

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

CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION,

Charging Party,

v.

LUCIA MAR UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4194-E

PERB Decision No. 1640

June 14, 2004

Appearances: Arnie Braafladt, Labor Relations Representative, for California School Employees Association; Girard & Vinson by Christian M. Keiner, Attorney, for Lucia Mar Unified School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Lucia Mar Unified School District (District) to a Board agent's proposed decision (attached). The charge alleged that the District violated the Educational Employment Relations Act (EERA)<sup>1</sup> by unilaterally contracting out transportation services to Student Transportation of America (STA), which were previously performed by unit members represented by the California State Employees Association (CSEA) in violation of EERA. In Lucia Mar Unified School District (2001) PERB Decision No. 1440 (Lucia Mar I), the Board upheld an administrative law judge's finding of unilateral change and ordered the District to:

1. Upon demand from CSEA, restore all bargaining unit transportation services positions at the earliest opportunity it can terminate the existing contract with the contractor. (Emphasis added.)

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<sup>1</sup>EERA is codified at Government Code section 3540, et seq.

2. Make all affected employees whole for any loss of wages or benefits due to the District's violation of the Act, including interest at 7 percent per annum.

In March 2003, the Board began compliance proceedings and facilitated several informal settlement discussions. These proved unsuccessful due to the District's alleged inability to terminate the contract with STA. In July 2003, a hearing was held to determine whether the District availed itself of its earliest opportunity to terminate the existing contract with STA whether such an opportunity arose when the District learned of the March 1, 2000 suspension of STA's corporate status or based upon various alleged contract violations by STA.

On June 4, 2004, the Board received a letter from the District stating that the parties have agreed to a deadline of July 30, 2004. The District further states that it wishes to withdraw its exceptions except for the requested change in date to the Board agent's proposed order.

Upon review of the entire record, the Board adopts the Board agent's decision as a decision of the Board itself but accepts the parties' agreement as a modification of the proposed remedy, as discussed below.

#### DISCUSSION

Lucia Mar I was issued in May 2001. In that decision, the Board in pertinent part, ordered the District to:

Upon demand from CSEA, restore all bargaining unit transportation services positions at the earliest opportunity it can terminate the existing contract with the contractor. [Id., at p. 4, emphasis added.]

The Board notes that the District has avoided compliance with the Board's order in Lucia Mar I for an extended time. In three years, the District has failed to comply with this order and has ignored a lawful opportunity to terminate the contract.

In its response, CSEA agreed to a modified order setting the date for termination of the contract to the day after the last day of summer school, which happens to fall on July 30, 2004, the agreed-upon deadline in the District's June 4, 2004 letter. This date would avoid the problem with disrupting busing services during the middle of summer school and still allow the District a few weeks to hire staff before the beginning of the 2004-2005 school year. We believe that CSEA has been more than accommodating to the District on this point and find it in the parties' best interest to resolve this dispute once and for all by accepting the agreed July 30, 2004 deadline.

#### ORDER

It is hereby ORDERED that the Lucia Mar Unified School District comply with the Order in Lucia Mar Unified School District (2001) PERB Decision No. 1440 by terminating the contract with Student Transportation of America no later than July 30, 2004.

Chairman Duncan and Member Neima joined in this Decision.

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION,

Charging Party,

v.

LUCIA MAR UNIFIED SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE CASE  
NO. LA-CE-4194-E

PROPOSED DECISION  
(4/13/04)

Appearances: Arnie R. Braafladt, Attorney, for California School Employees Association;  
Girard & Vinson by Christian M. Keiner, Attorney, for Lucia Mar Unified School District.

Before , .

BACKGROUND

On May 24, 2001, the Public Employment Relations Board (PERB or Board) issued Decision No. 1440 in the above-referenced unfair practice case. The Board upheld an administrative law judge's (ALJ) finding that the Lucia Mar Unified School District (District) had violated the Educational Employment Relations Act (EERA or Act) when it unilaterally contracted out the District's transportation services to Student Transportation of America (STA), an independent contractor. Transportation services were previously performed by District employees represented by the California School Employees Association (CSEA), the charging party in this matter. The Board's decision ordered the District to:

1. Upon demand from CSEA, restore all bargaining unit transportation services positions at the earliest opportunity it can terminate the existing contract with the contractor.
2. Make all affected employees whole for any loss of wages or benefits due to the District's violation of the Act, including interest at 7 percent per annum.

A Petition for Writ of Review filed by the District was denied by the Court of Appeal on January 9, 2003, and by the California Supreme Court on February 27, 2003. Compliance proceedings with the Board's order were undertaken by the San Francisco Regional Director on March 1, 2003.

The regional director conducted at least six informal settlement conferences beginning in July 2002, and ending in January 2003, in an attempt to resolve the issues raised by the Order. Most of these efforts centered on the restoration of bargaining unit positions and make whole issues. However, the District also approached STA with at least two different proposals designed to terminate their 2000-2005 contract. STA rejected one offer in a letter dated January 23, 2003. Responding to another District proposal, STA wrote in a letter dated February 3, 2003, that it would prefer to perform the services under the contract through its term, but "if forced to confront unilateral termination of its contract by the District," it would expect to be compensated \$400,000 if the contract were to be terminated effective July 1, 2003. This amount represented the loss of profit to STA for the remaining two years of the contract. Although it considered the offer reasonable, the District rejected it because of projected budgets cuts of \$1.2 million for each of the 2002-2003 and 2003-2004 school years and the fact that it had reduced its reserves to the statutory limit.<sup>1</sup>

Since settlement efforts proved unsuccessful, a hearing was scheduled for July 8 and 9, 2003. The amended notice of hearing issued on June 30, 2003, limited the scope of the hearing to whether the District:

availed itself of its earliest opportunity to terminate the existing contract with STA . . . including, but not limited to, whether such

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<sup>1</sup> A total of \$2.4 million was cut from the District's budgets for 2002-2003 and 2003-2004.

an opportunity arose when the District learned of the March 1, 2000, suspension of STA's corporate status.<sup>2</sup>

The hearing was held as scheduled, briefs were filed and the case was submitted for decision on September 16, 2003.

## FINDINGS OF FACT

### I. Suspension of STA's Corporate Status

In a letter dated November 19, 2002, CSEA informed District's counsel that STA's corporate status had been forfeited since March 1, 2000,<sup>3</sup> for noncompliance with a Franchise Tax Board requirement. CSEA urged the District to immediately terminate the District-STA contract because "it appears that STA may no longer legally engage in business in California."

Upon receipt of CSEA's letter on November 22, 2002, Deputy Superintendent for Business Mike Sears<sup>4</sup> communicated this information to STA Vice President for West Coast Operations Ray Delegarde. Delegarde was unaware of the situation and stated that he would investigate the matter with STA headquarters immediately. Sears then contacted the Franchise Tax Board, which confirmed CSEA's information. Delegarde informed Sears later that day that the forfeiture was likely due to a clerical error stemming from STA's purchase of Santa Barbara Transportation, and that the error would be rectified as soon as possible.

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<sup>2</sup> CSEA filed suit on March 17, 2003, in San Luis Obispo County Superior Court challenging the legal validity of the District-STA contract. In a second amended complaint filed on May 30, 2003, CSEA limited its challenge to the question of whether the contract should be declared void because its term exceeds the five-year limitation set forth in Education Code §39803(a) by several days. On February 3, 2004, the Court issued its decision changing the expiration date of the five year contract between STA and the District from July 31 to July 24, 2005, thereby declaring it a valid contract.

<sup>3</sup> This date preceded the execution of the contract between the District and STA by two weeks.

<sup>4</sup> Sears served as deputy superintendent of business from the end of July 2000 until he became Superintendent on July 1, 2003.

In a letter to Sears dated November 25, 2002, STA President K.B. Needler referred to the suspension of corporate status as a “technical glitch.” Needler explained that:

. . . Student Transportation of America, Inc. is our Corporate holding Company with Santa Barbara Transportation Corporation being our Subsidiary Company doing business only in California. We have in fact filed all of our tax returns covering all of our California assets, revenues and profits under the Subsidiary Company, Santa Barbara Transportation Corporation. There are no tax returns due nor are any tax payments in arrears for our Operations in California.

Unfortunately, both our internal and external accounting and tax personnel failed to file the returns required for Student Transportation of America, Inc. All of the returns would and will be filed as “Nil Returns” with the minimum [sic] tax liability attached to them. There will be some penalty and interest payment required upon our filing.

Ernst & Young, our Auditors are currently completing the required returns and should have them completed by the end of this week. Subject to the timing of the tax system, we will then be returned to “Good Standing.”

No further action was taken by the District, and STA’s corporate status was revived as of January 24, 2003. In a letter dated June 18, 2003, responding to an inquiry from CSEA, the Franchise Tax Board stated that STA still owed \$336.92 in tax, penalties and interest.

## II. Contract Violations

CSEA called as witnesses three bus drivers who formerly worked for the District and are currently employed by STA: Sharon Harwin, Patricia Vanderlinden and Cheryl Robinson. They all testified regarding alleged contract violations by STA.<sup>5</sup>

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<sup>5</sup> CSEA argues that the following sections of the STA contract have been violated:

26. . . . Buses shall be cleaned inside and out as necessary, and repairs to visible body damage, inside or out, shall be made immediately after such damage occurs.

32. No “Parking Out” of vehicles without prior permission of the DISTRICT.

Harwin testified that at a safety meeting in March 2002 an STA representative stated that the company had a 74 percent driver turnover. Harwin stated that STA was short 15 drivers and one dispatcher at that time, and at the time of the hearing was still short 15 drivers. She stated that vacant positions are filled with approximately six borrowed drivers and by combining routes (having one driver drive more than one route). This practice took place in May 2002 and was continued at the time of the hearing. Vanderlinden also testified regarding the high turnover rate at STA, stating that STA continues to be short on drivers and provides no substitute or stand-by drivers. She stated that STA borrowed eight or nine bus drivers from its operations in Santa Maria and Santa Barbara during the 2002-2003 school year. Robinson testified that she had to drive on one occasion when she was ill because there was no substitute available.

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35. Each CONTRACTOR employee in service to the DISTRICT shall be required to wear an identification badge supplied by the CONTRACTOR.

37. A. All drivers employed by the CONTRACTOR to provide service to the DISTRICT must have and maintain a valid Commercial Driver's License and School Bus Drivers Certificate.

37. C. When driving school buses in service of the DISTRICT, all drivers shall be well groomed and shall wear the uniform provided by the Contractor . . . .

45. It is expected that bus service is to be provided on an on time basis. For purposes of assessing damages, routes are considered late when arriving at designated destinations fifteen (15) minutes or more after the scheduled time, posted on the route sheet.

51. . . . Personnel such as dispatchers and management staff members shall not drive school buses except in cases of emergency. . . .

60. I. All school buses which transport district students shall not be parked at any other location or facility . . .

According to Harwin, the dispatcher drove almost daily from approximately July 2000 until April 2003, and has driven four or five times since then. Robinson confirmed this, stating that the dispatcher also drove in the summer of 2003.

Regarding the late arrival of buses, Harwin testified that she was late 50 – 60 percent of the time when arriving at Dana School, because she drove combined routes almost every day. Vanderlinden also testified that buses are late almost daily.

Debbie Wright was employed as a District bus driver until July 1, 2000, and now works as a campus supervisor at Arroyo Grande High School. She testified regarding the chronic late arrival of buses in the morning, as evidenced by records compiled from tardy slips she issued to students. She stated that late buses create a safety hazard because students waiting are sometimes involved in fights and may be injured by approaching buses.<sup>6</sup>

Both Harwin and Robinson testified about body damage to buses that was not repaired, such as dents, scratches, torn seats, and broken windows. This damage occurred as a result of a variety of incidents, some of which date back to the 2000-2001 school year.

“Parking out” is a term used to describe the private use of buses for personal reasons. Harwin and Robinson both testified that as many as six District buses were being parked out at the STA yard in Santa Maria overnight and used for commuting by drivers living there and working at the Arroyo Grande (District) yard.<sup>7</sup> Harwin and Robinson also both stated that they have often seen a District bus parked near a local restaurant during the driver’s lunchtime. In addition, both drivers testified that they were aware of District buses being used for non-District bus runs.

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<sup>6</sup> No example of such an incident was given.

<sup>7</sup> Santa Maria is located in Santa Barbara County, just south of the District’s southern border. STA maintains a service center in Santa Maria and one in Arroyo Grande, which is located on the District’s former bus yard.

Harwin, Vanderlinden and Robinson all testified that at least two or three drivers were driving District students without the proper certification at various times. They also stated that not all drivers wear badges and uniforms.

These concerns were brought to Sears' attention by a member of the Board of Trustees and by CSEA President Edi Kajas in May 2003. Kajas sent him two documents written by Robinson regarding her observations of what she believed to be STA contract violations. The first document is one handwritten page that appears to describe several occurrences of District buses driving runs in Santa Maria. The second document consists of five typewritten pages describing approximately 16 incidents dating from September through October 2002 and approximately 15 incidents dating from February to early May 2003. These incidents include minor accidents resulting in damage to the buses, drivers driving without proper certification, drivers not wearing uniforms and badges, and buses being driven on runs in Santa Maria.

Sears investigated the allegations in the documents initially by speaking to Delegarde, STA employee Paula Sauvadon and the managers of STA's Arroyo Grande and Santa Maria operations. STA subsequently provided a written response to the allegations. Sears also sent his transportation secretary to STA to review and retrieve documents from files relating to the incidents, such as mileage and damage reports. He also visited STA to discuss the allegations with the manager and review records.

Sears' review of STA operations was not limited to the allegations raised by CSEA. He testified that the District has closely monitored STA operations since July 2000, and that the current deputy superintendent for business, Diane Larsen, has been responsible for this oversight since she was hired in April 2003.

Sears testified that his investigation found some of CSEA's allegations to be true and others to be unsubstantiated. He determined that it was true that some drivers were not

wearing badges and/or uniforms. Sears also found some buses with minor damage that had not been repaired, but “found nothing that would jeopardize the safety of the students.” He stated that minor accidents are common in large transportation operations. Sears directed STA to make sure the drivers wore badges and to repair the buses as quickly as they could.

Sears spoke with school principals in Santa Maria-Bonita School District and the director of transportation in Orcutt School District regarding the allegations that buses were being used for runs in other districts. They denied that Lucia Mar buses were being used by their districts.

Sears was informed by STA that there are several reasons for District buses being observed in Santa Maria. First, District buses transport students on field trips and to athletic events in the area. Second, buses are used to train District drivers who live in the area. Third, a District bus picks up a homeless student who lives near Santa Maria. Fourth, some District buses are “parked out” in Santa Maria for District drivers who live there and drive a nearby District route, thus avoiding unnecessary trips to Arroyo Grande. Finally, buses are occasionally used to come to the aid of buses from other Districts that are having mechanical trouble. Sears was satisfied with these explanations and did not believe these occurrences to be problematic.

Sears testified that employing a sufficient number of bus drivers has always been difficult for the District, and that he believes STA has access to more drivers than did the District prior to July 2000. He attributed problems with timeliness to the bare minimum number of buses owned by the District due to lack of funding.

In June 2003, Larsen investigated STA’s school bus accident rate in the District compared to the statewide rate. She determined that STA had one accident above the state average, not what she considered a significant difference. Sears noted that the annual

California Highway Patrol (CHP) report issued on September 25, 2000, found that the condition of the District's school buses was unsatisfactory. Since that time the CHP reports have been satisfactory, including the most recent one which was issued in March 2003.

### ISSUES

1. Did the District have a reasonable opportunity to terminate its contract with STA when it learned of the forfeiture of STA's corporate status in California?
2. Did the District have a reasonable opportunity to terminate its contract with STA based on various allegations of contract violations on the part of STA?

### DISCUSSION

In its exceptions to the remedy in the underlying ALJ decision, CSEA specifically requested that the Board order rescission of the District's contract with STA. The Board declined to do so, stating, in pertinent part:

Another important goal is to compel the District to restore the status quo ante as soon as reasonably possible. That does not necessarily mean that the Board must order rescission of the STA contract, however. In a case involving transportation of public school students, to order abrupt rescission of the District's contract with a third party is almost certain to result in some disruption in services. Furthermore, there is no reason to presume that the District will unreasonably delay terminating the STA contract, since, after issuance of the Decision, there will be a strong financial incentive for the District to take prompt steps to terminate its contractual relationship with STA. . . . [Lucia Mar Unified School District, supra, PERB Decision No. 1440; emphasis added.)

The assumption emphasized above has proven inaccurate. In fact, subsequent to the issuance of the Board's decision, the District determined that its dire financial situation made it unable to terminate the contract through a voluntary buyout agreement with STA. Thus, the anticipated prompt termination of the contract has yet to take place.

## I. Suspension of STA's Corporate Status

Under the California Revenue and Taxation Code (CRTC), a corporation's powers, rights and privileges may be forfeited for failure to pay franchise taxes on time as well as failure to file a franchise tax return, even if no tax is due.<sup>8</sup> During the suspension, the corporation is disqualified from exercising any rights, powers or privileges, such as entering into contracts with outside entities.<sup>9</sup>

CRTC §23304.1(a) provides in pertinent part:

Every contract made in this state by a taxpayer during the time that the taxpayer's corporate powers, rights, and privileges are suspended or forfeited . . . shall, subject to §23304.5, be voidable at the instance of any party to the contract other than the taxpayer.

CRTC §23304.5 provides:

A party that has the right to declare a contract to be voidable pursuant to §23304.1 may exercise that right only in a lawsuit brought by either party with respect to the contract in a court of competent jurisdiction and the rights of the parties to the contract shall not be affected by §23304.1 except to the extent expressly provided by a final judgment of the court, which judgment shall not be issued unless the taxpayer is allowed a reasonable opportunity to cure the voidability under §23305.1. If the court finds that the contract is voidable under §23304.1, the court shall order the contract to be rescinded. However, in no event shall the court order rescission of a taxpayer's contract unless the taxpayer receives full restitution of the benefits provided by the taxpayer under the contract.

It is undisputed that STA's corporate status was forfeited as of March 1, 2000. This fact was discovered by CSEA's counsel, who made it known to the District in November 2002. CSEA first asserts that the District was negligent in that it had an obligation to be aware of STA's corporate status. It then argues that the District missed an opportunity to terminate the

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<sup>8</sup> CRTC §23301.

<sup>9</sup> CRTC §23301.

contract with STA when it failed to file a lawsuit seeking to void the contract pursuant to CRTS §23304. Instead, the District informed STA of the suspension, and, once it received assurances that STA intended to revive its corporate status, took no further action.

CSEA points out that even after STA’s corporate status was revived, the contract was still subject to voidability.<sup>10</sup> In order to obtain relief from voidability, STA was required to

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<sup>10</sup>§23305.1 provides the taxpayer, i.e., STA, an opportunity for relief from the voidability provisions of 23304.1, provided they do the following:

- (1) Provide the Franchise Tax Board with an application for relief from contract voidability in a form and manner prescribed by the Franchise Tax Board.
  - (2) Include on the application the period for which relief is requested in accordance with subdivision (b).
  - (3) File any tax returns required to be filed under this part with the Franchise Tax Board, including returns for the period for which relief is requested.
  - (4) Pay any tax, additions to tax, penalties, interest, and any other amounts owing to the Franchise Tax Board, including any liability attributable to the period for which relief is requested.
  - (5) Pay any penalty imposed under subdivision (b) for the period for which relief is requested.
- .....
- (b)(1) Except as provided in paragraph (2) both of the following shall apply:
- (A) The period for which relief is requested shall begin on the date that one of the taxpayer’s taxable years begins and ends on the date relief is granted.
  - (B) The Franchise Tax Board shall assess a daily penalty equal to one hundred dollars (\$100) for each day of the period for which relief from voidability is granted, but not to exceed a total penalty equal to the amount of the tax for the period for which relief is requested.
- (2) If an application for relief from voidability is filed for a period in which an application for revivor has been filed and the

apply for such relief in accordance with the applicable provisions of the CTRC, which at the time of the hearing had not been done.

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certificate of revivor has been issued, all of the following shall apply:

(A) The period for which relief is requested shall begin on the date the taxpayer's powers, rights, and privileges had been suspended or forfeited and ends on the date relief is granted.

(B) The Franchise Tax Board shall assess a daily penalty equal to one hundred dollars (\$100) for each day of the period for which relief from voidability is granted, but not to exceed a total penalty equal to that amount of the tax that would be imposed under Section 23151 and, except as provided in subparagraph (C), that penalty shall be equal to no less than the amount of the minimum tax provided under Section 23153 for the period for which relief is requested.

.....  
(3) Any penalty imposed under this subdivision shall, subject to section 23305.2, be due and payable on demand by the Franchise Tax Board.

(c)(1) Upon satisfaction of the conditions specified in subdivision (a), . . . the following shall apply:

(A) All contracts entered into during the period for which relief is granted that have not been rescinded by a final court order pursuant to Section 23304.5 may be enforced in the same manner and to the same extent, with regard to both the parties to the contract and any third parties, as if the contract had never been voidable.

(2) Upon being granted relief from voidability, the Franchise Tax Board shall certify that relief to the taxpayer in a form and manner as prescribed by the Franchise Tax Board. The certificate shall be issued or mailed to the taxpayer, or as directed by the taxpayer, and shall indicate the period for which relief is granted.

(d) The fact that a certificate of relief from voidability was issued pursuant to this section and the information contained on that certificate shall be subject to public disclosure. The certificate shall be prima facie evidence of the relief from voidability for contracts entered into during the period of relief stated on the certificate and the certificate may be recorded in the office of the county recorder of an county of this state.

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As stated above, the Board ordered the District to terminate the STA contract at its earliest opportunity. Such an opportunity arose in late November 2002, upon notification of the forfeiture of STA's corporate status, when the District could have filed a lawsuit to void the contract. However, rather than instigate litigation, the District informed STA of the situation and, upon assurances that the forfeiture of its corporate status was due to a "technical glitch" that would be remedied, took no further action. The District decided to follow this course of action, in part to avoid incurring litigation costs, despite the fact that the certificate of reviver did not, by itself, shield STA from voidability of its contract. STA would still have been required to obtain a certificate of relief from voidability and pay any additional taxes and penalties, which it had not done at the time of the hearing.

Thus, the District ignored a lawful opportunity to pursue termination of its contract with STA, as required by the PERB Order. For these reasons, it is found that the District is in noncompliance with the Board's Order and must terminate the STA contract.

## II. Contract Violations

The agreement between STA and the District discusses termination in two sections. Section 12 provides, in pertinent part:

If the CONTRACTOR refuses or fails to perform services as required to provide the DISTRICT with efficient, safe and economical transportation services, or any separable part thereof, including furnishing adequate equipment and properly trained personnel, . . . or if the CONTRACTOR should repeatedly or persistently refuse or fail to provide equipment and personnel in quantities required to provide transportation services as herein specified, . . . or is otherwise guilty of a material violation of this Agreement, then the DISTRICT may, without prejudice to any other right or remedy, serve written notification upon the CONTRACTOR of intention to terminate this Agreement. Such notice shall contain the reasons for such intention to terminate and unless within thirty (30) days after service of such notice the condition or violation shall cease and satisfactory arrangements for the correction thereof be made, this Agreement shall upon the

expiration of the (30) days cease and terminate. [Emphasis added.]

Section 13 of the Agreement provides:

The CONTRACTOR shall be considered in default and the Agreement subject to termination if:

- A. The CONTRACTOR furnishes or uses a bus which does not conform to requirements of the Agreement;
- B. The CONTRACTOR fails to comply with the requirements of the Agreement;
- C. The CONTRACTOR fails to adhere to bus schedules;
- D. The CONTRACTOR fails in any way to perform properly the work to be done under the Agreement with the DISTRICT.

A “material violation” refers to the doctrine of material breach of contract as defined in Black’s Law Dictionary (Seventh Edition, 1999) as:

A substantial breach of contract , usu.[sic] excusing the aggrieved party from further performance and affording it the right to sue for damages.

“In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.” Restatement (Second) of Contracts §241 (1981).

The District argues that it investigated all of the allegations presented at the hearing by CSEA and, applying the principles outlined above, determined that those alleged contractual violations were either unsubstantiated, immaterial or addressed. The record reflects that Sears’ investigation was thorough and conducted in good faith. This is not to say that the observations of the CSEA witnesses were without merit. However, regarding some matters

such as the proper certifications of bus drivers, the testimony of the CSEA witnesses was vague, and must be discredited in light of the more informed testimony of Sears. As far as the allegations regarding “parking out”, Sears’ acceptance of the rationale put forth by STA must be credited in light of his experience with the management of transportation services. The other incidents of contract violations are minor, and Sears consistently gave STA notice of such violations, receiving assurances that they would be remedied. In sum, STA has substantially performed the services which it contracted to provide, and the District, therefore, has had no opportunity to terminate the contract for reasons of material breach.

#### CONCLUSION AND ORDER

Based on the foregoing, it is determined that the District avoided an opportunity to terminate its contract with STA when it chose not to pursue voiding the contract upon notice of the forfeiture of STA’s corporate status. For these reasons, it is found that the District is in noncompliance with the Order in PERB Decision No. 1440 and must terminate the STA contract no later than June 30, 2004.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board  
Attention: Appeals Assistant  
1031 18th Street  
Sacramento, CA 95814-4174  
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

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Jerilyn Gelt  
Labor Relations Specialist