STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VENTURA COUNTY FEDERATION OF COLLEGE TEACHERS, LOCAL 1828, AFL-CIO, Charging Party, v. VENTURA COUNTY COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-4082-E PERB Decision No. 1547 September 24, 2003

Appearances: Lawrence Rosenzweig, Attorney, for Ventura County Federation of College Teachers, AFT Local 1828, AFL-CIO; Burke, Williams & Sorensen by Darren C. Kameya and Jack P. Lipton, Attorneys, for Ventura County Community College District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Ventura County Federation of College Teachers, Local 1828, AFL-CIO (Federation) to a proposed decision of an administrative law judge (ALJ) which found that the Ventura County Community College District (District) did not violate the Educational Employment Relations Act (EERA) section 3543.5(c) [1] by unilaterally contracting out the instruction of certain courses. After reviewing the record in this case,

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5(c) states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:

including the proposed decision, the Federation's exceptions and the District's response, the Board reverses the proposed decision of the ALJ.

FACTS

The District is a public school employer under EERA. The Federation is an employee organization under EERA and is the exclusive representative of a unit of the District's certificated employees. The collective bargaining agreement (CBA) between the parties defines the represented unit as the District's "academic employees," which includes the District's instructors.

For several years, the District has had a Criminal Justice program. The District catalog states:

> The Criminal Justice program is designed to prepare students to successfully complete the training and testing procedures required to enter law enforcement and corrections academies, or to work within the private sector. [At p. 75.]

In order to receive a certificate of achievement in Criminal Justice, a student needed to complete the following four required courses:

> Introduction to Criminal Justice
> Concepts of Criminal Law
> Community Relations
> Criminal Procedures

In addition, a student needed to complete three additional courses from a list of eighteen, including the following:

> California Penal Code
> Criminal Justice Report Writing
> Patrol Procedures
> Criminal Investigation
> Traffic Control and Investigation

> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

In order to receive an associate degree in Criminal Justice, a student also needed to complete the District's general education requirements and a total of at least 60 semester units.

Some courses offered by the Criminal Justice program have been certified by the Commission on Peace Officer Standards and Training (POST). Most of these POST-certified courses have been designed as continuing professional education for peace officers, and some have been limited to permanent (non-probationary) peace officers. Until 1999, all of the District's Criminal Justice courses were taught by certificated employees in the unit represented by the Federation.

For several years, the Ventura County Sheriff (Sheriff), in cooperation with other local law enforcement agencies, has run a basic law enforcement academy, providing cadets with entry-level law enforcement training. The academy is POST-certified, and the Sheriff is the only one in Ventura County certified to provide that training. POST requires that the training cover several learning domains, including the following:

Criminal Justice System
Community Relations
Property Crimes
Crimes Against Persons
General Crime Statutes
Crimes Against Children
Sex Crimes
Investigative Report Writing
Patrol Techniques
Traffic Enforcement
Traffic Accident Investigation
Preliminary Investigation

Until 1999, the academy had no connection with the District and cadets received no academic credit.

At some point, the Sheriff and the District began discussing an affiliation that would allow academy cadets to receive academic credit as students of the District. The Sheriff

expressed a desire to upgrade the professionalism of law enforcement personnel by encouraging them to get their associate degrees. It was believed that cadets who earned academic credit during their academy training would be more likely to go on to earn their degrees, which in turn would help them to advance in their profession.

According to District officials involved in discussions with the Sheriff, the District's motivations were to support the Sheriff and to "forge better community relations." The District also had an opportunity to benefit financially, because the District receives funds based on the number of Full Time Equivalent Students (FTES), and additional funds for growth in the number of FTES.[2]

On the issue of academy instructors, the District had no objection to paying the instructors and making them District employees. Indeed, during initial discussions the District proposed such an arrangement. However, the District's proposal was dropped after the Sheriff insisted that the instructors come from local law enforcement agencies. There remained questions however, as to whether the District would pay the instructors at the academy, and as to whether the instructors would be regarded as District employees while teaching.

At some point, the Federation became aware of the potential arrangement between the District and Sheriff. The subject was discussed informally between the District and Federation, and finally came up in formal negotiations on April 21, 1999. The Federation submitted a long list of questions based on the assumption that academy instructors would be District employees covered by the CBA. Thus, for example, the Federation wanted to know if

[2] District employees could also benefit financially. Under the CBA between the District and the Federation, a percentage of growth funding would go into a general salary increase pool.

the District was proposing to waive the negotiated salary in Article 3.4 of the CBA for academy instructors. The District asked for time to respond to the questions.

Four times between May 17 and June 1, 1999, the Federation reminded the District about the list of questions submitted at the April 21 negotiations, but the District did not respond during that time. By June 2, 1999, the District and the Sheriff had apparently reached some agreement to affiliate the academy with the District. The issue of compensation had still not been finally resolved, however. The District had apparently taken the position that it should pay the academy instructors, but the Sheriff disagreed. In a letter dated June 2, 1999, the Sheriff insisted that having the District pay the instructors (who would be law enforcement personnel) would be an "unworkable" situation. The Sheriff concluded:

> Therefore, I regret to inform you that we will be compelled to abrogate our initial agreement to affiliate with the District if this issue of instructor compensation is not resolved.

District officials thus understood it would be a "deal breaker" for the District to insist on paying the academy teachers.

Witnesses for the District had different understandings as to why the Sheriff insisted on paying the academy instructors. One witness testified that the Sheriff wanted to pay the instructors because the Sheriff would have more control directing their activities and because it would be easier to track when the instructors, who would mostly be Sheriff's personnel, came on and off duty. Another witness testified that the Sheriff was concerned about his employees "double-dipping." In other words, the Sheriff was concerned that his employees would be paid by the District for teaching at the academy while collecting their full pay from the Sheriff.

On the other hand, the District initially wanted to pay the academy instructors in order to ensure that the instructors could be regarded as employees of the District for FTES

attendance accounting purposes.[3] The District had requested a legal opinion on this subject from the Chancellor of California Community Colleges. In a letter dated June 3, 1999, the Chancellor's office responded to the District's request, stating in part:

> We understand that the Ventura County Community College District (district) intends to contract with a local law enforcement agency to provide law enforcement training. Instruction is being provided by the local law enforcement agency using a qualified instructor who is an employee of the local law enforcement agency. The district intends to enter into contracts with the local law enforcement agency and with the instructor for the training being offered pursuant to Title 5, California Code of Regulations, Section 58058(b). The district will not compensate the local law enforcement officer. The instructor meets minimum qualifications, the training will be open to all interested students, and all other requirements for offering a course at a community college will be met. [Resp. Ex. I.]

The Chancellor's office noted that arrangements like the one proposed by the District and Sheriff had caused "problems" and "audit exceptions" in the past. This was because the Department of Finance had taken the position that to be an "employee of the district" within the meaning of Section 58051(a)(1), the instructor had to be on the payroll of the District and

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[3] California Code of Regulations, title 5, section 58051(a)(1), states:

> Except as otherwise provided, in computing the full-time equivalent student [FTES] of a community college district, there shall be included only the attendance of students while they are engaged in educational activities required of students and while they are under the immediate supervision and control of an academic <u>employee of the district</u> authorized to render service in the capacity and during the period in which he or she served. (Emphasis added.)

Unless otherwise noted, all further regulatory references are to the California Code of Regulations, title 5.

be paid a real salary. However, the Chancellor's office opined that Section 58058(b)[4] solved the problem by establishing a procedure whereby an instructor can be both an employee of the District – for accounting purposes – and an employee of a contractor. To take advantage of Section 58058(b), the Chancellor's office stated that both the District and Sheriff would have to agree that the District maintains the primary right to control and direct the instructor while he or she is providing instruction. The Chancellor's office then stated:

> In conclusion, we think that Section 58058 contemplates a public or private agency providing courses for a community college using agency employees as instructors. These agency employees are not temporary, contract, or regular employees of the district, but qualify to be considered as "employees of the district" for attendance accounting purposes only.

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[4] Specifically, California Code of Regulations, title 5, section 58058, states:

> (a) A person is an 'employee of the district' within the meaning of subdivision (a)(1) of Section 58051 if:
>
> . . . . . .
>
> (b) For the purposes of complying with the requirements of this section, a district may also contract for instruction to be provided by a public or private agency. Such contracts shall specify that the district has the primary right to control and direct the activities of the person or persons furnished by the public or private agency during the term of the contract. In addition, the district shall enter into a written contract with each person furnished by the public or private agency; and said contracts shall meet the requirements of subsection (a)(1) and (2) of this section. In this manner an individual employed will continue to be an employee of a public or private agency, while at the same time qualifying as an employee of the district.

This opinion from the Chancellor's office apparently assuaged the District's concern about FTES attendance accounting problems.

On June 8, 1999, the District finally wrote a letter to the Federation, stating:

> In response to your inquiries with respect to the proposed police officers training program at Ventura College, please be reminded that the courses will be taught by employees of local law enforcement agencies, not by employees of the Ventura County Community College District. Accordingly, these instructors will not be members of the bargaining unit at the District and as such, the VCCCD-AFT Agreement will not be applicable as to them.
>
> We are enthusiastic about the proposed program, as it will be of great benefit to everyone including students, faculty, staff, and the entire Ventura County community.
>
> I look forward to your continued cooperation.
> (C.P. Ex. 5.)

The Federation responded by filing its unfair practice charge on June 14, 1999.

At a meeting on July 13, 1999, the District's Board of Trustees passed the following resolution:

> WHEREAS it has been determined that there is a need for a police officer training academy in Ventura County that provides college credit; and
>
> WHEREAS the Ventura County Community College District and the Ventura County Sheriff's Department have reached an agreement regarding the specifics of the academy;
>
> IT IS HEREBY RESOLVED that the Ventura County Community College District shall offer a POST Basic Academy through a contract with the Ventura County Sheriff's Department whereby the instruction will be provided by employees of the Sheriff's Department and other local enforcement agencies.
> (Resp. Ex. B.)

The action item on the Board's agenda stated that the fiscal impact of this resolution was "Undetermined."

The District and Sheriff eventually signed a Master Institutional Services Agreement (Agreement). The Federation requested a copy of the Agreement, which the District provided on November 22, 1999. Attached was a letter dated October 19, 1999, from the Sheriff to the Ventura County Board of Supervisors, stating in part:

> Fire Chief Bob Roper and I have reached an agreement with District Chancellor Westin that the Ventura County Community College District's FTES revenues will be used entirely to construct and maintain a state-of-the-art, regional public safety training center. The facility will be built within three years at the Camarillo Airport. This partnership presents a wonderful opportunity for all parties. [C.P. Ex. 6.]

At the hearing, District officials confirmed the existence of this agreement to use FTES funds for a new facility, although details of this agreement are not in the record.

In the Agreement that is in the record, the Sheriff agrees to provide instruction for which students will receive credit through the District. Paragraph 34 of the Agreement states:

> SHERIFF certifies that the COURSES shall be held at facilities that are clearly identified as being open to the general public (Title 5, Section 58051.5). Enrollment in the COURSES is open to any person who has been admitted to DISTRICT and who has met applicable prerequisites (Title 5, Sections 51006 and 58106). Both DISTRICT and SHERIFF agree that, per Penal Code 832.3 subdivision (c), at least 15% of these students shall be non-law enforcement trainees, if available. [C.P. Ex. 6.]

It is required by law that community college courses be open to enrollment by anyone admitted to the college and meeting the course prerequisites.[5] It is also required by law that 15 percent of students in POST-certified basic law enforcement courses offered by community colleges be non-law enforcement trainees if they are available.[6]

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[5] See California Code of Regulations, title 5, section 51006.

[6] See Penal Code section 832.3(c).

Paragraph 11 of the Agreement provides that the instructors for the academy "are not academic employees and are not employees of the District". Rather, the instructors are employees of the Sheriff. Paragraph 56 of the Agreement further provides that academy instructors are not members of the academic bargaining unit. Exhibit B to the Agreement is a form to be signed by the District and each academy instructor, specifically providing that the instructor will be entitled to no compensation or benefits from the District.

Although portions of paragraph 11 purportedly provide that academy instructors are not employees of the District, other portions indicate otherwise. Specifically, paragraph 11 also provides that:

> Only for the limited purposes of attendance accounting standards and computing Full-Time Equivalent Students, the instructors are deemed to qualify as 'employees of the district' only within the narrow meaning of Section 58058(b) of Title 5 of the California Code of Regulations. [Emphasis in original.]

As noted above, Section 58058(b) provides that employees of contractors may be deemed employees of the District for accounting purposes as long as the District "has the primary right to control and direct the activities of the person or persons furnished by the public or private agency during the term of the contract." (Sec. 58058(b).)

Consistent with the requirement that the District maintain primary control and direction over the academy instructors, the Agreement provides that supervision and instruction of students shall conform with District and State standards and that the District shall provide control of and direction to instructors. (Agreement, par. 8, 15.) Paragraph 17 again affirms that the District has the "primary right to control and direct the instructional activities of the instructors." Paragraph 17 continues:

> NOTE: DISTRICT will demonstrate control and direction through such actions as providing the instructor with an

> instructor's orientation manual, course outlines, curriculum materials, grading procedures, and any other materials and services it would provide <u>its other instructors who teach credit courses</u>. [Emphasis added.]

Although the District has no authority over personnel issues involving Sheriff's employees (Agreement, par. 15), the Agreement gives the District the authority to remove instructors from their teaching assignment. The Agreement further provides that academy instructors will be evaluated by the District. (Agreement, par. 27.) Finally, the Agreement provides that the District will review academy courses as necessary and reserves to the Governing Board of the District the right to determine the appropriateness of academy courses. (Agreement, par. 25-26.)

As a result of the agreement between the District and the Sheriff, two new courses have been added to the District catalog. Those two courses are described, in part, as follows:

> **CJ V80 - P.O.S.T REGULAR BASIC COURSE - 30 Units**
> Prerequisite: student must be 18 years old, posses [sic] a valid driver's license, and have no felony convictions; California Penal Code requires each applicant for admission to a basic course of training certified by the Commission on Peace Officer Standards and Training (P.O.S.T.) who is not sponsored by a local or other law enforcement agency, or who is not a peace officer employed by a state or local agency, department or district, shall be required to submit written certification from the Department of Justice that the applicant has no criminal history background which would disqualify him or her pursuant to this code, or the Welfare and Institutions Code, from owning, possessing, or having under his or her control a firearm; medical certification required; California Government Code requires medical and psychological suitability examinations as a condition of employment.
>
> Hours: 15 lecture; 45 laboratory weekly
>
> This is a P.O.S.T. (Peace Officer Standards and Training) basic course for students and individuals wishing to become full time law enforcement officers as defined in the California Penal Code (CPC). The course fulfills P.O.S.T. entry-level requirements as

> outlined in the CPC. The course provides instruction in administration of criminal justice, ethics, California court system, discretionary decision making, first aid, CPR, crimes in progress, unusual occurrences, police radio communications, police-community relations, criminal law, traffic law, traffic investigation, laws of evidence, and patrol procedures. Emphasis is placed on instruction in arrest, search, and seizure, methods of arrest, baton training, vehicle stops, and report writing. Additionally, the course provides special emphasis on and training in firearms safety, firearms (pistol and shotgun) use related to law enforcement with training in combat/stress shooting scenarios and qualification over a P.O.S.T. prescribed course of fire. The course completes the P.O.S.T. basic requirements.
>
> **CJ V81 - ORIENTATION FOR BASIC COURSE - 5 Units**
>
> Hours: 3 lecture; 6 laboratory weekly
>
> This course is an orientation for P.O.S.T (Peace Office Standards and Training) regular basic course. Emphasis is placed on assisting the student in preparing for successful completion of the P.O.S.T. regular basic course.
>
> Offered on a credit/no credit basis only.
> (C.P. Ex. 25.)

The District catalog also now lists a new "academy option" for earning a certificate of achievement or an associate degree in Criminal Justice, in addition to the previous "academic option" described earlier.

Under the academy option, a student needs to complete just three required courses:

> Concepts of Criminal Law
> Criminal Procedures
> P.O.S.T. Regular Basic Course

Unlike the academic option, the academy option does not require students to complete Introduction to Criminal Justice or Community Relations, presumably because those subjects are covered in the POST-certified basic course. Under the academy option, a student also needs to complete just one additional course from a list of five, which, unlike the list for the

academic option, does not include California Penal Code, Criminal Justice Report Writing, Patrol Procedures, Criminal Investigation or Traffic Control and Investigation, again presumably because those subjects are covered in the POST-certified basic course.

It is undisputed that the POST-certified basic course covers many of the same topical areas as other Criminal Justice courses. However, the District asserts that the courses in the academy differ significantly from those in the Criminal Justice program. Specifically, most Criminal Justice courses are 3-unit courses of three hours a week for 16 weeks. The basic course, in contrast, is a 30-unit course of 60 hours a week for 24 weeks.[7] The basic course is offered only at a training facility several miles from the main District campus. The basic course is designed to be practical, while other Criminal Justice courses are designed to be more historical and philosophical. Most important, asserts the District, is that fact that the basic course is highly standardized by POST, while other Criminal Justice courses may vary as much as academic freedom allows.

Pursuant to Penal Code section 832.3, subdivision (c), the District and Sheriff agreed that at least 15 percent of the students attending the academy would be non-law enforcement trainees, if available. There is no evidence in the record as to whether this goal was achieved. However, it does not appear that the District has reduced the number of other Criminal Justice courses or sections because of the academy. To the contrary, the District elicited testimony that the academy has actually resulted in more hours worked, with commensurate increases in pay, for the District's instructors.

[7] The orientation to the basic course, meanwhile, is a 5-unit course of 9 hours a week for 4 weeks.

At the hearing, District officials credibly denied that a desire to save labor costs was any part of the District's motivation to enter into the Agreement with the Sheriff. There is no evidence that the District's Board of Trustees considered labor costs as part of its decision approving the Agreement.

ALJ'S PROPOSED DECISION

In the proposed decision, the ALJ considered the issue to be whether the District unlawfully changed policy by unilaterally subcontracting the instruction of certain Criminal Justice courses. As there was no dispute that the District unilaterally implemented its decision to allow Sheriff's employees to teach academy courses, the sole issue before the ALJ was whether the District's decision was within the scope of representation. To address this issue, the ALJ began by setting forth the well-settled test for determining whether a matter is within the scope of representation. (Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim).) Under Anaheim, a subject is within the scope of representation if:

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

The ALJ then proceeded to discuss the various PERB decisions dealing with the issue of subcontracting, with particular emphasis on San Diego Adult Educators v. Public Employment Relations Bd. (1990) 223 Cal.App.3d 1124 [273 Cal.Rptr. 53] (San Diego II) and Lucia Mar Unified School District (2001) PERB Decision No. 1440 (Lucia Mar). The ALJ

noted that these cases reveal that subcontracting is sometimes within the scope of representation and sometimes not.

In Lucia Mar, a school district had simultaneously laid off its transportation employees and subcontracted the same transportation services. The Board affirmed and adopted a proposed decision that included a comprehensive survey of "subcontracting cases." The proposed decision stated, in part:

> Under these circumstances, where the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances, there is no need to apply any further test about labor costs in order to determine whether the decision is subject to the statutory duty to bargain. (Lucia Mar, proposed dec. at p. 39.)

Thus, the Board found the subcontracting decision in Lucia Mar to be within the scope of representation.

San Diego II also involved subcontracting, but under very different and unique facts. In San Diego II, a community college district had discontinued certain "popular" language classes because of high labor costs and had terminated the teachers of those classes. Two months later, under public pressure, the employer subcontracted the teaching of the same classes to a foundation. The court treated the discontinuation and termination decision as completely separate from the subcontracting decision. The court declared, in part:

> The most important factor in determining whether an employer's decision to have work done by a subcontractor rather than regular employees is unlawful is the impact of the subcontracting on the regular employees. [Citations.] Here, because the District terminated 'popular' language classes before the public pressure caused it to contract with the Foundation to provide the classes, the former District-employed teachers suffered no detriment by the decision to contract with the Foundation. (San Diego II at p. 1134.)

Because the district had already terminated all the instructors of "popular" language courses independently of any subcontracting decision, the court of appeal held that the district's decision did not impact any employees and thus was not within the scope of representation.

After analyzing the facts in San Diego II and Lucia Mar, the ALJ concluded that the facts in this matter did not neatly fit into either case. The ALJ noted that unlike Lucia Mar, the District did not terminate any Federation members nor were their work hours reduced. However, unlike San Diego II, the District's decision does impact its instructors because they are now competing with academy instructors to teach, for academic credit, some of the same subjects to some of the same students. The ALJ concluded that the decisive factor in determining whether the District's decision is within the scope of representation should be whether the District's decision was based on labor costs. Since the ALJ concluded that labor costs were not a motivating factor, the complaint was dismissed.

DISCUSSION

As set forth in the complaint, the issue before the Board is whether the District unlawfully changed its policy of having Federation members teach courses by contracting out instruction of POST courses to employees of the Sheriff. As there is no dispute that the District unilaterally made the alleged changes, the sole issue before the Board is whether the District's decision to contract with the Sheriff was within the scope of representation. If it was within the scope of representation, then the District violated EERA by failing to first negotiate the change with the Federation.

The District and the ALJ characterize the issue in this matter as one of "subcontracting." Accordingly, the ALJ's decision analyzed this case in light of PERB's various "subcontracting" cases. However, as discussed below, the Board believes that the

specific facts in this case render this situation more akin to a transfer of work, rather than subcontracting. The distinction between transfer of work and subcontracting is important since the Board has analyzed these two situations differently. (See, e.g., Whisman Elementary School District (1991) PERB Decision No. 868 (Whisman).)

Transfer of Work Versus Subcontracting

A "transfer of work" occurs when an employer transfers unit work to nonunit employees of the same employer. (San Diego II at p. 1133, fn. 5; Rialto Unified School District (1982) PERB Decision No. 209 (Rialto).) There are two ways to prove that a transfer of work has occurred. (Eureka City School District (1985) PERB Decision No. 481 (Eureka).) The first is to prove that unit employees have ceased performing work which they previously performed. The second is to prove that nonunit employees have begun to perform duties previously performed exclusively by unit employees. (Eureka at p. 15.)

Applying the three-prong Anaheim test, the Board has held that transfer of work decisions are within the scope of representation. In Rialto, the Board found that transfer of work decisions satisfy the first prong of Anaheim because:

> The decision to transfer work from one unit to another affects the wages, hours and working conditions of employees in the former unit. Actual or potential work is withdrawn from negotiating unit employees when such work is transferred out of that negotiating unit to employees in another unit in the employer's workforce. Wages and hours associated with the transferred-out work are similarly withdrawn.
>
> In addition to these effects, diminution of unit work by transferring functions weakens the collective strength of employees in the unit and their ability to deal effectively with the employer and can affect the viability of the unit itself. Such impact affects the work hours and conditions, and thus is logically and reasonably related to specifically enumerated subjects within the scope of representation. [Rialto at pp. 6-7.]

The Board also found that the second-prong of Anaheim was satisfied because the purposes of EERA would be furthered by negotiations over decisions to transfer work. The Board noted that:

> Negotiations that allowed for the possibility of tradeoffs and concessions, as well as suggestions of alternate means of accomplishing the District's cost-reduction objectives in this case, may have provided opportunity for the interests of both the employer and the employees to be accommodated.
> (Rialto at p. 8.)

Finally, the Board found that the third prong of Anaheim was satisfied because negotiating decisions to transfer work would not unduly interfere with management's prerogatives. This is because the employer is simply moving work from one group of employees to another under its employ. (Cf. Fibreboard Paper Products Corp. v. National Labor Relations Board (1964) 379 U.S. 203, 213 [85 S.Ct. 398] (Fibreboard) (decision to replace employees with independent contractor performing the same work under similar conditions is within the scope of representation).) Such decisions do not lie "at the core of entrepreneurial control" nor would managerial freedom be abridged by having to bargain over such decisions. (Fibreboard at pp. 213, 223.) Accordingly, the Board in Rialto held that:

> The District would not have surrendered central managerial prerogatives had it negotiated with the Association before transferring work out of the unit. The decision itself was not one which is central or essential to the District's obligation to run its operation or deliver educational services. Therefore, negotiations over this matter would not have abridged the District's freedom to exercise managerial prerogatives essential to its mission.
> (Rialto at pp. 8-9.)

As a result, the Board has long held that transfer of work decisions are within the scope of representation. (Rialto; Solano County Community College District (1982) PERB Decision No. 219.)

Similar to "transfer of work" decisions, subcontracting decisions involve the literal transfer of work. However, in "subcontracting," the transfer of work is from existing employees to employees of another employer. (San Diego II at p. 1133; Beverly Hills Unified School District (1990) PERB Decision No. 789.) In contrast to "transfer of work" decisions, "subcontracting" decisions are not always within the scope of representation. (Cf. San Diego II; Lucia Mar.) This is because a decision to "subcontract" may constitute a managerial decision "at the core of entrepreneurial control" and be based upon factors not amenable to negotiation. (Fibreboard at p. 223 (concurring opinion of Justice Stewart).) However, where the decision to subcontract is related to overall enterprise costs, it is within the scope of representation regardless of whether the decision can be characterized as a decision "at the core of entrepreneurial control." (Fibreboard at pp. 213-214; Otis Elevator Company (1984) 269 NLRB 891, 900-901 [116 LRRM 1075] (Otis Elevator) (concurring opinion of Member Zimmerman).) This is because subcontracting decisions motivated by an employer's enterprise costs are "peculiarly suitable for resolution through the collective bargaining framework." (First National Maintenance Corp. v. National Labor Relations Board (1981) 452 U.S. 666, 680 [101 S.Ct. 2573].) Since the union has control over various enterprise costs, "union concessions may substantially mitigate the concerns underlying the employer's decision, thereby convincing the employer to rescind its decision." (Otis Elevator at p. 901 (concurring opinion of Member Zimmerman).) In a decision interpreting the National Labor Relations Act (NLRA), the

Supreme Court noted that although a satisfactory resolution may not be reached in a contracting out situation:

> [N]ational labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation. (Fibreboard at pp. 404-405.)

Because the Board has analyzed transfer of work decisions differently from subcontracting ones, it is important to establish initially which situation is at issue here. (See e.g., Whisman at p. 12; San Diego Community College District (1988) PERB Decision No. 662, pp. 27-29 (concurring and dissenting opinion of Member Porter) (San Diego I).) As evidenced by the facts in this case, distinguishing between the two situations is not always easy. The primary difference between the two concepts is whether the work is being transferred within the same employer or to another employer. Accordingly, the first step is to identify the employer of the academy instructors.

Determining the "Employer" of the Academy Instructors

There can be little doubt that the Agreement was drafted to prevent the academy instructors from being considered employees of the District within the meaning of EERA. The Agreement provides expressly that the academy instructors are not "academic employees" of the District and that they are not part of the Federation's bargaining unit. The Agreement further states that the academy instructors "shall be considered employees of the Sheriff." Each academy instructor was required to sign an agreement acknowledging these conditions.

Although the District intended that the academy instructors would not be considered its employees, the Board is not bound by the District's intent nor the provisions of the Agreement in determining whether the academy instructors are "employees" for purposes of EERA. (Goleta Union School District (1984) PERB Decision No. 391 at p. 16 (Goleta.) The Board is

also not bound by any acknowledgement that the academy instructors may have signed agreeing not to be considered employees of the District. (Goleta at p. 16.) The rights guaranteed to employees by EERA cannot be abrogated unilaterally by an employer through a cleverly written contract with a third party. The issue of whether the academy instructors are "employees" is an issue for the Board to decide by examining the record in light of the statutory language of EERA.

Under EERA, an "employee" is defined as "any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees." (EERA sec. 3540.1(j).) By employing circular language, the Board has held that the Legislature:

> [I]ntended the definition of 'public school employee' to be inclusive, and extend broad coverage for representation and negotiating rights for persons who perform services for, and receive compensation from, public school employers. [Goleta Union School District (1984) PERB Decision No. 391, pp. 15-16, citing Palo Alto Unified School District, et al. (1979) PERB Decision No. 84.]

Accordingly, the Board has long applied a broad definition to the term "employee" under EERA. (Goleta at p. 16, fn. 9.)

Because the definition of "employee" under EERA is circular, the Board has often relied upon traditional indicia of employment to distinguish between employees and non-employees (e.g., contractors). (Goleta at p. 17.) Under the NLRA, the test of whether an individual is an independent contractor or an employee is the common law of agency right-to-

control test. (NLRB v. United Insurance Co. (1968) 390 U.S. 254, 256 [67 LRRM 2649] .)[8] Pursuant to that test:

> Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative. [News Syndicate Co. (1967) 164 NLRB 422, 423-424 [65 LRRM 1104] (News Syndicate).]

Attempting to apply the control test in this matter is not a simple proposition. As already noted, the Agreement between the District and Sheriff contains contradictory language regarding the employment status of the academy instructors. The reason for the conflicting provisions appears to be the District's desire to obtain state FTES funds for "providing" the academy courses. Pursuant to Section 58051(a)(1), the District could only obtain the funds if the academy courses were provided "under the immediate supervision and control of an academic employee of the district." (Sec. 58051(a)(1).) Under Section 58058, an "employee of the district" may be employed by another public or private agency so long as the district maintains the "primary right to control and direct the activities of the person or persons furnished by the public or private agency." (Sec. 58058.) Thus, for the District to obtain state FTES funds, state law requires that the academy instructors be District employees or be under the primary control of the District.

[8] In Goleta, the Board noted that the NLRA definition of "employee" differs from that under EERA. Accordingly, NLRA precedent must be examined carefully to determine whether it is applicable to EERA. Although the definition of "employee" under the NLRA differs from that under EERA, the same issues often arise in both statutes - for example, differentiating between subcontractors and employees. To the extent the issues being addressed are similar, the Board may rely on appropriate NLRA precedent. (Goleta at p. 15.)

The District selected the option of maintaining the primary right of control over the academy instructors. The Agreement contains many provisions designed to ensure that the District maintains the primary right of control over the academy instructors. Under the Agreement, the District is obligated to: (1) ensure the instruction at the academy complies with District and State standards; (2) provide control and direction over academy instructors; (3) provide academy instructors with course materials; and (4) remove an instructor from a class for misconduct. In short, the District is obligated to treat the academy instructors identically to "its other instructors who teach credit courses." The District's control does not just extend to the "result," but also to the "manner and means by which the result is to be accomplished." (News Syndicate at pp. 423-424.) In other words, the District maintains more than general supervisory control over the academy instructors. Instead, the District maintains the power to dictate the performance of the academy instructors by directing their teaching, ensuring their compliance with applicable standards, evaluating their performance, and by its power to remove them from the classroom.

Thus, although the academy instructors are Sheriff's employees in many respects, the Board finds that they are also "employees" of the District within the meaning of EERA during the times they are teaching at the academy. This finding is based on the fact that both Section 58058 and the Agreement require the District to maintain the primary right of control over the academy instructors while they are teaching. Such a finding is consistent with Board precedent which has recognized the concept of "joint employers."[9]

[9] A "joint employer" situation arises "where two or more employers exert significant control over the same employees – where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment." (United Public Employees v. Public Employment Relations Bd. (1989) 213 Cal.App.3d 1119, 1128

Although the Board finds that the District and Sheriff are joint employers of the academy instructors, this finding is not dispositive in determining whether a "transfer of work" or "subcontracting" analysis should be used. This is because the distinction between transferring work within the same employer versus to another employer is blurred where "joint employers" are involved. Thus, a "joint employer" finding does not automatically render this a transfer of work situation. However, as discussed below, the Board finds that a transfer of work analysis is most appropriate given the facts in this case.

Subcontracting Decisions are Inapposite

The fact that the District and Sheriff act as "joint employers" of the academy instructors distinguishes this case from what may appear to be similar situations considered by the Board in the past. (See San Diego I (reversed in part and affirmed in part by San Diego II; Fremont Union High School District (1987) PERB Decision No. 651 (Fremont).) San Diego II and Fremont both involved contracting decisions where the district or school did not maintain control over contractors' employees. For example, in San Diego II, a community college district decided to contract out instruction of foreign language classes to a private foundation. The contract between the college and foundation provided that the district would "provide on-site class supervision, assist in teacher selection and determination of class offerings . . ." (San Diego I at p. 8.) The record in that case established that the "supervision" provided by the district was more of an "oversight function." (San Diego I at p. 33.) In contrast, the Agreement here provides that the District maintains the primary right to control academy instructors.

[262 Cal.Rptr. 158] (citing to N.L.R.B. v. Browning-Ferris Industries (3rd Cir. 1982) 691 F.2d 1117, 1124 [73 A.L.R. Fed. 597]) (United Public Employees).)

Similarly, Fremont involved a school district's decision to offer classes through a third party, the University of La Verne (La Verne). The Board in Fremont specifically found that the La Verne teachers were not under the ultimate control of the district "or that the district exercised any control whatsoever over La Verne teachers." (Fremont at p. 20.) The contract between the district and La Verne declared La Verne "solely responsible for determining and administering the educational program." (Fremont at p. 20 [emphasis in original].)

This situation is distinguishable from San Diego II and Fremont because the District here maintains the primary right to control the instructors and must do so in order to comply with the state FTES regulations. To allow the District to characterize its decision as "subcontracting" would elevate clever legal writing above reality. Any employer would be able to avoid the dictates of EERA by using "contractors," yet be able to maintain complete control over the "contractors" just like any other employee. Such as result is contrary to the purposes of EERA. Accordingly, the Board finds that a subcontracting analysis is not appropriate under the facts in this case.

Transfer of Work Analysis is Appropriate

As already revealed, the Board finds that a "transfer of work" analysis is appropriate in this case. To understand why, it is important to first distinguish between the District's decision to affiliate with the Sheriff's academy and its decision to utilize Sheriff's employees to teach academy courses. The Board does not view these decisions as contingent upon one another. It was entirely possible for the District to affiliate with the academy and designate the academy instructors as District employees. The facts show that this was the District's original intent.

The District argues that the two decisions were in fact linked because the Sheriff demanded that the academy instructors be Sheriff's "employees." There was testimony that

the District's request to designate the academy instructors as District employees would have been a "deal-breaker" for the Sheriff. However, there were conflicting reasons presented for why the Sheriff insisted on paying the academy instructors. To the Board's knowledge, there was no statute, regulation, or rule that prohibited the District from employing the academy instructors. The Sheriff simply believed that there would be more control if the instructors were Sheriff's employees.

However, the Board cannot allow the demands of a third party to turn a decision that would otherwise be negotiable into one that is not. To do so would eviscerate the concept of bargaining. An obligation to bargain does not disappear simply because a party insists that its position is firm and there is no room for negotiation. In other words, bargaining is not futile simply because the Sheriff states that the issue is a "deal-breaker." The purpose of bargaining is to test whether it really is a "deal-breaker." Perhaps there is room for negotiation; perhaps there is not. The purpose of bargaining is to find out.

In the Board's view, the Sheriff's request to the District that the academy instructors be designated Sheriff's employees is exactly the type of decision amenable to negotiations. During negotiations, it is possible that the interests of both the employer and employees may be accommodated through tradeoffs, concessions, and other alternative means. (Rialto at p. 8.) Here, the Board can easily envision the give and take of negotiations resulting in a solution for all parties. For example, if the Sheriff was concerned about being able to track the work hours of academy instructors, special control mechanisms could have been negotiated. Similar control mechanisms could have also addressed the issue of "double-dipping." Indeed, there was testimony that the District had for years offered a "Reserve Officers Academy" taught by City of Oxnard police officers. These officers were considered "employees" of the District

while teaching and included within the Federation's unit. Thus, there appears to be precedent for exactly such a result.

This is not to say that the District and Federation would have definitely been able to reach an agreement to have District instructors teach at the academy. It is entirely possible that no satisfactory solution would result from negotiations. However, as the Supreme Court found with respect to the NLRA, the Board finds that the Legislature in enacting EERA has determined that the "chances are good enough to warrant subjecting such issues to the process of collective negotiation." (Fibreboard at pp. 404-405.)

Further, even if the Sheriff's position was firm, negotiations still could have occurred. Having to negotiate over the decision does not mean the District could not have taken a firm position during bargaining. (Public Employees Assn. v. Board of Supervisors (1985) 167 Cal.App.3d 797, 805-806 [213 Cal.Rptr. 491]; Oakland Unified School District (1982) PERB Decision No. 275.) What is required is that the District enter negotiations with a good faith intent to reach agreement. (Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

The District vigorously argues that its decision to affiliate with the Sheriff's academy was a fundamental management prerogative and should not be found to be within the scope of representation. With respect to the decision to affiliate, the Board agrees. However, once affiliated, the District had to decide whether the academy instructors would be District or Sheriff employees. Unlike the decision to affiliate, this decision is not a fundamental management prerogative. It is simply a transfer of work decision which the Board has long held to be negotiable. The District's arguments to the contrary evince a fundamental misunderstanding of the bargaining obligation. The fact that a decision is within the scope of

bargaining does not mean the decision is prohibited. The Board's holding that the District's decision is negotiable simply means that the District must first negotiate the decision with the Federation in good faith. Accordingly, the Board finds that a transfer of work analysis should be applied to these specific facts.

Decisions to Transfer Work are Within the Scope of Representation

A transfer of work occurs when unit employees cease performing work which they previously performed or when nonunit employees begin performing duties previously performed exclusively by unit employees. (Eureka at p. 15.) The facts establish that the Sheriff's employees are now teaching academic courses which were previously exclusively taught by the Federation's members. Accordingly, the Board finds that the District's decision to have Sheriff's employees teach academy courses constitutes a transfer of work.

The District counters that the academy courses are different from traditional Criminal Justice courses taught by the Federation's members. The District asserts that the academy courses are highly standardized by POST, while other Criminal Justice courses may vary as much as academic freedom allows. The District misses the point. The fact that academy courses may be pedagogically different from Criminal Justice courses does not change the fact that both are "academic courses" which the District and Federation have agreed would be taught by the Federation's members. The issue is not whether they cover the exact same topics, but whether they are both academic courses.

For example, the District offers both Elementary French I and Situational Conversation in French I. The two classes appear to be taught very differently; the former class emphasizes principles of grammar, reading of prose, and simple composition, while the latter is designed to give students an opportunity to practice French in conversational settings. However, both

classes are academic courses for which students receive credit. Similarly, while academy courses may be taught differently from traditional Criminal Justice courses, it is undisputed that both are academic courses for which students receive credit. Further, it is undisputed that students have the option of taking academy courses or traditional Criminal Justice courses to satisfy various requirements. Accordingly, the District's argument that the academy courses are different from the "academic courses" taught by the Federation's members must be rejected.

The record also establishes the undisputed fact that the District's decision to transfer work to Sheriff's employees was taken without providing the Federation an opportunity to bargain over the decision itself. Accordingly, the Board holds that the District violated EERA section 3543.5(c), and derivatively 3543.5(b), by unilaterally transferring unit work to Sheriff's employees without first affording the Federation the opportunity to negotiate with the District over that decision.

REMEDY

Section 3514.5(c) of EERA provides, in pertinent part, that:

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

Pursuant to this authority, PERB has broad authority to remedy unfair practices and fashion remedies to effectuate the purposes and policies of EERA. The Federation requests as a remedy that: (1) Federation members be assigned to teach courses at the academy; (2) the provisions of the CBA between the District and Federation be applied to the academy; (3) Federation members be awarded backpay for wages that they would have earned teaching

academy courses; and (4) the Federation be awarded the agency fees it would have received from academy instructors if they were part of the unit.

In this case, the Board has found that the District unlawfully transferred unit work to Sheriff's employees without first satisfying its duty to negotiate with the Federation. As the Board held in Rialto:

> This is a serious infringement of employee rights, as it denies the exclusive representative the opportunity to present and negotiate alternatives to the District's action, and to negotiate over the effects of the transfer of work. It is generally appropriate under these circumstances to order a return to the status quo and order the District to meet and negotiate, upon request, over the decision and effect of the transfer of work, to cease and desist from taking any further unilateral actions regarding matters within scope, and to make employees whole for any compensation lost as a result of the District's unlawful conduct. [At p. 13.]

Thus, the normal remedy where an unlawful unilateral change has occurred is to order a return to the status quo ante. (See also, Santa Clara Unified School District (1979) PERB Decision No. 104.) However, like the Board in Rialto, this Board is reluctant to order a return to the status quo ante because of the possible disruption to innocent third parties. (See Lucia Mar.) The academy has been in operation for several years. Presumably, students are currently enrolled in academy courses and many others may have made plans to enroll in the academy in the future. Any order to immediately return to the status quo ante could disrupt the operation of the academy and the education of these students. The Board wishes to avoid such an outcome. Accordingly, the Board will stay its order to return to the status quo ante for 120 days.[10] During this time period, the Board expects the parties to be able to complete negotiations over the District's decision to utilize Sheriff's employees to teach academy

courses. After 120 days, the District shall be prohibited from transferring unit work at the academy to Sheriff's employees without first negotiating the decision with the Federation.

As for the Federation's first and second remedial requests, they go beyond a return to the status quo ante. The Federation's requests assume that if negotiations had occurred, the District would have agreed to use unit members to teach academy courses. The Board does not believe such an assumption is appropriate. As emphasized, the Board's decision does not prohibit a transfer of work; it holds that a transfer of work is within the scope of representation and must be negotiated.

As for the Federation's request for backpay, the record establishes that the District's instructors did not suffer any loss of wages as a result of the District's decision. Accordingly, a backpay award is not warranted at this time. However, there remains the possibility that since the hearing the District's instructors have suffered a loss in compensation directly related to the District's unfair practice. To the extent such a loss in compensation can be demonstrated, the District shall make the employees whole. The parties are ordered to meet and confer over any claims for backpay. If agreement cannot be reached, the Federation may seek compliance with this order through the Office of the General Counsel.

Finally, an award to the Federation of agency fees is also inappropriate. Again, it is improper to assume that if negotiations had occurred, the District would have agreed to use Federation members to teach academy courses. However, to the extent any Federation member is awarded backpay, the Federation shall be entitled to any dues or fees associated with the backpay amount.

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[10] The Board believes that 120 days is ample time to complete negotiations. If for some unforeseen reason it is not, the stay may be extended by the Office of the General Counsel for good cause.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Ventura County Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c) by unilaterally contracting out the instruction of certain courses.

Pursuant to EERA section 3541.5(c) it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate with the Ventura County Federation of College Teachers, Local 1828, AFL-CIO (Federation) about the decision and effects of transferring instruction of academy courses to non-Federation members.

2. Denying the Federation its rights guaranteed to it by EERA and refusing to meet and negotiate over the transfer of work.

3. Denying Federation members their right to be represented by their chosen representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Upon request from the Federation, cease allowing non-Federation members to teach academy courses. If such a request is made, this order shall be stayed for 120 days to provide the District and Federation an opportunity to meet and negotiate over the decision and effects of transferring instruction of academy courses to non-Federation members.

2. Make whole any Federation member for any loss of compensation, plus interest at the rate of seven (7) percent per annum, which they suffered as a result of the

District's transferring instruction of academy courses to non-Federation members. If any relief is awarded, the Federation shall be entitled to any dues or fees that it would have received from the Federation member(s).

3. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

4. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on Federation.

Member Whitehead joined in this Decision.

Member Neima's concurrence begins on page 34.

NEIMA, Member, concurring: I agree that the Ventura County Community College District (District) had a duty to bargain with the Ventura County Federation of College Teachers (Federation) over the decision to enter an agreement with the Ventura County Sheriff (Sheriff) to bring a modified version of the Sheriff's law enforcement academy into the District. I also agree that this case is not properly analyzed under the Public Employment Relations Board's (PERB or Board) precedent regarding subcontracting. However, I would follow a simpler path to the majority's conclusion.

At the outset, I note that the complaint in this case alleged that the District violated EERA section 3543.5(c) by failing to bargain over both the decision to affiliate the academy and the effects of that decision. I also note that the first amended charge specifically alleges that the District intended to use state full time equivalent student (FTES) funds obtained as a result of the agreement "to construct a building adjacent to or near the District offices."

As noted by the majority, supra, the collective bargaining agreement (CBA) between the District and the Federation mandated that a portion of increased FTES funds go into a general salary increase pool.[1] In apparent conflict with that provision, according to correspondence in the record, quoted supra page 9, the Sheriff and District's chancellor agreed that "FTES revenues will be used entirely to construct and maintain a state-of-the-art, regional public safety training center."

Also, as noted by the majority, under Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim), a subject is within the scope of representation if:

> (1) it is logically and reasonably related to hours, wages, or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective

[1] See page 4, footnote 2, supra.

> negotiations is the appropriate means of resolving the conflict and (3) the employer's obligation to negotiate would not significantly abridge [its] freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

Applying the first two Anaheim factors, I find the District's formation of an agreement under which it has committed funds to construction of a building which the CBA with the Federation has earmarked for salary increases for Federation members is (1) logically related to wages; and (2) is of sufficient concern to both management and employees that conflict is not only likely but actual and the mediatory influence of collective bargaining would provide the appropriate means for resolving it.

Regarding the third Anaheim prong, the District has failed to establish that its ability to exercise essential managerial prerogatives would be significantly abridged by bargaining with the Federation over formation of the agreement with the Sheriff. Several aspects of the record illustrate this point.

First, clear record evidence indicates that the District secured little, if any, managerial control over the academy instructors. Throughout the negotiations leading to formation of the agreement, the record indicates that the Sheriff consistently insisted on maintaining control of the instructors. The managerial control claimed by the District was extremely attenuated, consisting of the barest indicia of employer status, articulated only for the limited purpose of securing FTES funding from the State.

Second, the District's professed interests in forming the agreement, namely to "forge better community relations" and support the sheriff's department, bear at best a tenuous relationship to "achievement of the District's mission" which, it would appear, is the education of students. Sheriff department representatives articulated complimentary interests in forming

the agreement – saying it was designed to upgrade the professionalism of law enforcement personnel by encouraging them to get their associate's degrees. The interests articulated by the District and Sheriff witnesses, with the exception of securing FTES funding, appear to inure primarily to the Sheriff. None of the articulated interests bear more than the weakest of relationships to "achievement of the District's mission."

Third, attributing managerial control over academy instructors to the District under the facts of this case would contravene public policy. The District rests its claim of managerial control on its contention that the instructors are "employees of the District" for purposes of calculating FTES funds. Yet, on its face, the agreement between the District and the Sheriff appears to contravene California Code of Regulations, title 5, section 58051(a)(1) as authoritatively interpreted by the Department of Finance (DOF). Under DOF's interpretation of that provision, an instructor is "an employee of the District" only if the instructor is on the payroll of the District and receives a regular salary.

The District argues that the academy instructors qualify as "employees of the District" notwithstanding the foregoing. In support of this argument, the District cites only one authority, an opinion letter written by the office of the chancellor. Yet, there is no authoritative ruling indicating that the agreement would be approved by the DOF. Nor is there any indication that the Sheriff ever agreed that the District supervised the academy instructors.

Thus, the District's limited claim of entitlement to FTES funds does not appear to meet the criteria set forth in the DOF regulation that is part of the record in this case. As the District's assertion of "managerial prerogative" rests on its dubious claim that the academy instructors are "employees" for the limited purpose of entitlement to FTES funds, it has failed to demonstrate that negotiating with the union would "significantly abridge" a legitimate

managerial prerogative. Consequently, the District has failed to show why the third prong of the Anaheim test would not be satisfied in this case.

The Board should avoid finding an agreement of this type to create a legitimate managerial prerogative when it appears to be in conflict with express DOF regulations and other provisions of law.[2] Accordingly, I believe the decision to enter the agreement at issue herein passes all three prongs of the Anaheim test. Thus, I would find that the District had a duty to bargain over the decision.

As the CBA provides that the FTES funds are to be used, in part, for salary, I would find that the District's entry into an agreement to spend the FTES funds associated with the affiliation of the academy on construction of a building to be a unilateral change in a matter within the scope of bargaining, in violation of Section 3543.5(c).

Even assuming, arguendo, that the decision to form the arrangement with the Sheriff would fail the third prong of the Anaheim test and would not, therefore, be negotiable, I submit that the District was still required to negotiate with the Federation over the effects of its decision, since, on its face, the agreement between the District and Sheriff has an impact on the availability of funds for salary increases.

Based on the foregoing grounds, I concur in the Board's disposition of this case.

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[2] On a similar policy note, as observed by the majority (supra, p. 9, fn. 6), Penal Code section 832.3(c) requires that 15 percent of students in POST-certified basic law enforcement courses in the community colleges be non-law-enforcement trainees "if they are available." However, the academy curriculum requires students to attend class 60 hours per week, which would be a difficult achievement for most students already carrying an ordinary academic load and/or working in a non-law-enforcement occupation. Provisions in the District's agreement with the Sheriff ostensibly designed to comply with Penal Code section 832(c) are questionable, therefore, when examined in light of the record as a whole.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-4082-E, Ventura County Federation of College Teachers, Local 1828, AFL-CIO v. Ventura County Community College District, in which all parties had the right to participate, it has been found that the Ventura County Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c) by unilaterally contracting out the instruction of certain courses.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate with the Ventura County Federation of College Teachers, Local 1828, AFL-CIO (Federation) about the decision and effects of transferring instruction of academy courses to non-Federation members.

2. Denying the Federation its rights guaranteed to it by the EERA and refusing to meet and negotiate over the transfer of work.

3. Denying Federation members their right to be represented by their chosen representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF ERRA:

1. Upon request from the Federation, cease allowing non-Federation members to teach academy courses. If such a request is made, this order shall be stayed for 120 days to provide the District and Federation an opportunity to meet and negotiate over the decision and effects of transferring instruction of academy courses to non-Federation members.

2. Make whole any Federation member for any loss of compensation, plus interest at the rate of seven (7) percent per annum, which they suffered as a result of the District's transferring instruction of academy courses to non-Federation members. If any relief is awarded, the Federation shall be entitled to any dues or fees that it would have received from the Federation member(s).

Dated: _____

VENTURA COUNTY COMMUNITY COLLEGE DISTRICT

By: _____
Authorized Agent

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 WITH ANY OTHER MATERIAL.