

**STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

LONG BEACH COMMUNITY COLLEGE  
DISTRICT POLICE OFFICERS ASSOCIATION,

Charging Party,

v.

LONG BEACH COMMUNITY COLLEGE  
DISTRICT,

Respondent.

Case No. LA-CE-4532-E

PERB Decision No. 1568

December 18, 2003

Appearances: Lackie & Dammeier LLP by Michael A. Morguess, Attorney, for Long Beach Community College District Police Officers Association; Parker & Covert LLP by Spencer E. Covert and Barbara J. Ginsberg, Attorneys, for Long Beach 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 appeal by the Long Beach Community College District Police Officers Association (Association) of a Board agent's dismissal of its unfair practice charge. The unfair practice charge alleged that the Long Beach Community College District (District) violated section 3543.5 of the Educational Employment Relations Act (EERA)<sup>1</sup> by subcontracting all the work of the Association's unit without providing the Association an opportunity to bargain over the decision. The Board agent dismissed the unfair practice charge as untimely and on the ground that the Association had waived its right to bargain pursuant to Barstow Unified School District (1996) PERB Decision No. 1138 (Barstow). After reviewing the entire record in this

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

matter, including the unfair practice charge, the declarations, the Association's appeal, and the District's response, the Board reverses the Board agent's dismissal.

### BACKGROUND

The Association's unit consists of thirteen (13) District employees in the classifications of Safety Officer and Police Officer. The remainder of the District's Police Department is made up of the police chief, a lieutenant and two shift supervisors. The Association is an independent entity, whose only financial support comes from its thirteen members' dues.

The Association and the District are parties to a collective bargaining agreement (CBA) effective from April 25, 2000 through June 30, 2003. Article 2 of the CBA contains a management rights clause which states, in its entirety:

#### 2.1 Powers and Authority

It is understood and agreed that the District retains all of its powers and authority to direct, manage and control to the full extent of the law. Included in but not limited to those duties and powers are the exclusive right to: determine its organization; direct the work of its employees; determine the times and hours of operation; determine the kinds and levels of services to be provided, and the methods and means of providing them; establish its educational policies, goals and objectives; insure the rights and educational opportunities of students; determine staffing patterns; determine the number and kinds of personnel required; maintain the efficiency of District operations; determine the curriculum; build, move or modify facilities; establish budget procedures and determine budgetary allocation; determine the methods of raising revenue; and contract out work. In addition, the District retains the right to hire, classify, assign, transfer, evaluate, promote, demote, terminate, and discipline employees, and all other rights and privileges not expressly waived by this Agreement or requirements of the law. [Emphasis added.]

The parties apparently agree that on August 22, 2002, a meeting occurred between Vic Collins (Collins), the District's Executive Dean of Human Resources, and Derek O'Malley (O'Malley), the President of the Association. During this meeting Collins informed O'Malley

that the District was considering contracting out the District's police services to the City of Long Beach (City). Because the contracting out would eliminate all the Association's unit work, Collins explained that it was the District's goal to facilitate employment opportunities for the District's police officers with the City. Collins requested that the Association members sign limited waivers so that representatives of the City's Police Department could examine their personnel files as a precursor to potential City employment. On August 26, 2002, O'Malley sent correspondence to Collins indicating that Association members would sign the limited waivers.

On August 27, 2002, the District's Board of Trustees adopted Resolution Number 082702(F), which provides, in pertinent part:

WHEREAS, the District and Governing Board of the Long Beach Community College District have received proposals from two law enforcement agencies to provide District police and safety services;

WHEREAS, on August 5, 2002, the District received a 'letter of intent' from the City of Long Beach Police Department which provided an implementation analysis and cost estimates for providing District police and safety services;

WHEREAS, the decision to utilize the City of Long Beach Police Department to provide police and safety services for the Long Beach Community College District has ramifications under the Educational Employment Relations Act for the District and the Police Officers Association ('POA'); and

WHEREAS, current campus police and safety personnel are represented by the POA and, therefore, the possible contracting of police and safety services with City of Long Beach Police Department is a subject of negotiations with the POA.

NOW, THEREFORE, the Governing Board of the District does hereby resolve, order and determine as follows:

Section 1. Each of the above recitals is true and correct.

Section 2. The District Administration is authorized to conduct negotiations with the POA regarding the utilization of the City of Long Beach Police Department to provide police and safety services. [Emphasis added.]

On September 4, 2002, the officers of the Association sent a letter to the District's Board of Trustees stating the Association's position on the August 27 resolution. The letter states, in part:

As the resolution is only the first step in a potentially long process, and until the POA, in conjunction with our legal council, has had an opportunity to review all bids presented, our position can only remain neutral. While the POA Board, and the membership at large, are not philosophically opposed to a merger of the College Police Department with a contracted outside agency, final acceptance of any agreement by the POA membership can only be judged solely on the favorable disposition of all POA members.

The parties met on October 25, 2002. The meeting concerned not whether the District would contract out police service, but instead the District's concern that eligible District employees be hired by the City.

On October 29, 2002, the officers of the Association sent another letter to the District's Board of Trustees. The letter emphasized that while the Association was "more than willing to cooperate in any negotiations" regarding the contracting out, it had several concerns which needed to be addressed by the District.

On December 13, 2002, Michael Lackie (Lackie), the Association's attorney, wrote a letter to Barbara Ginsberg (Ginsberg), the District's attorney. In his letter, Lackie states, in part:

You have not responded to my October 29, 2002 letter by which the Long Beach Community College Police Officers Association (POA) requested to meet and confer on the District's intent to contract out police services. Please advise me immediately of the District's position.

Please be advised that the District's continuing refusal to discuss the important issue with the POA serves only to signal to our client that the contracting out issue is being handled in an underhanded fashion with the intent to avoid compliance with the law. Our client will not hesitate to invoke PERB jurisdiction as necessary to assure that the bargaining unit's rights are protected.

On December 18, 2002, Ginsberg responded in a letter stating, in part:

At our October 25<sup>th</sup> meeting, we discussed the fact that the District was willing to meet with the POA regarding the proposed contracting out of police services, but that the District was unable to effectively discuss the issues raised by the POA on October 25, 2002 until the City of Long Beach was able to complete its assessment of District personnel. [Emphasis added.]

On January 24, 2003, Ginsberg sent another letter stating that the City had completed reviewing the personnel files of the Association's members. She further stated that:

Please be advised that the District is now prepared to schedule another meeting with POA concerning the issue of contracting out police services.

After receiving no response, Ginsberg wrote another letter on February 7, 2003, iterating that:

[T]he District is prepared to meet and negotiate with POA regarding the issue of contracting out of police services.  
.....  
If it is POA's intent to waive its right to meet and negotiate regarding this issue, please advise.

On February 25, 2003, the Association responded and informed the District that it was not waiving its right to bargain over the contracting out decision. According to the Association, a meeting was then scheduled for March 31, 2003, to discuss the proposed contracting out of police services. The Association claims that when it arrived for the meeting, Collins stated that the purpose of the meeting was not to "meet and negotiate," but rather an

“informational meeting.” The District claims at the March 31, 2003, meeting, it informed the Association of its position that the decision to contract out police services was not negotiable.

On June 17, 2003, the District’s Board of Trustees and the City Council of Long Beach both approved resolutions to enter into a contract whereby the City would provide the District with police and security services effective August 1, 2003. On the same date, the Board of Trustees passed a resolution, stating in part:

Article 19.3 of the CBA relieves the District of any obligation to meet and negotiate with respect to any subject or matter whether or not referred to or covered in the CBA, and the POA expressly waived and relinquished, in that same Article, its right to meet and negotiate with respect to any subject or matter whether or not referred to or covered in the CBA. All provisions concerning layoff and the effects thereof as a result of lack of work or lack of funds have been fully negotiated and reduced to writing in Article 14 of the CBA.

This resolution will authorize the layoff of all police and safety services within the District.

On June 23, 2003, the Association filed this unfair practice charge alleging that the District failed to negotiate over its decision to contract out police services and thereby eliminate all the Association’s work. On June 24, 2003, the Association filed a request for injunctive relief to prevent the District from laying off all unit employees effective August 1, 2003. The Board denied the Association’s request for injunctive relief on July 14, 2003. The Board agent subsequently dismissed the unfair practice charge on July 25, 2003. This appeal followed.

#### BOARD AGENT’S DISMISSAL

The Board agent first examined whether the Association’s charge was timely. The Board agent focused on the District’s August resolution informing the Association of its intent to contract out police services. Concluding that the Association was aware of the District’s

firm intent to contract out police services more than six months prior to the filing of the charge, the Board agent held that the charge was untimely.

Even if the charge were timely, the Board agent held that the charge would still be dismissed because the Association had waived its right to bargain over the contracting out decision. The Board agent first acknowledged that the District's decision to contract out is negotiable. (Lucia Mar Unified School District (2001) PERB Decision No. 1440 (Lucia Mar).) However, pursuant to Barstow, the Board agent held that the Association had waived its rights by the language in the management rights clause of the CBA. Specifically, the Association had agreed that the District retained the right to "contract out work." Accordingly, the Board agent concluded that the Association had waived its right to bargain and that the District could unilaterally contract out all police services.

#### ASSOCIATION'S APPEAL

In its appeal, the Association argues that its charge is timely because it was not until June 2003, that the District expressed an unwillingness to negotiate over the contracting out decision. It was only at that point that the Association was placed on notice that the District was refusing to meet and confer in good faith. Second, the Association argues that the Board agent's reliance on Barstow is misplaced. According to the Association, Barstow cannot be applied to the present situation in which all unit work is being contracted out, thereby resulting in the elimination of the Association. Barstow must be limited to situations where only some unit work is being contracted out, argues the Association. Thus, the Association urges the Board to reverse the dismissal and to order the issuance of a complaint.

## DISTRICT'S RESPONSE

In response, the District argues that the Board agent properly dismissed the charge as untimely. The District emphasizes that the Association knew of the District's firm intent to contract out police services in August 2002. Despite this knowledge, the Association did not file the present charge until June 2003. According to the District, the Association improperly sat on its rights for over six months.

Further, the District argues that the evidence clearly establishes that the Association waived its right to bargain over the contracting out decision. The District again cites to Barstow and also to its various declarations. Those declarations attest to the District's position that the Association knowingly waived its right to bargain over contracting out decisions involving any and all unit work. Having made a clear and unambiguous waiver, the Association is now trying to renege on its agreement, argues the District.

## DISCUSSION

### Statute of Limitations

EERA section 3541.5(a)(1)<sup>2</sup> prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College

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<sup>2</sup> EERA section 3541.5(a)(1) states, in part:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:

(1) Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

District (1996) PERB Decision No. 1177.) The charging party bears the burden of demonstrating that the charge is timely filed. (Tehachapi Unified School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

In cases alleging a unilateral change, the statute of limitations begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, provided that nothing subsequent to that date evinces a wavering of that intent. (Cloverdale Unified School District (1991) PERB Decision No. 911; The Regents of the University of California (1990) PERB Decision No. 826-H (Regents).) Charging party may not rest on its rights until actual implementation occurs. (Mt. Diablo Unified School District (1994) PERB Decision No. 1034.)

The District argues that the Association had notice as early as August 2002, of its intent to contract out police services. Specifically, the District points to a resolution adopted by its Board of Trustees on August 27, 2002. The Board agrees that the District's resolution placed the Association on notice that there was a proposal to contract out police services. However, the Board disagrees that the resolution evinced an unwavering intent by the District to do so unilaterally. To the contrary, the resolution expressly states that the decision to contract out police services was only "possible." Further, the resolution acknowledged the District's obligation under EERA to meet and confer with the Association over any decision to contract out police services. Having agreed to negotiate the decision to contract out, there was no unilateral change.

Establishing that a change is being made unilaterally is critical to establishing an unfair practice. By enacting a unilateral change, a party violates EERA by "refusing to meet and

negotiate in good faith . . .” (EERA sec. 3543.5(c).) It is important to understand that EERA does not prohibit changes per se, but only changes made without providing an opportunity to meet and negotiate. Thus, where an employer notifies an exclusive representative of a proposed change in the terms and conditions of employment, no unfair practice arises until the employer refuses to meet and negotiate over the change. Where the employer agrees to meet and negotiate, there is no refusal to bargain, and hence, no unfair practice.

In this matter, the District plainly offered to negotiate with the Association over its proposal to contract out police services. Not only did it do so in the August resolution, but the District repeatedly emphasized this point for months. For example, on December 18, 2002, Ginsberg stating that the District was “willing to meet with the POA regarding the proposed contracting out of police services.” On January 24, 2003, Ginsberg wrote to the Association stating that the District was “now prepared to schedule another meeting with POA concerning the issue of contracting out police services.” On January 24, 2003, Ginsberg again wrote to the Association stating that the District was “prepared to meet and negotiate with POA regarding the issue of contracting out of police services” and that “[i]f it is POA’s intent to waive its right to meet and negotiate regarding this issue, please advise.” It was not until the District’s second resolution in June 2003 that the Association was placed on notice that the District intended to contract out police services regardless of the status of negotiations. Accordingly, the Board finds that the statute of limitations did not begin to run until June 17, 2003. The Association’s charge, filed on June 23, 2003, is therefore timely.<sup>3</sup>

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<sup>3</sup>Even if the Board accepted as true the District’s assertion that it informed the Association on March 31, 2003, that it would not negotiate the contracting decision, this charge would still be timely. However, since the Association’s material allegations must be deemed true at this stage of the proceedings, the District’s characterization of the March 31, 2003, meeting must be rejected. (Golden Plains Unified School District (2002) PERB

The District counters that the Association has known of the District's "intent" to contract out all police services since August 2002. However, as discussed above, the Association's knowledge of the District's intent to contract out, without more, does not trigger the statute of limitations. It is the Association's knowledge that the District intended to do so unilaterally that triggers the statute of limitations. While the August 2002 resolution expressed the District's desire to contract out all police services, the resolution expressly acknowledged the District's obligation to negotiate the contracting decision. Even after August 2002, the District repeatedly emphasized its willingness to bargain over the decision to contract out.<sup>4</sup> The Association was entitled to accept the District's offers on their face. It was not until June 2003, that the Association was placed on notice that the District would no longer abide by its earlier commitment to negotiate. Accordingly, the District's argument must be rejected.

Similarly, the dismissal letter's citation to PERB's decisions in Milpitas Unified School District (1997) PERB Decision No. 1234 (Milpitas) and West Valley-Mission Community College District (1995) PERB Decision No. 1113 (West Valley-Mission) are unconvincing. Milpitas involved a school district's decision to change the annual instructional calendar. The district in Milpitas never offered to negotiate with the union over the decision and steadfastly maintained that the decision was non-negotiable. In contrast, the District here agreed to negotiate its proposal with the Association and repeated that offer numerous times. By doing

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Decision No. 1489 (Golden Plains); San Juan Unified School District (1977) EERB Decision No. 12 (San Juan) (prior to Jan. 1978, PERB was known as the Educational Employment Relations Board or EERB.))

<sup>4</sup>If the Board were to accept the District's contention that it had made a firm decision to contract out police services in August 2002, the Board would also have to find that the District's subsequent offers to negotiate were tendered in complete bad faith.

so, the District gave the Association every reason to believe that the proposal was not firm and that the District would not unilaterally implement the proposal without negotiating.

West Valley-Mission involved a school district's decision to layoff employees. The union had notice of the district's decision to layoff employees, but argued the limitations period did not begin to run until the layoffs actually took effect. The Board rejected the union's argument on the grounds that a charging party may not rest on its right until actual implementation occurs. (Regents.) However, the holding in Regents only applies where a firm decision has been made and there is no subsequent wavering of intent. Here, based on the District's repeated offers to negotiate, the Association reasonably believed that no firm decision had been made. Accordingly, neither Milpitas nor West Valley-Mission are applicable on the facts of this case.

#### Unilateral Change

Having found the Association's charge timely, the Board must now consider the Association's allegation that the District violated EERA section 3543.5(c) by unilaterally contracting out all police services. In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981))

PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

There is little dispute that the Association has established these two criteria. First, the Board has held that an employer's wholesale replacement of a group of employees with contractors is subject to bargaining regardless of the employer's motivation. (Lucia Mar; cf. San Diego Adult Educators v. Public Employment Relations Bd. (1990) 223 Cal.App.3d 1124 [273 Cal.Rptr. 53] (San Diego)). It is undisputed that the District intends to contract out all police services. The District's decision will not only result in the layoff of safety and police officers, but will result in the destruction of the Association itself. Under these facts, there can be no dispute that the District's decision is within the scope of representation.

Second, the record amply demonstrates that the District implemented its contracting out decision without providing the Association an opportunity to bargain. Although the District initially offered to bargain, it retracted that offer in its June 2003 resolution. Accordingly, the Association has established its prima facie case.

Once the Association has established its prima facie case, the District may raise various affirmative defenses, including the affirmative defense of waiver. (Sonoma County Office of Education (1997) PERB Decision No. 1225; Regents of the University of California (1994) PERB Decision No. 1077-H; Beverly Hills Unified School District (1990) PERB Decision No. 789.) In this case, the District asserts that the Association waived its right to negotiate over the contracting out decision. Specifically, the District argues that the plain language of the CBA allows the District to contract out the Association's unit work at the District's discretion.

The Board has held that a union may waive its right to bargain about the contracting out of unit work by agreeing in advance that the employer may unilaterally undertake such action. (Barstow; see also, Island Creek Coal Co. (1988) 289 NLRB 851, enfd., 879 F.2d 939 (D.C. Cir. 1989); American Stores Packing Co. (1986) 277 NLRB 1656 [121 LRRM 1173].) However, such a contractual waiver will not be construed solely from a broadly based management-rights clause. (San Jacinto Unified School District (1994) PERB Decision No. 1078.) To the contrary, any waiver of a right to bargain over a negotiable contracting out decision must be “clear and unmistakable.” (Amador Valley Joint Unified School District (1978) PERB Decision No. 74 (Amador Valley); see also, Metropolitan Edison Co. v. NLRB (1983) 460 U.S. 693, 708 [103 S.Ct. 1467] (Metropolitan Edison)). The “clear and unmistakable” standard is a high one and mandated by the Board’s previous findings that there is a strong public policy against finding waivers based on inferences. (Los Angeles Community College District (1982) PERB Decision No. 252; Palo Verde Unified School District (1983) PERB Decision No. 321; see Daniel Construction Company, Inc. (1979) 239 NLRB 1335, 1336 [100 LRRM 1201].) A waiver of an exclusive representative’s right to bargain will never be lightly inferred. (Oakland Unified School District (1982) PERB Decision No. 236.) In cases where the alleged waiver is exceptional in “breadth or severity,” the “clear and unmistakable” standard must be stringently applied. (San Marcos Unified School District (2003) PERB Decision No. 1508 (San Marcos) The burden of proof for establishing an affirmative defense of waiver rests exclusively with the District. (Placentia Unified School District (1986) PERB Decision No. 595.)

It is also important at this time to discuss how the burdens of proof discussed above intersect with the pleading requirements for issuance of a complaint. When a charge is first

filed, it is the duty of the Board agent to investigate whether the charge and evidence support a prima facie case. (PERB Reg. 32620(b)(5).<sup>5</sup>) In making this determination, the Board agent must accept all of the charging party's material allegations as true. (Golden Plains; San Juan.) In most instances, once the Board agent determines that the charging party has established a prima facie case, a complaint will be issued. This is true regardless of whether the respondent has proffered an affirmative defense. The exception to this rule is where an affirmative defense involves a question of law or the application of law to undisputed facts. It is appropriate for the Board agent to make a determination regarding an affirmative defense in these situations, since they do not involve factual disputes or credibility determinations. Where a respondent can establish an affirmative defense as a matter of law, the charge must be dismissed even when the charging party has otherwise established a prima facie case.

In this matter, the District asserts that the Association waived its right to negotiate over the decision to contract out police services. As the language of the contract is undisputed, the application of law to facts presents a question of law. Thus, the issue before the Board is whether the language of the CBA establishes a clear and unmistakable waiver as a matter of law.

#### Clear and Unmistakable Waiver

Applying the standards discussed above to the present case, the Board finds that the District has not established a clear and unmistakable waiver as a matter of law. The District's assertion of waiver rests solely on the language of section 2.1 of the CBA. Section 2.1 appears to be a broiler-plate management rights clause, with an introductory sentence that states:

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<sup>5</sup>PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

It is understood and agreed that the District retains all of its powers and authority to direct, manage and control to the full extent of the law. [Emphasis added.]

It is axiomatic that, “it is not possible to ‘retain’ something you do not otherwise have” in a management rights clause. (Los Angeles Unified School District (2002) PERB Decision No. 1501.) Here, there is no evidence that the District previously had the right to contract out all police services without bargaining. It logically follows that they could not “retain” such a right. Thus, at first blush, section 2.1 appears to do nothing more than merely affirm that the District has not ceded any traditional management rights.

This interpretation is supported by the fundamental precept of contract interpretation that a contract provision must be interpreted as a whole and harmonized with the other clauses or sections in which it appears. (Riverside Community College District (1992) PERB Order No. Ad-229 (Riverside); Victor Valley Community College District (1986) PERB Decision No. 570 (Victor Valley)). The second sentence of section 2.1 provides examples of the power and authority retained by the District. That list includes fourteen separate items. Significantly, there would be little dispute that the first thirteen enumerated items are all functions traditionally reserved for management. Items such as determining the curriculum and building facilities are matters firmly within management’s prerogative.

The same cannot be said as to all forms of contracting out. Some contracting out decisions are within the scope of representation and some are not. However, since the first thirteen items listed in section 2.1 all involve non-negotiable subjects of bargaining, it would be incongruent to interpret the phrase “contract out work” as a far reaching waiver of the Association’s fundamental statutory rights – indeed, the bargaining unit’s very right to exist. Instead, the most reasonable interpretation of the phrase “contract out work” in section 2.1 is

that it only refers to contracting decisions that have traditionally not been within the scope of representation. Such decisions are thus a management right. (See, e.g., San Diego; First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705].)

Thus, when section 2.1 is considered as a whole, it is not at all clear that the phrase “contract out work” refers to all contracting out decisions, especially those that are within the scope of representation. At the very least, there is some ambiguity as to which contracting out decisions are encompassed by section 2.1. In the presence of such ambiguity, the Board finds that the District has not established a clear and unmistakable waiver as a matter of law.

The Board’s holding is consistent with both public and private sector decisions regarding waivers of fundamental rights. Recently, the Board held in San Marcos that a general prohibition on “picketing” in a collective bargaining agreement did not extend to non-disruptive informational picketing. Even though the phrase “picketing,” when read in isolation, was broad and all-encompassing, the Board held that the term must be interpreted in conjunction with the other terms accompanying it. (San Marcos at p. 43.) Finding that “substantial, reasonable disagreement” existed over the reach of the term “picketing,” the Board concluded that there was not a clear and unmistakable waiver of the right to engage in non-disruptive informational picketing. (Id.)

Similarly, under the National Labor Relations Act (NLRA), it has been held that a general no-strike clause in a CBA will not be interpreted to extend to sympathy strikes.

(Children’s Hospital of Northern California v. CNA (9<sup>th</sup> Cir. 2002) 283 F.3d 1188, 1192 [169 LRRM 2779] (Children’s Hospital)). In Children’s Hospital, the court held that:

A general no-strike clause that does not specify whether sympathy strikes are included or excluded does not, simply by virtue of its incorporation in a collective bargaining agreement, constitute such a clear and unmistakable waiver. The rationale

for applying the “clear and unmistakable” standard to waivers of strike rights is this: if a union is negotiating away employees' rights that are fundamental to the collective bargaining process, any proposed contract must unambiguously put those employees on notice of the waiver.  
(Children’s Hospital at p. 1192, citation omitted.)

Thus, both San Marcos and Children’s Hospital support the Board’s holding here that the general phrase “contract out work” should not be interpreted as a waiver of the Association’s right to negotiate as to all forms of contracting out.

#### Extrinsic Evidence

The District has submitted several declarations as extrinsic evidence that the Association knew that it was waiving its right to negotiate over all contracting out decisions. Extrinsic evidence of a mutual waiver may certainly aid in the interpretation of section 2.1. However, the Association has disputed the District’s evidence. Indeed, the Association adamantly denies that it waived its right to negotiate over all contracting out decisions. Where a factual dispute exists, the Board must accept the charging party’s allegations at this stage. Accordingly, the Board cannot rely on the District’s declarations at this stage. Instead, the District must present its evidence before the Board agent.

#### Barstow Unified School District

Finally, the Board is aware that its decision in this case appears to be in conflict with the holding in Barstow. Barstow involved a school district’s decision to contract out transportation services. The district refused to negotiate its decision on the grounds that the California School Employees Association (CSEA) had waived its right to bargain in the CBA. Employing similar language to the CBA at issue here, the contract in Barstow stated:

- 4.1 It is understood and agreed that the District retain [sic.] all of its powers and authority to direct, manage and control to the full extent of the law. Included in but not limited to

those duties and powers are the exclusive right to: determine its organization; . . . determine the kinds and levels of services to be provided, and the methods and means of providing them; maintain the efficiency of District operations; contract out work, which may be contracted for . . . .  
(Barstow at p. 6; emphasis added.)

In considering whether the phrase “contract out work” constituted a clear and unmistakable waiver, the Board in Barstow rejected CSEA’s argument that the contract language was too broad and non-specific to support the district’s interpretation. Emphasizing the need to adhere to the “plain language” of the CBA, the Board in Barstow held that:

[T]he language of the contract is clear and explicit in giving the District the right to make the decision to contract out transportation services; and that the language in question constitutes a clear and unmistakable waiver by CSEA of the right to negotiate over the subject of that decision.  
(At p. 14.)

However, by focusing exclusively on the phrase “contract out work,” Barstow failed to adequately adhere to another fundamental rule of contract interpretation: that each phrase must be read in conjunction with the phrases surrounding it and harmonized as a whole. (Riverside; Victor Valley; see also, San Marcos at p. 43 (applying canon of noscitur a sociis – “it is known from its associates”).) As already discussed, the phrase “contract out work” can have a broad meaning when read in isolation. However, it is exactly because Barstow analyzed the phrase in isolation that the Board must overrule the Barstow decision.

In addition, the holding in Barstow was based on the assumption that not giving the phrase “contract out work” a broad interpretation would render the phrase meaningless and ineffective, and thus violate another principle of contract interpretation. (See City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1998) 68 Cal.App.4<sup>th</sup> 445, 473 [80 Cal.Rptr.2d 329].) However, Barstow failed to recognize that contracting out arises in

many different situations. Some of these contracting out situations have been traditionally held to be within management's prerogative while others have been held to be within the scope of representation. When read in conjunction with the thirteen other enumerated items in section 2.1 of the CBA, the phrase "contract out work" is best interpreted to refer only to those contracting out situations that have traditionally been held to be within management's prerogative. The Board's interpretation harmonizes the phrase "contract out work" with the other items in section 2.1. Contrary to Barstow, such an interpretation does not render the phrase surplusage, but rather seeks to give it its intended meaning.

Finally, the Board's rejection of Barstow furthers important public policy. The fundamental purpose of EERA is to "promote the improvement of personnel management and employer-employee relations." (EERA sec. 3540.) EERA achieves this goal by granting employees the right to organize and by requiring collective negotiations. (EERA sec. 3543.) Experience under the NLRA, upon which EERA was modeled, has shown that collective bargaining is a highly effective means of peacefully resolving conflicting workplace issues. (Fibreboard Paper Products Corp. v. National Labor Relations Board (1964) 379 U.S. 203, 214 [85 S.Ct. 398].) Thus, the Board must be ever mindful of the strong public policy in California favoring collective bargaining. (See Social Services Union v. Alameda County Training & Employment Bd. (1989) 207 Cal.App.3d 1458, 1465 [255 Cal.Rptr. 746].)

To protect the fundamental right to collective bargaining, the Board has long required that any waiver of the right to bargain be "clear and unmistakable." (Amador Valley; see also, Metropolitan Edison.) Generally, a "clear and unmistakable" waiver is one that is readily apparent to any lay person. Such a stringent standard is necessary not only to protect the rights of the parties, but also to promote the public interest in having disputes resolved through

collective bargaining. To hold otherwise would allow the inadvertent waiver of fundamental rights by those who are unrepresented or unsophisticated. Here, it cannot be said that a layperson reading the phrase “contract out work” in the context of section 2.1 would have understood the phrase to cede to management the right to contract out all the work of the Association, thereby causing the destruction of the bargaining unit itself.

Accordingly, the Board holds that the District has not established a clear and unmistakable waiver as a matter of law. To the extent Barstow is in conflict, it is overruled. The Board remands this case to the General Counsel’s Office for issuance of a complaint consistent with this decision. Although the District has not established a clear and unmistakable waiver as a matter of law, it may still raise its defense of waiver before the administrative law judge. The burden to establish a waiver at the hearing falls squarely on the District.

Education Code Section 88003.1

Finally, the Association argues that Education Code section 88003.1 prohibits the District’s contracting out of police services. However, as the District points out, the CBA does not contain the limiting language, “which may lawfully be contracted for,” that was present in Barstow. Thus, even if it could be shown that the District violated Education Code section 88003.1, there would be no violation of the contract that would constitute an unlawful unilateral change. Since PERB does not have independent jurisdiction to enforce the provisions of the Education Code, the contentions regarding the Education Code do not aid the Association.

ORDER

The Board REVERSES the Board agent's dismissal in Case No. LA-CE-4532-E and REMANDS this case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Members Whitehead and Neima joined in this Decision.