STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HILMAR UNIFIED TEACHERS ASSOCIATION, Charging Party, v. HILMAR UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2140-E PERB Decision No. 1725 December 15, 2004

Appearances: California Teachers Association by Ballinger G. Kemp, Attorney, for Hilmar Unified Teachers Association; Atkinson, Andelson, Loya, Ruud & Romo by Marleen L. Sacks, Attorney, for Hilmar 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 Hilmar Unified School District (District) of an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge alleged that the District violated the Educational Employment Relations Act (EERA)[1] by engaging in unlawful conduct during the statutory impasse procedure. The Hilmar Unified Teachers Association (Association) alleged that this conduct constituted a violation of EERA section 3543.5(a), (b) and (c).

The Board has reviewed the entire record in this matter, including the unfair practice charge, the complaint, the parties' pre-hearing briefs, the ALJ's proposed decision, the

[1]EERA is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

District's exceptions and the Association's response to the District's exceptions. In light of the Board's review, we affirm in part and reverse in part the ALJ's proposed decision.

BACKGROUND

At the time of the events at issue, the parties were participating in the statutory impasse procedure.

June 5 Mediation Session

In February 2002,[2] the Association and the District began contract negotiations, which quickly led to deadlock. The first mediation session occurred on May 1. Soon after that first session, around mid-May, District Superintendent David Miller (Miller) and Association Representative Rolf Tallberg (Tallberg) discussed dates for additional sessions. The time ultimately picked was the morning of June 5. Notwithstanding that selection, Miller expressed some concerns about that date because it was the day of the middle school graduation ceremony with high school graduation occurring the next day. Miller was busy with related duties on those days. Miller further testified that he told Tallberg that he was concerned about possible picketing by teachers during the mediation session when students, their relatives and others would be present for graduation. The middle and high schools were located next to the District office where the mediation sessions took place. Miller stated at the hearing that Tallberg indicated agreement to this condition but Tallberg testified that he did not recall discussing Miller's concern regarding concerted activity at this time. Tallberg thought that the first time he discussed it with a District official was on June 3.

Before June 5, the Association distributed a flyer that stated:

[2]Unless noted otherwise, all dates refer to 2002.

> Very Important! All staff members join the Hilmar Teachers United for Settlement in front of the District Office Wed. June 5 [at] 7:30 – 7:59 am and 3:15 – 3:45 pm[3] Join the teachers as we stand together in support of reaching an agreement at negotiations.

Tallberg testified that the flyer was to allow the teachers to meet so that the Association could provide information about the status of negotiations. When Miller saw the flyer, he contacted District Chief Negotiator and Counsel Chesley Quaide (Quaide) to discuss his previous conversation with Tallberg and convey his concerns about picketing during graduation ceremonies. On June 3 or 4, Tallberg and Quaide spoke by telephone. During that call, Quaide told Tallberg that the June 5 date was acceptable to the District if there was no concerted activity. Tallberg thought of concerted activity as "some kind of rally, picketing, organized kind of protest activity, or informational activity by the Association."[4] Tallberg responded that he knew of no plans for such activity "so that was fine with me." Tallberg further explained that the teachers were to meet before and after the session to receive information from the Association regarding the status of negotiations. The two debated whether concerted activity in front of the District office on June 5 was an unfair practice and agreed to disagree.

Tallberg talked to Miller later that day and Miller reiterated his concern about disruption during graduation. Tallberg contacted Association President Katey Clark (Clark) and advised her that the teachers not meet on the afternoon of June 5.

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[3]Tallberg testified that he did not think that he actually saw the flyer until sometime after the mediation session.

[4]Tallberg also testified that he believed that his and Quaide's understanding of the definition of concerted activity may be totally different. Tallberg stated that he would not characterize the gatherings before and after the mediation sessions as concerted activity but as an opportunity to pass information along to the members.

The mediation session occurred on June 5. The teachers met at the District office in the morning before the session to receive a status update on negotiations. Also, Clark distributed a flyer to Association members, which stated the following:

> As you are aware, we had planned to meet this afternoon in support of our bargaining team. Prior to setting our mediation, Dr. Miller told the Association that he did not want any activities to take place which might impact the graduation this evening. He stated that if any such activities took place, the District would not meet. He apparently feels that if we meet outside the District offices this afternoon, that will cause a disruption.
>
> In an effort to keep the mediation process moving, we agreed not to hold any organizing activities this afternoon. However, we urge everyone to show their support for the bargaining team individually and let them know you are behind them.

The teachers followed Tallberg's advice and did not meet in the afternoon.

Meetings with the Self Insured Schools of California

During the 2002 negotiations, the District offered the Association new plan options for health benefits. The District was offering the same options to its classified employees, who were not represented; and so Miller scheduled an informational meeting with classified staff and a representative of the Self Insured Schools of California (SISC), the District's health insurance administrator, but did not schedule such a meeting for certificated employees represented by the Association. Instead, Miller invited newly elected Association President Joyce Mitchell (Mitchell) and other Association representatives as a "courtesy." Although classified employees could ask questions at any time during the meeting, Miller told Mitchell that Association representatives would be restricted to holding their questions to the end of the meeting, to prevent overwhelming the classified employees.

It is unclear whether Association representatives attended this meeting but if they did, did not ask questions. Rather, the Association scheduled its own meeting with SISC

Representative John Stenerson (Stenerson). Before the meeting, Miller told Mitchell that Stenerson complained of "numerous phone calls" from the Association, about being placed in the middle between the District and the Association, and of questions that were primarily concerning negotiations. Miller asked Mitchell to work through the District on health plan-related issues. He suggested that the two contact Anna Marie Bettencourt, the District's health plan specialist. Mitchell responded that Miller was interfering with her right to contact SISC to obtain information about the health plans. Nonetheless, Mitchell invited Miller to attend the meeting with Stenerson. Mitchell testified that Miller responded angrily, "very harsh and intimidating." Miller stated to Mitchell, "What did I tell you?"

Mitchell claims that she only called Stenerson 4 or 5 times without incident and that the calls only occurred after her conversation with Miller. While other Association representatives may have called Stenerson earlier, none of these were identified in the record. Stenerson did not testify at the hearing. The Association inquiries to SISC were related to negotiations, as the Association and the District were negotiating a significant change in the health benefit program and the Association has a duty to ensure that its members are informed regarding the change and its impact.

Tentative Agreement

By the end of August, mediation was unsuccessful and the parties began factfinding. The health benefit program was still on the table. SISC offered three plans. The District offered two plans and to pay the $72 per month copayment that employees previously had to pay. The parties eventually achieved a tentative agreement on two of the plans but other issues precluded a complete agreement. After the tentative agreement, the Association put the health benefits issue to a vote before agreement on the entire contract. The Association devised a

two-part ballot asking: (1) if the members wanted to separate the tentative agreement on health benefits from the rest of negotiations, and (2) which of the two options they preferred.

On September 12, before the employees voted, Miller sent out the following memo:

> As you are probably aware, the leadership of H.U.T.A. has approved the removal of the $72.00 per month x 10 that each certificated employee has been contributing to our Health Plan since September 2000 (this brings the insurance cap to $8,296.20). The District will pick up this cost beginning with everyone's October paycheck.
>
> Also, the leadership has informed me that they have selected PB Option 1-B and PB Option 2-C as the two Plans for you to choose from. The two choices are included with this letter. Please stop by the District Office to inform Anna Marie Bettencourt and/or Mary Martins before September 30th which Plan you have selected. They will also answer questions that you might have.

Miller distributed this memo because accounting requirements dictated that the District begin implementation of the plans in September if the teachers were to receive the benefit of the eliminated copayment in October. Upon receiving the memo, teachers expressed concerns about the options, which were communicated to Miller and Mitchell.

Miller's memo was in accord with the parties' intent to begin implementation of the health plan. Quaide testified that Association Representative Jim Schlotz (Schlotz) had agreed to take "preliminary steps" to implement the health plan tentative agreement and "hold off on final action till we got word of ratification." Quaide communicated to Miller his agreement with Schlotz. Although Mitchell states that she was unaware of the verbal arrangement between Quaide and Schlotz, Schlotz did not testify at the hearing.

Around September 16, Mitchell told Miller that the tentative agreement had not been ratified. Miller immediately stopped implementation of the program. By September 27, not having learned whether the tentative agreement had been ratified, Miller sent Mitchell a memo that stated, in pertinent part:

> The purpose of this memorandum is to inquire as to whether this Tentative Agreement has been put to a ratification vote by the unit, and if so, what were the results of this vote? It has been over three weeks since this Tentative Agreement was signed off, and the District has not heard any reports of any subsequent ratification vote.

In the memo, Miller further asked Mitchell to answer him by 4:00 p.m. Mitchell responded late that day that the teachers had ratified the tentative agreement on September 24, adopting the original health plan and one additional plan. However, the parties never reached agreement on the overall contract and the District imposed certain terms on the unit at the end of impasse.

ALJ'S PROPOSED DECISION

The ALJ evaluated the following issues: (1) whether Miller's statements that the District would participate in the June 5 mediation only if the Association agreed not to engage in concerted activity tend to interfere with protected rights; (2) whether Miller's statements that Mitchell not contact the District's health insurance administrator tend to interfere with protected rights under EERA; and (3) whether Miller bypassed the Association in communicating with employees regarding health benefits and/or unilaterally implement changes in health benefit plans, in violation of its duty to participate in the impasse procedure under EERA.

Miller's Statements Concerning June 5 Mediation and Contacting SISC Directly

The ALJ found Miller's statements concerning the June 5 mediation to violate protected rights. The ALJ evaluated the facts under the test set forth in Rio Hondo Community College District (1980) PERB Decision No. 128 (Rio Hondo I) and its progeny. The Board has held that non-disruptive informational picketing is protected conduct and that the employer has a duty to participate in the mediation process in good faith. Therefore, conditioning

participation in a mediation session on waiver of a statutory right is unlawful under EERA. The ALJ further opined that the District may not threaten to interfere with or delay the statutory impasse procedure based on a concern that employees might exercise their right to participate in lawful concerted activities organized by the Association even if the District does not follow through on its threat. (Rio Hondo Community College District (1983) PERB Decision No. 292 (Rio Hondo II).) Thus, while the District has no duty to agree to a specific date for mediation, it may not condition its participation on waiver of a statutory right. According to the ALJ, this is what occurred here. The testimony of Tallberg, Miller and Quaide all corroborate the District's position that it would not mediate on that date if the Association picketed the mediation session.

The ALJ disagreed with the District's position that these statements merely comprised a bargaining proposal. In the cases cited by the District (Modesto City Schools (1983) PERB Decision No. 291 (Modesto); Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista)), negotiations over waiver of statutory rights occurred in the context of a negotiation setting. In this case, Miller and Quaide's statements did not occur in the context of negotiations and so they could not be construed as a mere proposal. Rather, the parties were setting dates for mediation. The District's stance was essentially if the Association pickets, it would not meet on June 5. As stated by the ALJ, "this is hardly the kind of proposal the Board found lawful in Modesto." In the interest of moving negotiations forward because of the important issues remaining on the table, Tallberg agreed. Therefore, Miller's statements caused the Association to forfeit its right to informational picketing or meeting related to negotiations, a protected right, and thus interfered with protected rights.

Similarly, the ALJ found that the District interfered with protected rights in Miller's statements to Mitchell that she not contact SISC directly. When Mitchell invited Miller to the

meeting she scheduled with SISC, he responded, "What did I tell you?" The District concedes that Miller was perturbed because Mitchell acted against Miller's wishes. The ALJ found the facts similar to those in Oakdale Union Elementary School District (1998) PERB Decision No. 1246 (Oakdale), in which the union president complained to a district's workers' compensation insurance carrier regarding the administration of the parties' collective bargaining agreement as an extension of earlier attempts to resolve safety issues. In Oakdale, the Board had found the employee's conduct to be protected. Here, Mitchell was president of the Association, the parties were negotiating new plans for employee health benefits, and Mitchell had questions for the health plan administrator. The Association needed the information in order to bargain intelligently and had a duty to ensure that the membership was informed of the changes in the new plans under consideration. Thus, Mitchell had a protected right to contact SISC for such information. (See e.g., Stockton Unified School District (1980) PERB Decision No. 143 (Stockton).) The ALJ did not credit Miller's testimony that Stenerson complained to him since the testimony was uncorroborated hearsay, while Mitchell testified that she never contacted Stenerson until after Miller forbid her from doing so.

Bypassing the Association and Unilateral Implementation of Health Benefits

The ALJ found that there was no support for the Association's allegation that the District bypassed the Association and unilaterally implemented the health benefits. Under the law, the employer may not directly communicate with employees to undermine the union's exclusive authority to represent its members. The employer also violates the duty to bargain by bypassing the exclusive representative to negotiate directly with employees over matters within the scope of representation. However, once a policy is lawfully established, the employer may take steps to implement the policy, including consulting with employees. (Walnut Valley Unified School District (1981) PERB Decision No. 160.) Quaide and Schlotz

reached a verbal agreement that allowed the District to take preliminary steps to implement the health benefit plans that were tentatively agreed to by the parties. Under this verbal agreement, final implementation would not occur until ratification of the policy by the teachers. Therefore, Miller's September 12 memo cannot be construed as an attempt to bypass the Association. The memo conformed to the tentative agreement, contained no inaccurate information, and clearly stated that the benefit plans were the result of negotiations. Furthermore, the preliminary steps in the memo benefited the teachers but not the District. Although some teachers expressed concern about the memo, the ALJ found that the concern was arguably caused by the Association's delay in holding the ratification vote.

The ALJ also found that the District also did not unilaterally change health benefits. The September 12 memo itself did not constitute a change. Once Mitchell told Miller that the tentative agreement had not been ratified, Miller stopped implementation of the plans. Even if the September 12 memo did initiate implementation of the plan, Miller stopped as soon as Mitchell contacted him. (Moreno Valley Unified School District (1982) PERB Decision No. 206 (Moreno Valley).) In either event, the ALJ concluded that the District did not violate the duty to bargain.

As remedies, the ALJ ordered the District to cease and desist from interfering with protected rights in violation of EERA section 3543.5(a) and (b) and to post a notice incorporating the terms of the order.

DISCUSSION

As no exceptions were taken to the bypass and unilateral change issues, these issues will not be addressed. As a result, the Board adopts the ALJ's findings of facts and conclusions of law for these issues.

The District excepts to the ALJ's findings of interference in violation of EERA. The test for whether an employer has interfered with the rights of employees under the EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. [State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.]

Under the above-described test, a violation may only be found if EERA provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

In this case, the ALJ found that the District interfered with the Association's protected right to engaged in protected concerted activities on June 5 and with the Association's protected right to request information directly from SISC, the District's health plan administrator. In the first situation, Miller and Quaide clearly threatened to cancel the mediation session scheduled for June 5 if the Association proceeded with its informational meeting. The Board has long held that a public school employer is "entitled to express its views on employment related matter over which it has legitimate concerns in order to facilitate full and knowledgeable debate." (Rio Hondo I, p. 19.) Further,

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

The Board utilizes an objective test and requires the charging party to demonstrate that an employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights, and the fact that the employees may interpret statements, which are otherwise protected, as coercive does not necessarily render those statements unlawful. (Regents of the University of California (1983) PERB Decision No. 366-H.) The employer's statements are viewed in their overall context to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No. 659.) Miller indicated two reasons that June 5 was a difficult date. The first reason involved Miller's busy schedule of duties during graduation and the resulting limited time to participate in mediation. The second reason pertained to Miller's expressed concern to Tallberg that he did not "really want concerted picketing, or marching around, or people in front of the District office when we have parents or grandparents, and the people coming in for graduation." Miller also testified that he would have insisted on a day other than June 5 if Tallberg had stated that the Association would picket the mediation session. Quaide communicated Miller's latter concern on June 4 to Tallberg when he stated that Miller would participate in the mediation on June 5 only if there were no concerted activities on that date.[5] Whether there was an agreement in mid-May not to engage in concerted activities is not certain and the ALJ did not make any finding on this issue.

Conduct, such as non-disruptive informational picketing is protected under EERA. (San Marcos Unified School District (2003) PERB Decision No. 1508 (San Marcos).) Further, the District has a duty to participate in the mediation process in good faith. (Moreno Valley

[5]We find insufficient evidence of an agreement by the Association weeks earlier to forego concerted activities in order to schedule the June 5 mediation session. We therefore reject the District's waiver argument.

Unified School District (1982) PERB Decision No. 206.) The Board has long disapproved threats to suspend statutorily mandated rights. In Rio Hondo II, the Board held that the employer's emergency resolution to suspend various employee organization rights if the employee organization encourages its members to engage in a work stoppage interfered with the rights of employees under EERA. The Board explained:

> A threat to punitively suspend statutory rights tends to undermine the status of the exclusive representative and has a chilling effect on employee activity. This is so because an employer's threat is backed by the considerable power that an employer holds over an employee.

However, statutorily protected rights, "such as the right to engage in non-disruptive informational picketing, can be divested, by employees or their exclusive representative, through a 'clear and unmistakable waiver.'" (San Marcos, p. 28, citations omitted.) Such a waiver will not be lightly inferred particularly when the waiver of a statutory right is involved. (Fresno Unified School District (1982) PERB Decision No. 208, p. 16, citing Amador Valley Joint Union High School District (1978) PERB Decision No. 74 and Timken Roller Bearing v. NLRB (6th Cir. 1963) 325 F.2d 746 [54 LRRM 2785].)

In this case, regarding Tallberg's discussion with Miller in mid-May to schedule the second mediation session, Miller testified that he indicated two concerns to Tallberg about the June 5 date: (1) Miller's busy schedule during graduation week, and (2) Miller's concern that picketing would disrupt graduation ceremonies that day. Miller further testified that Tallberg agreed that the Association would not engage in concerted activity in order to mediate on the June 5 date. Tallberg does not dispute that he made this agreement; rather, he states that he does not recall making the agreement.

However, during conversations with Quaide and Miller on June 3, Tallberg testified that he was unaware of any planned concerted activity and that an agreement that the

Association would not engage in such activity was fine with him in order to proceed with the mediation session on June 5. Miller called him later that day and reiterated his concern that picketing would cause disruption during graduation. The middle school was located adjacent to the District offices, where the mediation session took place. The planned informational meetings were to occur outside the District offices. Tallberg, as an Association representative and negotiator, had authority to commit the Association to waive its right to engage in concerted activity. The Association does not argue otherwise. In testimony, Tallberg notes that he and Miller may have had different understandings as to what "concerted activity" and "picketing" entail. However, Tallberg, with his understanding of those terms, requested Association President Clark to cancel the information meeting that was scheduled for the afternoon of June 5, after the mediation session. It is important to note that the Association still held its morning informational session for teachers on June 5 and there is no evidence that the District tried to prevent such activities from occurring on dates other than June 5, during graduation. Under these circumstances, we find that the Association clearly and unmistakably waived its right to host an informational meeting after the mediation session on June 5.

In the second situation, Miller attempted to bar Mitchell from obtaining health plan facts from the direct source, the health plan administrator by making inquiries instead through District officials. The parties were engaged in negotiations for a new collective bargaining agreement over health benefits and were discussing significant changes from the current plan. It is long-established "that an exclusive representative is entitled to information sufficient to enable it to understand and intelligently discharge its duty to represent bargaining unit members." (Chula Vista, at p. 50.) The Association has a duty to ensure that the unit members were informed of the changes in the new health plans under consideration. (Stockton,

pp. 14-15, in which health cost data is presumed relevant absent showing that its provision would be unduly burdensome.) Mitchell was merely attempting to obtain information on behalf of the members independent of the employer.

We further agree with the ALJ that the facts in this case parallel those in Oakdale. In Oakdale, the collective bargaining agreement provided that employees shall report unsafe working conditions to their supervisor. The union president complied with the collective bargaining agreement by consistently reporting unsafe issues to the principal. When a safety inspector from the district's worker's compensation insurance carrier approached her station, the union president provided the inspector with a list of various unsafe conditions at the school. As a result, the district issued the union president a memorandum that she was to report all safety issues directly to the principal and that this memo would be placed in her file. The Board found that the union president's report to the safety inspector was consistent with the parties' collective bargaining agreement and was an extension of her attempts to resolve these issues through discussions between the union and the district. As a result, the Board found these activities to comprise participation in the activities of an employee organization and thus protected under EERA section 3543. Similarly, Mitchell, the Association president, was attempting to obtain health plan information from SISC, the health plan administrator, in order to be informed of health plan options at the negotiating table and for explanation of options under consideration to members. This was part and parcel of her duties as an Association representative at the bargaining table and fulfillment of her duty to intelligently represent her members in negotiating the health benefit package. We thus find that Miller's statements to ban Mitchell from obtaining this information tend to interfere with Mitchell's rights to represent unit employees and with the right of employee's to Mitchell's representation.

In Carlsbad, the Board set forth a test for interference balancing the harm to employees with the interests of the employer. Where the harm is inherently destructive, the employer must show the inference was caused by circumstances beyond its control. (Carlsbad, at pp. 10-11.) Where the harm is slight, the Board will entertain a defense of operational necessity and then balance the competing interests. (Id.) Even assuming the harm to employees was slight, the District has not provided evidence of operational necessity. Miller testified that his reason for precluding Mitchell from directly contacting SISC involved alleged numerous complaints from Stenerson regarding calls from the Association over negotiations-related questions. Miller's testimony constituted uncorroborated hearsay and correctly was not credited by the ALJ. Under PERB Regulation 32176:[6]

> Compliance with the technical rules of evidence applied in the courts shall not be required. Oral evidence shall be taken only on oath or affirmation. Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. Immaterial, irrelevant, or unduly repetitious evidence may be excluded. The rules of privilege shall apply. Evidence of any discussion of the case that occurs in an informal settlement conference shall be inadmissible in accordance with Evidence Code Section 1152.
> (Emphasis added.)

The hearsay statement is the only evidence provided by the District to support its rationale impeding the Association's right to obtain information and thus under Section 32176, is insufficient to support a finding of operational necessity. The District did not profer any other evidence of operational necessity. In contrast, Mitchell testified that she called Stenerson four or five times but only after Miller directed her not to contact him. Thus, there is no evidence to support the veracity of Miller's comments.

[6]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

We conclude, under the objective test stated above, that Miller's statements to Mitchell not to contact SISC directly tend to interfere with a reasonable employee's exercise of protected rights.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that Hilmar Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b). The District violated the EERA when its agent David Miller informed the president of Hilmar Unified Teachers Association (Association), Joyce Mitchell, that he did not want her to directly contact the District health benefits administrator for information relating to health benefit plans that were then under negotiation.

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. Making statements that tend to interfere with the right of employees to form, join and participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations by attempting to prevent the Association from directly inquiring about healthcare benefits from the District's health plan administrator.

2. Making statements that tend to interfere with the right of the Association to represent its members in all employment relations matters by attempting to prevent the Association from directly inquiring about healthcare benefits from the District's health plan administrator.

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

1. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

It is further Ordered that the proposed decision in Case No. SA-CE-2140-E is hereby AFFIRMED IN PART AND REVERSED IN PART.

Chairman Duncan and Member Neima joined in this Decision.

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. SA-CE-2140-E, Hilmar Unified Teachers Association v. Hilmar Unified School District, in which all parties had the right to participate, it has been found that the Hilmar Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b). The District violated the EERA when its agent David Miller informed the president of Hilmar Unified Teachers Association (Association), Joyce Mitchell, that he did not want her to directly contact the District health benefits administrator for information relating to health benefit plans that were then under negotiation.

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

CEASE AND DESIST FROM:

1. Making statements that tend to interfere with the right of employees to form, join and participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations by attempting to prevent the Association from directly inquiring about healthcare benefits from the District's health plan administrator.

2. Making statements that tend to interfere with the right of the Association to represent its members in all employment relations matters by attempting to prevent the Association from directly inquiring about healthcare benefits from the District's health plan administrator.

Dated: _____ HILMAR UNIFIED SCHOOL 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.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

HILMAR UNIFIED TEACHERS ASSOCIATION, Charging Party, v. HILMAR UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-2140-E PROPOSED DECISION (1/14/04)

Appearances: California Teachers Association by Ballinger Kemp, Attorney, for Hilmar Unified Teachers Association; Atkinson, Andelson, Loya, Rudd and Romo by Marleen Sacks, Attorney, for Hilmar Unified School District.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

The Hilmar Unified Teachers Association (HUTA) initiated this action on December 4, 2002, by filing an unfair practice charge against the Hilmar Unified School District (District). The general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on January 10, 2003.

The complaint contains three allegations of unlawful conduct by the District during the statutory impasse procedure. First, the complaint alleges that the District's superintendent unlawfully told a HUTA representative that he would cancel an upcoming mediation session unless HUTA agreed not to conduct an informational meeting with teachers regarding the status of negotiations. Second, the complaint alleges that the District's superintendent unlawfully told the HUTA president not to contact the District's health insurance administrator directly for information related to health benefits, and to make all such contacts through the District. Third, the complaint alleges that the District unlawfully bypassed HUTA and

communicated with bargaining unit employees regarding health benefits then under negotiation, and followed with a unilateral implementation of health benefit plans prior to union ratification of a tentative agreement covering such plans. It is alleged that these actions violated the Educational Employment Relations Act (EERA or Act) section 3543.5(a), (b) and (e).[1]

The District answered the complaint on January 17, 2003, generally denying all allegations and asserting a number of affirmative defenses. Denials and defenses will be addressed below, as necessary.

A settlement conference was conducted by a PERB agent on February 11, 2003, but the matter was not resolved. The undersigned conducted a formal hearing in Sacramento on August 21, 2003. With the receipt of the final brief on October 20, 2003, the case was submitted for decision.

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[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code. In relevant part, section 3543.5 states:

> It is unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> . . . . . .
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

FINDINGS OF FACT

Jurisdiction

The District is a public school employer as defined in section 3540.1(k) of the EERA. HUTA is an employee organization as defined in section 3540.1(d). At all relevant times, HUTA was the exclusive representative, as defined in section 3540.1(d), of an appropriate unit of the District's certificated employees. At the time of the events in question here, the parties were participating in the statutory impasse procedure.

The June 5 Mediation Session

Beginning in February 2002, HUTA and the District began contract negotiations and quickly reached a deadlock.[2] In late March, PERB certified the parties were at impasse and a mediation session was held on May 1. However, the parties did not reach agreement.

Sometime after the first mediation session, District Superintendent David Miller and California Teachers Association field representative Rolf Tallberg discussed dates for additional sessions. One possible date was June 5. Miller testified that he informed Tallberg that June 5 was a problem for two reasons. First, it was the day of the middle school graduation ceremony, and the high school graduation ceremony would follow the next day, June 6. Miller typically is busy on graduation days with duties related to these events, and the time he had available for mediation would be limited. Although Miller is the superintendent, he also is a member of the District's bargaining team. Second, Miller testified, he informed Tallberg that he "really didn't want concerted picketing, or marching around, or people in front of the District office when we have parents or grandparents, and the people coming in for

[2] Unless otherwise noted, all dates refer to 2002.

graduation."[3] Miller was concerned about disruption because the middle and high schools are located next to the District office.

Miller and Tallberg agreed to conduct the mediation session in the morning and Tallberg said there would be no concerted action. At the time, Tallberg was aware of no planned activity. The parties then set June 5 as the next mediation date. Miller further testified that if Tallberg had indicated HUTA would picket the mediation session, he (Miller) would have picked another day.

Sometime before June 5, HUTA distributed a flyer that stated: "Very Important! All staff members join the Hilmar Teachers United for Settlement in front of the District Office Wed. June 5 [at] 7:30 – 7:59 a.m. and 3:15 – 3:45 p.m. Join the teachers as we stand together in support of reaching an agreement at negotiations." The purpose of the flyer, Tallberg testified, was to give teachers the opportunity to meet so that HUTA could distribute information about the status of negotiations to its members. The mediator had imposed no gag rule on the negotiations.

Miller saw the flyer in the teachers' lounge and interpreted it as evidence that HUTA would conduct some form of concerted activity in connection with the mediation session. Miller was concerned that such activity would disrupt the graduation ceremony, even though the middle school ceremony was scheduled for 7:00 p.m. On June 4, Miller contacted District negotiator and counsel Chesley Quaide to inform him of the prior conversation with Tallberg. According to Quaide, Miller said that Tallberg earlier had agreed "that they wouldn't be picketing," and he asked Quaide to look into the matter. Quaide also testified that Miller was

[3] HUTA had organized some activity around the first mediation session, and there is a dispute in the record about the specific conduct and whether it was disruptive. It is unnecessary to resolve that dispute in this proceeding.

willing to go forward with mediation on June 5 if he had assurances that there would be no picketing. Two relevant conversations followed.

In a conversation on or about June 4, Tallberg testified, Quaide informed him that "the June 5th date would be acceptable to the District, provided that there was no concerted activity that would take place around the mediation session." This is essentially the directive Miller had given to Quaide earlier, according to Quaide's testimony. Tallberg responded that he was aware of no concerted activity planned for the next day, so he agreed with Quaide's condition. Tallberg testified that he agreed there would be no concerted activity the next day because he knew of no plans to conduct such activity. The flyer described above had announced only that HUTA would distribute information about the negotiations. During the conversation, Tallberg explained to Quaide that the teachers are "just going to meet in front of the school and find out what's going on, and go to class. And they're going to meet afterward to find out what happened, and go home." Quaide and Tallberg debated whether the District's insistence that HUTA not picket or engage in other concerted activity in front of the District office on June 5 was an unfair practice, and they agreed to disagree.

Tallberg had another conversation with Miller the same day. He said he could tell that Miller was upset by the tone of his voice, and he (Miller) reiterated his concern that the graduation ceremony would be disrupted, despite the fact that HUTA had scheduled the afternoon meeting for 3:45 and the graduation ceremony was set for 7:00 p.m. After the conversation, Tallberg contacted HUTA President Katey Clark and described the District's concerns. Tallberg testified: "I advised [HUTA] that, given the situation and given the desire for the Association to move forward with the mediation, that the teachers not meet in the afternoon on June 5th."

The mediation session on June 5 lasted from 9:00 a.m. to approximately 11:30 a.m. The teachers met at the District office prior to the session and information about the status of negotiations was distributed. Also on June 5, Clark distributed the following memo to HUTA members.

> As you are aware, we had planned to meet this afternoon in support of our bargaining team. Prior to setting our mediation, Dr. Miller told the Association that he did not want any activities to take place which might impact the graduation this evening. He stated that if any such activities took place, the District would not meet. He apparently feels that if we meet outside the District offices this afternoon, that will cause a disruption.
>
> In an effort to keep the mediation process moving, we agreed not to hold any organizing activities this afternoon. However, we urge every one to show their support for the bargaining team individually and let them know you are behind them.

In accord with Tallberg's advice, the teachers did not meet in the afternoon to receive information about the morning mediation session.

Meetings with the Self Insured Schools of California

During the 2002 negotiations, the subject of health benefits was on the table and the District had offered HUTA new plan options. Because the District also was offering the same options to its classified employees, Miller scheduled an informational meeting for members of the classified staff and a representative of the Self Insured Schools of California (SISC), the District's health insurance administrator. The classified employees of the District are not represented by an exclusive representative.

The District did not schedule an informational meeting for certificated employees represented by HUTA. Instead, Miller invited newly elected HUTA President Joyce Mitchell and other HUTA representatives to the classified meeting as a "courtesy." He told Mitchell that HUTA representatives would be required to hold their questions to the end of the meeting,

but they would be permitted to ask any questions at that time. Miller wanted the classified employees to have the opportunity to ask questions about the health plans without interference. He testified that classified employees are sometimes overwhelmed by certificated employees, and he wanted to avoid that during the meeting.

It is not clear that any HUTA representatives attended the meeting with the classified employees, but if they did no questions were asked. Instead, HUTA scheduled its own meeting with SISC representative John Stenerson. Prior to the meeting, Miller called Mitchell to his office and told her that Stenerson had complained of "numerous" telephone calls that he had received from Mitchell and possibly other HUTA representatives. According to Miller, Stenerson complained that he was "being put in the middle between the administration and the Association, and he was being asked questions that were primarily negotiation-related questions." For that reason, Miller continued, he informed Mitchell that "I really would appreciate it if you would work through the District concerning questions you have on the health plan. If they're negotiated questions, we can do it in negotiations. If they're questions about the health plan, we need to contact AnnaMarie Bettencourt, who is our Health Plan Specialist." Mitchell responded that Miller was interfering with her right to contact SISC to secure information about the health plans.

Meanwhile, HUTA decided to make its meeting with Stenerson a joint District-HUTA meeting and invited Miller to attend. According to Mitchell, when she invited Miller he responded "[w]hat did I tell you?" Mitchell testified that Miller was "very harsh and intimidating. Fatherly, like an angry father."

Mitchell disputed Miller's testimony that she made numerous telephone calls to Stenerson that prompted complaints. Mitchell testified that she called Stenerson four or five times in 2002 without incident. She said, however, that these calls came after her conversation

with Miller. She said she did not call Stenerson even once prior to the time Miller told her to contact the District rather than Stenerson for information about the health plans. Other HUTA representatives may have contacted Stenerson earlier, but neither the identity of the callers nor the number of calls are established in the record.

As more fully explained below, I credit Mitchell's testimony on this point. Suffice it to say at this juncture that Mitchell credibly testified she had not contacted Stenerson as of the time of her conversation with Miller, and Stenerson did not testify at the hearing. Therefore, Miller's testimony regarding what Stenerson told him is hearsay.

HUTA inquiries to SISC were related to the ongoing negotiations. As Tallberg testified, the District and HUTA were negotiating a significant change in the health benefit program, and it is HUTA's duty to make sure that members are informed of what the changes are and what the impact might be.

The Tentative Agreement

By the end of August, mediation had been unsuccessful and the parties were engaged in factfinding. The subject of health benefits remained on the table. In the past, the District had offered only one plan, but in these negotiations the District offered two plans and agreed to pay the $72.00 per month co-payment that was previously imposed on employees. The two plans were selected from three plans offered by SISC. In other words, SISC offered three plans and the parties were to agree on two of those. The parties eventually reached tentative agreement on two of the three plans, but other outstanding issues precluded a complete agreement.

After the tentative agreement, HUTA decided to put the health benefits issue to a vote of employees before agreement on the entire contract. To that end, HUTA devised a two-part ballot asking employees to decide (1) whether they wanted to separate the tentative agreement on health benefits from the main negotiations, and (2) which of the two options they preferred.

According to Mitchell, HUTA felt uncomfortable selecting the plans; if the members did not agree with the selections, she reasoned, they would communicate their disagreement to the union negotiators by the way they voted.

On September 12, 2002, before employees voted on the health benefits issue, Miller sent out the following memo.

> As you are probably aware, the leadership of H.U.T.A. has approved the removal of the $72.00 per month x 10 that each certificated employee has been contributing to our Health Plan since September 2000 (this brings the insurance cap to $8,296.20). The District will pick up this cost beginning with everyone's October paycheck.
>
> Also, the leadership has informed me that they have selected PB Option 1-B and PB Option 2-C as the two plans for you to choose from. The two choices are included with this letter. Please stop by the District Office to inform Anna Marie Bettencourt and/or Mary Martins before September 30 which Plan you have selected. They will also answer questions that you might have.

Because of accounting requirements, the District needed to begin implementation of the plans in September if the teachers were to receive the benefit of the eliminated copayment for the month of October. Therefore, Miller felt some urgency to distribute the memo.

Upon receiving the memo, some of the teachers became concerned about their health benefits, and these concerns were communicated to Miller and Mitchell. The particular concerns are not relevant here. Suffice it to say that some teachers were not happy with the options.

Miller's memo was in accord with the parties' intent to begin immediate implementation of the health plan tentative agreement. Quaide drafted the tentative agreement at the September 5 factfinding meeting. He testified that, during a one-on-one meeting with HUTA negotiator Jim Schlotz, the two men agreed to "take preliminary steps" to implement the health plan tentative agreement and "hold off on final action till we got word of

ratification." Quaide continued, "because this was costing the unit members seventy-two dollars a month, we thought all parties had an interest in getting this in place as soon as possible." Quaide then met with Miller and communicated his agreement with Schlotz to him.

Miller corroborated Quaide's testimony. He testified that he "was a hundred per cent certain, at that point, that everyone was agreeable, because I would not have proceeded with that if there had been a problem because I do understand the need for collective bargaining and the final sign-off on the part of the Association membership." There was no benefit to the District in preliminary implementation of the plan.

Mitchell testified that she was aware of the tentative agreement, but she had no knowledge of the discussion between Quaide and Schlotz regarding implementation. She testified that she had a discussion with Schlotz regarding health benefit options after he came out of the meeting with Quaide, but there is no mention in her testimony that she and Scholtz discussed implementation. Mitchell also testified that, after Miller's September 12 memo, she contacted Tallberg and Schlotz to inquire if HUTA had agreed to implement the health plans. She said they informed her that the tentative agreement had to be ratified prior to implementation.

Tallberg's testimony about implementation is similarly limited. Asked if he was present during the conversation between Schlotz and Quaide during which implementation was discussed, Tallberg said, "I don't recall that." Schlotz did not testify at the hearing.

Based on the foregoing testimony, I find that Schlotz and Quaide entered into a verbal agreement to take preliminary steps to implement the tentative agreement covering the health benefit plans, but that final implementation would not occur until after the ratification. It was expected that the vote would take place quickly so that the plans could be implemented, thus relieving employees of the October co-payment. Quaide convincingly testified with absolute

certainty that the agreement to implement took place and that he communicated it to Miller shortly thereafter. Miller also testified with certainty that the agreement had been reached during negotiations, thus corroborating Quaide's testimony.

The testimony of HUTA witnesses, in contrast, was not persuasive. Neither Mitchell nor Tallberg were able to offer concrete testimony that rebutted that given by Quaide and Miller. Schlotz was not called to testify and thus he was unable to dispute Quaide's version of the one-on-one meeting. Tallberg could not recall being present during the discussion between Quaide and Schlotz. And Mitchell's testimony that Scholtz told her the tentative agreement must be ratified prior to implementation is hearsay.

Moreover, I find it unlikely that the District would have taken preliminary steps to implement health benefits without an agreement with HUTA to do so. It would be highly unusual for the District to carve out one subject for implementation prior to ratification or impasse. Quaide and Miller are experienced negotiators and it appears they were aware that such conduct would almost certainly draw an unfair practice charge. And there was no benefit to the District in taking preliminary steps to implement the health benefits. Only the teachers stood to gain from implementation as soon as possible.

Meanwhile, after speaking with several teachers about their concerns, Mitchell on or about September 16 informed Miller by e-mail that the tentative agreement had not been ratified. Miller immediately stopped implementation.

As of September 27, Miller had received no formal notification that teachers had ratified the tentative agreement on health benefits, although he had heard informally that a vote had taken place. He sent Mitchell a memo which stated in relevant part:

> The purpose of this memorandum is to inquire as to whether this Tentative Agreement has been put to a ratification vote by the unit, and if so, what were the results of this vote? It has been

> over three weeks since this Tentative Agreement was signed off, and the District has not heard any reports of any subsequent ratification vote.

In closing, Miller asked that Mitchell inform him by 4:00 p.m. of the results of the ratification vote.

Mitchell responded late in the afternoon of September 27 that the teachers had ratified the tentative agreement, adopting the original health plan and one additional plan. The tentative agreement had been ratified on September 24, and it was eventually implemented. The parties never reached agreement on an overall contract and the District imposed a contract on certificated employees at the end of the impasse procedure.

ISSUES

1. Did statements by Superintendent Miller that the District would participate in the June 5 mediation session provided HUTA agreed to engage in no concerted activity that day tend to interfere with protected rights under EERA?

2. Did statements by Superintendent Miller that HUTA President Mitchell not contact the District's health insurance administrator directly tend to interfere with protected rights under EERA?

3. Did Superintendent Miller bypass HUTA in communicating with employees regarding health benefits and/or unilaterally implement changes in health benefit plans, in violation of its duty to participate in the impasse procedure under EERA?

CONCLUSIONS OF LAW

Statements Regarding the June 5 Mediation Session and Contacting SISC Directly

Two of the allegations set forth in the complaint assert that comments by a District representative were unlawful under the EERA. They include Miller's statements to Tallberg regarding concerted activity at the District office during the June 5 mediation session, and

Miller's statement to Mitchell that she should not contact the District's health insurance administrator directly. Thus, resolution of these allegations depends on whether the particular speech by the District's superintendent was unlawful.

The Board has long held that an employer is entitled to express its views on employment-related matters over which it has legitimate concerns. To decide whether employer speech is unlawful, the Board established the following test.

> . . . The Board finds that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by [the Act]. [Rio Hondo Community College District (1980) PERB Decision No. 128, p. 20 (Rio Hondo); fn. omitted.]

Several subsequent cases have expanded on and clarified the general rule set forth in Rio Hondo. For example, whether an employer's speech is unlawful is determined by applying an objective rather than a subjective standard. (California State University (California State Employees Association, SEIU Local 1000) (1989) PERB Decision No. 777-H, adopting proposed decision of administrative law judge at 12 PERC Para. 19063, pp. 292-294.) The charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights, and the fact that employees may interpret statements, which are otherwise protected, as coercive does not necessarily render those statements unlawful. (Regents of the University of California (1983) PERB Decision No. 366-H, pp. 15-16, fn. 10.) And statements by an employer are viewed in their overall context to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No. 659.)

Miller cited two reasons for his concern about conducting a mediation session on June 5. He first said he is typically busy during days of graduation ceremonies and his time is

limited. Granted, it is often difficult for busy negotiators to mutually agree on dates for mediation, and the assertion that duties associated with conducting graduation ceremonies might render a date unacceptable does not violated the EERA. But Miller went beyond his duties as superintendent in discussing June 5 as an acceptable date. As Miller conceded, he also told Tallberg that he didn't "really want concerted picketing, or marching around, or people in front of the District office when we have parents or grandparents, and the people coming in for graduation." And Miller further testified that if Tallberg had indicated HUTA would picket the mediation session, he (Miller) would have insisted on a day other than June 5. Quaide communicated the same information to Tallberg on or about June 4 when he said that June 5 would be an acceptable date provided there was no concerted activities on that date.

The District put HUTA in a difficult position. A reasonable interpretation of Miller's and Quaide's comments is that if HUTA wanted the negotiations to proceed on June 5, it would have to forego its right to engage in informational picketing or its right to conduct informational meetings with teachers at the District office. Otherwise, the mediation session would be postponed to a later date.

It is well established that conduct such as non-disruptive, informational picketing is protected conduct under the EERA. (See e.g. San Marcos Unified School District (2003) PERB Decision No. 1508, at p. 27.) In addition, the District has a duty to participate in the mediation process under the EERA in good faith. (See e.g., Moreno Valley Unified School District (1982) PERB Decision No. 206, p. 5.) It follows that conditioning participation in a mediation session on waiver of a statutory right is unlawful under the EERA. The District may not threaten to interfere with or delay the statutory impasse procedure based on a concern that employees might exercise their right to participate in lawful concerted activities organized by HUTA, even if the District ultimately does not act on the threat. (Rio Hondo Community

College District (1983) PERB Decision No. 292, pp. 12-13 [district's resolution threatening to withdraw certain statutory rights in response to anticipated one-day "Day of Dignity" strike found unlawful, even though threat not ultimately carried out].) Thus, while the District has no duty to agree to a particular date for mediation, it may not condition its participation on waiver of a statutory right.

Indeed, this is what occurred here. Tallberg and Quaide disagreed about whether the District could lawfully insist on no picketing or informational meetings on June 5. Tallberg asserted that such conduct was an unfair practice under EERA and the parties agreed to disagree. However, given HUTA's desire to move forward with the negotiations, Tallberg understandably advised HUTA not to meet in the afternoon of June 5. It is worth repeating that if Tallberg had indicated HUTA would picket the mediation session, Miller testified he would have insisted on a day other than June 5, and Quaide reiterated the same position to Tallberg during a discussion on June 4.

The District argues in its brief that "negotiating over concerted activities is permitted by law, as it falls within the scope of permissive bargaining." In support of its argument, the District points to Modesto City Schools (1983) PERB Decision No. 291 (Modesto), where the Board held that a school district did not commit an unfair practice during negotiations by insisting on a no-strike clause while resisting a binding arbitration provision. Indeed, Quaide testified that during his conversation with Tallberg he took the position that Miller's comments were merely a matter for negotiations. In the circumstances presented here, I disagree. Conditioning participation in a statutorily required mediation session on waiver of the union's right to picket or engage in other forms of lawful concerted conduct may not be excused merely as a bargaining proposal.

It is true, as a general rule, that a mere proposal that a statutory right be waived may not necessarily violate the Act; the Act is violated only when a party insists on such a proposal to impasse. (Modesto at pp. 29-30; See also Chula Vista City School District (1990) PERB Decision No. 834.) These cases, however, involved proposals for waiver of statutory rights in the context of a negotiation setting, where the parties are free to trade proposals and rights for other concessions in an attempt to reach a mutually agreeable settlement. In contrast, Miller's comments to Tallberg were not made in the context of true negotiations and they cannot realistically be construed as a mere proposal. The parties were seeking dates for mediation. Miller conceded in his testimony that he told Tallberg he did not want teachers picketing or marching around the District office on June 5, and if HUTA insisted on engaging in such activity he would have selected a different date for the mediation. Quaide's comments to Tallberg were similar. Essentially, the District adopted a take it or leave it stance: agree not to picket or engage in similar activities or the District will not meet on June 5. Indeed, the District concedes in its brief that Miller "advised Tallberg that the District would be willing to meet with HUTA on June 5, 2002, *if* HUTA agreed that it would not demonstrate or picket." (Emphasis added.) This is hardly the kind of proposal the Board found lawful in Modesto.

In the interest of moving the negotiations forward, Tallberg advised Clark not to conduct the afternoon meeting with teachers. Key benefits such as salary and new health plans were on the table and HUTA was interested in scheduling the mediation with the goal of moving the negotiations to conclusion. Rather than challenge the comments at that time, HUTA agreed to not engage in the activity in the interest of trying to conclude the negotiations as rapidly as possible. In practical terms, Miller's statements caused HUTA to forfeit its right to engage in an informational meeting or picketing related to the negotiations, clearly protected conduct under the Act.

Based on the foregoing, I conclude that Miller's comments carried the threat that the District would not participate in mediation on June 5 unless HUTA agreed not to picket or conduct informational meetings at the District office. Given the content of the statements and the context in which they were made, the comments objectively may be viewed as the kind of comments that tend to interfere with protected rights.

Miller's statements that Mitchell not contact SISC directly likewise tend to interfere with protected conduct. As Miller conceded in his testimony, he told Mitchell that he would prefer she not contact SISC directly and to contact Bettencourt with questions about the health plans. Later, when Mitchell invited Miller to the meeting with SISC, Miller responded "what did I tell you?" As the District concedes in its brief, "Dr. Miller was understandably perturbed, as she had directly contacted SISC when he had just asked her not to." For the following reasons, I find that Miller's statements directly interfered with Mitchell's protected right to contact a third party about an employment related matter.

In Oakdale Union Elementary School District (1998) PERB Decision No. 1246 (Oakdale) PERB found protected a school employee's complaint to a district's workers' compensation insurance carrier. The Board found it significant that the complaint was made by the union president, it related to the administration of a collective bargaining agreement, and it was an extension of the employee's earlier attempts to resolve safety issues with the district. Thus, the Board found the employee's conduct was protected under section 3543 as a form of participation in the activities of an employee organization on a matter of employer-employee relations. (Oakdale at p. 18.)

The circumstances presented here are similar to those in Oakdale. At the time of the events in question, Mitchell was president of HUTA, the parties were engaged in negotiations about health benefits, the negotiations involved new plans for employees and Mitchell had

questions for the health plan administrator. As Tallberg testified, HUTA needed relevant information about the plans to bargain intelligently; and HUTA had a duty to make sure that members were informed of the changes in the new plans under consideration. (See e.g., Stockton Unified School District (1980) PERB Decision No. 143, pp. 14-15 (Stockton) [information regarding wage-benefit programs relevant to weigh value of proposals].) Thus, Mitchell had a protected right to contact SISC for information about the health benefit plans. While the District itself did not refuse to provide relevant information to HUTA regarding health plans, Miller's comments tended interfere with HUTA's protected right to acquire such information from a third party.

It is worth noting that Miller's rationale for his comments does not withstand scrutiny, for it is not established in the record that Stenerson ever complained to him. Stenerson did not testify at hearing and thus Miller's testimony that Stenerson complained to him about Mitchell's prior contacts is hearsay upon which no finding can be based. (PERB Regulation 32176.[4]) In contrast, Mitchell credibly testified that, at the time Miller asked her not to contact SISC, she had not called Stenerson even once. While it is true that Mitchell contacted Stenerson several times, these contacts occurred after the conversation with Miller that is the subject of this complaint, and there is no evidence that they were improper. Thus, the record does not support a finding that there was any basis for Miller's comments.

Based on the foregoing, I conclude that Miller's comments that Mitchell not contact SISC directly, viewed objectively, are the type of statements that tend to interfere with a reasonable employee in the exercise of protected rights.

[4] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Bypassing HUTA and Unilateral Implementation of Health Benefits

The complaint also alleges that the District bypassed HUTA and dealt directly with employees, and followed with a unilateral change in health benefits. For the following reasons, these allegations find no support in the record.

An employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members. (Muroc Unified School District (1978) PERB Decision No. 80.) Similarly, the employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (Walnut Valley Unified School District (1981) PERB Decision No. 160.) However, once a policy has been established by lawful means, an employer has the right to take necessary actions, including consulting with employees, to implement the policy. (Ibid.) To establish that an employer has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (Ibid.) Under these standards it cannot be concluded that the District unlawfully bypassed HUTA.

As I have found earlier, Quaide and Schlotz reached a verbal agreement that permitted the District to take preliminary steps to implement the health benefit plans that were tentatively agreed to by the parties. Under the agreement, final implementation was to occur upon ratification by the teachers. Therefore, Miller's September 12 memo cannot realistically be construed as an attempt to bypass HUTA and negotiate directly with bargaining unit employees. The memo was in accord with the tentative agreement, contained no inaccurate information and clearly stated that the benefit plans contained therein were the product of

negotiations. Moreover, the preliminary steps outlined in the memo actually benefited teachers; there was no benefit to the District.

I conclude, therefore, that the memo did not undermine HUTA's authority as exclusive representative, it was not an attempt to negotiate directly with employees and it did not itself create a new policy or modify an existing policy. It may be true that Miller's memo caused some concern among certain teachers, but the concern arguably was due more to HUTA's delay in conducting the ratification vote than by any unlawful conduct on the part of the District. As noted earlier, the parties reached a tentative agreement on the health benefit plans on or about September 5, and the agreement envisioned early implementation so that teachers would not be responsible for the October co-payment. Miller followed quickly with the memo on September 12. For reasons not contained in the record, HUTA did not conduct the ratification vote until September 24 and did not inform the District of the results of the vote until September 27.

Nor has the District implemented a unilateral change in health benefits. A unilateral change is considered a violation of the duty to bargain if certain criteria are met. The charging party must show that the employer implemented a change in policy concerning a matter within the scope of representation, and the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District, supra, PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant).)

In this case, no unilateral change was implemented. It is true that Miller on September 12 distributed a memo to teachers announcing the first steps in implementation of the health plans reflected in the tentative agreement. Teachers complained to Mitchell and she, in turn, complained to Miller. Upon receiving Mitchell's objection by e-mail on September 16,

Miller stopped implementation of the health benefit plans. Under these circumstances, I find that Miller's memo made no change in a negotiable subject and thus did not violate the duty to bargain under EERA. Absent an actual unilateral change in a negotiable subject, no violation of the duty to bargain may be found. (Grant at p. 10.)

It is worth repeating that Miller acted in accord with the tentative agreement. However, even if Miller erroneously began implementation, he stopped the process upon receiving Mitchell's e-mail. An employer who immediately corrects an erroneous act does not violate the duty to bargain. (See Moreno Valley at p. 11; California State University (1990) PERB Decision No. 799-H, adopting proposed decision of administrative law judge at pp. 26-27.)

REMEDY

Section 3514.5(c) provides in relevant part that

> 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.

It has been found that a District representative made statements to HUTA representatives that, viewed objectively, tend to interfere with the exercise of protected conduct under the EERA. Specifically, through the comments of Miller and Quaide, Tallberg was informed that Miller did not want HUTA to picket or engage in other concerted activities on the date a mediation session was to occur, and the District would participate in the mediation session provided there was no such activity. Also, Miller informed Mitchell that she should not contact the District's health insurance administrator directly regarding health benefit plans then under negotiation by the parties. By this conduct, the District has interfered with the right of employees to be represented by HUTA in matters of employer-employee relations, in violation of section 3543.5(a). By the same conduct, the District has interfered

with HUTA's right to represent its members in their employment related matters, in violation of section 3543.5(b). It is, therefore, appropriate to direct the District to cease and desist from such activity in the future.

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

All other allegations in the complaint are hereby dismissed

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this proceeding, it is found that the Hilmar Unified School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(a) and (b). Pursuant to section 3541.5(c) of the Government Code, it is hereby ordered that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Making statements that tend to interfere with the right of employees to form, join and participate in the activities of an employee organization of their own choosing for the purpose of representation on all matters of employer-employee relations.

2. Making statements that tend to interfere with the right of the Hilmar Unified Teachers Association to represent its members in all employment relations matters.

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

1. Within ten (10) days of the service of a final decision in this matter, post at all work locations where notices to certificated employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

All other allegations against District in the complaint are hereby dismissed.

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).)

Fred D'Orazio
Administrative Law Judge