

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CHARTER OAK EDUCATORS ASSOCIATION, )  
CTA/NEA, )  
 )  
Charging Party, ) Case No. LA-CE-2920  
 )  
v. ) PERB Decision No. 873  
 )  
CHARTER OAK UNIFIED SCHOOL )  
DISTRICT, ) April 4, 1991  
 )  
Respondent. )  
\_\_\_\_\_ )

Appearances: California Teachers Association by Robert Einar Lindquist, Staff Counsel, for Charter Oak Educators Association, CTA/NEA; Liebert, Cassidy & Frierson by Bruce A. Barsook, Attorney, for Charter Oak Unified School District.

Before Hesse, Chairperson; Shank, Camilli, Cunningham and Carlyle, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Charter Oak Educators Association, CTA/NEA (Association) of a Board agent's dismissal of its unfair practice charge and refusal to issue complaint. The Association alleges that the Charter Oak Unified School District (District) violated the Educational Employment Relations Act (EERA)<sup>1</sup> sections 3543, 3543.1(a), 3543.5(b) and

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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.

Section 3543 gives public school employees the right to form, join and participate in the activities of employee organizations of their own choosing. Section 3543.1 grants employee organizations the concomitant right to represent their members. Section 3543.5 prohibits employers from engaging in various types

(d), and 3548 by failing and refusing to bargain in good faith, making unilateral changes in policy, and bypassing and undermining the Association.

After careful review of the entire record in this matter, the Board finds the Association failed to state a prima facie case, and therefore affirms the Board agent's dismissal of the charge.

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of conduct. The Association, in its charge, claims that subsections (b) and (d) of section 3543.5 were violated. Subsection (b) forbids an employer from denying to employee organizations rights guaranteed by EERA. Subsection (d) forbids an employer from dominating or interfering with the formation or administration of an employee organization or contributing financial or other assistance to an employee organization, or encouraging employees to join one organization in lieu of another.

However, it is subsection (e) of section 3543.5 which is implicated by the facts and the Association's arguments in this case. That subsection makes it unlawful for an employer to refuse to participate in good faith in the impasse procedures. Allegations of bad faith "bargaining" conduct which occurs during the pendency of statutory impasse procedures constitutes a violation of section 3543.5(e). In contrast, section 3543.5(c), makes it unlawful for an employer to refuse or fail to meet and negotiate in good faith with an employee organization. (Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191.) Here, the Association alleges the District failed and refused to bargain in good faith, made unilateral changes in policy, and bypassed and undermined the Association, all of which are alleged to have occurred at a time when statutory impasse procedures had been instituted and were continuing.

Section 3548 is the mediation/impasse section, but it does not provide statutory support for an unfair labor practice charge, and is therefore inapposite.

Although the Board agent did not explicitly so state in the warning and dismissal letters, he appropriately analyzed the facts under section 3543.5(e). The Board will do the same here.

### FACTUAL ALLEGATIONS

The Association and the District were parties to a one-year collective bargaining agreement that expired on June 30, 1989. They met to commence negotiations for a successor agreement on or about April 19, 1989. On June 12, 1989, the Association filed a Request for Impasse Determination with PERB. PERB determined that impasse existed and appointed a mediator.

On or about August 10, 1989, during mediation, the District's attorney, Mary Dowell (Dowell) told the Association negotiators that factfinding would "not make any difference, because the [District] Board will not accept the factfinding report anyway."

On or about September 7, 1989, still during mediation, the District made a "package" proposal to the Association. The "package" included an increase in the District's previous salary offers. On class size, the District proposed to make a "good faith" attempt to reduce class size to 29 at the elementary level in the 1989-90 school year, with an obligation to meet that goal in the 1990-91 school year. In an earlier proposal, on July 26, 1989, the District stated it "[would] reduce class size to 29 at the elementary level" in the 1989-90 school year.

Also, in its September 7, 1989 "package," the District proposed "[n]o inclusion of any language regarding discipline." However, in a previous proposal the District proposed the following language:

Discipline of a unit member shall be done pursuant to the procedures set forth in the

appropriate provisions of the Education Code except as provided for in this article. The District will utilize such elements of progressive discipline (e.g., verbal warnings or written reprimands) as are appropriate to each situation.<sup>[2]</sup>

The Association countered the District's "package" proposal. The District responded with a "Last, Best and Final Offer" which increased the District's salary offer to 7.25 percent. The "Last, Best and Final Offer" also proposed a \$100 increase (from \$1000 to \$1100) in the anniversary increments at Steps 16 and 20 of Column C and Steps 17 and 21 of Column D on the salary schedule. The "Last, Best and Final Offer" incorporated various other proposals, including some on which the parties had reached tentative agreement.

On September 12, 1989, the mediator certified the dispute to factfinding. A factfinding report was issued on November 22, 1989. The Association's panel member signed the report; the District's panel member dissented. In its dissent, the District disagreed with the factfinding report regarding: (1) Article VI, Grievance Procedure; (2) Article X, Teacher Assignment and Transfer; (3) Article XVI, Compensation; (4) Article XVII, Medical and Dental Insurance; and (5) Article XXVI, Just Cause and Due Process. The dissent articulates the District's reasons for dissenting on these provisions.

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<sup>2</sup>The first sentence was part of an April 25, 1989 proposal. The second sentence was added by a May 4, 1989 amendment to the proposal.

The parties met again on December 11, 1989. The Association formally proposed to accept the factfinding report, even though the report allegedly was adverse to the Association on several issues. The Association also offered to extend the duration of the agreement from two years to three years, as the District had proposed earlier. After a caucus of no more than 15 minutes, the District rejected the Association's proposal and refused to change its own "Last, Best and Final Offer."

On January 9, 1990, at a public meeting, the District board voted to implement a 7.25 percent salary increase. The Association president, who was present, protested the action and demanded that the District negotiate the salary increase.

On January 10, 1990, the District superintendent sent a memorandum to bargaining unit members announcing the 7.25 percent salary increase and a \$100 increase in anniversary increments. The memorandum stated, in part, that "it was determined that further negotiations would not be productive"; that "[t]he negotiations for 1989-90 are completed and the present contract remains in force"; and that the Association leadership "may now present an initial proposal and begin negotiations for a new contract for 1990-91." Following a statement that the District participated in good faith and seriously considered the panel's recommendations, the memorandum stated:

However, the [District] Board concluded that although it agreed with many of the panel's recommendations, the salary increase recommended would not be prudent. In addition, the Board had serious concerns about three of the recommendations: Transfer

procedure, Salary, and "Just Cause/Due Process."

The subsequent paragraphs explain the District board's consideration of each of these three issues, and the reasons for its ultimate conclusions. The issues enumerated in the January 10, 1990 memorandum to unit members are consistent with the District's dissent to the factfinding report and the reasons therefor.

The memorandum also contained the following statements, all of which are alleged to be false and misleading:

1. "The resulting working conditions [in the District] since 1985 are among the best enjoyed by any teachers in Los Angeles County," including "[f]ringe benefits that rank in the top quartile in Los Angeles County" and "[h]ighly protective teacher transfer procedures."

2. "The District participated in the Fact Finding process in good faith and seriously considered the panel's recommendations."

3. "The current transfer procedure in the contract . . . guarantees serious consideration for transfer requests and assures involuntary transfers will only be made under certain limited circumstances."

4. "The District's offer for salaries for 1989-90 . . . includes 1.91% for step and column increases."

5. A "Just Cause/Due Process" article "would virtually guarantee a grievance hearing over every disciplinary action no matter how minor;" such an article "would be unusual and, in fact, very few districts have such a provision."

6. "Unfortunately, the [Association] requested impasse in June of 1989, well before the adoption of the State budget."

7. "The District met again [after factfinding] with the [Association] negotiating team in an effort to reach agreement. At the conclusion of that meeting, it was determined that further negotiations would not be productive."

8. "The [District] Board has authorized me to meet with the [Association] leadership to discuss any changes that we can mutually make in bargaining practices which may lead to less adversarial bargaining."

9. "The [District] Board of Education did not believe that unit members should be deprived of the salary increase which it has been willing to give since the beginning of this year. That is why last night the [District] Board, on my recommendation, voted to increase unit members' salaries."

#### DISCUSSION

In cases of an alleged failure or refusal to bargain in good faith, PERB has held that one must look to the entire course of negotiations, examining a party's outward conduct to determine whether its subjective intent was to seriously attempt to resolve differences and reach a common ground. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; Regents of the University of California (SUPA) (1985) PERB Decision No. 520-H.) The statement made by Dowell, the District's attorney, on August 10, 1989, that factfinding would make no difference because the school board would not accept the report in any case is circumstantial evidence that the District did not engage in good faith bargaining. The Board has held that certain actions constitute per se violations of the duty to bargain in good faith because they are egregious and have such a great potential to

frustrate negotiations.<sup>3</sup> (Ibid.) However, the statement made by Dowell is not of a nature such that it alone constitutes bad faith bargaining per se. Therefore, the statement must be considered in the entire course of negotiations to determine if a prima facie case is stated by these allegations.

The Association also contends that the District failed to consider the factfinding report in good faith.<sup>4</sup> Specifically, the Association alleges the District (1) failed to make any proposal in response to the factfinding report; (2) failed to schedule a bargaining session to consider the factfinding report; (3) made no substantive proposal of its own in response to the factfinding report; (4) after receipt of the Association's proposal, caucused for a period of no more than 15 minutes and then rejected the Association's proposal in its entirety; (5)

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<sup>3</sup>The "per se" categories include the following: (1) an outright refusal to bargain (Pajaro Valley Unified School District, supra, PERB Decision No. 51); (2) refusal to provide information that is necessary and relevant to the employee organization's duty to represent bargaining unit employees (Stockton Unified School District (1980) PERB Decision No. 143); (3) insistence to impasse on a non-mandatory subject of bargaining (Lake Elsinore School District (1986) PERB Decision No. 603; Modesto City Schools (1983) PERB Decision No. 291); (4) bypassing the employee organization's negotiators (Muroc Unified School District (1978) PERB Decision No. 80); and (5) implementation of a unilateral change in working conditions without notice and opportunity to bargain (Pajaro Valley Unified School District, supra, PERB Decision No. 51).

<sup>4</sup>In addition to the parties' duty to meet and negotiate in good faith, the parties have a duty to participate in good faith in the statutory impasse procedures. Unlike the National Labor Relations Act (NLRA), the EERA contains explicit impasse procedures. (See EERA sections 3548 through 3548.4.) The issuance of the factfinding report is part of the statutory impasse procedures.

made no substantive counterproposals in response to the Association's proposal; and (6) declined to engage in discussion or bargaining in an attempt to establish whether the factfinding report provided the basis for settlement. In Modesto City Schools, supra, PERB Decision No. 291 (Modesto), this Board found that after the recommendations of the factfinding panel have been issued and considered in good faith, the parties may remain at impasse or return to the bargaining table until they reach agreement or again reach impasse. The Board further held that:

. . . the statutory impasse procedures are exhausted only when the factfinder's report has been considered in good faith, and then only if it fails to change the circumstances and provides no basis for settlement or movement that could lead to settlement. . . . (Id. at p. 32.)

Under Modesto, the obligation of the parties after the recommendations of the factfinding panel are made is to consider the recommendations in good faith to determine whether there is a basis for settlement, or for such accommodations, concessions, or compromises that might lead to settlement. As a result of this process, either party or both parties may decide in good faith that the factfinding report does not provide a basis for settlement or movement that could lead to settlement.

The dissent cites Modesto and Temple City Unified School District (1990) PERB Decision No. 843 (Temple City), a case decided by only three Board members, as precedent for its requirement that after the factfinding report is issued, the parties have a "joint duty" to discuss the factfinding report

together to determine whether impasse still exists. In Temple City, the Board, citing footnote 18 at page 37 of Modesto, stated that the parties are obligated to:

. . . seriously discuss the report and engage in a further exchange of information which may determine whether movement toward settlement is a possibility.  
(Id. at p. 6.)

We do not construe Modesto to require that, in every case, the parties have an affirmative duty to engage in further discussions or negotiations regarding the factfinding report. Such a requirement would extend negotiations indefinitely. The parties would never reach Modesto's "second impasse." Consequently, the employer would not be permitted to implement its last, best, and final offer, while the exclusive representative would be legally prohibited from engaging in concerted activity (i.e., strike). Since its inception, Modesto has provided sufficient guidance to the parties during their impasse and post-impasse conduct. Therefore, there is no need for any clarification or modification of the Modesto decision. Good faith consideration of the factfinding report will be determined on a case-by-case basis. That portion of Temple City which discusses the Modesto requirement that the parties consider the factfinding report in good faith, including the citation to footnote 18 at page 37 of Modesto, is hereby overruled.

Nevertheless, this case is factually dissimilar from Modesto and Temple City. In Modesto, the Association made significant concessions, and the District refused to even consider the

factfinding report because of its concern that it would have to go back through the PERB process of certifying impasse. Similarly, in Temple City, the factual allegations were much stronger than in the present case. Specifically, the district entered into post factfinding discussions, but presented a "take it or leave it" attitude in doing so. The case currently before the Board is distinguishable on its facts from both Modesto and Temple City. In this case, there are no factual allegations, apart from the Dowell statement, to support a prima facie case that the District failed to consider the report in good faith.<sup>5</sup>

In support of the allegation that the District failed to consider the factfinding report in good faith, the Association alleges that on December 11, 1989, when it proposed to accept the factfinding report, the District caucused for 15 minutes before rejecting the proposal. However, the factfinding report was issued on November 22, 1989, so the District had two and one-half weeks to review the document before it met with the Association. In addition, the District's dissatisfaction with the factfinding report was already expressed in its dissent.

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<sup>5</sup>The dissent would require the District to make an affirmative showing that it engaged in good faith consideration of the report, by mandating the District should have entered into a face to face and item-by-item explanation of its reasons for rejecting the Association's proposal to accept the factfinding report in its entirety.

Such a requirement improperly shifts the burden to the District. It is the charging party's burden to allege a prima facie case, not the burden of the respondent to negate the charge. Furthermore, such a rule requires the respondent to prove its defense at a premature stage in the proceedings.

Consequently, when the Association proposed to accept the factfinding report, the District's position was known to the Association by virtue of the District panel member's dissent to the report. The Association did not make any new substantive proposal in this case, but simply proposed to accept the factfinding report in its entirety, and to extend the agreement by one year. In any case, neither the length of time between the issuance of the report and the December 11 meeting, nor the brevity of the District's caucus during the December 11 meeting are sufficient facts to indicate that the District failed to consider the factfinding report in good faith.<sup>6</sup>

The Association claims that the issuance of the factfinding report and the Association's proposal to adopt the factfinding report broke impasse and constituted changed circumstances. The Board has held that where one party believes the factfinding report provides a basis for agreement and the other does not, the concessions made by one party must be given consideration by the other, but that:

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<sup>6</sup>We note the dissent inaccurately states that the District refused to consider the factfinding report. The relevant factual allegations, as stated by the dissent, are that the District caucused for 15 minutes during a "face to face" negotiation session, and then rejected the Association's proposal. Further, the dissent makes no reference to the District panel member's dissent to the factfinding report.

In determining whether a prima facie case has been stated by the charging party, the factual allegations in the charge are assumed to be true. However, where, as here, a charge contains a legal conclusion, but other factual allegations contained in the charge do not support such a legal conclusion, the Board is not required to accept the legal conclusion as true.

Having already gone through an extended period of negotiations and impasse proceedings, either party is free to conclude that it has made all the concessions it can and further negotiations are futile. Where this determination is reached in good faith, NLRA-type impasse exists. The parties may decline further requests to bargain and may implement policies reasonably comprehended within previous offers made and negotiated. (Modesto City Schools, supra, PERB Decision No. 291, p. 39, emphasis added.)

As there are no other factual allegations that the District failed to consider the factfinding report and the proposal of the Association in good faith, the unfair practice charge does not state a prima facie case that the District violated the duty set out in Modesto when it determined that impasse existed and implemented policies reasonably comprehended within previous offers. The Association's claims that second impasse had not been reached and that its proposals constituted changed circumstances are therefore rejected as conclusory.

The Association further claims that on January 9 and 10, 1990, the District implemented unilateral changes and failed and refused to bargain in good faith at a time when, in the Association's view, impasse had been broken. Under the test enunciated in Modesto, the District was free to end negotiations and to implement unilateral changes if it determined in good faith that the parties were still at impasse, or had once again reached impasse, even if the Association disagreed. As the facts alleged are insufficient to show that the District acted in bad faith when it determined that the parties had reached impasse after the issuance of the factfinding report, the District's

implementation of increases in salary and anniversary increments does not constitute a prima facie violation of section 3543.5(d) of EERA.

The Association also contends that by failing to implement all of the tentative agreements reached by the parties, the District engaged in bad faith bargaining when, on January 9 and 10, 1990, it implemented the salary and anniversary increments proposed in its last, best and final offer, and retained provisions of the prior memorandum of understanding (MOU) on other issues. However, when an employer reaches impasse in the entire negotiations, an employer may implement some or all of its proposals and need not place all of them into effect. (Morris, *The Developing Labor Law* (2d ed., 5th supp.) 1982-88, p. 331.)

In addition, section 3.7 of Article III of the parties' MOU, which sets out the procedural ground rules for negotiations between the parties, states:

As the various Articles of the proposed contract are agreed upon, they shall be labeled "Tentative Agreement," initialed by both parties, and set aside to be later incorporated into a final contractual agreement except for corrections of minor typographical and grammatical errors.

Section 3.7 is evidence that the parties did not intend tentative agreements to have effective significance separate from the final MOU, but rather, that they should be set aside only to be incorporated into a final comprehensive MOU. As there is no final contractual agreement, according to the parties' own ground

rules for negotiations, the tentative agreements have no binding effect upon the parties. This argument is therefore rejected.

Furthermore, the Board has held that the changes implemented once a party determines in good faith that a post-factfinding impasse exists, ". . . need not be exactly those offered during negotiations, but must be reasonably 'comprehended within the impasse proposals.'" (Modesto City Schools, supra, PERB Decision No. 291, p. 46.)

[M]atters reasonably comprehended within pre-impasse negotiations include neither proposals better than the last best offer nor proposals less than the status quo which were not previously discussed at the table.  
(Id. at p. 47.)

All of the provisions for which changes were implemented had been subject to negotiation by the parties, so the Association had notice that changes were contemplated. Because the last, best and final offer was a "package proposal," we decline to dissect the package to separately compare each provision of the package to prior proposals concerning that provision. Looking at the totality of negotiations, we find the changes implemented were reasonably comprehended within pre-impasse proposals.

The Association contends that the statements made in the January 10, 1990 letter to bargaining unit employees unlawfully undermined the Association's authority and constituted bad faith bargaining. It is alleged that the statements made in this letter are false, misleading and derogatory, and constitute a campaign of coercive communications. However, the charge fails to allege any facts to support the allegation that the statements

are indeed false, misleading or derogatory. On the contrary, a review of the January 10 letter indicates that the District was merely communicating its position to employees, and announcing the unilateral implementation of certain policies.

Furthermore, even if the allegation that the statements are false, misleading and derogatory is assumed to be true, the statements contained in the January 10 letter still do not constitute unlawful communication. In Rio Hondo Community College District (1980) PERB Decision No. 128, the Board considered section 8(c) of the NLRA which provides that the expression of views, argument or opinion, in written, printed, graphic, or visual form shall not constitute or be evidence of an unfair labor practice if such expression contains no threat of reprisal or force or promise of benefit. Although the EERA contains no parallel provision to section 8(c) of the NLRA, the Board, in Rio Hondo Community College District, supra, found that a public school employer is entitled to express its views on employment-related matters in order to facilitate full and knowledgeable debate. (Id. at p. 9.) The employer's privilege of free speech is balanced against the employee's right to be free from employer communications which persuade by coercion. (Id. at p. 18.) The Board held 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 [EERA] and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. [Fn. omitted.] (Id. at p. 20.)

The employer is prohibited only from engaging in communications which amount to negotiations with a person or group other than the exclusive representative. (Id. at p. 19.)

The statements found in the January 10 letter constitute neither a promise of benefit nor a threat of reprisal. The District had determined that impasse existed and implemented its last, best and final offer. By this letter, the District was communicating its position and the reasons therefor, and was announcing the unilateral implementation of certain policies. Further, the employer was not attempting to bypass the Association and negotiate through the employees. (Cf. Walnut Valley Unified School District (1981) PERB Decision No. 160.) The District was no longer attempting to negotiate. Rather, the District had determined the parties had reached impasse and negotiations were at an end when it announced the implementation of its last, best and final offer. Therefore, the statements fail to constitute an attempt to bypass the Association, a promise of benefit or a threat of reprisal or force. Consequently, the statements fail to state a prima facie case of bad faith bargaining.

Finally, the Association contends that the District's package proposal on September 7, 1989, was regressive and therefore evidenced bad faith in the totality of the circumstances. The provisions on class size and discipline procedures in the September 7 package proposal did contain proposals which were less beneficial to the Association than it

had offered in prior proposals. However, the proposals on salary and anniversary increments were more beneficial to the Association than prior proposals. The Association fails to allege how the District's last, best and final proposal, which includes numerous provisions covering all subjects of the MOU, is regressive. The District's package proposal is not necessarily regressive merely because two provisions contained therein are less advantageous to the Association than previous proposals. Therefore, as there are no other factual allegations which support a regressive bargaining violation, the Association fails to state a prima facie case of bad faith bargaining.

#### CONCLUSION

As stated above, the Dowell statement is insufficient, by itself, to constitute a prima facie case of a violation of the duty to bargain in good faith. As discussed above, none of the additional factual allegations state a prima facie case of bad faith bargaining. Accordingly, the Board finds that the unfair practice charge fails to state a prima facie violation of the EERA.

#### ORDER

The unfair practice charge in Case No. LA-CE-2920 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairperson Hesse and Member Carlyle joined in this Decision.

Member Shank's and Cunningham's concurrence and dissent begins on page 19.

Member Shank, concurring in part, and dissenting in part:

I agree with the majority's conclusions that: (1) the District's statements in the January 10, 1990 letter to bargaining unit employees did not constitute a campaign of communications, a promise of benefit or a threat of reprisal or force and, therefore, are insufficient in themselves to constitute a prima facie case of bad faith bargaining; and (2) the allegations regarding the Charter Oak Unified School District's (District) package proposal on September 7, 1989 were insufficient to raise an issue of regressive bargaining.

I strongly disagree, however, with the majority's conclusion that the Charter Oak Educators Association, CTA/NEA (Association) failed to state a prima facie violation of the duty to participate in good faith in the impasse procedures (EERA section 3543.5(e)<sup>1</sup>). In determining whether a prima facie case has been stated by the charging party, the Board agent takes the factual allegations in the charge as true. (See Riverside Unified School District (1986) PERB Decision No. 562a; San Juan Unified School District (1977) EERB Decision No. 12<sup>2</sup>.) The Board agent is then obliged to consider whether the factual allegations set forth in the charge, if substantiated by evidence at a hearing, are sufficient to make out a case under existing PERB precedent.

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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.

<sup>2</sup>Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

The source of my disagreement with the majority in this case is two-fold. First, from a procedural standpoint, I find the majority's analysis fails to recognize that the factual allegations themselves, and not the strength or quantity of the supporting evidence, must be the primary focus in ascertaining whether a charge states a prima facie case. The majority apparently finds the factual allegations underlying the charge that the District failed to consider the factfinding report to be insufficient. Yet, a charging party need not include in its charge each piece of evidence upon which it intends to base its case. The Association should be given the opportunity at hearing to produce evidence substantiating its claims that the District failed to consider the report and implemented its own proposal before a second impasse had occurred. Furthermore, noting that the District had two and one-half weeks to consider the factfinding report between the date of its issuance and the post-factfinding meeting on December 11, 1989, the majority makes unjustified assumptions as to what occurred during this two and one-half week period, erroneously adopting the District's factual assertion (e.g., that it did consider the report), rather than assuming the truth of the allegations in the charge. Second, in applying existing Public Employment Relations Board (PERB) precedent to the factual allegations of the charge, the majority misinterprets the existing precedent established in Modesto City Schools (1983) PERB Decision No. 291 (Modesto) and unjustifiably overrules, in part, precedent established in Temple City Unified

School District (1990) PERB Decision No. 843 (Temple City).

Specifically, the majority dilutes what is required of the parties vis-a-vis the factfinding report, finding that the Modesto directive that the parties consider the factfinding report in good faith may, in some cases, require only that the parties each separately consider the factfinding report.

Nevertheless, even under the majority's interpretation of Modesto and Temple City, I would find the facts alleged are minimally sufficient to state a prima facie case.

It is my view, however, that Modesto and Temple City clearly and correctly establish that the duty to consider the factfinding report is a joint duty requiring the parties, in all cases, to discuss the factfinding report with one another prior to concluding that the report provides no basis for settlement. Under the view of Modesto set forth in Temple City, the existence of a prima facie case under the facts alleged cannot even be questioned.

The Association has alleged the following facts which, if taken as true, support its contention that the District failed to abide by its duty to participate in the impasse procedures in good faith. Significantly, the Association has alleged that Mary Dowell (Dowell), the District's legal counsel and bargaining team spokeswoman, stated that the parties' attempt to resolve the impasse through factfinding would "not make any difference, because the board will not accept the factfinding report anyway." The Dowell statement supports the Association's contention that

the District did not have the requisite subjective intent to participate in good faith in the impasse procedures. Not only is the Dowell statement significant as indicative of subjective intent, but the statement, especially since it was made before factfinding even began, could have had a deleterious effect on the impasse process by delivering a message that further participation in the impasse procedures was probably going to be futile.

I do not agree that the allegations in the charge pertaining to the Dowell statement, when considered together with the allegations of subsequent District conduct, are insufficient to state a prima facie case of failure to participate in the impasse procedures in good faith. If the Dowell statement planted any seeds in the minds of the Association's negotiators as to the District's intentions regarding the factfinding process, those seeds were cultivated by the District's actions on December 11. Thus, the Association alleged that on December 11, 1989, the Association proposed adoption of the factfinding report at the December 11 post-factfinding meeting and made a new proposal to extend the duration of the agreement for one additional year. These proposals represented substantial concessions on the part of the Association. The District caucused for fifteen minutes, rejected the Association's proposals in their entirety and, the charge alleges, "failed and refused to engage in discussion or bargaining in an attempt to establish whether the factfinding report provided the basis for settlement." The Association

further alleged that, despite its repeated requests that the District meet in a bargaining session to consider in good faith the factfinding report, the District declined to do so and, ultimately, unilaterally implemented a wage increase, an increase in the anniversary increment, and selected provisions of the predecessor agreement.

The facts set forth in the charge, if accepted as true, are clearly sufficient, under the principles set forth in Modesto and Temple City, to constitute a prima facie case of failure to participate in good faith in the impasse procedures and justify a hearing. The majority's conclusion to the contrary is not supported by either the facts alleged or existing PERB precedent.

The parties obligations vis-a-vis the factfinding was first before us and was directly addressed by this Board in Modesto. The facts alleged in the charge before us are strikingly similar to the post-factfinding factual scenario in Modesto. In Modesto, the parties bargained to a first impasse, participated in mediation and factfinding, and met post-factfinding, at the Association's request. The Association came to the meeting, ready to make significant concessions, including a concession on the one-year duration proposal considered vital by the school district. The Board characterized the district's response, in pertinent part, as follows:

The District maintained that it did not have to examine the recommendations of the factfinder or the Association's concessions to see if these provided a basis for settlement or opened a ray of hope. It insisted that impasse was automatic when the

factfinding report issued, that the obligation of good faith negotiations had ended. The District refused to characterize the February 4 meeting as negotiations, defining it as a "meet and discuss session." . . . It told the Association that there would be no negotiating and no District proposals, that the Association had the option of accepting the District's position or having it imposed as a post-impasse unilateral change. In short, the District made no effort to examine all the circumstances to determine whether or not there was hope of reaching agreement. (Modesto, supra, PERB Decision No. 291, at p. 40.)

Similarly, in the instant case, the Association has alleged that the parties met after the factfinding report had issued. The Association proposed accepting the report, even though it was adverse to the Association on several issues. As in Modesto, the Association, among other things, offered to extend the duration of the contract. The Association has further alleged that the District's negotiators caucused amongst themselves and rejected the proposal outright, without discussion, and subsequently sent a memorandum to bargaining unit members explaining why they could not abide by the recommendations in the factfinding report.

In Modesto, the District argued at hearing that although it took the position that the bargaining obligation had already ended, it nonetheless did bargain after factfinding and actually saw a possibility of progress in those talks. The Board found that:

The District's attempt, at hearing, to characterize its post-factfinding conduct as negotiating does not alter the fact that its flat insistence at the table that it would not bargain was clearly incompatible with good faith.

(Id. at p. 41.)

The Board further noted that the District's decision, not to bargain after the factfinder's report was issued, indicated:

. . . the District was more concerned with its ability to implement unilateral changes than it was with its obligation to attempt to reach agreement. (Id. at pp. 43-44.)

Similarly, in the instant case, the majority apparently adopts the District's position that the memorandum, sent by the District to bargaining unit employees on January 10, a month after the parties had last met, constitutes evidence that the District did consider the factfinding report. While the memorandum did state the reasons the District was unwilling to abide by the recommendations in the factfinding report, the same document simultaneously announced the District's position that "further negotiations would not be productive," that negotiations were completed, and that the District would be unilaterally implementing a salary increase.<sup>3</sup>

In Modesto, the Board described the parties' obligations vis-a-vis the factfinding report as follows:

[W]e find that the statutory impasse procedures are exhausted only when the factfinder's report has been considered in good faith, and then only if it fails to change the circumstances and provides no basis for settlement or movement that could lead to settlement. At that point, impasse under EERA is identical to impasse under the

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<sup>3</sup>Had the District discussed its rationale for rejecting the recommendations in the factfinding report as expressed in its memorandum, both the spirit and the letter of Modesto and Temple City would have been satisfied and the Association would not have been successful in stating a prima facie case.

NLRA; either party may decline further requests to bargain, and the employer may implement policies reasonably comprehended within previous offers made and negotiated between the parties. If the factfinding report, and/or new proposals made after the report, change circumstances and bargaining is subsequently resumed but again deadlocks, the Board cannot recertify impasse or reimpose the already exhausted impasse procedures.

We find this result compelled by the clear language of Article 9 of the Act and the legislative intent manifested therein. In addition, our holding is consistent with that of the Fifth Appellate District Court in PERB v. Modesto City Schools, supra.<sup>4</sup> (Id. at pp. 32-33.)

In reaching its conclusion in Modesto that the District's failure to consider the factfinder's report or the Association's post-factfinding concessions breached its obligations under EERA and constituted a refusal to participate in good faith in the impasse procedures (Id. at p. 44), the Board made several important points that should be considered here.

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<sup>4</sup>As the Fifth Appellate District Court stated in PERB v. Modesto (1982) 136 Cal.App.3d 881, 899:

Under District's rationale, as soon as mediation and factfinding are completed, the duty to negotiate in good faith evaporates. We find no authority supporting this contention nor do we find any authority which would compel us to implement section 3549 giving District the right to refuse to bargain after post-factfinding concessions made by Association.

[S]ince collective bargaining is at the heart of the EERA scheme, it is necessary that PERB embrace the concept of the duty to bargain which revives when impasse is broken. (Id. at pp. 881, 899.) (Emphasis added.)

First, the Board discussed the meaning of "impasse" under the National Labor Relations Act (NLRA), noting that under National Labor Relations Board (NLRB) precedent, once impasse is reached, either party may refuse to negotiate further and the employer is free to implement changes already offered the union. While the NLRA does not require the parties to participate in an impasse procedure, as does EERA, NLRA precedent does provide that impasse suspends the bargaining obligation only until changed circumstances indicate an agreement may be possible. Noting that the purpose of the NLRA is to "mitigate and eliminate . . . obstructions [to agreement]. . . when they have occurred by encouraging the practice and procedure of collective bargaining" (29 U.S.C. section 151), the Modesto Board noted that:

The NLRB encourages, through face-to-face bargaining, the exploration of new proposals which may provide avenues to resolve differences and arrive at a final agreement. (Id. at p. 35.) (Emphasis added.)

Thus, the NLRB has emphasized the "face-to-face" aspect of the collective bargaining process.

The Board in Modesto also noted that although EERA was enacted with the same purpose in mind as is envisioned under the NLRA, under EERA:

. . . the impetus to keep the parties bargaining is so strong that an extensive impasse procedure was written into the Act, [Citation omitted.] and failure "to participate in good faith in the impasse procedures" was made an independent unfair practice under the Act [Citation omitted.]. (Id. at p. 35.)

After describing the EERA impasse procedure, the Board points out that while the terms of the recommended settlement are advisory, and neither side is obligated to accept them, "the factfinder's recommendations are a crucial element in the legislative process structured to bring about peacefully negotiated agreements." (Id. at p. 36.)

While under the NLRA, precedent defines what constitutes "changed circumstances" sufficient to break impasse and revive the duty of face-to-face bargaining, under EERA, "a clear purpose of the factfinding report is to change the circumstances of bargaining by providing an impetus for settlement . . ." (Id. at p. 37.) Thus, the Board imposed the following obligation upon the parties:

. . . [T]he factfinder's recommendations must be given good faith consideration by the parties before they determine that impasse persists. [footnote 18 - for text, see below]

Therefore, the first obligation of the parties, after the recommendations of the factfinder are made, is to examine the recommendations to see if they can find in them a basis for settlement, or for such accommodations, concessions, or compromises that might lead to settlement. (Id. at p. 37.)

To further define the scope of the parties' obligation to consider the factfinding report in good faith, as an obligation to consider that report jointly, the Board quoted the district's own representative's understanding of the nature of the district's duty vis-a-vis the report:

. . . . I certainly told them [the District] that they have an obligation to send me back to the table, or someone representing them, to discuss that factfinding report. There would be no logic to the legislation if the parties didn't get together and seriously discuss, exchange whatever information they could to determine whether or not an agreement could be reached based on that factfinding report . . . .

[Citation omitted.]  
(Id. at p. 37, fn. 18.) (Emphasis added.)

If any ambiguity remained as to the nature of the parties' duties vis-a-vis the factfinding report after Modesto, that ambiguity was clearly eliminated by this Board in Temple City which issued in September 1990. In Temple City, the Association alleged that the parties negotiated to a first impasse, participated in mediation and factfinding, and met on March 22, 1989 to discuss the factfinding report. The Association alleged that on this date, the District merely presented a "take-it-or-leave-it" bargaining position, which was significantly different from its previous offers, and that no negotiations took place because the District was unwilling to negotiate. The Association further alleged that the parties met again on April 20, at which time the District presented the Board's "last, best and final" offer and refused to consider or discuss proposals made by the Association. On April 25, the District unilaterally adopted its offer as presented on April 20.

The facts in the instant case are similar in that the Association has alleged that the District failed to sit down at the table to discuss the report, and merely rejected the report

out of hand and proceeded to take steps to implement what it couched as a "last, best, and final" offer.

In Temple City, based on the alleged facts,<sup>5</sup> this Board found that the Association stated a prima facie case of, inter alia, failure to bargain in good faith and failure to participate in good faith in the impasse procedures. In reaching that conclusion, this Board reaffirmed and clarified the principles enunciated in Modesto as follows:

The Board in Modesto stated that, subsequent to factfinding, the parties are required to examine the factfinding report to see if they can find a basis for settlement or for compromises that might lead to settlement. [Citation omitted.] This obligation includes the requirement that the parties seriously discuss the report and engage in a further exchange of information which may determine whether movement toward settlement is a possibility. [Citation omitted.] (Temple City, supra, PERB Decision No. 843, at p.6.)

The Temple City clarification of Modesto, authored by this Board<sup>6</sup> less than six months ago, validates and gives meaning to the factfinding process as a crucial element of the collective bargaining process. By rejecting the Temple City interpretation

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<sup>5</sup>In Temple City, the Board reversed the PERB regional attorney's dismissal of the case, finding that the regional attorney had improperly resolved disputed issues of fact instead of accepting as true the charging party's allegations of fact. The Board found a prima facie case existed based upon the allegations stated in the charge.

<sup>6</sup>In the majority opinion, our colleagues state that Temple City was decided "by only three Board members." We note, for the record, that EERA section 3541(c) provides, in relevant part: "(t)he board may delegate its powers to any group of three or more board members . . . ." Panels consisting of three board members are the norm, rather than the exception, and decide the majority of the decisions issued by this Board.

of Modesto, the majority demonstrates a lack of faith in the ability of the factfinding process to break the impasse. By dispensing with the requirement that the parties must discuss the factfinding report with each other, the majority eliminates the impetus for the parties to make one last effort to avoid economic warfare, promote cooperative relations and, ideally, reach an agreement.

The concerns expressed by the majority to justify their retreat from precedent established in Temple City are unwarranted. The majority's fear that requiring the parties to discuss the factfinding report "would extend negotiations indefinitely" is unfounded. While I agree with the majority that finality in the collective bargaining process is absolutely necessary, I do not believe that the Temple City clarification of Modesto compromises that finality.

Significantly, the Board in Modesto was careful to point out that so long as the parties engage in the "process," i.e. examination of the recommendations of the factfinder through discussion of the report with one another, they are free to decide that the factfinding report provides no basis for settlement or for movement that could lead to settlement. (Modesto, supra, PERB Decision No. 291, at p. 37.) In such a case, the parties have reached a second impasse, PERB has no more authority to recertify impasse or reinvoke impasse procedures, and either party may decline further requests to bargain. The employer, at such point in time, may implement policies

reasonably comprehended within previous offers made and negotiated between the parties. (Id. at p. 38.) Thus, while the parties have an initial obligation to discuss the factfinding report, the duty to bargain revives only if both parties find a basis for settlement, or movement toward settlement, in the factfinder's report. Once revived, the duty to bargain exists until the parties reach a second impasse.

Neither does the Temple City clarification of Modesto impact the burden of proof as suggested by the majority. (See maj. opinion, p. 11, fn. 5.) In fact, by interpreting the requirement that the parties "consider the factfinding report in good faith" to mean the parties must discuss the report, the necessity of shifting the burden of proof is avoided. A requirement that the parties objectively manifest their consideration of the factfinding report by discussing it with one another facilitates a determination of whether the parties have met their obligation of considering the report in good faith. Concomitantly, the facts that need to be alleged by the charging party to state a prima facie case of violation of that duty, that the respondent did not discuss the factfinding report, are clearly within the knowledge of the charging party. The respondent may defend the charge by proving it did, in fact, consider the report. Thus, an interpretation of the requirement that the parties must "consider the factfinding report in good faith" to mean the parties must meet to discuss the report, avoids the necessity of shifting the burden of proof.

In contrast, under the majority view, the charging party is forced to allege and prove facts not always within its knowledge or control, i.e. that the respondent failed to consider the factfinding report. Traditionally, our law provides for the shifting of the burden of proof in such situations. Thus, for example, in reprisal cases, once the employee states a prima facie case based on circumstantial evidence that adverse action was taken against him or her for an unlawful reason, the burden shifts to the employer to prove that it had a legitimate reason for taking the adverse action. (See Novato Unified School District (1982) PERB Decision No. 210, at p. 14.)<sup>7</sup> Under the majority view, the burden of proof should shift to the respondent to show that it had considered the report, since the charging party does not, as a general rule, have access to evidence<sup>8</sup> to prove what transpired behind the closed doors of the respondent, and thus, would be forced to prove a negative, i.e. that the District failed to consider the report. The majority's dissatisfaction with the lack of detail in the charge in the instant case demonstrates the difficulty a charging party will

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<sup>7</sup>In Novato, the Board found that shifting the burden of proof does not conflict with the requirement of PERB Regulation 32178 in that the charging party must prove his case. It merely requires the employer to prove an affirmative defense to the prima facie case of unlawful motive.

<sup>8</sup>In the instant case, the Association does have additional circumstantial evidence that the District did not consider the factfinding report in good faith in the form of the extremely damaging Dowell statement that factfinding would "not make any difference, because the board will not accept the factfinding report anyway."

have in stating a case under the majority's interpretation of Modesto.

Finally, implicit in the majority's position that the parties do not, in every case, have an affirmative duty to engage in "further discussions or negotiations regarding the factfinding report," (maj. opinion, p. 10) is the admission that in some cases such a duty would exist. In this particular case, however, the majority concludes that joint discussion of the report was not mandated, primarily based upon its contentions that: (1) the District's negotiating team privately considered the factfinding report and later communicated its response to the report through a letter addressing some of the issues raised in the report and announcing a unilateral implementation of its offer; and (2) the District's panel member on the factfinding panel wrote a dissent to the report.

Private consideration of the report by each party on its own does not comport with the "practice and procedure" designed to result in settlement. Unlike communications by letter, face-to-face discussions, or at least a verbal interchange, regarding the contents of the report provide the parties an opportunity to express to each other their own interpretation of the factfinding report. Through discussion and perhaps a further exchange of information, the parties may find common ground that will lead to an agreement. If the parties are not required to objectively manifest their consideration of the report by discussing it with each other, there is nothing to preclude the employer who wants

to unilaterally implement, or the union being pressured by its members to strike, from completely disregarding the report, engaging in economic warfare, and rendering the whole factfinding process a nullity.

Neither is the fact that the District panel member who wrote a dissent to the factfinding report significant in the determination of whether the District fulfilled its duty to consider the factfinding report in good faith. The majority's contention that "the District's dissatisfaction with the factfinding report was already expressed in its dissent" and that, therefore, the "District's position was known to the Association," (maj. opinion, at pp. 11-12) is flawed. The factfinding panel is obligated to complete its factfinding report, including any dissents or concurrences, prior to the release of the entire report to the parties. (See Capistrano Unified School District (1983) PERB Decision No. 294.) Thus, it is entirely possible that the District negotiators, once they received the entire report, may not have agreed with the points raised in the panel member's dissent. Once the factfinding report was received by the District, the District had an obligation to consider the entire factfinding report, including the dissent. (See Los Virgenes Unified School District (1979) PERB Order No. IR-8.) A requirement that the parties discuss the entire factfinding report would give the District the opportunity to distance itself from any portions of the dissent with which it

disagrees, and gives the Association the opportunity to address concerns raised by the dissent.

In summary, the ultimate issue in this case is whether the Association has stated a prima facie case under existing law. If we assume, as we must, the truth of the Association's allegations that the District stated it did not intend to consider the factfinding report and then indeed declined to do so, then we must find the Association has stated a prima facie case and is entitled to a hearing under the principles of Modesto as clarified in Temple City.<sup>9</sup> Even under the majority's interpretation of Modesto, assuming the parties are not required to discuss the factfinding report with one another, the Association alleged sufficient facts to state a prima facie case against the District for violation of the duty to consider the report in good faith. This Board's first responsibility is to promote the process of collective bargaining -- a failure to grant a hearing in this case would seem to do the opposite.

Member Cunningham joined in this concurrence/dissent.

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<sup>9</sup>Since I would also find the unilateral implementation of any "last, best, and final" offer, under the facts alleged, to further support a finding of a prima facie case of failure to participate in good faith in the impasse procedures, I do not find it necessary to decide the issue of whether the District is obligated to incorporate all of the tentative agreements into that offer and disassociate myself from the majority's discussion of that issue.