing Corporation (1955) 113 NLRB 823, [36 LRRM 1397].)

The Board has also held that statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No. 659, p. 9, and cases cited therein.)

Additionally, the Board has placed considerable weight on the accuracy of the content of the speech in determining whether the communication constitutes an unfair labor practice. (Alhambra City and High School Districts (1986) PERB Decision No. 560, p. 16; Muroc Unified School District (1978) PERB Decision

No. 80, pp. 19-20.) Thus, where employer speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the Board will not find the speech unlawful.

On the other hand, the fact that employees do not actually feel threatened or intimidated by the employer's comments does not necessarily insulate those comments as protected. (See National Labor Relations Board v. Triangle Publications (3d Cir. 1974) 500 F.2d 597.) Neither are the facts that the challenged statements were brief or made to only one person determinative of their coercive nature. North American Aviation, Incorporated (1967) 163 NLRB 863 [65 LRRM 1017].

Applying the above principles to the facts of the instant case, we conclude that none of the statements in question contain a threat of reprisal or force or promise of a benefit. The content of the statements was not such that a reasonable employee would have felt intimidated or coerced. In fact, none of the teachers who heard the statements testified that they felt intimidated or threatened. Although one teacher, Carol Clark, testified she felt "pulled or torn" in her feelings about whom to believe concerning the real reason for the outcome of the salary negotiations, that fact is insufficient to transform mere statements of fact or opinion into the proscribed threats or promises.

Furthermore, the statements cannot be fairly characterized as factually inaccurate. The statements merely attempted to

communicate the status of the negotiations and accurately portrayed the situation as one of give and take.

Finally, the context in which the statements were made was not coercive. The statements were not, as the ALJ suggested, all made in formalized meetings. The statements made at the in-service meeting (June 21, 1984) were made in response to a specific question from a teacher, as were the statements made at the faculty meeting that took place in early fall. One of the challenged statements was made in response to a question from a teacher at a meeting in August of 1984 called by temporary teachers to discuss issues pertaining to that group of employees. Some statements were made at a grievance meeting, August 7, 1984, called to discuss grievances having no connection to the summer school teacher salary issue. Finally, one of the statements was made at a chance meeting, in the fall of 1984, between a school principal and a teacher.

We find the statements in question are not "threats of reprisal or force or promise of a benefit." They instead constitute protected employer free speech, and therefore do not result in, or tend to result in some harm to employee rights granted by EERA. Thus, the Association failed to establish a prima facie case of interference under Carlsbad.<sup>9</sup>

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<sup>9</sup>Since we find no prima facie case of interference, we need not apply, as did the ALJ in this case, the remainder of the Carlsbad test which balances the extent of the harm to the employees against the interests of the employer.

II. EXCEPTIONS RELATED TO THE PROPOSED ORDER THAT THE DISTRICT CEASE AND DESIST FROM "INSISTING TO IMPASSE ON NEGOTIATING ABOUT SUBJECTS OUTSIDE THE SCOPE OF REPRESENTATION . . . ."

The ALJ found that the District illegally insisted to impasse upon the following proposals which she concluded were outside the scope of bargaining:

- A. Three grievance proposals that limited the Association's right to:
  - (1) Present grievances in its own name;
  - (2) Be physically present at all grievance meetings, whether informal or formal, even if the employee involved does not seek representation by the Association; and
  - (3) Take grievances to arbitration without the concurrence of the named grievant.
- B. A proposal to maintain prior contract language that provides that the parties waive their right to seek unit modification or clarification during the term of the contract; and
- C. A proposal that the summer school article in the contract apply only to employees who served the employer as permanent, probationary or temporary employees in the previous school year.

Each proposal will be examined separately.

A. THE GRIEVANCE PROPOSALS

Article 7 of the 1981-84 CBA contained provisions pertaining to the grievance procedure. Initially, the Association proposed numerous substantive amendments to this article. The District's initial proposal suggested that the provisions of Article 7 remain unchanged in the successor agreement.

(1) Proposal That Association Waive the Right to Present Grievances in its Own Name.

## Factual Summary

Section 7.1 of the existing Agreement contained the definitions of relevant terms of the grievance procedure. The Association proposed to amend section 7.1.1 which defines a "grievance." This section states:

[A] "grievance" is a written claim by an employee, or group of employees, that there has been a violation, misinterpretation, or misapplication of the Agreement which adversely affects the employee or group of employees. (Underlining added.)

The Association proposed to delete the underlined language above, which it says is, "unnecessary and open to varied interpretation."

Section 7.1.2 defines a "grievant" as "an employee, or group of employees, making the claim." The Association also proposed to amend this section.

The proposed changes in both of these sections were intended to permit the Association to be listed as a grievant in sections 7.1.1 and 7.1.2. The Association believed that these additions would clarify its right to grieve as set forth in section 7.3.4.4., this latter section states:

The Association, in behalf of the affected teachers, may initiate a grievance which affects more than one employee in a single building, or employees in more than one building, at Level II.

The District at first proposed "no change" in Article 7. Later, in its June 21 settlement proposal, the District proposed several modifications to Article 7. In particular, it counterproposed the following language for section 7.1.2:

A "grievant" is an employee, or group of employees, making the claim. The right of the Association to act in the capacity of "grievant" shall be in accordance with Article 7.3.4.4.

In the Association's June 22 written response to the settlement proposal, the Association rejected this counterproposal as a "pure status quo position" which the Association asserted failed to address the Association's problem with the District's recent interpretation of section 7.3.4.4.

The dispute over section 7.3.4.4 was based on differing interpretations about whether this language permitted the Association to grieve in its own name in any circumstance or whether the right was limited to the type of situation stated in section 7.3.4.4. The Association took the position that, as a party to the contract, it had a legal right to file grievances in its own name and that it was no longer willing to waive that right.

The parties' positions regarding these proposals remained unchanged at the time that impasse was declared in June and throughout the entire impasse procedures.

#### Analysis

The District excepts to the ALJ's finding that by insisting to impasse on the grievance proposals which would limit the Association's right to file grievances in its own name, the District failed to negotiate in good faith in violation of section 3543.5(c). Specifically, the District argues that: (1) the Association has no EERA right to present grievances in its own name; (2) the Association breached its obligation to "take a

firm position" prior to reaching impasse that the proposals in question were outside the scope of representation; and (3) it was the Association, and not the District, that insisted to impasse on these grievance proposals.

a. The grievance proposals are nonmandatory subjects of bargaining.

In South Bay Union School District (1990) PERB Decision No. 791, a majority of this Board found, for different reasons, that a proposal for a contract provision providing that the Association had a right to file grievances in its own name was a nonmandatory subject of bargaining. Consequently, the Board held, the school district violated section 3543.5(c) by insisting to impasse on the maintenance of contract language denying that right.

Although the Board members who wrote the lead and concurring opinions in South Bay both concluded that the proposal was a nonmandatory subject of bargaining, they reached that result through different analyses. Member Craib, noting that the Association's right to grieve in its own name does not fall within the subjects of bargaining enumerated in EERA section 3543.2, utilized a modified version of the test set out in Anaheim Union High School District (1981) PERB Decision No. 177 to resolve the question of whether the proposal in question is a mandatory subject of bargaining.<sup>10</sup> Having found the first two

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<sup>10</sup>The PERB will find a subject negotiable even though it is not specifically enumerated as such in section 3543.2 if: (1) it is logically and reasonably related to hours, wages or an enumerated subject under "terms and conditions of employment," (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory

prongs of the Anaheim test satisfied, Member Craib modified<sup>11</sup> the third prong of the Anaheim test to address the situation where it is the employee organization, rather than the employer, that is refusing to bargain over a proposal allegedly outside the scope of bargaining. The modified third prong asks the question of whether compelling the exclusive representative to negotiate its right to present and process grievances in its own name would "significantly abridge the organization's freedom to exercise those representational prerogatives essential to the achievement of the organization's mission as exclusive representative." Finding the third prong of the test unsatisfied, Member Craib concluded that the proposal in question is nonmandatory. The ALJ, in the instant case, applied essentially the same analysis to reach her conclusion that all of the grievance proposals were nonmandatory.

Member Camilli, who wrote the concurring opinion in South Bay, found the proposal in question to be a nonmandatory subject of bargaining based upon his conclusion that the association has a statutory right, pursuant to EERA section 3543.1(a), to file

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influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge the employer's freedom to exercise those managerial prerogatives (including matters of fundamental policies) essential to the achievement of the employer's mission. (Anaheim Union High School District (1981) PERB Decision No. 177; test approved in San Mateo City School District v. PERB (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800].)

<sup>11</sup>The modification of the Anaheim test was originally suggested in a proposed decision in the case of San Diego Unified School District (1987) PERB Hearing Officer Decision No. HO-U-314.

grievances in its own name. He found it unnecessary to apply the Anaheim test to reach this result.<sup>12</sup>

In this case, based on the analysis below, we adopt the rationale set forth in Member Camilli's concurrence in South Bay, but only insofar as it concludes that the exclusive representative's right to file grievances in its own name is a statutory right, and that a proposal that the exclusive representative waive that right is a nonmandatory subject of bargaining.

In Marine Shipbuilding Workers v. NLRB (3rd Cir. 1963) 320 F.2d 615, [53 LRRM 2878], a case cited and relied upon by the ALJ, the proposal in question required the signature of each employee involved before a grievance could be processed. In finding the employer's insistence on the proposal to impasse to be an unfair labor practice, the court observed:

[T]he Supreme Court has defined mandatory subjects as those within the phrase "wages, hours, and other terms and conditions of employment [citations]." It is clear to us that Bethlehem's proposal does not come within the scope of that phrase. Although at first glance it might appear to be a "condition of employment," actually the

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<sup>12</sup>Member Camilli also noted that he would find the exclusive representative's right to grieve in its own name to be not only a statutory right, but a statutory right that is nonwaivable by the union. Here, the Association has not argued that the statutory rights in question are nonwaivable, but only that it was unwilling to waive them. Since this case involves the Association's unwillingness to waive its statutory right to represent its members, we find it unnecessary to decide whether a waiver of such a right, if agreed to by the Association would be legal.

Chairperson Hesse dissented in South Bay, finding the right of a union to file grievances in its own name to be a mandatory subject of bargaining.

effect of the proposal is to limit the union's representation of the employees and not to condition the employees' employment.  
(Emphasis added.)

Under EERA, the Association's statutory right to represent its members is found in Government Code section 3543.1(a) which provides, in part, that "employee organizations shall have the right to represent their members in their employment relations with public school employers. . . ." PERB has recognized the extent of that right in a number of cases. In Modesto City Schools (1983) PERB Decision No. 291, the Board recognized that, "[t]he grievance procedure is perhaps the most important point at which employee organizations represent their members in their day-to-day employment relations." (Id. at p. 28.) In Mt. Diablo Unified School District, et al. (1977) EERB Decision No. 44, the Board held that, "the grievance process is an 'employment relation' within the meaning of 3543.1(a) and therefore employee organizations have a statutory right to represent employees in the presentation of their grievances."

In Rio Hondo Community College District (1982) PERB Decision No. 272, the Board found the District violated EERA by its refusal to permit the attendance of a union representative at an informal grievance discussion. The Board acknowledged the "right of employees to join together in an organization which may serve as the vehicle by which they assert their interests in their employment relationship." The Board also noted:

[I]t is the nature of grievance resolution that the manner in which a single employee's grievance is resolved may serve as a model to be followed should another employee raise the same issue in the future. Thus, while the

immediate impact of a grievance resolution may affect only the single employee directly involved, the resolution is nevertheless a matter of collective concern for the individual's fellow employees.  
(Id. at p. 10.)

In Chaffey Joint Union High School District (1982) PERB

Decision No. 202, the Board cited federal precedent in observing:

[T]he processing of grievances is a form of continuing negotiations over the written agreement [citations] in which the adjustment of the grievance provides the meaning and content to the general and often deliberately ambiguous terms of the agreement [citations].  
(Id. at p. 8.)

Thus, we adopt that portion of the ALJ's analysis which states:

The system of labor relations created by the EERA envisioned employees acting collectively through a chosen exclusive representative to bargain with their employer about matters within the scope of representation. The grievance procedure is a contractual tool for enforcing the results of a negotiated agreement. For contract violations to be grievable and arbitrable only by the initiation of an individual employee runs counter to the EERA's statutory system of collective action. In a system of collective bargaining, the ability to challenge contractual [sic] violations must lie with the party that negotiated the contract, i.e., the exclusive representative. Any other system makes the viability of the contract dependent upon the willingness of each unit member to stand individually.  
(Proposed decision at p. 131.)

We therefore affirm the ALJ's conclusion that the District violated EERA by insisting to impasse that the Association waive its statutory right to file grievances in its own name, but reject the ALJ's reliance on a modified version of the Anaheim test to reach that result. Application of the Anaheim test to

determine the negotiability of the grievance proposals is unnecessary since the District is not actually insisting to impasse on a term or condition of employment, but rather is insisting that the Association waive a basic statutory right. (See discussion of Marine Shipbuilding Workers, supra.)

b. The Association did not breach any legal obligation to take a firm position that the grievance proposals not be included in the contract.

The District contends that the Association had an obligation to and failed to assert, prior to impasse, that the grievance proposals were outside the scope of representation.<sup>13</sup> In Poway Unified School District (1988) PERB Decision No. 680, PERB held that an employer may bargain over a permissive and nonmandatory subject of bargaining without waiving the right thereafter to take a position that it is a nonmandatory subject. Clearly, the District's freedom under Poway to bargain over its proposal that the Association waive its statutory rights did not impact the Association's freedom to bargain, or, having bargained, not to agree to the District's counterproposals. Furthermore, while a prior agreement may be some evidence that an exclusive representative might again consent to a nonmandatory contract provision, a permissive subject does not become mandatory by

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<sup>13</sup>The District's reliance on the cases of Jefferson School District (1980) PERB Decision No. 133, and Healdsburg Union High School District and San Mateo City School District (1984) PERB Decision No. 375 for this proposition is misplaced. The essence of the holdings in both Jefferson and Healdsburg, is that where an ambiguous proposal is arguably negotiable, a party cannot refuse to bargain about that proposal based upon its own perception that the proposal is outside the scope of bargaining, but must seek clarification of the proposal. In this case, the proposals themselves were not ambiguous.

virtue of such an agreement. (Poway Unified School District, supra, PERB Decision No. 680.)

On the other hand, while the parties may engage in negotiations over proposals dealing with permissive, nonmandatory subjects of bargaining, when one party subsequently decides to take the position that the nonmandatory proposal not be included in the contract, that party must express its opposition to further negotiation on the proposal as a prerequisite to charging the other party with bargaining to impasse on a nonmandatory subject of bargaining. (Lake Elsinore School District (1986) PERB Decision No. 603; Laredo Packing Company (1981) 254 NLRB 1 [106 LRRM 1350]; Union Carbide Corporation, Mining and Metals Division (1967) 165 NLRB 254, 255, enforced sub nom. Oil, Chemical and Atomic Worker's International Union, Local 3-89, AFL-CIO v. National Labor Relations Board (D.C. Cir. 1968) 405 F.2d 1111.)

In Lake Elsinore, having concluded that a settlement proposal presented by the district to the association was a nonmandatory subject of bargaining, this Board noted that:

. . . the mere proposing of these terms for settlement . . . was not per se unlawful or in violation of the District's duty to bargain in good faith. [Citations.]

But, on the same date that the District presented this initial settlement offer to [the Association], [the Association] clearly placed the District on notice that it would not bargain over the non-mandatory subjects, i.e., the withdrawal of the pending grievances and unfair practice charges. [The Association's chief negotiator] even went further by stating to the District that if it persisted in its position regarding the non-mandatory subjects, [the Association]

considered that the District was "laying the groundwork for an unfair practice charge." Hence, even though the District was entitled to propose terms for settlement, which it hoped would finally resolve the numerous disputed matters between the parties and included non-mandatory bargaining subjects, it could not legally insist upon [the Association's] acceptance of the "total package" in the face of a clear and express refusal by the [Association] to bargain over the non-mandatory aspects of the settlement proposal.

(Id. at pp. 27-28.)

Thus, the question under the Lake Elsinore test is whether, at any time, the Association put the District on notice that it would not bargain over the grievance proposals. After observing that Buress testified that the Association believed it had a legal right to be a named grievant, the District asserts that: "There is no credible evidence that the Association prior to impasse asserted that it had a legal right under the EERA to be a named grievant." (District's exceptions, pp. 22-23.) In fact, the Association did indicate to the District that it intended to stand on its legal right to represent its members by filing grievances in its own name.

The District's attorney elicited the following testimony on cross-examination of Frank Buress, the Association's chief negotiator:

Q: "Did the Association take this issue [the Association's right to file grievances in its own name] to factfinding?"

A: "I believe so, yes."

Q: "Prior to and including factfinding in this matter, did the Association or you ever indicate to the District that it was insisting on a matter outside the scope of representation?"

A: "We believed we had a legal right and that we weren't prepared to agree to language

which the District asserted was a waiver of that right and that we notified them that we wished to withdraw any waiver implied by the current language."

Q: "And what was that legal right that you discussed with the District, if you discussed it? What specifically was the legal right that we were discussing with the District?"

A: "We believed that as a party to the contract we had in the absence of a restriction that says the Association may not grieve, a legal right to file grievances."

Q: "So if I may rephrase it and put it to you this way: you indicated to the District that the Association had a legal right to be a named grievant, is that correct?"

A: "And that we were not going to agree to waive that through the District's interpretation of the current Contract language." (Transcript, Vol. IX, pp. 1020-1021.)

Obviously, this case is not as clear as that addressed by this Board in Lake Elsinore. Whereas in Lake Elsinore the association clearly stated that the district's persistence in bargaining over a nonmandatory subject of bargaining would result in the filing of an unfair practice charge, in this case we have no such unequivocal statements. Nevertheless, while the Association did not explicitly state that the proposals in question were "outside the scope of bargaining," the Association did make clear its contention that it was improper for the District to insist on language which it believed deprived the Association of its statutory rights. Notably, the District introduced no testimony from its own witness and chief negotiator to dispute the testimony set forth above. While this is a close case, we find the Association's statements sufficient to put the District on notice that the Association was unwilling to waive its statutory right to represent its members.

c. The District did insist to impasse on the grievance proposals.

The District argues that it was the Association, and not the District, that insisted on taking the grievance proposals to impasse. At the time that impasse was declared, the Association was proposing that the grievance provisions in the prior contract be modified to reflect what the Association believed was its statutory right to represent its members in their employment relations with their employer. The District counterproposed, first by insisting on maintenance of the grievance provisions of the prior contract, and then by proposing some modifications, that the Association waive that statutory right.

Contrary to the District's assertion that the Association pushed the parties to impasse, it is apparent from the record that both parties realized, at essentially the same time, that they had reached an impasse in their negotiations. During the hearing, the District took pains to try to establish that it was the Association that first uttered the word "impasse." The Association countered that it was the District that filed the first declaration of impasse form. Neither of these facts is determinative. PERB must look to the history of the bargaining, the substance of the proposals, and the contents of the declarations of impasse to determine whether a party can be considered to have "insisted to impasse" on a particular proposal.

In this case, a review of the bargaining history and the substance of the proposals and counterproposals supports the ALJ's conclusion that the District insisted to impasse on its

counterproposals that the Association agree to contract language which constituted a waiver of the Association's statutory right to file grievances in its own name.<sup>14</sup> Throughout the negotiations and impasse procedures, the District maintained its status quo position. By refusing to relinquish the nonmandatory subject once the Association communicated its refusal to include the nonmandatory subject in the collective bargaining agreement, the District violated section 3543.5(c).

(2) Proposal That Association Waive Right to be Physically Present at Grievance Meetings Where Employee has not Requested Representation.

#### Factual Summary

The Association asserts that the District insisted to impasse on a provision giving the employer the right to resolve grievances with individual employees without the intervention of the Association. The disputed language is found in sections 7.2.1 and 7.4.2 of the 1981-84 CBA. Section 7.2.1 states the purpose of the grievance procedure and reads as follows:

7.2.1. The purpose of this grievance procedure is to secure, at the administrative level closest to the grievant, solutions to problems which may arise from time to time. The parties agree that confidentiality at any level should be maintained. The grievance procedure shall not be construed as in any way hindering, discouraging, or denying the settlement of problems outside the structure of the grievance procedure.  
(Emphasis added.)

The Association proposed to delete the language underlined above.

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<sup>14</sup>In contrast, the record shows the Association lawfully insisted on the elimination of a provision that was in the prior contract and that covered a nonmandatory subject.

Section 7.4, et. seq., pertains to the rights of unit members to representation. Section 7.4.2 stated the following:

7.4.2. An employee may be represented at all stages of the grievance procedure by himself/herself, or at his/her option, with a representative selected by the Association. If an employee is not represented by the Association or its representative, the Association shall have the opportunity to be present and to state its views at all formal stages of the grievance procedure. (Emphasis added.)

The Association proposed to delete the word "formal" underlined above.

The Association viewed the language of section 7.2.1 as allowing unit members to utilize a nonnegotiated procedure to resolve contract-related problems. The term "formal" in section 7.4.2 was regarded as permitting an employee to adjust grievances without the involvement of the Association at all levels of the grievance procedure. The District initially proposed no change in either of these sections of the Agreement.

The parties had extensive negotiations over the grievance procedure at the May 21, June 21 and June 26 bargaining sessions. In its June 19 counterproposals, the Association took the position that its proposed modification of section 7.4.2 was not necessary if its suggested changes to sections 7.2.1 and 7.3.1 were accepted.<sup>15</sup>

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<sup>15</sup>Section 7.3.1 stated as follows:

7.3.1 Informal Level

The grievance [sic] will first discuss the grievance with the appropriate principal or immediate supervisor with the objective of resolving the matter informally.

### Analysis

The District excepts to the ALJ's finding that "the term 'formal' in Section 7.4.2 was regarded as permitting an employee to adjust grievances without the involvement of the Association at all levels of the grievance procedure." The District contends that the language only states that the Association shall be present at all formal stages. On this point, the District is technically correct. The District is also correct in its observation that the contract language is actually silent as to whether the Association may be present at any informal level of the grievance procedure.

The District admits, however, that the existing contract language could be fairly interpreted as excluding the Association from being present at informal grievance meetings where it is not representing the employee grievant. Citing EERA section 3543, the District argues that the Association has no right to be physically present at grievance meetings where employees do not seek representation by the Association. We agree.

The Association's right to represent, found in section 3543.1(a), is limited by the rights granted to employees in section 3543, which provides, in pertinent part:

. . . Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration . . . and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution

and has been given the opportunity to file a response.

(Emphasis added.)

This section permits employees to participate in grievance processing with their employer without the intervention of the Association. The Association's right to represent and enforce its collective bargaining agreement on behalf of all unit members is protected by the proviso in section 3543, which requires that the exclusive representative be notified of the grievance and proposed resolution, and be afforded an opportunity to respond.

Since we find that the District's proposals in this regard do not infringe on the Association's statutory right to represent its members, and since individual employees have a statutory right to adjust their grievances without the intervention of the Association pursuant to section 3543, we find the District was within its right in insisting to impasse on its proposal restricting the Association from being physically present at informal grievance meetings.<sup>16</sup>

(3) Proposal Limiting Association's Right to Arbitrate Grievances.

#### Factual Summary

The Association alleged that the District insisted to impasse on a provision that prohibits the Association from taking a grievance to arbitration without the consent of the individual

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<sup>16</sup>Since we find that the District did not violate the EERA in insisting to impasse on this proposal, we need not address the District's arguments that the Association insisted to impasse on the proposal and that the Association failed to "take a firm position" prior to reaching impasse that the proposal was outside the scope of representation.

grievant. The dispute arose after the Association proposed to delete the language to which it objected from section 7.3.6 of the grievance procedure.

Initially, neither party proposed a change in section 7.3.6. During the May 21 negotiations, however, the Association submitted a written proposal to the District to delete the following language which it considered "unnecessary." The disputed clause reads:

[I]f the grievant is not satisfied with the disposition of the grievance at Level III, the grievant may, within ten (10) duty days, file a written request with the Association that the Association submit the grievance to arbitration. The Association will determine whether the matter may go to Level IV.

The Association contended that this language concerns a matter that should be determined solely between the Association and the affected member(s) of the bargaining unit.

The District submitted a written counter to this proposal in the June 21 settlement proposal. It stated, in relevant part:

[T]he Association will determine whether the matter (grievance) goes to Level IV providing the grievant wishes the grievance to be appealed to arbitration.

In its June 25 analysis of the settlement proposal, the Association rejected this counter, stating that it had "absolutely no affect [sic] on status quo . . . ." (Underline in original.) The District offered no additional oral or written counterproposals at this time prior to the declaration of impasse.

The arbitration issue remained in dispute through the factfinding process. In its factfinding submission, the District

stated that its June 21 proposal represented a "compromise" position, in that the individual grievant would no longer be required to file a written request with the Association in order for the matter to be submitted to arbitration. The Association took the position that the District's insistence on its proposal was improper.

#### Analysis

In its exceptions, the District argued that: (1) the Association has no EERA right to take a grievance to arbitration without the concurrence of the grievant; (2) the Association breached its obligation to "take a firm position" prior to reaching impasse that the proposal was outside the scope of representation; and (3) it was the Association, and not the District, that insisted to impasse on the grievance proposals.

The District's argument that the Association has no EERA right to take a grievance to arbitration is rejected.

As is the case with the grievance proposal prohibiting the Association from filing in its own name, the proposal limiting the Association's ability to take a grievance to arbitration without the grievant's approval impinges upon the Association's statutory right to represent its members and is therefore a nonmandatory subject of bargaining. Clearly, limiting an exclusive representative to arbitrating only those grievances an individual employee has requested or consented to arbitrate, has the same adverse impact upon the exclusive representative's ability to represent the "unit" in its employment relations, as

does requiring the individual employee's consent to initiating the grievance.

Contrary to the District's assertion, we find that the Association did take a firm position, prior to impasse, that the proposal in question was outside the scope of representation. The following testimony was elicited by the District's attorney on his cross-examination of Buress.

Q: "What was the specific thrust of the charge in Paragraph 12(E), and does it relate to specific language that was in the collective Bargaining Agreement which is Association Exhibit No. 3?"

A: "The Association believed that it had the ability to determine whether or not a dispute should be interpreted through the arbitration provisions it had negotiated in the Agreement, and so informed Mr. Zampi. We believed it was improper, and so told him for the District to insist on language which allowed an individual employee to determine whether or not the organization could proceed to arbitration."

(Transcript, Vol. IX, p. 1026.)

As was the case with the proposal prohibiting the Association from filing grievances in its own name, the Association never stated explicitly that the arbitration proposal was outside the scope of bargaining. The Association did inform the District, however, of its position that the District's insistence on the proposal was improper.

Finally, we reject the District's argument that it was the Association, and not the District, that insisted to impasse on the arbitration proposal. As noted above, the issue remained, as did the other grievance issues, in dispute through the

factfinding process. The District's proposed language remained part and parcel of its proposal for settlement of the contract.

By failing to relinquish the nonmandatory subject once the Association communicated its refusal to include the nonmandatory subject in the collective bargaining agreement, the District violated section 3543.5(c).

B. UNIT MODIFICATION/CLARIFICATION PROPOSAL

Factual Summary

Section 2.1 of the CBA names by title, those classifications expressly included and excluded from the bargaining unit. The major thrust of the proposed modification to section 2.1 was to update the titles of those classifications already in the unit and add to the unit summer school teachers and long-term substitutes who were expressly excluded. Section 2.2 read as follows:

The Board and Association agree that the composition of the bargaining unit is appropriate and that they will not seek a clarification or amendment of the unit, either as to the specific exclusions or the specific inclusions except that both parties to this agreement shall attempt to agree on the status, for purposes of recognition, of any disputed newly created position in the unit as a result of a change in the job description. If the parties cannot agree, either or both parties may submit the dispute to PERB, which is the proper agency to determine said dispute. Thereafter, should there be a decision by PERB regarding classification additions or deletions specific to the above bargaining unit listings, this Section shall be amended to abide by that decision.  
(Emphasis added.)

The Association proposed to delete all of the language of section 2.2 and replace it with new language pertaining to unit

clarification and/or modification. The language of the first sentence of section 2.2 was particularly objectionable to the Association. In its initial proposals, the District wanted no changes in Article 2.

The parties discussed this article during several negotiating sessions prior to June 26, 1984. Negotiations occurred in connection with the Association's proposed new Article 55 covering summer school teachers and its proposal about long-term substitutes.

#### Analysis

The District excepts to the ALJ's finding that the District failed to bargain in good faith when it insisted to impasse that the Association waive its right to seek unit modification. The District's specific exceptions to this finding are not entirely clear. The District appears to be making two arguments, in the alternative. First, the District seems to be arguing that the subject of unit recognition/modification/clarification is a mandatory subject of bargaining. Alternatively, the District argues that the unit recognition/modification/clarification proposal is a nonmandatory, permissive subject, but the District did not commit an unfair labor practice in insisting to impasse because: (a) the Association failed to take a firm position that the proposal was outside the scope of bargaining, and therefore it cannot object that the District insisted to impasse on a nonmandatory subject; and, (b) it was the Association, not the District, that took negotiations to impasse.

The ALJ adequately addressed and properly rejected the District's argument that the unit modification/clarification was a mandatory subject of bargaining.

Under federal law, the recognition clause is not a mandatory subject of bargaining. (See NLRB v. Wooster Division of Borg-Warner Corporation (1958) 356 U.S. 342 [42 LRRM 2034].)

Likewise, the composition of the bargaining unit is not a mandatory subject of bargaining. It is therefore, an unfair labor practice for either party to insist to impasse and that employees be added to or excluded from a certified unit. The final determination of the appropriateness of the bargaining unit lies within the power of the NLRB. (See Douds v. Longshoremen's Association (2d Cir. 1957) 241 F.2d 278 [39 LRRM 2388].)

The scope of the bargaining unit is not a specifically enumerated subject in section 3543.2. Nor has PERB specifically ruled on the matter as a scope of representation issue.<sup>17</sup>

In El Monte Union High School District, *supra*, the Board addressed the waiver provision in the parties' collective bargaining agreement recognition article and determined that it

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<sup>17</sup>In Davis Joint Unified School District (1984) PERB Decision No. 474, PERB held that the district did not violate section 3543.5(c) by refusing to bargain about teachers not in the bargaining unit represented by the exclusive representative. In Davis, a question existed about the appropriateness of the unit at the time that negotiations were demanded by the exclusive representative. However, the composition of the bargaining unit itself was not addressed in Davis as a scope of representation issue. Neither did PERB specifically address unit composition as a "scope of representation issue" in the case of El Monte Union High School District (1982) PERB Decision No. 220, discussed *infra*. Instead, the case was before the Board after the district engaged in a technical refusal to negotiate with the exclusive representative in order to test PERB's unit determination.

did not preclude the Board from exercising its statutory authority to determine the appropriate unit. In so concluding, the Board relied upon federal sector cases which rejected contractual provisions that waived the union's statutory rights. The Board noted that:

[U]nder the NLRB, a waiver provision will not be upheld where the waiver is in derogation of the bargaining representative's rights under the Act, Bethlehem Steel Corp. (1950) 89 NLRB 341 [25 LRRM 1564], or where its enforcement might dilute employees' rights under the Act. NLRB v. Magavox Co. (1974) 415 U.S. 323 [85 LRRM 2475].  
(Id. at p. 6.)

Indeed, the NLRB has held that it is contrary to the basic philosophy of national labor law policy to permit a union or an individual employee to contract away the jurisdiction of that board as established by Congress. (Local 743, IAM v. United Aircraft Corporation (D.C. Conn. 1963) 220 F.2d 1953 [53 LRRM 2904]; enforced (2d Cir. 1964) 337 F.2d [57 LRRM 2245].)

Given the similarity between the powers of the NLRB to approve and define an appropriate bargaining unit and the statutory authority of PERB to determine appropriate bargaining units or approve modifications to units, we find the federal sector precedent persuasive and hold that a proposal dealing with the composition of a negotiating unit is not a mandatory subject of bargaining under EERA.

Here, the contested waiver clause was intended to preclude either the Association or the District from exercising unit modification rights provided by PERB regulations and, in effect, to contract away the jurisdiction of the PERB to approve unit

modifications. Applying the conclusions of the Board in El Monte Union High School District to this provision, it is concluded that the waiver clause covers a nonmandatory subject which contravenes the Association's unit modification rights under EERA. As such, the District could not lawfully insist to impasse upon maintaining this language in the agreement. (Lake Elsinore School District, supra, PERB Decision No. 603.)

The District, in the first instance, had no lawful obligation to negotiate about the recognition of summer school teachers or long-term substitutes, since neither group of employees was in the bargaining unit at the time of the negotiations. Despite the parties' voluntary agreement to include this proposal in their negotiations, and even though the disputed provision was contained in the 1981-84 CBA, it still remained a nonmandatory subject of negotiations. Therefore, it is determined that by insisting on the inclusion of a waiver clause which covered a nonmandatory subject of negotiations, the District committed a per se violation of the duty to bargain in good faith imposed by section 3543.5(c).

The record does not support the District's argument that the Association failed to take a firm position that the proposal in question must not be included in the contract between the parties. The following exchanges took place between the District's attorney on the cross-examination of Bures:

Q: "Do you have any information that the Association, prior to the Unfair Practice Charge being filed in August of 1984, ever indicated to the District that the matter in Article 2.2 is outside the scope of representation?"

A: "We told the District we no longer wish to waive any rights to seek amendment. And if that answers your question in the affirmative, the answer would be yes."

Q: "Well, it doesn't answer my question. Let me rephrase it. Did you ever tell the District prior to the filing of the unfair practice charge that the matter in Article 2.2 was outside the scope of representation?"

A: "I don't know that I used those exact words, no. . . ."

Q: "Did you in any way object to the Public Employment Relations board in or about July or June of 1984 that this matter was outside of scope and should not go to impasse?"

A: "No. . . ."

Q: "Did you at any time to the factfinding panel indicate that the matter in Article 2.2 was outside the scope of representation?"

A: "I do not recall."

Q: "Do you recall at any time any representative of the Association objecting to Article 2.2 in negotiations or impasse or factfinding, the matter in Article 2.2 was outside the scope of representation?"

A: "When you say outside the scope of representation, we told him it was something that we didn't have to agree to, and we didn't wish to waive it anymore, and to that extent I guess we did tell him that."

Q: "And when did you say that?"

A: "At the bargaining table."

Q: "When?"

A: "I don't remember when."

(Transcript, Vol. VIII, pp. 1010-1011.)

Notably, the District introduced no testimony by its own witness and chief negotiator, Zampi, to contradict the testimony set forth above.

There is nothing in the law that says a party needs to chant the magic words that a specific subject is outside the scope of representation to preserve its right, after having bargained about a nonmandatory subject, to take the position that the nonmandatory proposal shall not be included in the contract. In *The Developing Labor Law* (2d ed. 1983) author Morris states:

Either party may bargain about a permissive topic as if it were a mandatory subject without losing the right, at any time before agreement is reached, to take a firm position that the matter shall not be included in a contract between the parties.

(At p. 847; emphasis added.)

Although this is admittedly a close case, we find that in stating that the proposal in question was something that the Association "didn't have to agree to" and that the Association "didn't wish to waive [its rights] anymore," the Association was taking "a firm position that the matter shall not be included in a contract between the parties" and met the test set forth in Lake Elsinore. (See discussion supra, at pp. 24-25.)

We also reject the District's argument that it did not insist to impasse on the unit modification/clarification proposal. As noted above, the District included its counterproposal on unit modification/clarification in its June 21 settlement proposal despite the fact that the Association had indicated that it was no longer willing to waive any rights to seek modification of the unit. Once the Association communicated its refusal to waive its right and refusal to include the nonmandatory subject of bargaining in the collective bargaining agreement, the District's insistence that the proposal be included violated 3543.5(c).

#### C. SUMMER SCHOOL PROPOSAL

##### Factual Summary

At the time that negotiations between the Association and the District commenced, summer school teachers were expressly excluded from the bargaining unit represented by the Association.

Nonetheless, the parties agreed to negotiate over hours, wages, and other terms and conditions of employment for these employees. Written proposals covering these subjects were exchanged on May 9, 1984. A provision pertaining to summer school teachers was considered as a potential new article in the successor agreement.

The parties exchanged several written proposals about summer school teachers between May 9 and June 25, 1984. All of these were conceptual in form, i.e., written in general terms rather than specific contractual language. Throughout this time, the proposals of both sides regarding unit inclusion simply stated:

[I]nclude summer school teachers in unit description in Article II [sic].

At the afternoon session of the June 13 negotiations, the District presented its unit inclusion proposal in contract language that read as follows:

Teachers who teach in summer school and were classified as temporary, probationary, or permanent in the immediately preceding regular school year shall be considered unit members for purposes of employment in the summer school program.

The Association immediately rejected this proposal, stating that it viewed this language as more restrictive than the concept proposal that the District made during the morning session of June 13. Nothing in the record shows that the District sought to withdraw this proposal from the negotiations, prior to or on June 26, 1984, the date that the parties declared impasse.

#### Analysis

The Association alleged that the District violated the duty to bargain in good faith by insisting to impasse on the inclusion

of the June 13 summer school proposal, a nonnegotiable or permissive provision, in the successor Agreement.

The ALJ concluded that the summer school proposal was a nonmandatory subject of bargaining, citing Healdsburg Union High School District et al., *supra*, PERB Decision No. 375.

In Healdsburg Union High School District, et al., *supra*, the Board considered the negotiability of a proposal by the exclusive representative of a classified unit regarding substitute employees who were not included in the classified unit. The Board concluded that the proposal was outside the scope of representation because it sought to negotiate for employees outside the classified unit. A similar determination was made concerning the union's proposal regarding short-term employees, even though that proposal related to wages and hours. The Board concluded that the employees for whom the union sought to negotiate were outside of the bargaining unit which it represented. Thus, the proposal was nonnegotiable.

It is undisputed that summer school teachers were not in the bargaining unit represented by the Association when negotiations occurred in the spring and summer of 1984. In applying the Healdsburg holding to these facts, the ALJ determined that: (1) the District initially had no obligation to bargain with the Association about wages, hours and other terms and conditions of employment of these employees; (2) all proposals related to these employees were nonnegotiable; and (3) even though the parties voluntarily undertook to negotiate about various topics concerning these employees, some of which concerned matters

within the scope of representation, neither party had a right to insist to impasse on the inclusion of the provision in the new agreement because it was nonnegotiable.

The District excepted to the above conclusions on the grounds that: (1) the Association never alleged in its charge that the District committed an unfair practice by insisting to impasse on this issue; therefore, the District had no notice that the unalleged conduct might constitute the basis for an independent violation; (2) the Association never took a firm position that the summer school article should not be included in the contract; and (3) the initial language was proposed by the Association and the District only made a counter-proposal.<sup>18</sup>

There is no evidence in the record that the Association ever took a firm position that the District's summer school proposal not be included in the contract. This failure of proof mandates our reversal of the ALJ's finding that the District illegally insisted to impasse on this proposal.

In summary, by insisting to impasse on nonmandatory subjects of bargaining, the District committed per se violations of its section 3543.5(c) duty to bargain in good faith. Additionally, the District's continued insistence, through the statutory impasse procedures, on including nonmandatory subjects in its proposals on unit recognition and the grievance procedure constituted an unlawful failure to participate in the impasse

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<sup>18</sup>It is unnecessary to address the first and third of these exceptions since we find no violation based on the fact that the Association never communicated, after having bargained on this permissive subject, its insistence that this proposal not be included in the contract.

procedure in good faith in violation of section 3543.5(e). (See generally, Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191 [191 Cal.Rptr. 60].)

### III. FAILURE TO PROVIDE REQUESTED INFORMATION

#### A. PERSONAL LEAVE

##### Factual Summary

In mid-February 1984, Buress and Zampi met informally to discuss various employment matters of concern to each of them. During the course of their discussion regarding the use of personal necessity and compelling personal importance leaves, Zampi was quoted by Buress as saying that the District was going to "tighten up" on its reasons for approving both categories of leave because too many teachers were using personal necessity leave. Zampi further stated that the District had compiled a list that contained all the reasons for which the District would approve such leaves in the future.

At the time of this conversation, Buress was unfamiliar with the policy and practice in the District regarding the approval or disapproval of such leave. The language of the Agreement did not contain any guidelines as to what constituted appropriate use of personal necessity leave. Subsequent to their meeting, Buress sent a letter to Zampi on February 29, 1984, requesting information about any District policy, other than the language in the Agreement, which described the difference between the two types of leaves and when each could or could not be used. Zampi did not respond to this letter.

Article 14 of the 1981-84 Agreement contained provisions pertaining to both types of leave.<sup>19</sup> In their initial proposals for a successor agreement, neither the Association nor the

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<sup>19</sup>Article 14, sections 14.1 to 14.2.3, state as follows:

PERSONAL NECESSITY-COMPELLING PERSONAL  
IMPORTANCE LEAVE

14.1 Personal Necessity

14.1.1 Personal necessity leave shall be granted with pay. When possible, application shall be made prior to leave. Forms for such leave shall be mutually agreed upon and placed in the appendix for the duration of this Agreement.

14.1.2 Entitlement to three (3) days of personal necessity leave accrues to each employee annually. The unused portion shall accumulate to ten (10) days. Part-time employees shall be entitled to a prorated amount of such leave.

14.1.3 In any year, a maximum of ten (10) earned and unused days may be used for personal necessity.

14.2 Compelling Personal Importance

14.2.1 Each employee who has completed three (3) years of service with the District is entitled to use one (1) day leave for personal business if it is beyond the ability of the employee to schedule outside of working hours.

14.2.2 This leave may be accumulated to a limit of three (3) days.

14.2.3 This leave is deducted from personal necessity leave.

Appendix D of the CBA contained a sample of the "Special Leave Form" to be used for certain leave requests. The form required the employee to state a reason for requesting personal necessity leave. No reason was required for requesting compelling personal importance leave.

District proposed a change in the language of either leave provision.

Even so, during discussions about leaves in the early part of the negotiations, it became apparent to the parties that they had different interpretations about their original intent for the use of personal necessity leave. Thus, at the May 14, 1984 negotiating session, when the Association and the District agreed to "sign off" on all articles in the 1981-84 CBA that would remain unchanged in the new agreement, they excluded Article 14 and one other article from the group because of their differences.

During the negotiating session on June 1, 1984, the parties further discussed the intent of the contract language and the practice of the District in granting or denying use of both personal necessity and compelling personal importance leaves. Following that session, Buress sent Zampi a letter on June 4, 1984, again requesting information pertaining to any District policy on "acceptable/unacceptable" reasons for granting personal necessity or compelling personal importance leave. Buress also asked how long the District retained leave applications submitted by unit members.

Zampi responded to both inquiries in a letter dated June 15, 1984. The letter stated that the Agreement governed the reasons for granting both types of leave.

On June 19, 1984, Buress sent a third letter requesting a more detailed response from Zampi regarding the District's leave approval practices.

The parties met for negotiations on June 21, 1984. At that time, the Association stated that if the District refused to provide more specific information than it had given in the June 15 letter, the Association wanted to review all personal necessity and compelling personal importance applications on file from the 1979-80 school year forward. Zampi responded that the documents were "privileged." Buress then asked to see the applications with the individual employee's name deleted. Zampi said "no." Zampi refused the request, stating that the applications were personnel records and thus subject to restricted access.

Following the June 21 session, Buress reiterated the Association's oral request in a June 21 letter to Zampi. That letter stated that the Association needed access to the leave application files from 1979-80 to the present for bargaining purposes and for preparing grievances that were going to be filed soon. In late June and early July, 1984, grievances were filed by six individual employees and the Association regarding the denial of personal necessity leave.<sup>20</sup>

On July 2, 1984, Zampi responded to the June 19 request with a letter that provided a point-by-point answer to each question. Nonetheless, the Association was not satisfied with the response.

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<sup>20</sup>Paragraph six of the original charge alleged that the District "unilaterally changed its past practice governing allowable uses of personal necessity leave." PERB dismissed and deferred this allegation to the contractual grievance machinery. The matter was proceeding through arbitration at the time of this unfair practice hearing.

Thus, on July 6, 1984, the Association sent another letter requesting clarification of the information contained in the July 2 letter. In particular, the July 6 letter requested that the District specify which provisions of the Agreement were actually relied upon to disapprove personal necessity and compelling personal importance leave requests.

During this period the Association also attempted to obtain information about leave applications from individual unit members. Members were asked to submit copies of their approved/disapproved leave applications directly to the Association. The Association also asked members to give it written authorization to review their individual personnel files. Through these efforts, the Association obtained leave applications from approximately 20-30 people.

On July 13, 1984, the District responded to the Association's July 6 letter. The District's letter cited 25 different contract articles relied upon by the District in the approval/disapproval of personal necessity leave requests. When the Association received the July 13 letter, it decided that the issue was not "going any place" and thus, would not be resolved.

On August 9, 1984, the Association notified the District by letter that it was withdrawing its objections to the District's proposal to maintain the "status quo" language of Article 14 in the successor agreement. The District acknowledged the Association's withdrawal on August 10, 1984. Consequently, the personal leave issue was not taken to the factfinding process.

### Analysis

It is well settled under PERB and NLRB case law that an exclusive representative is entitled to information sufficient to enable it to understand and intelligently discharge its duty to represent bargaining unit members. Requested information must be furnished for purposes of representing employees in negotiations for a future contract and also for policing the administration of an existing agreement. (See Morris, The Developing Labor Law, supra, p. 610.)

An employer's refusal to provide such information evidences bad faith bargaining unless the employer can demonstrate adequate reasons why it cannot supply the information. (Stockton Unified School District (1980) PERB Decision No. 143; Azusa Unified School District (1983) PERB Decision No. 374; Modesto City Schools and High School District (1985) PERB Decision No. 518.)

The determination of whether requested information is relevant is made under "a liberal 'discovery-type standard.'" (Soule Glass and Glazing Company v. NLRB (1st Cir. 1981) 652 F.2d 1055 [107 LRRM 2781].)

Where the requested information is related to negotiations, PERB has followed private sector precedent. Thus, the Board noted in Stockton Unified School District, supra, that:

[I]n defining the parameters of "necessary and relevant information" to which the representative is entitled, the Courts have concluded that information pertaining immediately to mandatory subjects of bargaining is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant and must be disclosed unless the employer can establish that the information is plainly irrelevant

and can provide adequate reasons why it cannot furnish the information. [Citation.] (Id. at p.13.)

The standard for judging how much information must be provided, incident to the processing of grievances, was discussed by the Supreme Court in NLRB v. Acme Industrial Company (1967) 385 U.S. 432 [64 LRRM 2069]. In that case the court concluded that an employer must provide the requested information:

. . . if it likely would be relevant and useful to the union's determination of the merits of the grievance and to their fulfillment of the union's statutory representation duties. (Id. at pp. 437-438.)

Once a good faith demand is made for relevant information, it must be made available promptly and in a useful form. Unreasonable delay in providing requested information is tantamount to a failure to provide the information at all. Thus, a delay of six months in providing information has been held a failure to negotiate in good faith. (Azusa Unified School District, supra, PERB Decision No. 374; see also John S. Swift Company, Incorporated (1959) 124 NLRB 394 [44 LRRM 1388].) Even a delay as short as two months, without employer explanation, has been held to be a violation. (Colonial Press, Incorporated (1983) 204 NLRB 852 [83 LRRM 1648].) The fact that an employer ultimately furnishes the information does not excuse an unreasonable delay. (K & K Transportation Corporation, Incorporated (1981) 254 NLRB 722 [106 LRRM 1138].)

Whether the particular information sought must be provided in the manner requested depends upon the facts of the case. (Detroit Edison Company v. National Labor Relations Board (1979)

440 U.S. 301 [100 LRRM 2728].) Once a demand for relevant information is made, the information must be made available in a manner not so burdensome or time-consuming as to impede the process of bargaining, although not necessarily in the form requested by the union. However, the employer may not simply present the information in any form which it considers adequate but which is nonetheless unsuitable for informed consideration by the union. (See Morris, *The Developing Labor Law*, supra, at pp. 615-616; General Electric Corporation (1970) 186 NLRB 14 [75 LRRM 1265]; Colonial Press, Incorporated, supra.)

Employers are limited in the defenses that they may successfully invoke against a charge of refusal to bargain arising from a failure to provide relevant information. Once a request for relevant information is made, ". . . the employer must either supply the information or adequately set forth the reasons why it is unable to comply." (The Kroger Company (1976) 226 NLRB 512 [93 LRRM 1315].) In Detroit Edison Corporation v. NLRB, supra, the Supreme Court rejected the notion of an "absolute rule" that automatically requires the employer to disclose all relevant information. In Detroit Edison, the union sought information about a battery of aptitude tests and the answer sheets which linked the test scores with individual employees names. Test secrecy and confidentiality of scores were critical factors in maintaining the validity of the testing program. In concluding that the union could not get the information in the form requested, the court pointed out that:

[A] union's bare assertion that it needs information to process a grievance does not

automatically oblige the employer to supply all the information in the manner requested. The duty to supply information . . . turns upon "the circumstances of the particular case" [Citation.] . . . and much the same can be said for the type of disclosure that will satisfy that duty. [Citation.]

The District filed several exceptions to the ALJ's specific findings that it was non-responsive to requests for information regarding use of personal necessity and compelling personal importance leave. Each exception is discussed separately below.

1. The District argues that it did not respond to the Association's February 29, 1984 letter requesting its personal leave policy because there was no policy.

It is undisputed that the District never responded to the Association's first request for information about the District's policy concerning to the use of the two types of personal leave. The ALJ noted that the District offered no explanation for its lack of response. The ALJ found that even if the District questioned the relevancy of the material sought, the District had the burden to make its challenge in a timely manner. This, it did not do. If it could not provide the requested policy, it was obligated to set forth adequate reasons for its inability to do so. (Stockton Unified School District (1980) PERB Decision No. 143.) Instead, the District totally ignored the request. We agree with the ALJ's conclusion that the District's lack of response amounted to a flat refusal to furnish the information.

2. The District argues that since there were no pending grievances as of February 29 and no changes were made to the leave article throughout negotiations, the ALJ incorrectly

concluded that the February 29 request was presumptively relevant because the "information was necessary and relevant to the Association's bargaining obligation in that the Employer's policies were and are the subject of pending grievances."

The District implies that the information was not necessary and relevant based on Buress' testimony that there were no pending grievances when the February 29 letter was sent and that no changes were made to the leave article throughout negotiations. The ALJ's statement, however, pertained to the numerous requests for information made by the Association from February through June and not just the February 29 request. The Board has found that information pertaining to mandatory subjects of bargaining is presumptively relevant. (Stockton Unified School District, supra, PERB Decision No. 143.) Since "leave" is a mandatory subject of bargaining pursuant to section 3543.2(a), the information was presumptively relevant and the District's argument is without merit.

3. The District argues that it fully responded to Buress' questions regarding acceptable reasons for leave at the June 1 bargaining session.

The bargaining notes do not, as the District contends, support a finding that the District fully responded at the June 1 bargaining session to Buress' questions regarding acceptable reasons for leave. (See District Exh. 11, pp. 300-303.) In three subsequent written requests and one oral request, the Association sought clarification of the District's leave policy, which clarification was not forthcoming. The District's

responses to the Association's requests for information relating to personal leave were general, ambiguous, and from the Association's standpoint, relatively useless.

4. The District argues that the collective bargaining agreement requires personnel files to be kept confidential and, therefore, it was not obligated to supply completed leave request forms to the union.

By letter on June 19 and by oral request on June 21, the Association requested the opportunity to review all unit member leave applications maintained by the District for several years prior to 1984. Since the District had this material in its possession, it was obliged to grant the Association access to its records, or make the information available in a useable form. However, the District flatly refused to provide the information on the grounds that the records were "privileged" and not for review by the Association.

Contrary to the District's contentions, the leave requests in this case were not the type of confidential employee records that the court exempted from disclosure in the Detroit Edison, supra, 440 U.S. 301 [100 LRRM 2728]<sup>21</sup> case. The District could have accommodated the Association's need by deleting identifying information from the request forms before giving them to the Association or supplying the information in a form that would

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<sup>21</sup>This case is clearly distinguished from Detroit Edison, supra, in which the employee's right to privacy was held to outweigh the union's need for extremely sensitive and confidential test results. Additionally, it is noted that the Association's attempts to obtain written authorization from members of the bargaining unit, as suggested by the District, was an ineffective and unsuccessful means to obtain the data needed.

have made it equally useful to the Association. (See Los Rios Community College District (1988) PERB Decision No. 670, pp. 10-12.)

The fact that the information may not have been conveniently available in a form that would accommodate both the interests of the Association and the District does not automatically render the Association's request unduly burdensome nor relieve the District of its duty to provide it. (See Stockton Teachers Association (1980) PERB Decision No. 143, pp. 12-16.)

5. The District argues that it was not required to clarify the information provided to the Association absent a request to do so.

This argument is without merit as the Association made numerous and repeated requests of the District to clarify the information provided. Furthermore, the ALJ correctly states, the employer may not simply present the information in any form which it considers adequate but which is, nonetheless, unsuitable for informed consideration by the union, citing, The Developing Labor Law, supra, pp. 615-616; General Electric Company (1970) 186 NLRB 14 [75 LRRM 1265]; Colonial Press, Incorporated (1973) 204 NLRB 852 [83 LRRM 1648].

6. The District argues that the Association could have easily acquired the District policy from the "Board Policy Handbook."

The record reflects, however, that the requested information was not readily available in the "Board Policy Handbook." The request was based upon information received by the Association

that the District was going to "tighten up" on its allowable justifications for the leaves. Whatever information may have been available in the past did not necessarily reflect a change in the District's practice.

The District's conduct with respect to the Association's request for information regarding personal leave constitutes a per se violation of the duty to negotiate in good faith under 3543.5(c). This same conduct interferes with the employee organization's right to represent its members in their employment relations and thus violates section 3543.5(b).

B. LONG-TERM SUBSTITUTES

Factual Summary

In its initial proposal for the 1984 negotiations, the Association proposed that teachers classified as long-term substitutes be included in the bargaining unit. In a letter to the District dated May 18, 1984, the Association requested that the District provide the names, addresses and current assignments of all teachers employed as long-term substitutes.<sup>22</sup> The letter did not state the Association's reason for requesting this information. At the time of the May 18 request, long-term substitutes were expressly excluded from the bargaining unit by the language of Article 2 of the 1981-84 CBA.<sup>23</sup> By a June 2

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<sup>22</sup>In its factfinding submission regarding long-term substitute teachers, the District defined a "long-term substitute" as a substitute who replaces an individual teacher for more than ten consecutive days.

<sup>23</sup>PERB representation file for case number LA-UM-332 reveals that the Association filed a unit modification petition on May 25, 1984, to include long-term substitute teachers in the certificated unit. On June 20, 1984, the District responded by

letter, the District promised a future response to the May 18 request.

At the June 11 bargaining session, the parties discussed the status of long-term substitutes in connection with the Association's proposal to add a new provision, Article 52, to the successor agreement. Article 52 was intended to spell out specific rights for "temporary/restricted teachers." As stated above, temporary teachers were already included in the certificated bargaining unit. During the discussion, the Association questioned the appropriateness of the District's classification of some substitute teachers as long-term substitutes rather than as temporary teachers. The information requested on May 18 was needed to address this concern.

Some time in late August or early September 1984, the District provided the Association with the information requested on May 18. The information was provided as part of the District's submission for factfinding on the issues presented by Article 52.

#### Analysis

The District excepts to the ALJ's finding that it delayed its response to a request for information regarding names, addresses, and current assignments of nonunit members employed as long-term substitutes. Specifically, the District asserts that long-term substitutes were not members of the bargaining unit, and the Association was obligated to precisely demonstrate

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opposing the petition. The petition was thereafter withdrawn by the Association on July 11, 1984.

relevance. Since the Association did not demonstrate relevance in its request, the District argues that it did not have to provide the information.

Questions concerning the relevance and necessity of requested information often arise when a union demands information concerning nonunit employees. In such cases, it has been held under federal law that the bargaining representatives must demonstrate the "probable or potential relevance" of the information sought to its representation of unit employees. (See San Diego Newspaper Guild v. National Labor Relations Board (9th cir. 1977) 548 F.2d 863 [94 LRRM 2923].)

Thus, on May 18, when the Association requested the names, addresses, and current assignments of all teachers employed by the District as long-term substitutes without stating the "probable or potential relevance" of the requested information to its representation of unit members, the District arguably had no obligation to provide the information. The District did not, however, initially challenge the relevance of the requested information. Instead, the District promised in writing to respond to the request at an unspecified future time.

On June 11, 1984, the subject of long-term substitutes was discussed in negotiations, in connection with the Association's proposal for a new contract article to apply to employees designated by the District as "temporary/restricted" teachers. The latter group of employees were in the bargaining unit. At the June 11 session, the Association explained to the District why it needed the information about long-term substitutes. The

Association was concerned about the number of teachers that the District was classifying as long-term substitutes instead of "temporary/restricted" teachers and the effect of this decision on the employment rights of long-term substitutes. This employment information was necessary for negotiations as well as contract administration. When the Association explained its reasons for the information, the relevance of and necessity for this material clearly was established.

Once the Association established the relevance and necessity for the long-term substitute data, the District was then required to disclose to the Association such information about the nonunit employees relevant to the Association's representation of unit employees in negotiations and in administering provisions of the CBA. (See Modesto City Schools and High School District, *supra*, PERB Decision No. 518.)

Even though the District had promised prior to the June negotiations to respond to the Association, it never provided information about long-term substitutes during the time of the negotiations, when it was most needed by the Association. When it did finally make the information available, it was supplied to the Association only as a part of the District's factfinding submission on this issue.

While the District never expressly refused to provide the information, it failed to make it available to the Association within a reasonably prompt time and at a time when it could have been more useful to the Association. The District's conduct may

therefore be considered a flat refusal. (See NLRB v. John S. Swift Company, supra, 124 NLRB 394.)

The District has offered no explanation for the delay from mid-June to early September 1984 in making the requested information available to the Association. By the time the Association obtained the data that it first sought on May 18, its opportunity to engage in meaningful negotiations about its "temporary/restricted" teachers proposal had already passed.

The District's unjustified delay in furnishing the information was inconsistent with the good faith bargaining obligation imposed by EERA. Its conduct, therefore, is found to have violated section 3543.5(c). This same conduct interferes with the employee organization's right to represent its members in their employment relations and thus violates section 3543.5(b).

C. HEALTH INSURANCE

Factual Summary

In 1983, the parties negotiated a change in one of the District's group health insurance carriers. The change was from Sun Life Insurance of Canada to Travelers Indemnity Company (Travelers) and became effective October 1, 1983. During the 1983-84 school year, several Association concerns regarding the coverage under the Travelers' health plan surfaced. Consequently, on April 24, 1984, the Association and the District met to discuss its concerns. This meeting was not a part of the negotiations process.

The Association had two major concerns: (1) the coordination of benefits and coverages for a married couple where both spouses were District employees; and (2) the extent of coverage for surgery where the employee obtained a second opinion confirming the medical necessity for the surgery. During the April 24 meeting, the Association representatives requested a copy of the Travelers' master policy. They were informed that the District had not yet received it.

On May 2, 1984, the Association wrote to the District to confirm its position on the matters discussed at the April 24 meeting and to reiterate its request for a copy of the Travelers' contract with the District. The Association also requested a copy of the District's contract with its insurance broker, Creaser-Price Insurance Company. Some time prior to May 2, the District received, and distributed to employees, group insurance benefit booklets provided by Travelers. In his May 2 letter, Buress stated that the Association did not believe that the summary in the benefit booklet was sufficient.

On May 7, 1984, Zampi telephoned Buress in response to the May 2 letter. Zampi informed Buress that, among other things, the District disagreed with the Association's interpretation concerning the percentage of coverage provided by the contract for "second opinion surgery." The Association interpreted the language to mean that the contract provided 100 percent coverage for any surgery performed after a second opinion was obtained regarding the need for surgery. The District interpreted the language to mean that only the second opinion and not the surgery

itself was paid for at the 100 percent coverage level instead of the 80 percent coverage level. Zampi also stated that coordination of benefits was provided through the plan. He then asked the Association to supply the District with the names of any unit member who had been denied either of the above-referenced benefits by Travelers.

Zampi further informed Buress that the Travelers master contract had been received, but was returned to the District's insurance broker because certain inaccuracies were discovered in the contract. He did not specify the exact nature of the inaccuracies. He did promise, however, to send a corrected copy of the contract as soon as it was received.

By letter, dated June 6, 1984, Buress asked again if the District had received a copy of the master contract and once again requested a copy for the Association. On June 8, the District again responded that it did not have the final approved contract in its possession because the errors had not yet been corrected. Zampi renewed his promise to send a final copy to the Association as soon as it was received.

The group health insurance plan was not discussed at the June 13, 1984 negotiating session. However, at the June 21 bargaining session, the Association again made an oral request for the Travelers contract. The District replied that it had a draft copy which contained errors, but it did not want to distribute it. The Association insisted on having a copy, even if it was inaccurate. The District said that it would think about the latter request even though it did not want inaccurate

material going out to anyone. Again, no specifics were given to the Association about what actual errors were found in the contract.

On June 25, 1984, Zampi sent Buress a copy of the Travelers master contract. In his cover letter, he characterized it as "an unfinished, incomplete, inaccurate document from Travelers Insurance Company regarding medical coverage." The letter went on to state that:

[T]he District has refused to sign or acknowledge this document, however, we expect certain sections to be the basis of a final master contract.

On July 20, 1984, the District notified the Association, in writing, that it still did not have an accurate copy of the master contract, that it had expressed its concern to Travelers about the continuing delay, and that it expected to have one in the near future and would provide a copy to the Association immediately upon receipt.

On August 10, 1984, the Association responded to the July 20 letter, reminding the District that it had also requested copies of all correspondence between the District and either its insurance broker or Travelers regarding the health insurance contract. The District answered on August 16, 1984, by reiterating that it did not have a corrected copy of the Travelers contract. The letter further stated that the need for a corrected copy had been discussed in a recent meeting between the District and Robert Jelsvik (Jelsvik), the local Travelers agent. This response was followed by letters from Zampi on August 20 and September 13, 1984. Both of these letters included

copies of correspondence from the District to Travelers in July and August of 1984 stating its need for the master contract as soon as possible.

Harry Martin (Martin), the District's insurance consultant, received the initial draft of the master contract in the spring of 1984. Martin and Jelsvik delivered the contract and the employee benefit booklets to the District shortly thereafter. However, Martin did not examine the contract before he delivered it to the District. Shortly, thereafter, the District informed both Martin and Jelsvik that portions of the contract were not correct.<sup>24</sup> Additionally, the contract did not provide the depth and breadth of coverage that the District wanted. This information was conveyed to the Travelers corporate office in Hartford, Connecticut, where the desired corrections were to be made.

During the time while the Travelers home office was amending the master contract, the District contacted Martin several times, asking him to urge Travelers to expedite the correction process. Martin knew that the District needed the corrected contract as soon as possible because of the ongoing negotiations with the Association and the Association's request for a copy of its final contract. Martin also knew that the District had contacted Travelers directly to obtain the corrected contract.

During July and August 1984 Martin contacted Jelsvik and urged him to do everything in his power to persuade the home

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<sup>24</sup>The errors pertained to the definitions of "employee eligibility" and "termination" of group insurance benefits upon employee separation from active employment with the District.

office to respond to the District's request. Martin finally received the final corrected master contract on November 8, 1984, and forwarded a copy to the District shortly thereafter. At that time the hearing in this case was still in progress.

On August 10, 1984, the Association also requested a copy of the District's group dental insurance policy. The District responded on August 14, 1984, by sending a copy of the dental benefits booklet. The District also informed the Association that the master contract for this program had not yet been received from Travelers which was also the carrier for this program. The District later provided the Association with a copy of this master contract on September 12, 1984.

On September 6, 1984, the Association requested a copy of the District's group life insurance policy. This program was also provided to the District by Travelers. The District sent a copy of the requested master contract to the Association on September 13, 1984.

#### Analysis

The District excepts to the ALJ's finding that it violated the Act by its delay in providing the Association with requested health care information. Specifically, the District asserts that it did not provide a copy of the health insurance contract to the Association because it did not have an accurate copy. The District also argues that there was no indication that the Association's questions were not answered during the April 24, 1984 meeting.

The relevance of the Association's request for health insurance information is not in dispute. Health and welfare benefits are included among the "terms and conditions of employment" enumerated in section 3543.2. (See Stockton Unified School District, supra, PERB Decision No. 143.) The Association needed to review the Travelers master contract to evaluate the provisions of two specific areas of coverage over which questions had arisen among unit members. The Association also wanted this information in order to prepare for successor contract negotiations regarding health benefits.

The Association made its first request for the Travelers contract on April 24, 1984, during a meeting with the District to discuss its concerns about the health insurance coverage. When this request was made, the District did not possess a copy of the Travelers master contract. Some time between April 24 and May 7, the District did receive a draft copy of this document from its insurance broker. During this same period, District Administrator John Vugrin determined that the draft was inaccurate because it contained errors that were of consequence to the District.

On May 2, the Association sent a letter to the District that reiterated its two major areas of concern about the Travelers coverage and renewed its demand for a copy of the master contract. This letter also requested that, in lieu of a copy of the contract, the District provide the Association with letters of interpretation from Travelers about the health insurance program.

The District first informed the Association that it had received the draft contract when Zampi telephoned Buress on May 7 about the Association's May 2 letter. Although Zampi told Buress that the contract contained errors, he did not specify the nature of the errors, nor did he offer to let the Association review a copy of the draft contract.

The record shows that the contract errors did not pertain to either of the two areas of concern to the Association -- namely, co-insurance coverage for married employees and the percentage of coverage allowed for second opinion surgery.

Approximately one month later, the District again promised, in a June 8 letter, to furnish the Association with a copy of the completed and final contract as soon as it was received. However, it was still unwilling to give the Association a copy of the draft contract to review those areas that were the subject of their ongoing discussion. The June 8 letter failed to explain the substance of the "errors" that had been discovered in the draft contract in May. With reasonable diligence, this information surely could have been ascertained by the District by June 8 and communicated to the Association. Even without a copy of the contract itself, a more detailed response from the District about the known inaccuracies would have enabled the Association to evaluate whether the information it wanted to review in the contract was available in a reliable form.

It was only after the Association insisted, at the June 21 negotiation session, on being given a copy of the Travelers contract that the District finally sent a copy on June 25, 1984,

just a day before the parties declared impasse. Zampi's characterization of the insurance contract in his cover letter was not particularly helpful in assisting the Association in its review of the contract.<sup>25</sup> He called the master contract an "unfinished, incomplete, inaccurate document that the District has refused to sign or acknowledge."

The District maintains that since it responded to the Association's questions about the extent of the coverage provided by the program on April 24 and May 7, 1984, it had no reason to believe that these matters were still of any great concern to the Association after that time. However, the steady stream of correspondence and communications between the Association and the District from April 24 to June 25 belies the validity of this assertion.

From early May, when the District first obtained a copy of the draft contract, it clearly stated to the Association what amounted to a disclaimer as far as the accuracy of this document was concerned. Even with this knowledge, the Association persisted in expressing its need for a complete copy of the draft contract. Having given this caveat, the District was thereafter obligated to furnish the Association, within a reasonable time, with the Travelers contract, irrespective of the inaccuracies contained therein. Additionally, where known, the District could have pointed out the errors that it had discovered. If this action had been taken, the Association could have determined for

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<sup>25</sup>In July, August, and September of 1984, the District continued to correspond with the Association about the status of its efforts to obtain an amended version of the contract.

itself the usefulness of the information that it sought from the master contract.

Instead, without excusable justification, the District delayed giving the Association the requested information for approximately six weeks. This period included a time of intensive negotiations between the parties. Arguably, the Association's access to this information during such time could have positively affected the outcome of the negotiations on this subject.

It is therefore concluded that by its unjustified delay in providing the Association with requested health insurance information, the District violated its section 3543.5(c) duty to bargain in good faith. The same conduct constitutes a violation of 3543.5(b).

#### IV. EXCEPTIONS TO ALJ FINDING THAT DISTRICT "DID NOT ENTER INTO THE NEGOTIATIONS WITH A BONA FIDE INTENT TO REACH AGREEMENT"

In its exceptions, the District notes the inconsistency between the ALJ's conclusions in one portion of her decision that there was no surface bargaining, and her finding of bad faith bargaining under the totality of the circumstances test in another portion of her decision.

The District contends that the ALJ erred in finding bad faith bargaining under the "totality of conduct" test based solely on the District's failure to provide certain information and insistence to impasse on nonmandatory subjects of negotiations. We agree.

PERB uses both a "per se" and a "totality of conduct" test in determining whether a party's negotiating conduct constitutes

an unfair practice, depending on the specific conduct involved and its effect on the negotiating process. (Regents of the University of California (SUPA) (1985) PERB Decision No. 520-H; Pajaro Valley Unified School District (1980) PERB Decision No. 143.) The duty to bargain in good faith requires the parties to negotiate with genuine intent to reach agreement and a "totality of conduct" test is generally applied to determine if the parties have bargained in good faith. This test looks to the entire course of negotiations to see whether the parties have negotiated with the required subjective intention of reaching an agreement. Certain acts have such potential to frustrate negotiations and undermine the exclusivity of the bargaining agent that they are held to be unlawful without any finding of subjective bad faith. These are considered "per se" violations. (Pajaro Valley Unified School District, supra.)

The Association alleged specific conduct of the District in support of its allegation of surface bargaining: (1) taking a "regressive" position regarding the summer school teachers proposal; (2) ignoring the Association's priority issues; (3) failing or refusing to submit counterproposals; (4) failing or refusing to explain its interpretation of proposals in which the employer's position was to maintain existing contract language; (5) failing or refusing to explain opposition to union proposals; and (6) failing or refusing to provide information. The ALJ rejected these allegations of surface bargaining concluding:

These factors lead to the conclusion that what occurred was hard bargaining, rather than bad faith bargaining. Each party was desirous of improving its position vis-a-vis

the other, as measured by the terms of the 1981-84 CBA. Thus, the bargaining strategies of the District, which are charged here as surface bargaining, do not justify an inference of bad faith.

For the reasons discussed above, it is therefore concluded that the District's negotiating conduct, complained of in this allegation, did not amount to surface bargaining and, thus, was not a violation of section 3543.5(c). This allegation of the charge/complaint will therefore be dismissed. (P.D. at p. 118.)

Later in the proposed decision, the ALJ discussed the "totality of conduct" test and examined the per se violations under this test:

In this case a number of allegations of bad faith conduct on the part of the District have been examined. As a result, it has been found that the District committed per se violations of the Act by (1) failing to provide information needed by the Association to perform its statutory negotiating and representational functions; (2) insisting to impasse on nonmandatory subjects and on provisions which involve the relinquishment of CVEEA's statutory representational rights. It was not found, however, that the District engaged in unlawful surface bargaining.

The unlawful conduct, when considered in its totality, leads to the inescapable conclusion that the District did not enter into the negotiations with a bona fide intent to reach agreement. It is thus concluded that the District's negotiating conduct during the spring and summer of 1984 did not comport with the statutory duty imposed by section 3543.5(c) to meet and negotiate in good faith. Thus, the District violated section 3543.5(c). (P.D. at pp. 145-146.)

Although failure to provide information and insistence to impasse on nonmandatory subjects of bargaining are "per se" violations of section 3543.5(c), we do not agree with the ALJ's

conclusion, based on this same conduct, that the District did not enter into the negotiations with a bona fide intent to reach agreement.<sup>26</sup> Unlike the "totality of conduct" test, the "per se" test does not involve any determination of intent. In this case, the finding of per se violations (failure to provide information and insistence to impasse on a nonmandatory subject) does not justify a finding that the District did not have the required subjective intent to reach agreement.

#### V. REQUEST FOR ATTORNEY'S FEES

The District excepts to the ALJ's conclusion that it should not receive reasonable attorney's fees. Specifically, the District asserts that the Association negligently and intentionally misled it into preparing a defense to frivolous charges, only to withdraw or amend the charges at the formal hearing. The District further asserts that many allegations had no factual basis, the Association did not utilize the requested information it received, and the Association sought at least 100 changes to the previous agreement with little rationale for the proposed changes.

Applying a standard utilized by the NLRB and the federal courts, the Board has concluded that PERB's remedial authority is strictly limited. (Modesto City Schools and High School District (1985) PERB Decision No. 518.) Attorney's fees and related litigation costs are awarded only if a party's case is without any arguable merit, frivolous, dilatory, or pursued in bad faith.

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<sup>26</sup>We note the Association did not except to the ALJ's finding that the District did not engage in surface bargaining.

(King City High School District Association, et al. (1982) PERB Decision No. 197; Chula Vista City School District (1982) PERB Decision No. 256.) Attorney fees will be denied if the "issues are debatable and brought in good faith." (Chula Vista City School District, supra.) The Board in Modesto, supra, affirmed the ALJ's denial of the union's request for attorney's fees despite the fact that the ALJ found that the district "tried to make a mockery of the contract grievance machinery as well as PERB's unfair practice procedures."

While the Association may have belatedly withdrawn or amended its charges, given the absence of additional Board precedent establishing standards imposing such a limitation prior to the hearing, it would be difficult to conclude that the Association's case was frivolous, or that dilatory litigation was pursued in bad faith. Furthermore, despite the District's assertions regarding the merits of the Association's case, some of the allegations have been found meritorious. Thus, it cannot be said that this case is without any arguable merit. Although we reverse the ALJ on some of her legal conclusions, we do not find sufficient justification for an award of attorney's fees.

#### REMEDY

We find that by the conduct discussed above, the District interfered with the employee organization's right to represent its members in violation of section 3543.5(b), failed to negotiate in good faith in violation of section 3543.5(c) and failed to participate in good faith in the impasse procedures in violation of section 3543.5(e). The ALJ also determined that the

insistence to impasse on nonmandatory subjects of bargaining constituted a derivative violation of section 3543.5(a). We find that there was no evidence presented demonstrating an independent violation of section 3543.5(a), and accordingly, dismiss the alleged violation of that section.

The Association sought an order requiring the District to cease and desist from its unlawful conduct and such other affirmative relief as is appropriate to remedy the violations.

In section 3541.5(c) the PERB is given:

. . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

An order is appropriate to direct the District to cease and desist from failing to meet and negotiate in good faith by: (1) refusing to provide the Association with information relevant to negotiating or grievance processing; and (2) by insisting to impasse on nonmandatory subjects.

With regard to the District's duty to furnish information to the Association, if information heretofore requested has not been provided, and the Association is still interested in receiving the information, the District is ordered to inform the Association about the nature and format of the information that it has available, or which it has compiled, so that the Association may, if necessary, modify its request for information with the knowledge of the types of information available. Thereafter, the District shall provide the information requested

in a reasonably clear and understandable form. It shall be the responsibility of the parties themselves to determine how to satisfy this requirement. If there are substantial costs involved in compiling the information in the form requested by the Association, the parties must bargain in good faith as to whom shall bear the cost. If no agreement can be reached, the Association is entitled to access to records from which it can reasonably compile the information. (See Johns-Manville Products Corporation (1968) 171 NLRB 451 [69 LRRM 1068].)

Similarly, if the current Agreement contains the same provisions that were found to be unlawful restrictions on the Association's right to file grievances, arbitrate grievances, and petition PERB for unit modifications, it is appropriate to order the District to: (1) accept grievances filed by the Association in its own name on behalf of individual unit members, as well as grievances filed to protect the Association's rights; (2) process grievances to arbitration, whether or not the grievant has made a written request; and (3) recognize the Association's right to seek unit modification pursuant to PERB regulations.

These remedies will achieve the results sought by the Association without an additional order that specific clauses be stricken from the Agreement between the parties.<sup>27</sup> The purpose of these remedies is to ensure that such provisions are no longer enforced.

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<sup>27</sup>These contested provisions were carried forward from the 1981-84 CBA to the 1984-87 CBA.

Finally, it is appropriate to order the District to cease and desist from failing and refusing to participate in good faith in the impasse procedures by maintaining its unlawful insistence on nonmandatory subjects through the statutory impasse procedures.

It also is appropriate that the District be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized representative of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. (Davis Unified School District, et al. (1980) PERB Decision No. 116. See also Placerville Union School District (1978) PERB Decision No. 69.)

#### ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Chula Vista City School District violated Government Code section 3543.5(b), (c), and (e) of the Educational Employment Relations Act. Pursuant to Government Code section 3541.5(c), it is hereby ORDERED that the Chula Vista City School District, its officers and representatives shall:

- A. CEASE AND DESIST FROM:

1. Refusing to provide the Chula Vista Elementary Education Association, CTA/NEA, with information relevant to contract administration, grievances processing and negotiations.

2. Insisting to impasse on negotiating about subjects outside the scope of representation, including contractual language which has the effect of restricting (1) the Association's right to file grievances in its own name on behalf of individual unit members; (2) its decision to submit grievances to arbitration without the approval of the grievant; and (3) the Association's right to petition PERB for unit modification.

3. Enforcing and giving effect to those portions of the 1984-87 Agreement (or any subsequent Agreement), which contain provisions that (a) limit the Association's right to initiate grievances only at Level II when a grievance "affects more than one employee in a single building, or employees in more than one building . . .," or (b) allow the Association to submit a grievance to arbitration only after the "grievant . . . file[s] a written request with the Association. . . .," or (c) limit the Association's right to seek unit modification pursuant to PERB regulations.

4. Denying to the Association rights guaranteed by the Educational Employment Relations Act, including the right to represent its members in their employment relations with the District.

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

(1) Upon request, provide the Association with any information requested, and not previously provided, as noted in

the decision above, following the guidelines set forth in the Remedy section herein.

(2) Accept and process grievances filed by the Association in its own name on behalf of individual unit members, as appropriate under the time limits and subject matter requirements of the Agreement between the parties.

(3) Accept and process requests for arbitration filed by the Association, as appropriate under the time limits and subject matter requirements of the Agreement, without requiring that a written request be made by the grievant(s) to the Association.

(4) Recognize the Association's right to seek unit modification pursuant to PERB regulations.

(5) Within thirty-five (35) days following the date the Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. 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.

(6) Make written notification of the actions taken to comply with the Order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his/her instructions.

All other allegations raised in the unfair practice charge/complaint are hereby DISMISSED.

Member Camilli joined in this Decision.

Member Craib's concurrence begins at page 81.

Chairperson Hesse's concurrence begins at page 82.

Craib, Member, concurring: I am in full agreement with the results reached in the majority opinion. I also concur with the analysis applied therein, with one exception. Consistent with my opinion in South Bay Union School District (1990) PERB Decision No. 791, I believe it is necessary and appropriate to employ a modified version of the test established in Anaheim Union High School District (1981) PERB Decision No. 177 to determine that the proposals limiting the Association's right to file grievances and to submit them to arbitration are nonmandatory subjects of bargaining. My view stems primarily from the following: (1) the rights of an exclusive representative to file grievances in its own name and to submit grievances to arbitration without the consent of a named grievant are not expressly set out in the statute, and (2) such matters are reasonably related to grievance procedures, which are included among those mandatory subjects that are specifically enumerated under section 3543.2, subdivision (a) of the Educational Employment Relations Act.

Hesse, Chairperson, concurring: As the majority noted in its decision, my dissent in South Bay Union School District (1990) PERB Decision No. 791 found the exclusive representative's right to file a grievance in its own name is a mandatory subject of bargaining. Based on the absence of an Educational Employment Relations Act (EERA) provision that specifically makes the filing and prosecution of grievances in its own name an exclusive representative's independent statutory right, I concluded that there is no such statutory right under EERA. While I still believe EERA does not contain explicit statutory language providing that the exclusive representative has the right to be a named grievant, I am persuaded by the analysis in a recent court decision that the exclusive representative's right to be a named grievant is a statutory right.

Subsequent to the majority's decision in South Bay Union School District, supra, the Court of Appeal issued its decision in Lillebo v. Davis (1990) 218 Cal.App.3d 1588.<sup>1</sup> Although

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<sup>1</sup> On June 29, 1990, the California Supreme Court granted appellants' petition for review. Subsequently, the matter was transferred to the Court of Appeal with direction to vacate its opinion and to reconsider the case in light of the United States Supreme Court's opinion in Keller v. State Bar of California (1990) \_\_\_ U.S. \_\_\_ [110 S.Ct. 2228].

In Keller v. State Bar of California, supra, the court determined the scope of permissible expenditures for activities financed by the compulsory dues collected by the State Bar of California. The Supreme Court held that the use of the compulsory dues to finance political and ideological activities with which the members disagree violates their First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services.

Lillebo v. Davis is an agency/fair share fee case, the court addressed the right of individual employees to represent themselves in their employment relations with the state. (Id. at pp. 1608-1611.) Specifically, the plaintiffs, who are individual employees, claimed that, since they desired to represent themselves individually in their employment relations without the exclusive representative, they could not constitutionally be assessed fair share fees because the exclusive representative would be providing them with no service in return. In determining the plaintiffs may be assessed a fair share fee, the court discussed the provisions of the Ralph C. Dills Act (Dills Act).

While recognizing sections 3515 and 3515.5 of the Dills Act provide that the individual employee has the right to self-representation,<sup>2</sup> the court found the Dills Act focuses on the establishment of relations between the state employer and exclusive representative and, in fact, is clear regarding the

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As the Keller opinion involves the determination of permissible and impermissible expenditures of the dues, the opinion does not appear to address the plaintiffs' argument that employees who represent themselves individually in their employment relations cannot constitutionally be assessed a fair share or agency fee. Accordingly, I, nonetheless, find the Court of Appeal's analysis on the right of individual employees to represent themselves in their employment relations is persuasive.

<sup>2</sup>Section 3515 of the Dills Act and section 3543 of EERA contain identical language regarding the right to self-representation. However, EERA does not contain a provision similar to section 3515.5 of the Dills Act.

role of an individual employee when part of an appropriate bargaining unit represented by an exclusive representative.

After a review of the statutory provisions, the court determined that, despite their right of self-representation, state employees have no mechanism for the enforcement of this statutory right absent the exclusive representative. There is no statutory right for the individual employee to present grievances regarding terms and conditions of employment. Rather, the individual employee has the right to the grievance procedure only to the extent it is created by the collective bargaining agreement negotiated and administered by the exclusive representative.

Although I still believe EERA does not contain explicit statutory language providing that an exclusive representative has the right to be a named grievant, I find the court's discussion in Lillebo v. Davis persuasive. In the present case, as the enforcement of the individual employee's rights is dependent upon the exclusive representative's representation, I find the Chula Vista Elementary Education Association, CTA/NEA has the statutory right to be a named grievant.





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

1. Upon request, provide the Association with any information requested, and not previously provided, as noted in the decision above, following the guidelines set forth in the Remedy section herein.

2. Accept and process grievances filed by the Association on behalf of individual unit members, as appropriate under the time limits and subject matter requirements of the Agreement between the parties.

3. Accept and process requests for arbitration filed by the Association, as appropriate under the time limits and subject matter requirements of the Agreement, without requiring that a written request be made by the grievant(s) to the Association.

4. Recognize the Association's right to seek unit modification pursuant to PERB regulations.

Dated: \_\_\_\_\_

CHULA VISTA CITY SCHOOL  
DISTRICT

By \_\_\_\_\_  
Authorized Representative

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



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

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, California, 95814-4174. I am readily familiar with the ordinary practice of the business in collecting, processing and depositing correspondence in the United States Postal Service and that the correspondence will be deposited the same day with postage thereon fully prepaid.

On August 16, 1990, I served the attached PERB Decision No. 834, Chula Vista City School District, Case No. LA-CE-2038 on the parties listed below by placing a true copy thereof enclosed in a sealed envelope for collection and mailing in the United States Postal Service following ordinary business practices at Sacramento, California, addressed as follows:

Chula Vista City School District  
Attn: Lewis L. Beall, Supt.  
84 East J Street  
Chula Vista, CA 92010-6199

Chula Vista Elementary Education  
Association, CTA/NEA  
Attn: Frank Buress, Exec. Dir.  
196 Landis Avenue  
Chula Vista, CA 92010

Richard J. Currier, Attorney  
Littler, Mendelson, Fastiff  
& Tichy  
701 B Street, Suite 300  
San Diego, CA 92101-8101

A. Eugene Huguenin, Jr., Attorney  
California Teachers Association  
1705 Murchison Drive  
P.O. Box 921  
Burlingame, CA 94011-0921

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 16, 1990, at Sacramento, California.

Teresa Stewart  
(Type or print name)

  
(Signature)

