

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION AND ITS CHAPTER #1,

Charging Party,

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-2226-E

PERB Decision No. 1770

June 21, 2005

Appearances: Karen L. Hartmann, Attorney, for California School Employees Association and its Chapter #1; Wiley Price & Radulovich by Joseph E. Wiley, Attorney, for Oakland Unified School District.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Oakland Unified School District (District) to the proposed decision of an administrative law judge (ALJ) (attached). The unfair practice charge alleged that the District violated the Educational Employment Relations Act (EERA)<sup>1</sup> by unilaterally subcontracting police work from the District police force to the Oakland Police Department (OPD) without giving the California School Employees Association and its Chapter #1 (CSEA) notice and the opportunity to bargain the decision and its effects in violation of EERA section 3543.5.

The Board has reviewed the entire record, including the unfair practice charge, the District's response, briefs from both parties, the transcript of the hearing, the post-hearing

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

briefs, the ALJ's proposed decision, the District's exceptions to the proposed decision, and CSEA's response. We find the ALJ's proposed decision to be free of prejudicial error and adopt all findings of fact and conclusions of law as the decision of the Board itself, subject to the discussion below.

### DISCUSSION

Until the events in this case, the District had provided some form of police force since 1957. In 1998 both unit members and OPD patrolled the District. At that time, concerns about school safety caused the District to assign a task force to review safety issues. The result was a recommendation for an independent single command and control with 24-hour coverage that was dedicated to school site safety. Funding for this was to come from a combination of federal and state grants, the City of Oakland (City) and savings from a reduction in theft and vandalism. The independent force was established in 1999.

By mid-2000, it appeared that there was not enough money to support the force without taking money from discretionary funds. The District did not want to use the discretionary funds for the force and by August of 2000 indicated it was considering elimination of the District's independent police force in favor of OPD taking over the duties.

#### Negotiations

During the same time in 2000, the District and CSEA were in negotiations for a successor collective bargaining agreement (CBA). CSEA raised the issue of rumors about OPD taking over police services. The District response was that it was not going to happen.

The District and CSEA reached an agreement on January 31, 2001. This was for a three-year CBA. It was ratified by the Board of Education in March 2001. CSEA then wrote to the superintendent and, in light of the binding labor agreement, requested that the District

refrain from any unilateral actions that would violate the labor agreement. The District responded that it did not intend to breach the agreement.

At the next board meeting following that exchange, the District representative advanced the position before the board that there was no obligation on the District to maintain a police force and the terms and conditions in the CBA would apply only if the District chose to maintain the unit.

#### Public Actions by the District

CSEA wrote again on March 28, 2001. The letter voiced concerns about whether the District would honor the new labor contract. That was the same day the task force on the police force and other safety issues released its report to the District in open session. It was decided to hold public hearings on the subject of school safety and the superintendent was directed by the board to continue discussions with the City regarding possible involvement of OPD. Costs of police services and the City's obligation to provide services were also discussed at the meeting.

#### Elimination of District Force

Finally, in early May 2001, CSEA was notified by the District labor relations representative that the District would eliminate the District force and OPD would take over responsibility for police services.

A memorandum of understanding (MOU) was signed by the District and the City. It was for two years and provided that the District would contribute \$1 million towards the operating budget of the unit.<sup>2</sup>

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<sup>2</sup>This was the state grant money previously used by the District to help fund services. The District had been notified that it would no longer receive money from the federal government or the City and it had not seen any savings related to theft and vandalism reduction.

### CSEA's Position

CSEA filed the charges in this case because it believed that a decision was made by the District to subcontract bargaining unit work to an outside entity for performance of the same duties in a similar manner under similar circumstances. During negotiations CSEA had brought up the rumors about doing away with the unit and they were told that would not happen. There was one story from District negotiators and another one from members of the school board.

### District's Position

The District's position, from its initial response through the exceptions it filed, is that the few years of having an independent police force actually reduced and worsened services to school sites and reduced the safety of the students in general. Because of that background it entered the MOU with the City to provide complete police services for the District. The District believes the ALJ relied on the wrong standard believing that rather than a closely integrated arrangement between the two entities, this move by the District was a fundamental change in direction. The District found this to be a part of its managerial rights and did not believe that the same services were provided by the OPD as had been by the District police force. Rather than subcontracting, the District saw this move as within its entrepreneurial prerogative, with cost savings as a side effect.

The District excepted to the ALJ proposed decision related to the issues of subcontracting, the applicability of the zipper clause, non applicability of the management rights clause, decision bargaining and findings related to denial of union rights, and interference with employee rights. The District also excepted to the remedy and order.

## Subcontracting

We first look at whether the District did subcontract out bargaining unit work, if the work OPD did was identical to what the District police force did and the motivation for the change. We believe that by entering the MOU with the City and providing \$1 million to pay for the services of OPD, the District subcontracted services.

The ALJ acknowledged that:

It is well settled that managerial decisions that lie at the core of entrepreneurial control or change the nature and direction of an operation are not automatically subject to collective bargaining, even though such decisions may well impact employment security. (See Fibreboard Corp. v. NLRB (1964) 379 U.S. 203, 223 [57 LRRM 2609] (Fibreboard); Stanislaus County Department of Education (1985) PERB Decision No. 556 (Stanislaus).)  
(ALJ's proposed decision at p. 26.)

We find that here the District did more than that. The ALJ found it difficult to distinguish the decision to enter into the MOU with the City from a decision to subcontract, and under the facts of this case, we agree. If the City, without the District's involvement and money, had control there might have been a basis to find a significant change in direction by the District, but the MOU keeps the District involved.

The District argues that this is not subcontracting because OPD has structured the duties of the officers differently than the District did. The ALJ indicates that the duties are not different because the District could have structured the unit as OPD did. He also noted that OPD was always responsible for 24-hour coverage. The District never was able to provide 24-hour coverage and the provision of police services by the District failed to meet any of its goals, coverage-wise, financially or any other way.

Because the provision of District police had become a disaster, drastic measures were necessary and implemented. The District argues this is another indicator that to have OPD

take over is a change in direction and is allowed. It is true that the District police program had failed on every level and a drastic change was necessary to ensure the safety of students and facilities. OPD, however, is not only still doing what they did before the MOU (as related to the District) but now they are also doing all the duties previously performed by District employees.

The police patrolling the campuses are now all City employees. OPD controls the hiring, firing, assignments, pay and benefits without the District. OPD sets the rules and operational procedures. The officers are not assigned in the same way as those employed by the District were. However, the MOU and the money keep the District involved just like hiring a subcontractor to do a part of any job.

If this were just the layoff of the bargaining unit then it would not be subject to bargaining. As the Board stated in Newman-Crows Landing Unified School District (1982) PERB Decision No. 223:

The layoff of employees unquestionably impacts on their wages, hours, and other conditions of employment. It may concurrently impact upon those employees who remain. Nevertheless, the determination that there is insufficient work to justify the existing number of employees or sufficient funds to support the work force, is a matter of fundamental managerial concern which requires that such decisions be left to the employer's prerogative.

However, the removal of work either from one bargaining unit to another or subcontracting it outside to non-employees is negotiable. (Arcohe Union School District (1983) PERB Decision No. 360 (Arcohe); Rialto Unified School District (1982) PERB Decision No. 209.) Unless it is a "core restructuring" decision that falls outside the scope of representation. (Lucia Mar Unified School District (2001) PERB Decision No. 1440 (Lucia Mar).

The District wanted to go in a different direction by turning over the school policing duties to the OPD. Had the Board simply laid off all the members of the bargaining unit and

left policing up in the air there is no doubt it would have fallen to the OPD because the District is in the City of Oakland. The problem is the District did not let go. It entered a contract with the City and paid \$1 million to have OPD do the work previously done by the unit. Although the transfer of the money to the new entity might not have been enough to find conclusively that this is a subcontracting case, the language of the MOU in combination with the money lock in the District as having hired a subcontractor.

The District says it got out of the police business but the MOU says otherwise. The introduction to the MOU, in part, states:

The OPD and the OUSD will continue to make every effort to reduce criminal activity in our schools and communities. This Memorandum of Understanding will ensure that school related problems are identified and that resolutions to these problems are found, in conjunction with the Principal or designated administrator, School Security Officers, other Campus Life and School Safety Unit (CLASS) personnel and appropriate City agencies; engage in and coordinate problem-solving activities in and around their assigned schools in conjunction with the principal or designated administrator and School Security Officers; and give special attention to preventing and addressing problems to include, but not limited to, weapons, drugs, aggression, trespassing and truancy in and around their assigned schools. This can be achieved through responsible and reciprocal information sharing. Weekly scheduled meetings of school and police officials will be held to ensure the effectiveness of the Understanding.

Further evidence of the integrated relationship between OPD and the District is contained in the specific terms of the MOU.

Contrary to the District's position, the MOU memorializes a close working relationship between the two entities in providing police services.

#### Zipper Clause

The zipper clause in a contract generally precludes unilateral changes in any negotiable topics during the life of the agreement. We agree with the ALJ that the zipper clause here

precluded bargaining on matters outside the agreement because the clause states that neither party may be compelled to bargain any matter during the life of the agreement. The ALJ further stated that the language of the clause provides that both parties waive any right to demand negotiating, bargaining or change during the term of the agreement. We agree.<sup>3</sup>

### Management Rights Clause

The question then becomes whether the District could take the steps it did under the management rights clause. Here, the District excepted to the ALJ conclusion that the management rights clause did not apply. That conclusion, the District maintains, makes the clause meaningless.

In San Jacinto Unified School District (1994) PERB Decision No. 1078, PERB held that a broadly based management rights clause would not be construed as a waiver of statutory bargaining language. Any waiver of a right to bargain must be "clear and unmistakable."

(Amador Valley Joint Union High School District (1978) PERB Decision No. 74.)

The clause at issue does not specifically address subcontracting or police services. It states:

Except as limited by the specified and express terms of this Agreement, the District retains the exclusive right to manage the school district including, but not limiting, its rights to determine the methods, means and personnel by which the District

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<sup>3</sup>The zipper clause is found in Article 17 of the agreement and states, in relevant part:

Neither party shall during the term of this Agreement demand any change therein, nor shall either party be required to bargain with respect to any matter. Without limiting the generality of the above, both parties waive any right to demand of the other any negotiating, bargaining, or change during the life of the Agreement; provided that nothing herein shall prohibit the parties from changing the terms of the agreement by mutual consent.

operations are to be conducted; and to determine the missions and functions of each of its departments, sites, facilities and operating units, set standards of service to be offered to the public; and to administer the personnel system, classify positions, and or delete positions or classes to or from the salary plan, establish standards for employment, take disciplinary action for just cause, to schedule work and relieve its employees from duty because of lack of work or other legitimate reasons. The District further reserves the right to take whatever action may be necessary in an emergency situation.

If the District had laid off the bargaining unit and stopped there, it might have fit under this clause as "reliev[ing] its employees from duty because of lack of work or other legitimate reasons." Had the District been able to declare an emergency due to the problems in public safety there would have been a much better argument that the management rights clause allowed the actions that were taken. That did not happen. This is a generally worded clause without reference to subcontracting or police services and therefore does not support the unilateral action by the District.

#### Labor Costs Issue

The ALJ correctly noted that there is not always a need to apply any labor cost savings test in determining whether a decision to subcontract is negotiable. This is based on the Lucia Mar case where the Board found that there is no need to apply any further test about labor costs when an employer "replaces its employees with those of a contractor to perform the same services under similar circumstances."

In any event, the District's argument that saving labor costs was not part of its motivation is not persuasive. Even ignoring any statements by the elected officials, there are

reports by the superintendent and assistant superintendent indicating labor costs as a factor in the recommendation to have the City take over the delivery of police services.<sup>4</sup>

#### Negotiations for Successor Agreement

In 2000, while participating in negotiations for the successor agreement to the then existing collective bargaining agreement, the District repeatedly advised CSEA it was not going to change the provision of police services. Even rumors of layoffs were brushed aside by the District at that time. However, the discussion and actions related to the change in provision of police services did not result in a tentative decision until May 4, 2001. During the successor agreement bargaining all aspects of the potential change in the provision of police services were in a preliminary state. We agree, therefore, that the allegation of bad faith bargaining by the District in relation to the successor agreement should be dismissed.

#### Waiver of Opportunity to Bargain the Decision

Once appropriate notice has been given, it is up to the employee organization to request bargaining. The ALJ found that CSEA did not waive the opportunity to bargain because bargaining would have been futile. We believe this portion of the ALJ proposed decision needs clarification.<sup>5</sup>

Under Victor Valley Union High School District (1986) PERB Decision No. 565, an employer must provide notice and opportunity about any proposed change in regulations or resolutions directly relating to matters within the scope of representation. The District here did provide timely notice of a tentative decision. CSEA did ask to bargain the decision and effects

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<sup>4</sup>As early as December 2000, Superintendent Dennis Chaconas indicated he was in discussions with OPD. This was reported to the Student Services and Safety Committee of the board. This report included a recommendation related to cost savings that included labor costs.

<sup>5</sup>At p. 43 of the proposed decision the ALJ indicates that "a firm decision in the form of a tentative MOU" was reached. The context indicates that was a tentative decision.

before the firm decision was made at the school board meeting on June 13, 2001. CSEA did this by letter dated June 11, 2001, and a second letter on June 13, 2001.<sup>6</sup> CSEA went further and also requested bargaining at the District board meeting on June 13, 2001, just prior to the vote. The District then made a firm decision without bargaining.

Like the concurring members of the Board, I believe the issue of futility need not be reached in these circumstances, but I do believe some clarification is necessary in light of the District's exception on that issue. I find the District is correct in its exceptions that Arcohe, cited by the ALJ, is not on point for these facts. Arcohe is a case where there was no actual notice to the union. Here, the notice was timely.

Fall River Joint Unified School District (1998) PERB Decision No. 1259 (Fall River) was also cited by the ALJ as a basis for his conclusion that it was futile for CSEA to ask to bargain the District's decision. In Fall River, there is a closer analogy to the facts of this case.

In Fall River, a school district had involuntarily transferred a special education teacher. Under the facts, it was determined that the district could make that specific transfer but that any overall program of involuntary transfers without notice and opportunity to bargain violated the EERA. The teachers association did not request bargaining until one year after the district indicated it gave notice. The district maintained notice was in a letter dated June 27, 1995. This letter was to the two teachers being transferred for the upcoming school year and included language indicating this was part of a two-year pilot program teacher swap.

The establishment of the teacher swap program had not proceeded through normal channels in the district and was approved in an executive session, not an open meeting. Only the next year when a lawsuit was filed alleging a violation of the open meeting law, did the

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<sup>6</sup>The District admits this letter was sent but mistakenly indicates it is a letter of June 13, 2001. The correct date is June 11, 2001. (Brief in Support of Exceptions by the Oakland Unified School District, October 29, 2003.)

district address this issue in open session. It was adopted August 7, 1996, giving the district the authority to establish the swap program exactly as it had been instituted the prior year.

In Fall River, there was a question as to whether actual notice was given. That was not an issue in this case. What is related to this case is the PERB holding that, "even if FREA [the union] had been notified, its failure to request bargaining would not constitute waiver because the District had clearly made a firm decision to implement the special education teacher swap program." Here, the District appears to have been committed to the replacement of the District police force with the services of OPD. But here we know it was futile for the union to ask to bargain the decision because they did ask. They made the request in writing in a letter of June 11, 2001, sent by the union representative, and in a letter from the CSEA attorney dated June 13, 2001, and orally at the board meeting on June 13, 2001, before the vote. The District could have responded to any of those requests and did not until July 19, 2001. On July 19, 2001, the District superintendent wrote, "Although the District does not agree with your legal analysis that it is required to bargain over the decision or effects prior to implementing the decision,. . . the District is willing to negotiate the impact of its decision to cease providing police services."<sup>7</sup> This makes it clear that the District would not negotiate the decision. Even though there is evidence of futility here, the issue should not have been reached because of the zipper clause, discussed above.

The Board finds that the issue of futility need not be reached in this particular case.

#### Effects Bargaining

The ALJ found that the District was not responsible for any delays in bargaining the effects of the decision to lay off the entire bargaining unit and enter into the MOU with OPD. CSEA did not present firm proposals until late 2001 and presented no evidence that the District

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<sup>7</sup>ALJ's proposed decision at p. 8.

refused to bargain the effects at any time. In fact, CSEA declared impasse and requested no other negotiations or participation in impasse procedures.

### CONCLUSION

The ALJ opinion is adopted as the decision of the Board itself.

### ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Oakland Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5.

Pursuant to section 3541.5(c) of the Government Code, it is hereby ordered that the District, its governing board and representatives shall:

**A. CEASE AND DESIST FROM :**

1. Failing and refusing to meet and negotiate with the California School Employees Association and its Chapter #1 (CSEA) about the decision to contract out the District's police services.

2. Denying CSEA its right to represent bargaining unit members in their employment relations with the District.

3. Denying bargaining unit members the right to be represented by their chosen representative.

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

1. Upon demand from CSEA, restore the positions in its independent police services unit, reinstate bargaining unit employees affected by the memorandum of understanding (MOU) with the Oakland Police Department, and rescind the MOU as soon as reasonably possible.

2. Make all affected employees whole for losses, monetary and otherwise, subject to mitigation, suffered as a result of the District's unlawful action, along with interest at the rate of 7 percent per annum.

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

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, 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 CSEA.

Member Shek and Member Whitehead's concurrence begins on page 15.

SHEK, Member, concurring: I concur with the result of Chairman Duncan's decision. I find that the proposed decision of the administrative law judge (ALJ) is free of prejudicial error, and that the ALJ has adequately addressed the issues raised by the Oakland Unified School District (District). I therefore adopt the ALJ's proposed decision as a decision of the Public Employment Relations Board (PERB or Board), subject to the following comment.

Since the District raised the same issues in its exceptions that were addressed in the proposed decision, and the Board is adopting the proposed decision as its own, I find it unnecessary for the Board to address these same issues in its decision, unless the Board is affirming the result based on a supplemental or different rationale.

I agree with the conclusion in Chairman Duncan's decision that the issue of futility need not be reached in this case. However, I do not adopt that portion of the proposed decision regarding the futility of the demand to bargain by the California School Employees Association and its Chapter #1 (CSEA), and the District's decision to enter into the memorandum of understanding (MOU) with the Oakland Police Department (OPD)<sup>1</sup>, based on the rationale stated as follows.

As stated in the proposed decision, the zipper clause in the parties' collective bargaining agreement gave CSEA the right to refuse to bargain the decision after being notified of the District's proposal to enter into the MOU with the OPD. The District was also precluded from unilaterally implementing a change in the status quo, pursuant to the zipper clause. Based on

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<sup>1</sup>Furthermore, as a clarification to page 43 of the proposed decision, it is apparent from the context of his discussion that the ALJ concluded that the District reached a tentative decision to enter into a MOU with OPD on May 4, 2001, which then triggered the duty to provide notice to CSEA under Victor Valley Union High School District (1986) PERB Decision No. 565.

this conclusion, I find it unnecessary to address the alternative theory that it would have been futile for CSEA to demand to bargain the District's decision.

Member Whitehead joined in this Concurrence.

**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. SF-CE-2226-E, California School Employees Association and Its Chapter #1 v. Oakland Unified School District in which all parties had the right to participate, it has been found that the Oakland Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5.

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

**A. CEASE AND DESIST FROM:**

1. Failing and refusing to meet and negotiate with the California School Employees Association and its Chapter #1 (CSEA) about the decision to contract out the District's police services.
2. Denying CSEA its right to represent bargaining unit members in their employment relations with the District.
3. Denying bargaining unit members the right to be represented by their chosen representative.

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

1. Upon demand from CSEA, restore the positions in its independent police services unit, reinstate bargaining unit employees affected by the memorandum of understanding (MOU) with the Oakland Police Department, and rescind the MOU as soon as reasonably possible.
2. Make all affected employees whole for losses, monetary and otherwise, subject to mitigation, suffered as a result of the District's unlawful action, along with interest at the rate of 7 percent per annum.

Dated: \_\_\_\_\_

OAKLAND 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



CALIFORNIA SCHOOL EMPLOYEES  
ASSOCIATION AND ITS CHAPTER 1,

Charging Party,

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE  
CASE NO. SF-CE-2226-E

PROPOSED DECISION  
(9/17/03)

Appearances: Karen Hartmann, Attorney, for California School Employees Association and its Chapter 1; Wiley Price and Radulovich, by Joseph Wiley, Attorney, for Oakland Unified School District.

Before Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

California School Employees Association and its Chapter 1 (CSEA) initiated this action on August 27, 2001, by filing an unfair practice charge against the Oakland Unified School District (District). The general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on December 6, 2001, alleging that the District contracted out police services work to the City of Oakland (City) without affording CSEA notice and the opportunity to negotiate the decision and its effects. In a separate allegation, the complaint charges that during negotiations for a collective bargaining agreement that took place prior to the decision to subcontract, the District repeatedly denied any intent to take such action and thereby avoided negotiating with CSEA. By this conduct, the complaint alleges, the District violated the Educational Employment Relations Act (EERA or Act) section 3543.5(a), (b) and (c).<sup>1</sup>

<sup>1</sup> The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. In relevant part,

The District answered the complaint on December 19, 2001, denying all allegations. A Board agent conducted several settlement conferences, but the matter was not resolved.

A formal hearing was conducted by the undersigned in Oakland on September 16-19, 2002. With the receipt of the final brief on February 6, 2003, the matter was submitted for proposed decision.

### FINDINGS OF FACT

CSEA is an employee organization within the meaning of section 3540.1(d) and, at all relevant times, was the exclusive representative of a unit of police officers employed by the District within the meaning of section 3540.1(e). The District is a public school employer within the meaning of section 3540.1(k).

At the time of the decision at issue here, the District and CSEA were parties to a collective bargaining agreement. However, the agreement does not contain a subcontracting clause that expressly prohibits or permits the conduct underlying the primary allegation in the complaint: whether the District's action in entering into a memorandum of understanding (MOU) with the Oakland Police Department (OPD) for police services constitutes a negotiable

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section 3543.5 provides that it shall be 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.
- (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

decision to subcontract the work.<sup>2</sup> (See State of California (Department of Corrections) (1995) PERB Decision No. 1100-S, p. 14.)

### Background

In 1957, the District created a security division consisting of two officers who were assigned to protect property. The officers patrolled the District's buildings and grounds, made periodic security inspections and responded to burglar alarms. The officers had certain peace officer powers, but were limited to a supplemental rather than general law enforcement role.

In 1973, the officers began to take on more law enforcement responsibility, such as writing crime reports and handling less serious incidents. Most law enforcement responsibility remained with the OPD under its general authority.

In 1983, the California Commission on Peace Officer Standards and Training certified the division as a full service police department within the District. District police officers answered dispatcher calls for police services at or in the vicinity of the District's schools and performed related services. However, the division still relied on the OPD for many services, including assistance in responding to calls, criminalistics, investigations and training. There were about 10 officers in the division at this time.

In 1990, the District's police officers were placed under the supervision of the OPD. During the period between 1990 and 1999, both District police officers and OPD policed the District. An OPD lieutenant managed the District's police department, and the District

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<sup>2</sup> At the time the complaint was issued in this matter a grievance had been filed by CSEA, but the District had rejected it as premature. (State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S [deferral appropriate only when employer willing to arbitrate.]) During the hearing, it became known that the District had later accepted the grievance and the parties had agreed to hold an arbitration in abeyance pending the outcome of this proceeding. Various provisions of the collective bargaining agreement that are relevant here will be addressed below.

reimbursed the OPD for his services. In addition, the OPD provided approximately 20 school resource officers to supplement the District's staffing.

In 1998, concerns about school safety prompted the District to convene a task force to analyze the issue. The task force eventually recommended creation of an independent District police force. It was expected that the benefits of an independent department would include a single control and command unit, closer integration of police officers and school security officers (SSOs),<sup>3</sup> 24-hour coverage to prevent costly vandalism and break-ins and a police force dedicated to school site safety. Funding for the independent force came from four sources: (1) \$1,000,000 in federal funding for school police services; (2) \$1,000,000 in existing state grants; (3) \$680,000 from the City; and (4) savings from reduced theft and vandalism. The District adopted the recommendation on April 28, 1999.

The District's officers were responsible for policing all of the District's 140 facilities. They were assigned to geographical areas. For example, Officer Chris Haddad, president of CSEA Chapter 1, testified that her territory was Oakland High School and its feeder schools, which consist of approximately 15 elementary schools and three middle schools. Haddad testified that her primary responsibility was in the high school because that's where most of the problems occurred, although she was not required to report to a specific school site each day. District officers also were responsible for providing police services for after school events.

Haddad has worked as a District police officer for approximately 20 years. The specific duties of officers, she testified, are reflected in the 1998 proposal to create the independent police force in the District. She said the list of duties in the proposal is an

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<sup>3</sup> The District employed approximately 117 SSOs under the supervision of two District police officers. The SSOs are in a separate bargaining unit and generally perform tasks related to school safety and security.

accurate representation of the duties of police officers. Because the duties are relevant here, they are set out in some detail. The District's officers were required to identify high-risk behavior or criminal activity in and around school property; provide crime information to school and security personnel; coordinate student activities that promote a safe school environment and preventative programs; coordinate organizations and resources to provide manpower for security and education; provide a law-related education component to the school curriculum; identify potentially violent behavior and aid in reducing or avoiding conflicts; serve as a conduit for information useful to police, schools, educators and community; patrol school grounds; investigate criminal complaints; remove trespassers; prevent fights and disturbances; maintain radio communication with school staff; handle police issues at assigned schools; avoid non-emergency matters outside District jurisdiction; act as the primary officer in handling calls for service; comply with all federal, state and local legal requirements and District procedures for law enforcement; coordinate law enforcement responses or requests for service programs at assigned schools; provide a visible deterrent to crime while presenting a positive impression of a uniformed law enforcement officer within the school setting; be responsible for investigations of criminal or traffic related incidents involving students in route to or from school, or occurring on or near school grounds; and notify appropriate investigators of sex offenses or other serious crimes against a person.

In addition, Haddad testified, District officers were required to promote a safe school environment. This requirement included that following duties: attend school and student council meetings; participate in solving problems concerning the welfare of students; advise students and staff on safety and security; lecture in classrooms on safety-related topics; coordinate anti-truancy programs; implement law enforcement programs, such as the Police Athletic League and Students Against Drunk Driving; act as mentors to the student body and

counsel individual students as required; and attend staff meetings and other meetings where an officer's presence would be of benefit.

Under this arrangement, OPD continued to provide the District's police force with assistance in the following areas: radio communication, access to criminal information systems, jail services, prisoner transportation, training, investigative services, crime lab support, evidence and property control support, emergency response support, crossing guard programs, school safety patrol programs and youth offender programs. Also, OPD officers entered school campuses as necessary for law enforcement purposes.

In or about Mid-2000, the District's police force once again became a topic of concern. On May 15, 2000, Haddad had a discussion with District Superintendent Dennis Chaconas during which he informed her of the possibility of cuts in the department. Haddad testified that Chaconas said, "it's serious. We need to make some cuts. I'm looking at officers . . . unless you can tell me how we can save \$300,000 through your department, or \$300,000 in cuts." On August 21, 2000, then vice president of the District's board of education, Jason Hodge, notified Haddad that Chaconas was considering eliminating the District's independent police department in favor of OPD providing police services. Haddad was concerned because she had been under the impression that cuts were necessary and she had even given Chaconas some suggestions about how to achieve cuts; however, she had not expected that the department would be eliminated. It was against this background that negotiations for a successor collective bargaining agreement began.

#### Negotiations for a Successor Collective Bargaining Agreement

At a negotiations session on November 1, 2000, Haddad referred to the "heads up" she had received from Hodge and asked the District's chief negotiator, Mike Helms, about the rumor that the OPD might take over the District's police services. Helms responded that he

had no knowledge of an OPD takeover and indicated it was not going to happen. CSEA field representative Jack Ford was present at the meeting. He testified that Helms said "categorically" it was not going to happen. Ford responded, "if there is any truth to this rumor, then I'm going to amend my proposals for our side on the spot." Based on Helms assurance that the OPD takeover would not occur, CSEA did not amend its proposals. The rumors of an OPD takeover persisted, and Haddad made a similar inquiry during a negotiating session the next day. Helms gave a similar response.

During a negotiating session on November 16, 2000, Ford spoke by telephone with then president of the District's board, Dan Siegel, about OPD performing police services for the District. Siegel informed Ford that the matter was under investigation, but no decision had been made. According to Haddad, CSEA then informed Helms that it was interested in negotiating a severance package for officers, but Helms responded that "just because one or two [board members] say something doesn't mean that that's what was going to happen." Haddad testified that Helms again said he was there only to negotiate a three year contract. CSEA made no proposals regarding the OPD takeover of police services.

On December 4, 2000, during a meeting of the District's Student Safety and Services Committee, Chaconas addressed his concern about the student safety issue. He stated that the independent police force was established in 1999 to address this concern, but it had not improved services. As a result of lack of coordination between the District's police force and OPD, he said, the District was receiving less effective policing. Chaconas also noted that he had been engaged in discussions with OPD regarding safety and security of school sites through a program called Safe Passages. Chaconas recommended exploring all options with OPD to develop a comprehensive approach to school safety issues. The committee authorized Chaconas to commence a dialogue with the City of Oakland and investigate the subject before

any action was taken. Lewis Cohen, assistant to the superintendent, was directed to prepare a comprehensive analysis of public safety issues in the District.

The next day Haddad spoke with Hodge about the matter. According to Haddad, Hodge assured her that the District was merely going to ask the City for money for police services and she shouldn't worry.

At a negotiating session on December 12, 2000, Haddad again asked Helms about the rumored OPD takeover. Helms again had little to say about the matter. He responded that he had not been informed of an OPD takeover of police services, and he again said he was there only to negotiate a three-year contract. According to Haddad, CSEA at that point began to submit a handwritten proposal. She said "we wrote on there layoffs and started writing down some ideas, but because we got into the discussion with Mr. Helms that they knew nothing of this, they were only there to bargain this three year agreement, he wasn't going to hear this because that's not what he was instructed, that's not what he was told or knew of, so it didn't go any place." A similar exchange occurred during a negotiating session on January 23, 2001.

On January 31, 2001, CSEA and the District reached a tentative agreement in their negotiations for a successor contract. The District's board ratified the agreement on March 14, 2001.

#### Discussions with OPD Regarding Police Services

By February 26, 2001, Cohen and Chaconas had completed the comprehensive analysis authorized earlier by the Student Safety and Services Committee. The most relevant section of the lengthy report addresses law enforcement.

Currently the District's police force has an authorized strength of 20 officers, 2 sergeants, 1 lieutenant and the Chief. In addition there are 4 non-sworn FTEs. Four sworn positions are currently vacant. The current statewide shortage of police officers and the relatively low salary paid by the District will make attracting

additional officers difficult. These same factors along with the current uncertainty about the future of the District police force is likely to result in the exodus of many current officers.

The District force is described as operationally independent. This refers to the command structure but does not reflect a true independence from OPD. The District force presently relies on OPD for dispatch, training, criminalistics, booking and jail services, investigations, crossing guards and in many cases emergency response.

Nor has the expansion of the District's force achieved any of its goals. While the District has operational command and no longer has to worry about whether the city will supply the school resource officers, the promised 24 hour coverage has not materialized and consequently there has been no accompanying reduction and [sic] theft or vandalism. That is because only this year, some twenty months after the transition, has the contract with the District's officers been renegotiated to allow shifts after 4:30 p.m. and on weekends. These new shifts have not been implemented yet and when they are, given the limited size of the force, they will have the added negative consequence of reducing the already slow time of the District's units.

The promised 24-hour coverage was supposed to reduce losses from theft and vandalism by \$1.4 million dollars. The failure to realize this objective combined with the failure to obtain Federal funding for police services and the termination of City funds means the District is now spending nearly \$850,000 in increased costs. These additional costs will grow if the department reaches full strength.

The transition was also advertised as giving OUSD police services full investigative services. In fact, even if full staffing were realized, OUSD police services would still be unable to provide more than preliminary investigations. Currently after initiating investigations, these are turned over to other agencies, usually OPD. In the most common instance, reports of child abuse, it is the District that is subsidizing the operations of OPD.

Reports of child abuse require a mandatory police investigation. While school site personnel report these incidents they almost always involve incidents that are not related to school sites or staff. According to OPD, there were 37 reports of child abuse filed at school campuses. OUSD police services currently conducts the preliminary investigation in these cases, at an average investigation time of three hours each. The preliminary

findings are then transferred to OPD's Youth Service Division that completes the investigation.

In addition to taking on investigations of behalf of OPD, the District police as a Peace Officer Standards and Training (POST) certified department, must respond to calls for police services in and around school sites. As a result District police officers are involved in additional law enforcement activities unrelated to the Oakland Public Schools. Further, the existence of OUSD Police Services has served as a justification for OPD to ignore calls at school sites.

Thus, the creation of the operationally independent school force has actually reduced police services to school sites. It also has led to decreased coordination between the District and OPD. In one recent instance, OPD was aware that an off-campus fight between Fremont and Castlemont students might lead to retaliation. No notice was provided to the District and a student was severely injured in retaliatory attack.

The report went on to explain that the need for law enforcement on school sites on a day-to-day basis is quite limited if effective student behavioral programs and initiatives are combined with professional security. The report noted that the vast majority of incidents requiring police action have little or nothing to do with students or even the day-to-day operations of the sites; therefore, police officers are most useful when they are part of the school site intervention and prevention strategy.

The report recommended that the District deploy so-called school resources officers at high schools and middle schools with the responsibility for implementing a site safety plan for each school. These officers would manage the day to day activities of the SSOs.<sup>4</sup> The report further recommended that the resource officers be under the command of the OPD in order to insure adequate coordination with OPD's community policing, patrolling and investigative

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<sup>4</sup> The report was critical of the SSOs, claiming among other things that their overall performance was unsatisfactory and some SSOs had been accused of sexual harassment complaints and racial discrimination.

officers. The model advocated by the report would require that OPD officers be assigned to specific school sites and work within those sites to develop preventative programs for school safety. As part of the recommendation, the report explained that "the District's cost savings would allow up to \$1.1 million dollars to be transferred to the City to help cover the City's cost." The report recommended that the District enter into discussions with the City to determine how responsibility for policing the school could be returned to OPD. Haddad testified that she was shocked by the report because the District and CSEA had just completed negotiations on a three-year collective bargaining agreement.

Cohen testified that "increased costs" was one reason for these recommendations. He said the District's independent police unit had been supported by a subsidy from the City and by federal funds. Because these funds would no longer be available and savings from reduced vandalism and theft had not materialized, Cohen said, "it was going to mean that the District would have to take its discretionary dollars from the general fund, away from its core activities of education and spend them on police services."

In addition, the report contained two alternative recommendations. The first was to deploy existing officers to the high schools and middle schools. The second was to reorganize the District's police force to eliminate sworn officers and replace them with school site safety coordinators at each school site. The coordinators would play the role envisioned for school resource officers but would leave law enforcement functions to OPD.

On March 5, 2001, Cohen presented the report and recommendations to the Student Safety and Services Committee. Minutes of the meeting indicate that Siegel stated he "strongly supports the idea that the City should take over the control of the policing function of the schools because we do not have a special State allocation for policing in the Oakland schools. The policing is paid from the budgets we use to pay principals, teachers, to buy

books, and to buy supplies. By doing that we are short changing urban children in comparison to children living in places like Walnut Creek or Palo Alto where they don't have to take their regular State allocation and use it for policing." CSEA representatives Haddad and Ford voiced opposition to adoption of the recommendations in the report, and no action was taken at that time. On March 12, 2001, however, the committee voted favorably on the recommendations and forwarded the matter to the District's board for review.

On March 5, 2001, meanwhile, Ford wrote to Chaconas reminding him that CSEA and the District had reached a binding agreement which does not permit the District to contract out any work presently being done by District police officers. "Please refrain from any further unilateral action that would violate the labor agreement. The school police and their representatives are willing to meet with you to address the concerns of the District and see how we might possibly accommodate them within the framework of our current labor agreement," Ford wrote.

Chaconas responded on March 7, 2001, indicating he had no intention of breaching the labor agreement. Regarding Ford's concern about contracting out, Chaconas wrote, "To the best of my knowledge the District has not imposed any unilateral action as indicated in your letter. I would encourage you to address any concerns of such action to ... Helms."

The next board meeting was on March 14, 2001. During the process of ratifying the successor collective bargaining agreement, member Paul Cobb asked if the recommendations in the report would impact the officers covered by the collective bargaining agreement with CSEA. Specifically, Cobb wanted to know if the agreement would lock the District into a situation that would prevent it from taking the actions recommended in the report. Chaconas responded that he had consulted legal counsel before bargaining the agreement and was assured it would not. District counsel Roy Combs was at the meeting and agreed with

Chaconas' position. Siegel also stated that he had received similar assurances from the human resources and labor relations staff. In essence, these District representatives set out a position that the District had no obligation to maintain a police services unit, and the terms and conditions in the collective bargaining agreement would apply only if the District chose to maintain the unit.

On March 28, 2001, Ford wrote to Chaconas and again asked if the District intended to honor the new labor agreement. "If so," Ford wrote, "why is the District going forward with discussions with the Oakland Police Department?" On the same day, Cohen's report was presented to the District's full board in open session. In response to concerns expressed by students, staff, parents and the community, the board decided to convene hearings with various community organizations in concert with the board's Intergovernmental Relations Committee and the Student Safety and Services Committee to develop a comprehensive student safety and services plan. The board also directed the superintendent to continue discussions with the City.

During the meeting, Ford again opposed further discussions with the City and urged the board not to renege on the collective bargaining agreement. Voicing a concern that the District would not honor the labor agreement, Ford cited an exchange of letters between Chaconas and Oakland Mayor Jerry Brown. In response to Brown's proposal that the District and the City proceed with a comprehensive review of the issues, Chaconas wrote that he intended to seek permission from the District's board to meet with the City to address the issues of school safety:

If you are unwilling to move forward at this time, we will implement an alternative plan to create the site-based proactive problem solving team we believe is necessary to address safety and security concerns on an on-going and timely basis. Further, let me be clear, this alternative plan will mean the District will no

longer provide police services. As a result the Oakland Police Department will have to provide these services as required under state law.

In addition, the discussion at the March 28, 2001, meeting was replete with comments by board members and Cohen about the cost of police services and the City's obligation to provide such services. For example, Chaconas said the District was facing a \$5.4 million dollar deficit. He said that if police services were implemented to full staffing, \$1.1 million would have to be added to that figure. Chaconas also stated that he had been notified that the City would be contributing no funding for police services for the coming year. In order to fund the \$700,000 loss of the City's subsidy, the District would have to make cuts elsewhere, Chaconas said.

On May 4, 2001, the District and OPD reached a tentative agreement regarding police services. If approved by the respective parties, it would eliminate the District's independent police department and responsibility for police services would revert to OPD. In a May 8, 2001, letter, District labor relations representative Arnold Schneider formally informed Haddad of the tentative agreement. Schneider wrote that the District proposed meeting with CSEA "over the possible implementation of the agreement. We are anxious to see that you and all members of your unit are informed of what is happening, and to work with you to see that if this agreement is approved the union has input into the effects of the implementation of the agreement."

The MOU between the District and OPD is a lengthy document that establishes a Campus Life and School Safety (CLASS) Unit comprised of a lieutenant, two sergeants and twelve police officers.<sup>5</sup> The compensation for the positions was to be paid by the OPD, with

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<sup>5</sup> Under the MOU, six officers would be assigned to the District's six high schools; two officers would be assigned to follow-up investigations; and four officers would be assigned to

the District contributing \$1,000,000 annually to the cost of the CLASS Unit operating budget.<sup>6</sup> Under the terms of the MOU, office space for CLASS officers would be provided by the District at each high school; SSOs would continue under the authority of the principal or administrator at the school to which they were assigned; OPD would provide police services to District schools with an "A" or "B" priority response to crimes in and around school facilities;<sup>7</sup> OPD would establish a presence in and around campuses, especially during school dismissal times; and OPD would provide appropriate training for SSOs, District personnel and CLASS officers.

The MOU provides, in addition, that the rules and procedures of the OPD govern CLASS officers, and it sets out a long list of specific duties of the officers. Among other things, the CLASS officers are required to report to the principal or designated administrator of their assigned school at least 30 minutes prior to starting time; establish and maintain a professional relationship with all school staff and students; participate in school safety and security committees; assist in the preparation of annual security audits; enforce all laws, rules and procedures, and suppress and prevent crime in and around schools; ensure that school related problems are identified and resolutions found in connection with other school or law enforcement personnel; engage in and coordinate problem-solving activities in and around assigned schools in connection with other school or law enforcement personnel; give special

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an afternoon shift to cover after school events. Cohen testified that OPD agreed to provide four additional officers at no cost to the District.

<sup>6</sup> Cohen testified the \$1,000,000 contribution came from two state grants that were earmarked for school safety. According to Cohen, the funds would not have been available to the District after it ceased providing police services.

<sup>7</sup> Under OPD's response system, an "A" response requires an immediate response, a "B" response is the next level down and so forth.

attention to preventing and addressing problems associated with issues such as drugs, weapons, trespass and truancy; report promptly to the principal or designated administrator and school security officer all incidents; report all arrests to the principal or designated administrator; take appropriate action when conditions affecting the safety of students and staff are observed; teach a law-related component to the school curriculum; cooperate with and support school staff in their efforts to ensure compliance with the student code of conduct; use District facilities and equipment to assist the police function strictly for the performance of duty-related tasks; ensure proper care and maintenance of District equipment; use radios, when available, to maintain communication with school security officers and staff; consult frequently with the principal or designated administrator and school security officers regarding problems and conditions in and around their assigned school; and avoid scheduling instruction exercises during critical periods such as dismissal.

In addition, the MOU provided that nothing therein would supersede any administrative procedure or collective bargaining agreement. The duration of the MOU was two years.

Cohen testified about differences between the OPD officers and the District officers. He said OPD controls the hiring, firing, assignments, pay, and fringe benefits of its officers. The OPD officers operate under the OPD's operational rules and procedures. OPD officers are not responsible for patrolling geographical areas. One officer is assigned to each high school and leaves the campus only for limited reasons such as taking a break or making an arrest. According to Cohen, the duties of the OPD officers are in keeping with the Attorney General's recommendation that the officers conduct preventive work, get to know students, and work with school sites to create safe conditions. Noting that District officers were responsible for patrolling a geographical area, Cohen said that they were in a call and response mode as opposed to the crime prevention approach taken by the OPD officers. In addition, Cohen

testified, OPD would patrol the entire District as part of its assignment and respond to calls for assistance.

In contrast to Cohen's testimony, Haddad testified that she had reviewed the list of duties in the MOU. She said she performed the same duties in her role as an officer in the District's independent police force.

On May 15, 2001, Ford wrote to Schneider indicating that CSEA opposed contracting out police services, and the decision to do so violated the parties' collective bargaining agreement. CSEA submitted the letter as a grievance. Helms responded to Ford on May 18, explaining that the MOU was a tentative agreement and thus the grievance was premature. "At this time, the District is not able to accept your letter of May 15, 2001, as a Level I grievance because the District has taken no action," Helms stated.

At an informal meeting on May 22, 2001, Chaconas explained the background of the MOU to CSEA representatives, noting that the District had to make "some cuts." Ford said he informed Chaconas "in no uncertain terms that [he] was not there to make any accommodations because [he] had a labor agreement, valid, legal, binding agreement in place." No proposals were exchanged. Three days later Ford asked Helms to move the grievance to arbitration, but Helms again refused on the basis that the grievance was premature.

In a June 11, 2001, letter to Chaconas, Ford demanded that the District retract the tentative MOU with OPD and maintain the status quo. Ford also demanded that in the future the District afford CSEA notice of any proposal to contract out work so that the union could determine whether to demand to negotiate the decision or the effects of the decision.

As the date neared for the District to consider adopting the MOU, CSEA continued its opposition. By letter of June 13, 2001, CSEA attorney Alan Hersh requested that the board not take action on the MOU until the parties had negotiated over both the decision and the effects

of the decision. In his letter, Hersh took the position that it was not permissible to contract out bargaining unit work during the life of the agreement, and he reiterated the request that the grievance be moved to arbitration.

In a June 13, 2001, memo to the board, Chaconas and Cohen formally recommended adopting the MOU based on five reasons: (1) the District's police force had not achieved any of its goals; (2) there was a lack of police coverage after 4:30 p.m.; (3) there was a reduced level of communication, coordination, and service from OPD; (4) there had been increased costs; and (5) the District's police force was handling calls unrelated to the schools. The recommendation noted that the MOU would require the District to contribute \$1,000,000 to the City annually. The proposed funding sources were state funds earmarked for school security (referred to in the record as AB 1113) and a grant. The recommendation noted that "the result of this agreement is an estimated savings of up to \$1,700,000 to the general purpose fund. The conditions under which the agreement is implemented will affect the actual savings." At a meeting on that day, the board adopted the recommendation on the conditions that approximately \$1.3 million in savings from the OPD takeover of police services would be used to fund counselors, conflict resolution and mental health programs. A few days later the Oakland City Council ratified the MOU.

During the discussion at the June 13 meeting, several board members who voted to adopt the MOU stated that the monetary savings from an OPD takeover of police services was a factor in their decisions. For example, board president Hodge said he did not want to adopt the MOU, and that the District's police officers had done a good job. He said, however, that the District did not have the money to fund police services adequately and the City would not provide the funds. Another member, Kerry Hamill, said the District did not have the money to put millions of dollars annually into police services and she wanted to get out of the policing

business. Another board member, Noel Gallo, said the City should be responsible for providing police services, but it had not done so. He stated his view that the issue is one of cost, and money for police services could be channeled into educational services.

The subject of the duty to bargain with CSEA also was hotly debated at the June 13 meeting. Ford and Hersh addressed the board. They argued against adoption of the MOU and demanded that the District negotiate the decision and the effects of the decision to turn police services over to OPD. Siegel responded that the District had a duty to negotiate only the effects of the decision, an opinion in which Combs concurred.

#### Post-June 13, 2001. Bargaining

The parties met on several occasions following adoption of the MOU. These meetings initially concerned reopeners under the collective bargaining agreement, but the discussions eventually moved to effects of the MOU. On July 5, 2001, for example, the parties discussed reopener proposals presented by CSEA: a 3.87 percent wage increase, a "three percent at 50" retirement formula and increased vacation days. CSEA made no proposals related to the MOU. On the same day, Hersh wrote to Chaconas reiterating CSEA's claim that the contracting out of police services was unlawful under the collective bargaining agreement, and the District breached its duty to afford CSEA notice and an opportunity to negotiate the decision and its effects. Chaconas responded on July 19. He objected to the characterization of the District's action as "contracting out," and stated that the District had simply decided to cease providing police services. "Although the District does not agree with your legal analysis that it is required to bargain over the decision or effects prior to implementing the decision," Chaconas wrote, "the District is willing to negotiate the impact of its decision to cease providing police services."

The parties met again on July 19, 2001, to discuss reopeners. The impact of the MOU entered into the discussion when the District indicated it would discuss extending health and welfare benefits, a severance package and a one-time payment for training unit members who seek new employment. CSEA made no proposals on July 19. Instead, Ford responded by letter of August 2, requesting clarification of what he described as the "vague topics for discussion" presented by the District on July 19. On August 27, 2001, CSEA filed this unfair practice charge.

In September 2001, implementation of the MOU began with OPD officers appearing on campuses. Six OPD officers were assigned to six high schools, they were given offices on their respective campuses, and they began handling calls from District personnel. District officers such as Haddad assisted the OPD officers in the transition.

The parties continued to meet, but CSEA made no proposals regarding effects of the decision during meetings on August 27 or September 10 and 13. Discussions at these meetings focused primarily on the reopeners under the collective bargaining agreement: wages, retirement benefits, and vacation days

On September 25, 2001, Helms wrote to Ford reiterating the District's willingness to negotiate effects and restating the offers made at the July 19 meeting. On October 11, Ford and other CSEA representatives met with Combs to discuss the layoff of District officers as part of implementing the MOU. Ford testified that this was the first notice CSEA received indicating that layoffs would occur and that they would include the entire bargaining unit.

The parties met on November 5 and 14, but there is little evidence about what was said at these meetings. On November 15, 2001, the District's police officers received layoff notices indicating their last day of employment would be December 31, 2001. After receipt of the layoff notices, the parties began to engage in effects bargaining.

At a meeting on December 17, 2001, with the reopener proposals still on the table, CSEA proposed full salary and benefits for bargaining unit employees through June 30, 2003, and maximization of their PERS contribution. There was a discussion about the cost of the retirement contribution to the District. CSEA at some point had increased its proposal for an increase in wages to 5.87 percent. The District responded with a 3.87 percent wage increase retroactive to July 1, 2001, and CSEA agreed.

At a negotiating session on December 18, 2001, CSEA proposed that unit members be permitted to keep their weapons, motorcycles and cars and that they receive letters of recommendation and recall rights. The District responded that it would provide unit members with two weeks severance pay, one month of health and welfare benefits, one week pay for training, seniority rights, and letters of recommendation. The District rejected the proposals regarding retaining vehicles and preferential rehire rights, and indicated it could not respond to the retirement proposal because the cost was unknown. CSEA then agreed to the District's proposal regarding pay for training. CSEA also proposed 18 months of severance pay for unit members with 18 or more years of service and 12 months of severance pay for unit members with less than 18 years of service, along with health and welfare benefits for one year.

The parties held an additional bargaining session on December 20, 2001. The District agreed to provide three weeks of severance pay for unit employees employed more than 18 years and two weeks of severance pay for unit members employed less than 18 years. In addition, the District said it would pay all accumulated comp time and cover one month of health and welfare benefits. The District agreed that officers could retain their weapons. Lastly, the District agreed to issue letters of recommendation and determine seniority by date of hire. CSEA reiterated its proposal of December 18 with little modification.

At the final negotiating session on January 11, 2002, the parties engaged in some discussion about retroactive pay to July 1 and certain retirement issues. Some officers opted to retire rather than be laid off. The parties were unable to reach agreement and CSEA declared impasse. CSEA did not pursue the impasse procedures set forth in the EERA and there is no evidence of further bargaining.<sup>8</sup>

### ISSUES

1. Did the District unilaterally contract out police services to OPD in violation of its duty to bargain under EERA?

2. Did the District fail to negotiate in good faith with CSEA during negotiations for a successor collective bargaining agreement from the fall of 2000 to January 31, 2001, by denying during that period that it intended to contract out police services and thereby avoid bargaining on the subject.?

### CONCLUSIONS OF LAW

Relying on PERB and court decisions, CSEA asserts that the District unlawfully laid off its police officers and contemporaneously replaced them with OPD officers who continue to perform the same work in a similar manner under similar circumstances. The decision to take such actions meets the definition of subcontracting under PERB case law, CSEA contends, and therefore is subject to the duty to negotiate. According to CSEA, the decision made by the District constituted no change in direction and thus is within the scope of representation under PERB law, even if it was not motivated by labor costs. However, CSEA continues, even if labor costs are considered here, the evidence shows that the decision made

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<sup>8</sup> There were 27 full-time equivalent (FTE) positions in the District's police force. The bargaining unit consisted of 15 FTE positions, twelve of these were filled at the time of the layoff.

by the District was at least partially motivated by economic savings, thus providing yet another reason to find the decision negotiable. Under Board law, CSEA concludes, the District had a duty to provide it with notice and an opportunity to negotiate the decision and the effects of the decision. By failing to do so, the District breached its duty to negotiate in good faith.

The District responds that the duty to provide notice and an opportunity to bargain arises only when an employer makes a firm decision to take action, and it made no firm decision regarding police services during the successor negotiations. Thus, there was no duty to give CSEA formal notice during the negotiations for the successor contract negotiations. The subsequent decision to cease providing police services, the District argues, was a managerial prerogative and thus not within the scope of representation. According to the District, its decision did not constitute contracting out under PERB case law and thus it was not obligated to provide CSEA with notice and an opportunity to bargain the decision. The District argues that its only obligation was to negotiate the effects of the decision and it did so. However, even if it had a duty to provide notice and an opportunity to negotiate about the decision and the effects of the decision, the District argues in the alternative, it did so in a timely manner.

To prevail on a claim of unilateral change, the a charging party must establish that (1) the employer implemented a change in a collective bargaining agreement or an established practice; (2) the change was implemented without affording the exclusive representative an opportunity to bargain; (3) the change was not merely an isolated incident, but rather had a generalized effect or continuing impact on terms and conditions of employment; and (4) the change concerned a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196.)

There is no dispute that the District changed the employment conditions of bargaining unit employees in a fundamental way that had a continuing effect on the officers and on CSEA. The District's police officers were laid off, their duties were transferred to OPD officers and the bargaining unit was eliminated. The questions at the center of this dispute are whether the District's decision was within the scope of representation, and, if so, whether the District satisfied its duty to afford CSEA notice and an opportunity to negotiate.

The scope of representation under the EERA is set forth in section 3543.2.<sup>9</sup> The subject at issue here is not enumerated in that section. An item not enumerated in section 3543.2 is negotiable if (1) it is logically and reasonably related to wages, hours, or an enumerated term

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<sup>9</sup> Section 3543.2 states in relevant part:

(a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22316 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

or condition of employment; (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of its mission. (Anaheim Union High School District (1981) PERB Decision No. 177, pp. 4-5 (Anaheim); see also San Mateo City School District v. PERB (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800] (San Mateo).) Applying this test, PERB has long held that a decision to subcontract is within the scope of representative and that an employer must therefore negotiate about such decisions. (See e.g., Arcohe Union School District (1983) PERB Decision No. 360, pp. 5-7 (Arcohe); Oakland Unified School District (1983) PERB Decision No. 367, p. 25 (Oakland).)

More recently, the Board has held that the decision to subcontract bargaining unit work is negotiable when it results in an outside entity performing the duties of bargaining unit employees in a similar manner under similar circumstances. In Redwoods Community College District (1997) PERB Decision No. 1242 (Redwoods), a union contended that a school district had unilaterally contracted out the operation of its campus dormitories. The district argued that it had not contracted out the services but rather had abandoned the operation of its dormitories and transferred that activity to an auxiliary foundation. The Board held that the decision did not turn on change in the nature and direction of the district's operation. Instead, the Board concluded, the district terminated bargaining unit employees and contemporaneously subcontracted their work to an outside entity that continued to perform the work in a similar manner under similar circumstances. (Redwoods adopting administrative law judge (ALJ) proposed decision at p. 22.) In Lucia Mar Unified School District (2001) PERB Decision No. 1440 (Lucia Mar), the Board reached a similar conclusion where a school district

subcontracted its bus service to an outside entity that performed the same services as bargaining unit employees under similar circumstances. When an employer's decision results in an outside entity performing similar duties as unit employees under similar circumstances, the Board concluded, there is no need to consider labor costs in order to determine whether the decision is subject to the duty to bargain. (Lucia Mar adopting ALJ proposed decision at pp. 39-40.)

It is well settled that managerial decisions that lie at the core of entrepreneurial control or change the nature and direction of an operation are not automatically subject to collective bargaining, even though such decisions may well impact employment security. (See Fibreboard Corp. v. NLRB (1964) 379 U.S. 203, 223 [57 LRRM 2609] (Fibreboard); Stanislaus County Department of Education (1985) PERB Decision No. 556 Stanislaus.) For example, a decision entirely to eliminate bargaining unit work constitutes an exercise of managerial prerogative that changes the scope or direction of the operation and therefore does not necessarily require negotiations. (See Otis Elevator Company (1984) 269 NLRB 891 [116 LRRM 1075] (Otis Elevator); San Diego Adult Educators v. PERB (1990 223 Cal.App.3d 1124, 1133 [273 Cal.Rptr. 53].) However, that is not the type of decision under consideration here.

If the District had decided merely to eliminate police services, this arguably would have been a different case. However, the District did not merely eliminate the services performed by its independent police force. It eliminated its police force and contemporaneously entered into an MOU under which it paid OPD to provide the same police services previously performed by unit employees and laid off the entire bargaining unit. Contrary to the District's position, the evidence in this matter makes it difficult to distinguish the decision to enter into the MOU from a decision to subcontract police work. Haddad credibly testified that the duties

in the 1998 proposal to create the District's independent police force were an accurate representation of the duties of officers in the independent unit at the time the MOU was adopted and the District's officers laid off. The duties enumerated in the 1998 proposal are similar to the duties contained in the MOU. Both contain a list of basic law enforcement duties aimed at providing a safe school environment.

For example, the core duties performed by the District's police officers included patrolling school grounds, identifying criminal activity or potential criminal activity, investigating criminal complaints, ensuring compliance with state, federal and local laws, and providing information to school and security personnel. The MOU contains a fundamentally similar list of core duties to be performed by the OPD. For example, OPD officers are to report to designated schools, enforce relevant laws and procedures, suppress and prevent crime in and around schools, deter crime and disorder by maintaining high visibility in and around schools, coordinate problem solving activities in and around schools, and participate as members of school safety and security committees. In addition, Haddad testified that she was an active participant in the transition period from September through December 2001. She described the duties of the first OPD officers who began to work on the campuses as essentially the same as those performed by the District's officers.

The District's attempt to distinguish the duties of the OPD officers from those of the District officers is not persuasive. The District points out that District officers were responsible for geographical areas while OPD officers are assigned to specific schools, and under the MOU OPD beat officers patrol the District and respond to calls 24 hours a day. Under its independent police force, the District argues, it could not have effectively made the same type of assignments and simultaneously patrolled the entire District with its officers. I disagree.

It may be true that the City's police force is larger than the District's force and therefore its law enforcement capacity is greater as a general matter. However, it is not clear that the police services performed under the MOU constitute a change in the nature and direction of the District's operation. Under the MOU, aside from the lieutenant and two sergeants, 12 officers would be assigned to the District. As of the end of 2001, the District's police force was comprised of 12 officers, and there were several additional vacant positions. Thus, absent financial concerns that will be discussed later, it does not appear that the District's capacity to provide coverage with its own police officers was significantly different than the coverage provided for in the MOU. Nor does the switch from geographical assignments to individual school assignments appear to be a significant change in direction. Nothing precluded the District from making the same kind of dedicated assignment within its independent police force. Indeed, this approach was among the alternatives set out in Cohen's February 26, 2001, memo. And OPD has always been responsible for responding to calls 24 hours a day and performing a variety of services related to law enforcement in and around the District's schools.<sup>10</sup>

The District's claim that its officers were in a "call and response mode" and the OPD officers were in a "crime prevention mode" is similarly unpersuasive. According to Haddad's testimony regarding the duties in the 1998 report, District officers had a prevention responsibility similar to that attributed to the OPD officers. That report states in relevant part that officers in the District's independent police force were responsible for coordinating student activities which "promote a safe school environment and preventative programs,"

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<sup>10</sup>These include radio communication, access to criminal information systems, jail services, prisoner transportation, training, investigative services, crime lab support, evidence and property control support, emergency response support, crossing guard programs, school safety patrol programs and youth offender programs.

"provide a visible deterrent to crime while presenting a positive impression of a uniformed law enforcement officer within the school setting," and a range of duties that involve problem solving, advising and counseling students, lecturing in classrooms and implementing law enforcement programs such as Students Against Drunk Driving. It is, therefore, fair to characterize the duties of the District's officers as including crime prevention. Even assuming that the District officers did not operate in a crime prevention mode to an extent that satisfied the District, there would have been no prohibition against the District requiring its officers to do so. Contracting with OPD for services that could have been performed by District officers is not the type of change in direction that exempts such decisions from the bargaining process.

In a related argument the District contends its police officers were ineffective. After a lengthy review process, the District asserts in its brief, it concluded that the independent police force failed to provide coverage after school and on weekends, there had been no reduction in theft and vandalism, OPD had ceased responding to District officers' calls for service at the same time that District officers responded to calls for which OPD should have been responsible, investigative services had not improved, and supervision of SSOs was unsatisfactory. As a result of these findings, the District argues, it was justified in ceasing to provide police services and contracting with OPD to do the work..

Addressing such matters through the bargaining process would erode no managerial prerogative essential to the achievement of the District's mission. For example, concerns about coverage after school and on weekends by District officers may involve establishing shifts that relate to hours of work and possibly wages for overtime, plainly enumerated items under section 3543.2(a). In fact, the parties included these very subjects in their collective bargaining agreement that was ratified by the District on March 14, 2001.

Nor do matters such as District officers responding to calls for assistance that should have been handled by OPD, lack of improvement in investigative services, unsatisfactory supervision of SSOs, or general ineffectiveness transform a negotiable decision into a managerial prerogative. Attempts to address such matters through changes in assignment of work, evaluation of officers, training or other means are in large part amenable to the mediatory influence of collective bargaining and do not necessarily involve managerial prerogatives. (See Lucia Mar ALJ proposed decision at p. 44 [managerial failures and ineffective supervision not valid reasons to justify subcontracting].)

The District next contends that its decision to enter into the MOU cannot be construed as subcontracting because it does not meet the definition of subcontracting as set forth in Fibreboard and PERB case law. In Fibreboard, according to the District, the Supreme Court defined contracting out as "the substitution of one group of workers for another to perform the same task in the same [location] under the ultimate control of the employer." (Fibreboard at p. 224.) In Fremont Union High School District (1987) PERB Decision No. 651 (Fremont I), the District points out, the Board applied this definition. Contending that the District has not retained ultimate control over police services, the District argues that its decision to enter into the MOU cannot be construed as subcontracting.

It is not entirely clear that the Board intended the definition of subcontracting set forth in Fremont I to be applied in all cases, nor is clear that the analysis in that case is applicable here. In Fremont I, a school district ceased entirely operating a comprehensive summer school program upon losing a significant amount of funding. Later, the district leased a portion of its facilities to a private university to offer the summer courses. The university was solely responsible for administering the program and hired district teachers to teach the courses. Relying on the definition of subcontracting advanced by the District here, PERB found the

summer school teachers were not under the ultimate control of the district; they were hired by the university and subject solely to the university's direction, control, compensation, and discharge. Accordingly, lack of control by the district influenced the Board's conclusion that the arrangement in Fremont I did not fall under the definition of subcontracting. (Fremont I at p. 20.) However, the Board pointed out that the courses would not have been offered without the lease, noting that had there been evidence that the district would have provided the classes if the lease agreement option was not available, a different analysis might well be warranted. Thus, the Board concluded, "absent any specific evidence that the [university-run summer course program] replaced unit work that had been performed by the district, there cannot exist subcontracting of unit work." (Fremont I at p. 23.)

In contrast to the fact pattern in Fremont I, there is abundant evidence in this record that OPD officers replaced unit employees and that, absent the MOU, the District would not have eliminated its independent police force and laid off its employees. The District has employed police officers since 1957 and the subject of school safety was a major concern of the board, the superintendent and the community throughout the discussions surrounding adoption of the MOU. It is fair to say that the debate centered not on whether the District should place police officers on school campuses but rather which police officers should be placed on the campuses. It is also fair to conclude that, absent the MOU, the District would not have replaced unit work that had been performed by District employees. Therefore, I believe the analysis in Fremont I is not controlling here.

In addition, the leading cases decided by the Board after Fremont I have not placed great weight on the control test advanced by the District here. In *Lucia Mar*, for example, there is no mention whatsoever of the control test, despite the fact that the contractor assumed control over key conditions of employment such as compensation and termination. Nor was

the ultimate control test a factor in Redwoods, despite the fact that the District turned over operation of its dormitories to a contractor.

It appears that even the Supreme Court in Fibreboard, which involved subcontracting maintenance work, did not intend that the control test would apply to all forms of subcontracting. The District's description of the test, as stated above, is only partially correct. The test relied on by the District here is found in a concurring opinion in Fibreboard and was limited to the facts of that case. In context, the concurring opinion court stated the test as follows:

The question remains whether *this particular kind of subcontracting decision* comes within the employer's duty to bargain. On the facts of this case, I join the Court's judgment because all that is involved is the substitution of one group of workers for another to perform the same task in the same plant *under the ultimate control of the same employer*. [Fibreboard; italics added.].

The majority opinion in Fibreboard, however, did not include an ultimate control component of the test:

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case - the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment - is a statutory subject of collective bargaining under [the NLRA]. Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy. [Fibreboard 57 LRRM at pp. 2613-2614]

Accordingly, I conclude that the District's reliance on the concurring opinion in Fibreboard and the Board's decision in Fremont I as requiring that an employer maintain ultimate control over terms and conditions of employment before an action may be characterized as subcontracting is misplaced. While control over such matters may be a factor

to consider in appropriate circumstances, I decline to afford it the weight suggested by the District.

Ultimate control aside, the District and OPD do participate in a closely integrated arrangement under the terms of the MOU. The introduction to the MOU provides a flavor of the close working relationship between the District and the OPD:

The OPD and the OUSD will continue to make every effort to reduce criminal activity in our schools and communities. This Memorandum of Understanding will ensure that school related problems are identified and that resolution to these problems are found, in conjunction with the Principal or designated administrator, School Security Officers, other Campus Life and School Safety Unit (CLASS) personnel and appropriate City agencies; engage in and coordinate problem-solving activities in and around their assigned schools in conjunction with the principal or designated administrator and School Security Officers; and give special attention to preventing and addressing problems to include, but no limited to, weapons, drugs, aggression, trespassing and truancy in and around their assigned schools. This can be achieved through responsible and reciprocal information sharing. Weekly scheduled meetings of school and police officials will be held to ensure the effectiveness of the Understanding.

Further evidence of the integrated relationship between OPD and the District is contained in specific terms of the MOU. For example, CLASS officers are to be selected using criteria developed with input from the superintendent. The chief of the OPD and the superintendent are to meet as necessary to review operations of the CLASS unit and discuss measures to ensure its effectiveness. CLASS officers are assigned offices at each high school, and they must report daily to the principal or designated administrator at least 30 minutes prior to the starting time of the assigned school. Officers are given the right to use District facilities and equipment to assist in their policing duties. Officers are given the authority to enforce rules adopted by the District's board, such as the student code of conduct. Officers must submit incident reports to the principal or designated administrator for approval, and the principal or

designated administrator must sign off on such reports and report them to the OPD. Principals and designated representatives must report all drug or weapon violations to the OPD for criminal prosecution and notification of parents. Officers are to provide appropriate training to the District's school security officers and other District personnel. Accordingly, I conclude that while the District may not retain ultimate control of OPD officers, the relationship between the District and OPD closely resembles that of employer and subcontractor.

The District argues nevertheless that the decision here is unlike the decisions in PERB cases because the District is not mandated to provide police services. In this regard, the District claims this case is governed by the Board's decision in Stanislaus. In that case, a county served as the administrator of a federal migrant child development program in a seven county region and as the direct operator of the migrant program within the county. The county decided to cease its role as operator of the program in three locations due to programmatic and financial reasons. The county then awarded a contract to a nonprofit organization to operate the program and funneled the federal funds to the organization. Concluding that the county's decision was an exercise of managerial prerogative, the Board stated that "unlike a school district that abandons its in-house transportation program and hires a private bus company to carry the students to and from its schools, here, the migrant child centers are not part of a County program which survives as such after the County decided it no longer wished to be in the business of directly providing the educational services.... Thus, since the County's role in the migrant child program was that of a conduit for federal funds, we agree that whether a school employer continues to operate a program on behalf of the Federal Government is a basic managerial prerogative about which negotiation is not required." (Stanislaus at pp. 4-5.)

While there may be similarities between Stanislaus and the present case, there are significant differences. That case involved the use of federal funds to establish a federal

program at a local level. The program would not have existed without federal involvement, and, as a result of the contract, the county was transformed into a mere agent of the federal government through which funds were channeled. That is not what happened here. In this case the District had established an independent police force pursuant to the Education Code, administered it within the District and funded it through state funds.<sup>11</sup> The independent force had been in existence in one form or another since 1957 and it was not a program entirely dependent on federal funding and run strictly under federal regulations. In addition, the MOU creates a role for the District that is unlike the role played by the county in Stanislaus. The District is not a mere agent through which funds are provided. As evidenced by the terms of the MOU, the District works in collaboration with OPD and is responsible for considerable funding for the services. It is also significant that the District in reality did not decide to eliminate police services; rather, the question was whether the District and OPD could agree on an arrangement under which OPD would provide the services. And, as discussed elsewhere in this proposed decision, the District did not decide to end police services upon execution of the MOU. It merely substituted OPD officers for District officers to perform work that is similar to the work previously performed by the District's officers under similar circumstances. I conclude therefore that Stanislaus is not controlling here.

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<sup>11</sup> Education Code section 38000 provides in relevant part:

The governing board of any school district may establish a security department... or a police department under the supervision of a chief of police, as designated by, and under the direction of, the superintendent of the school district. ... It is the intention of the Legislature in enacting this section that a school district police or security department is supplementary to city and county law enforcement agencies and is not vested with general police powers.

This case resembles San Diego more than Stanislaus. In San Diego, a community college district offered non-credit classes in several languages. In March 1983, the district decided to discontinue the non-credit classes in German, French and Spanish for economic reasons. In May 1983, after pressure from the public to reinstate the classes, the district restored the classes by subcontracting them to a nonprofit foundation. In August 1983, the district discontinued the remaining non-credit language classes (Farsi, Swedish and Tagalog) and simultaneously subcontracted them to the foundation. Following the Board's decision in Fremont I, the court determined that the district had clearly decided to discontinue the courses in German, French and Spanish, a decision not within the scope of representation. The decision to offer those courses later through the foundation was a separate decision. The court reached a different conclusion regarding the Farsi, Swedish and Tagalog courses, even though the district was under no mandate to offer the courses. Placing great weight on the timing of the district's decisions, the court reasoned that the decision to subcontract these courses to the foundation fell within the scope of representation because it was made contemporaneously with the decision to offer the work of district employees to an outside contractor. (San Diego at pp. 1135-1136.)

The same analysis is applicable here. The District did not decide to entirely eliminate police services on its various campuses and resume them pursuant to an independent decision at a later point in time. Instead, it entered into an MOU with OPD to provide similar police services using OPD officers rather than District officers. The decision to eliminate its independent police force and lay off District officers was not the kind of separate decision to eliminate a department that would not require negotiations. It was made contemporaneously with the decision to enter into the MOU and resulted in replacing District officers with OPD officers. As such it was a decision that should have been negotiated with CSEA, even though

there exists no mandate to provide the services. (San Diego at pp. 1135-1136; Lucia Mar. ALJ proposed decision at p. 39.)

Therefore, I conclude that the decision to enter into the MOU was not a change in direction that involves a core managerial prerogative essential to the District's mission. Virtually the same police work is being performed in the District, except that the duties previously performed by District officers are now performed by officers of the OPD pursuant to an MOU between the District and the City. The District's action in adopting the MOU is not the kind of managerial prerogative that would exempt it from the duty to bargain under the Anaheim test. Accordingly, it is concluded that the District's decision to subcontract bargaining unit work to the OPD constituted a negotiable decision under the EERA. (San Diego; Redwoods; Lucia Mar.) By failing to negotiate the decision to enter the MOU, the District breached its duty to negotiate in good faith with CSEA.

The District next argues that even if its action is characterized as subcontracting, it had no obligation to negotiate about the decision because it was not based on labor costs. The District claims its decision was driven by the fact that the safety needs of school sites were not being met and that the independent police force had not met many of its goals. CSEA argues in response that it need not prove that labor costs was a motivating factor to prevail on a claim of unilateral subcontracting. However, CSEA argues, even if labor costs is a necessary element of such a claim, the record shows that the decision was at least partially motivated by savings in such costs and therefore the District had a duty to bargain.

As the District points out, early PERB decisions placed great weight on labor costs as a motivating factor in determining whether a decision to subcontract was negotiable. The Board held in those cases that an employer's decision to contract out work is negotiable, provided it is motivated by labor costs. (See e.g., California Department of Personnel Administration

(1987) PERB Decision No. 648-S.) Under more recent PERB case law, however, it is unnecessary to find that labor costs was a motivating factor as a prerequisite to finding that a decision to subcontract is negotiable. "Where the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances, there is no need to apply any further test about labor costs in order to determine whether the decision is subject to the statutory duty to bargain." (Lucia Mar ALJ proposed decision at p. 39.) Thus, no further analysis is necessary to resolve the issues presented here.

However, assuming labor costs is a necessary factor in determining whether a decision to subcontract is negotiable, as the District argues, the record supports a conclusion that the District was motivated at least in part by potential savings in labor costs.

The District faced difficult economic circumstances in 2001. Among other things, it lost federal funds, the City terminated its financial support of police services, and savings expected from decreased theft and vandalism did not materialize. In addressing this situation, the record shows, the District was motivated at least partially by savings that would be achieved by agreeing to the OPD takeover of police services and laying off officers who performed the services previously.

On June 13, 2001, Chaconas submitted a written recommendation that the board adopt the MOU. In the memo, Chaconas indicated that under the MOU the District would provide one million dollars to the City annually, the funding to be obtained through AB 1113 and grants. According to Chaconas' recommendation, estimated savings to the general purpose fund from adopting the MOU could reach \$1,700,000 and money that would be used for police services could be diverted to other District needs.

The discussion at the June 13, 2001, board meeting was essentially consistent with Chaconas' recommendation. Several board members stated that economic savings from an

OPD takeover of police services was a factor in their decision to adopt the MOU. Board president Hodge said the District's police officers had done a good job and he did not want to adopt the MOU. However, he said, the District did not have the money to fund police services adequately, and the City would not provide the funds. Hamill said the District did not have the money to put millions of dollars annually into police services and she wanted to get out of the policing business. Gallo described the issue as one of cost, and he said savings from police services could be channeled into educational services. In fact, that is precisely what happened. Under the MOU, the District would contribute \$1,000,000 annually to the cost of the CLASS unit operating budget, and the remaining resources to fund police services would come from OPD rather than the general fund. The MOU was adopted by the board on the condition that the savings would be spent on counselors, conflict resolution programs and mental health services. It is self evident that much of the savings were derived from the salaries and benefits of the District's police officers who were laid off as a result of the MOU.

The actions of June 13, 2001, are generally consistent with economic concerns articulated by the District throughout the dialogue about police services. Chaconas stated the need for cuts during the meeting with Ford and Haddad on May 22, 2001. At a March 28, 2001, board meeting Chaconas made it clear that the cost of providing services was a factor in moving forward with discussions with the City. He said the District was facing a \$5.4 million deficit and fully staffing police services would result in adding another \$1.1 million to that amount. Chaconas noted, moreover, that the City would not be contributing to the District's police services in the upcoming school year. In order to fund the loss of the City's subsidy, Chaconas said, the District would have to make cuts elsewhere.

At a student safety committee meeting on March 5, 2001, Siegel said he supported "the idea that the City should take over the control of the policing function of the schools because

we do not have a special State allocation for policing in the Oakland schools. The policing is paid from the budgets we use to pay principals, teachers, to buy books, and to buy supplies."

In a February 26, 2001, memo to the District board recommending the OPD takeover of the District's police function, Chaconas explained that \$1.4 million in savings from expected reductions in theft and vandalism had not materialized, and the City had terminated its funding to the District. The result, Chaconas wrote, was that the District was spending nearly \$850,000 in increased costs. Chaconas noted, moreover, that the District's savings would allow up to \$1.1 million to be transferred to the City to help cover OPD's costs.

Cohen's testimony confirmed that increased costs was a motivating factor in the decision to enter into the MOU. He said because the funds from the City would no longer be available and savings from decreased theft and vandalism had not been realized, "it was going to mean that the District would have to take its discretionary dollars from the general fund, away from its core activities of education and spend them on police services."

Lastly, Haddad's unrebutted testimony is that Chaconas told her as early as May 2000 that the District needed to make cuts for the 2000-2001 school year. He said, "I'm looking at officers . . . unless you can tell me how we can save \$300,000 through your department, or \$300,000 in cuts."

I find, therefore, that economic concerns at least partially motivated the District's decision to enter into the MOU, and a considerable amount of the expected savings would come from not having to fully fund the salaries, benefits and costs associated with maintaining its independent police services unit. However, "[w]hile sound fiscal management is a significant concern, such concern is properly addressed at the bargaining table and is not 'an excuse to avoid the negotiating obligation entirely.'" (Archoe at p. 7.) As the Board observed in Lucia Mar, CSEA may have been unalterably opposed to subcontracting. However,

. . . if negotiations had not given the District what it believed it needed, it was still free to contract out the work at the completion of the impasse procedures. The law does not mandate success, but only requires a "good faith" effort by the parties to reach agreement. A willingness to negotiate will, by itself, never guarantee success. A refusal to negotiate, however, will almost always guarantee failure and circumvent what legally and rightfully should be a mutual effort to find solutions to mutual problems. [Lucia Mar ALJ proposed decision at p. 45.]

### The District's Waiver Arguments

The District argues that, assuming the decision to adopt the MOU is found to be negotiable, its only obligation was to provide CSEA with notice and an opportunity to bargain prior to arriving at a firm decision. The District contends that it had no duty to provide notice and an opportunity to bargain during the successor negotiations prior to January 31, 2001, because no firm decision had been made. The District claims it provided notice and an opportunity to bargain the decision almost immediately after it reached a tentative decision to cease offering police services, on or about May 4, 2001. However, despite numerous notices and discussions between the May 4 notice and the June 13, 2001, adoption of the MOU, CSEA did not request negotiations and made no proposals, thereby waiving its right to negotiate.

The District argues further that the zipper clause in the collective bargaining agreement did not prohibit its action. The zipper clause is relevant here, the District contends, only if it made a decision to subcontract, but it did not do so. In addition, the District argues that there is no evidence that the zipper clause was intended to require the District to continue every service it was providing at the time the agreement was negotiated. When the zipper clause is read together with the management rights clause, the District continues, it is clear that the District has not clearly and unmistakably waived its right to cease providing police services. Lastly, the District argues that while a zipper clause may be invoked to refuse to negotiate a mid-contract change to an express provision of the agreement, there are no reported cases

where the zipper clause has prevented an employer from changing a policy or procedure outside the agreement.

CSEA rejects these arguments, asserting that the District did not provide notice and an opportunity to negotiate over the decision to subcontract police services before the MOU was approved. CSEA contends the District had reached a firm decision to subcontract as of the time it provided notice of a tentative agreement on May 4 and 8, 2001. In CSEA's view, by that time the District had already struck a deal with OPD, and CSEA was presented with a fait accompli. Any attempt to bargain the decision would have been futile. In any event, CSEA claims Hersh demanded to bargain the decision and the effects of the decision shortly before adoption of the MOU on June 13, 2001, but the District refused.

Notice must be given sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate. (Victor Valley Union High School District (1986) PERB Decision No. 565, p. 5 (Victor Valley)). The successor negotiations began in late 2000 and ended with a tentative agreement on January 31, 2001. As these negotiations proceeded, there were rumors and other indications that the District and the City were engaged in discussions about an OPD takeover. On August 21, 2000, for example, Hodge told Haddad that Chaconas was considering eliminating the independent police force in favor of OPD providing the services. Siegel told Ford in November 2000 that the District was investigating the matter. At a December 4, 2000, meeting of the Student Safety and Services Committee, the matter was a subject of discussion. Chaconas indicated he had discussed the matter with OPD and recommended exploring all options to achieve an adequate level of safety in the schools. Cohen's investigation of the matter began before the end of the negotiations, although it was

not completed until late February 2001, approximately one month after the parties reached agreement on a successor contract.

In this context, although it may have been frustrating for CSEA negotiators to receive Helms' denials at the bargaining table, the discussions with OPD were in an exploratory stage prior to January 31, 2001, and no firm decision had been made to trigger the notice obligation under Victor Valley. It was not until May 4, 2001, when the District and the OPD reached a firm decision in the form of a tentative MOU, that the duty to provide notice arose. The District provided CSEA with formal notice of the MOU on May 8, 2001. CSEA had the opportunity to present proposals prior to the time the District adopted the MOU on June 13, 2001, and fully implemented it on December 31, 2001.

It is concluded, therefore, that the District did not fail to provide notice and an opportunity to negotiate during the period from late 2000 to the completion of negotiations for a successor collective bargaining agreement on January 31, 2001. During this period, the discussions with OPD were in a preliminary stage and a firm decision was not made until early May 2001, several months after January 31, 2001. Accordingly, this allegation in the complaint shall be dismissed.

I turn next to the events after May 4, 2001, and application of the relevant language in the parties' collective bargaining agreement. PERB has long held that the purpose of a zipper clause is to foreclose further requests to bargain regarding negotiable matters, even if not previously considered, during the life of a contract. It does not, however, cede to the employer the power to make unilateral changes in the status quo. If such power exists, it must be found elsewhere in the agreement. (Los Angeles Community College District (1982) PERB Decision No. 252, pp. 11-12 (Los Angeles); Cupertino Union School District (1993) PERB Decision No. 987, pp. 3-4.) The National Labor Relations Board (NLRB) follows the same reasoning .

(See e.g., Suffolk Child Development Center (1985) 277 NLRB 1345, 1350 [121 LRRM 1103] [zipper clause acts as curb on the union's right to demand bargaining during the life of the agreement about the terms and conditions of employment contained in the agreement, but it does not grant employer right to change terms and conditions of employment during the agreement].)

In this case, the zipper clause is found in Article 17 of the collective bargaining agreement between the parties. It states in relevant part:

Neither party shall during the term of this Agreement demand any change therein, nor shall either party be required to bargain with respect to any matter. Without limiting the generality of the above, both parties waive any right to demand of the other any negotiating, bargaining, or change during the life of the Agreement; provided that nothing herein shall prohibit the parties from changing the terms of the Agreement by mutual consent.

The District argues that CSEA presented no evidence that that the zipper clause prohibited changes to the agreement or to any policy or practice outside the agreement. The District claims, moreover, that the specific language in the zipper clause prohibits changes to only the "Agreement" and cannot reasonably be construed as including matters outside the agreement itself. I disagree.

The plain language in the zipper clause states that neither party shall be required to bargain "with respect to any matter" during the life of the agreement. It also provides that both parties waive any right to demand "any negotiating, bargaining, or change during the life of the Agreement." I find this language clear and unambiguous. CSEA had no duty to bargain with respect to any matter, and the District had waived its right to demand any change. In the face of clear and unambiguous language, it is unnecessary to rely on extraneous evidence to derive its meaning. Thus, CSEA's decision not to present evidence about the meaning of the zipper clause is irrelevant. (See Barstow Unified School District (1996) PERB Decision No. 1138,

p. 16 (Barstow); See also Marysville Joint Unified School District (1983) PERB Decision No. 314, p. 9 [where contract language is clear, it is unnecessary to beyond plain language to ascertain its meaning].)

Another aspect of the zipper clause undermines the District's argument. The language in the clause states that "neither party shall during the term of this Agreement demand any change therein." In this case, the District did not change a particular provision in the agreement; rather, it subcontracted all bargaining unit work to OPD, laid off all bargaining unit employees, and thus abrogated the entire agreement. This was precisely the claim raised repeatedly by Ford and Hersh after the District ratified the collective bargaining agreement on March 14, 2001.

In a March 5, 2001, letter, Ford informed Chaconas that the District and CSEA had a binding agreement that did not permit subcontracting. "Please refrain from any unilateral action that would violate the labor agreement. The school police and their representatives are willing to meet with you to address the concerns of the District and see how we might possibly accommodate them within the framework of our current labor agreement," Ford wrote. Ford was adamant that CSEA was entitled to the benefits of the recently negotiated contract and he raised the same objection again in letters to Chaconas on March 28 and June 11, 2001, and to Schneider on May 15. During a meeting on May 22, 2001, Ford indicated he would make no accommodations to the District's desire for cuts, because a labor agreement was in place. At a board meeting on June 1, 2001, the same arguments were raised by CSEA.

In addition, Hersh laid out the same position in some detail in a letter to the District on June 13, 2001, prior to the time the board voted to adopt the MOU. Hersh and Ford forcefully presented the same arguments to the board at the meeting on that day. Nevertheless, the District rejected these arguments and proceeded to adopt the MOU, in plain contravention of

the labor contract and the existence of a zipper clause that precluded unilateral changes in any negotiable topics during the life of the agreement.

Although CSEA did not present bargaining history evidence about the precise meaning of the language in the zipper clause, it presented evidence that is relevant here to determine if a waiver exists. As the NLRB has stated,

A zipper clause must meet the standard of any other alleged waiver. It is well established that in order to establish waiver of the statutory right to bargain in regard to mandatory subjects of bargaining, such as is involved here, there must be a clear and unequivocal relinquishment of such right. Even where a zipper clause is couched in broad terms, it must appear from an evaluation of the negotiations that the particular matter in issue was fully discussed or consciously explored and the Union consciously yielded or clearly and unmistakably waived its interest in the matter. This is particularly true where, as here, an employer relies on the zipper clause to establish its freedom to unilaterally change, or institute new, terms and conditions of employment not contained in the contract.

(Suffolk at pp. 1350-1351, quoting from Angeles Block Company (1980) 250 NLRB 868, 877 [105 LRRM 1141].)

In this case, Ford and Haddad repeatedly raised the matter of the OPD takeover during negotiations for the successor agreement and indicated that if the takeover was to occur, the union would seek to bargain the subject. During bargaining sessions on November 1, 2, and 16, and on December 16, 2000, the matter was raised. It was raised at a session on January 23, 2001, only a few days prior to reaching tentative agreement. CSEA also raised the matter on several occasions after the tentative agreement was reached but before the District ratified it on March 14, 2001. It was only because Helms professed lack of knowledge about any takeover and repeatedly indicated he was there only to negotiate for a successor three-year agreement that CSEA agreed to the tentative agreement.

I find that CSEA at no time during the negotiations consciously yielded or clearly and unmistakably waived its right to negotiate about the subcontracting decision that gave rise to

this matter. In fact, the opposite is true. At all relevant times, CSEA negotiators attempted to engage Helms in negotiations about the subject. And, after the parties reached agreement, CSEA repeatedly argued to the District that the new labor agreement precluded the subcontracting.

The District's claim that the zipper clause applies only to matters covered by the agreement runs counter to the language in the clause and PERB case law. As noted above, the plain language does not limit the application of the zipper clause to matters contained in the agreement. It provides that neither party shall be required to bargain "with respect to any matter," and "both parties waive any right to demand of the other any negotiating, bargaining, or change during the life of the Agreement." In this case, the District announced its decision to change a longstanding practice under which it provided police services. Under the terms of the agreement, CSEA had the right to refuse to bargain about changes in terms and conditions of employment covered by the clause, and the District was not free to implement a unilateral change in the status quo. In other words, CSEA was free to use the zipper clause as a shield to resist efforts by the District to change the practice, and the District was not permitted to use the zipper clause as a sword to change the status quo. (Los Rios Community College District (1988) PERB Decision No. 684, pp. 12-15.); see also Fountain Valley Elementary School District (1987) PERB Decision No. 625; CBS Corp. (1998) 326 NLRB 861 [160 LRRM 1021].)

The District next claims that the management rights clause in the collective bargaining agreement afforded it the authority to adopt the MOU and agree to an OPD takeover of police services without negotiating about the decision to do so. Article 4, the management rights provision, provides:

Except as limited by the specified and express terms of this Agreement, the District retains the exclusive right to manage the school district including, but not limiting, its rights to determine the methods, means and personnel by which the District operations are to be conducted; and to determine the missions and functions of each of its departments, sites, facilities and operating units, set standards of service to be offered to the public; and to administer the personnel system, classify positions, and or delete positions or classes to or from the salary plan, establish standards for employment, take disciplinary action for just cause, to schedule work and relieve its employees from duty because of lack of work or other legitimate reasons. The District further reserves the right to take whatever action may be necessary in an emergency situation.

To prevail on this argument, the District must show that CSEA by agreeing to this provision waived its right to negotiate about subcontracting in clear and unmistakable terms. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74 (Amador Valley)). A generally worded management rights clause will not be construed as a clear and unmistakable waiver of statutory bargaining rights. (San Jacinto Unified School District (1994) PERB Decision No. 1078, adopting ALJ proposed decision at p. 24); see also Mammoth Unified School District (1983) PERB Decision No. 371.) As the Board has held, when a management rights clause is the source of the asserted waiver, it is normally scrutinized to determine whether it affords justification for the "specific" unilateral action at issue. (Fremont Unified School District (1997) PERB Decision No. 1240, adopting ALJ proposed decision at pp. 42-43 (Fremont ID.))

Article 4 is a broadly worded management rights clause that lacks the requisite specificity to establish waiver. The reservation by the District to determine the "methods, means and personnel by which the District operations are to be conducted" plainly does not withstand scrutiny under PERB precedent that requires clear and unmistakable waiver. To meet this standard, the District would have to show that the parties agreed to permit the

"specific" unilateral action at issue here, subcontracting. The plain language of the agreement does not address the subject of subcontracting and cannot reasonably be construed as authorizing the District to contract out work. (See Barstow at p. 14 [waiver found where management rights clause permits district to "contract out work"].) In this case, moreover, there is no evidence to indicate that the parties discussed the subject of contracting out and agreed to permit the District to contract out the work of police officers. It must be concluded, therefore, that the District has not shown that the subject was "fully discussed" or "consciously explored" and that CSEA, by agreeing to Article 4, "consciously yielded" its interest in the matter. (Los Angeles at p. 13.)

#### Decision Bargaining

The District's alternative argument that it afforded CSEA an opportunity to negotiate about the decision to subcontract prior to adoption of the MOU on June 13, 2001, does not withstand scrutiny. It is true that the District gave CSEA formal notice of the tentative MOU on May 8, 2001, and CSEA presented no proposals regarding the decision. However, CSEA was under no duty to negotiate during the life of the agreement because an effective zipper clause was in place by then.

The zipper clause aside, it is clear in the record that the District took the position that it would not negotiate the decision and thus any attempt to submit proposals would have been futile. The District first informed CSEA of the tentative MOU in early May 2001, almost two months after Ford's letter to Chaconas put the District on notice of the union's position. At every juncture thereafter, the District clearly indicated the decision embodied in the MOU was a managerial prerogative, and while it would not negotiate about the decision itself it would negotiate about effects. At a public board meeting on March 14, 2001, member Cobb voiced a concern about going forward with the MOU in light of the recently negotiated labor contract.

Chaconas and Siegel assured the board that they had consulted legal counsel and the human resources department and were informed that the District had no obligation to maintain a police services unit and only the impact of a decision to eliminate the department would be negotiable. The meeting proceeded on that basis.

Further evidence of the District's intent to implement the MOU without negotiating the decision to do so with CSEA is found in a March 2001 letter from Chaconas to Oakland Mayor Jerry Brown in which Chaconas states plainly that if the City did not "move forward at this time" the District would implement an alternative plan under which the District would no longer provide police services and the OPD would have to deliver the services as required under state law. Implicit in the letter is the notion that the District would proceed without negotiations.

Schneider's May 8, 2001, letter to Haddad announcing the District had reached the tentative agreement with OPD made clear that the District would like to meet with CSEA to "see that if this agreement is approved the union has input into the effects of the implementation of the agreement." Consistent with the discussion at the March 14, 2001, meeting, Schneider gave no indication that the District would agree to negotiate the decision.

Finally, at the board meeting on June 13, 2001, where the MOU was adopted, a lengthy discussion occurred about the arguments raised by Hersh and Ford. Siegel and Combs said clearly that the District's duty to bargain extended only to the effects of the decision to adopt the MOU.

Based on the foregoing, I find that the District at all relevant times adhered to a position that it would not negotiate the decision to adopt the MOU. It agreed to negotiate only the effects. Under these circumstances, the District's claim that it afforded CSEA notice and an opportunity to bargain the decision is rejected. CSEA's decision not to present proposals

regarding the decision to adopt the MOU cannot serve as a waiver of its right to bargain. A union has no duty to present proposals when doing so would be futile. (See Archoe at p. 11; Fall River Joint Unified School District (1998) PERB Decision No. 1259, p. 28.)

### Effects Bargaining

The District argues that it satisfied its duty to negotiate the effects of its decision prior to the time it laid off officers on December 31, 2001. The District contends that, despite notice and the opportunity to negotiate about effects, CSEA failed to make proposals during several bargaining sessions after June 13, 2001, where it had the opportunity to do so. Eventually, the parties engaged in effects bargaining and when no agreement was reached, the District claims, it was entitled to implement the MOU.

CSEA has insisted throughout this proceeding that it had the right to negotiate about the decision to subcontract police services. However, CSEA contends, assuming it is determined that the decision to subcontract is not a negotiable matter, the District did not satisfy its duty bargain the effects of the decision. According to CSEA, the District at no time informed the union that it would begin the transition of services to OPD in September 2001; therefore, the unilateral implementation that took place in September took CSEA by surprise and denied it the right to meaningfully bargain effects. In addition, CSEA argues that the layoff date of December 31, 2001, was set arbitrarily. There is no evidence, CSEA asserts, that it was based on an managerial interest that precluded negotiations beyond that date.

In advancing their respective arguments, both parties rely on Compton Community College District (1989) PERB Decision No. 720 (Compton). In Compton, PERB held that under some circumstances an employer, prior to agreement or exhaustion of impasse procedures, may implement a nonnegotiable decision after providing reasonable notice and a meaningful opportunity to bargain over the effects of the decision. The circumstances under

which an employer may implement a nonnegotiable decision are as follows: (1) the implementation date is not an arbitrary one, but is based on either an immutable standard (such as one set out in the Education Code or other laws not superseded by the EERA) or an important managerial interest such that delay in implementation beyond the date chosen would effectively undermine the employer's right to make the nonnegotiable decision; (2) notice of the decision and implementation date is given sufficiently in advance of the implementation date to allow for meaningful negotiations prior to implementation; and (3) the employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation. (Compton at pp. 14-15.)

I note at the outset that Compton is inapplicable here because it applies to conditions under which an employer may implement a nonnegotiable decision. I have already found that the decision to adopt the MOU and turn over police service to the OPD was a negotiable decision. However, assuming that the decision to adopt the MOU was not negotiable, as the District contends, I would find the District has satisfied its duty to negotiate effects under Compton.

On May 8, 2001, the District gave CSEA notice that it had tentatively agreed to an MOU providing that OPD would take over police services in the District. The District offered to negotiate the effects and implementation of the MOU at that time. The lay off of District officers and thus final implementation of the MOU did not take place until December 31, 2001, almost seven months later. And the parties met on several occasions throughout 2001. Specifically, CSEA had the opportunity to present proposals regarding effects during meetings on July 5 and 19, August 27, September 10 and 13, October 11, and November 4 and 14. Although these meetings primarily concerned reopener negotiations, there were opportunities

to present proposals about effects, yet CSEA did not do so until shortly after receiving the layoff notices on November 15. CSEA then presented detailed proposals regarding effects on December 17, 18, 20 and January 11, 2002. The record shows that the parties negotiated about effects during these meetings, but no agreement was reached.<sup>12</sup> It is concluded, therefore, that the District afforded CSEA a meaningful opportunity to present proposals regarding the effects of the decision to adopt the MOU prior to implementation.

CSEA's related claim that the timing of the transition and the layoffs were inconsistent with the District's obligation under Compton is similarly unconvincing. In September 2001, as the meetings continued, OPD officers began to appear on District campuses, commencing the first step of the transition process. At a meeting with Combs on October 11, Ford learned that the District intended to lay off police officers in the bargaining unit. Only about one month later, on November 15, all District officers received notice that the layoff would become effective December 31, 2001.

In the context presented here, I do not find that the District's conduct violated any duty under Compton. The District had provided adequate notice of the MOU almost seven months prior to the December 31, 2001, layoff of the officers. The transition phase that began in September 2001 when OPD officers appeared on District campuses was four months after CSEA had received notice. As noted, this was a reasonable amount of time to allow for meaningful negotiations regarding effects of the decision. Further delay in implementing the layoff of District officers may have effectively undermined the District's right to make the

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<sup>12</sup> On December 17, CSEA proposed full salary and benefits unit employees through June 30, 2003, and maximization of their PERS contribution. CSEA proposals on December 18 included the right to retain weapons and cars, letters of recommendation, and recall rights. During the meetings on December 18 and 20, the parties discussed proposals related to training, lump sum severance pay, health and welfare benefits. Similar issues were discussed at the January 11, 2002, meeting, but the parties reached impasse.

decision in the first place. The MOU was two years in duration, and further delays could have undermined its very purpose. There is no evidence, moreover, that the presence of the OPD officers in the District had any immediate impact on District officers or the effects bargaining.

Although meaningful effects bargaining did not commence until late in 2001, the District cannot be faulted for any delays. CSEA took the position that the decision itself was negotiable and passed up the opportunity to present proposals on the effects of the OPD takeover. It is clear that CSEA waited until late in 2001 before it began to present concrete proposals. And there is no evidence that the District refused to negotiate effects prior to the layoffs, or afterward as to those subjects not necessarily resolved by virtue of the implementation. It is noteworthy that many if not all of the subjects on the table at the time CSEA declared impasse arguably were amenable to negotiation after December 31, 2001. Ultimately, it was CSEA who declared impasse and requested no further negotiations or participation in the impasse procedures. Accordingly, I find that the District did not fail or refuse to negotiate in good faith regarding the effects of the decision to implement the MOU providing for OPD takeover of the District's police services.<sup>13</sup>

#### REMEDY

The PERB in section 3541.5(c) is given:

... 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.

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<sup>13</sup> In reaching this conclusion, I note that although the parties did engage in effects bargaining, such bargaining does not fulfill the District's obligation to negotiate about the decision to subcontract. (See e.g., General Electric Company (1990) 296 NLRB 844, fn. 3 [132 LRRM 1312].)

It has been found that the District contracted out its police services to OPD without providing CSEA with notice and the opportunity to negotiate the decision to do so, in violation of section 3543.5(c). By this conduct the District has denied CSEA its right to represent bargaining unit members, in violation of section 3543.5(b). By the same conduct, the District has interfered with the right of bargaining unit members to be represented by CSEA, in violation of section 3543.5(a). It is therefore appropriate to order the District to cease and desist from such conduct.

It is also appropriate to order the District, upon the request of CSEA, to reinstate the status quo ante in accordance with the following. The District will be ordered, as soon as reasonably possible, to rescind the MOU with OPD, restore its independent police services unit, reinstate bargaining unit employees to their former positions, and make such employees whole for losses, monetary and otherwise, suffered as a result of the District's unlawful action, along with interest at the rate of 7 percent per annum. (Lucia Mar.) The order to rescind the MOU is not intended to preclude the OPD from exercising its authority to conduct law enforcement activities in and around the District's schools.

It is further appropriate that the District be directed to post a notice incorporating the terms of this order at all District schools where notices customarily are posted for members of the bargaining unit represented by CSEA. 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 this 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. (Placerville Union School District (1978) PERB Decision No. 69; Lucia Mar.)

All other allegations are hereby dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this unfair practice case, and pursuant to Educational Employment Relations Act (Act), section 3541.5(c), it is hereby ordered that the Oakland Unified School District (District) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate with the California School Employees Association and its Chapter 1 (CSEA) about the decision to contract out the District's police services;

2. Denying CSEA its right to represent bargaining unit members in their employment relations with the District;

3. Denying bargaining unit members the right to be represented by their chosen representative.

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

1. Upon demand from CSEA, restore the positions in its independent police services unit, reinstate bargaining unit employees affected by the Memorandum of Understanding (MOU) with the Oakland Police Department, and rescind the MOU as soon as reasonably possible.

2. Make all affected employees whole for losses, monetary and otherwise, suffered as a result of the District's unlawful action, along with interest at the rate of 7 percent per annum.

3. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to employees are customarily 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.

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

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 or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than 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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FRED D'ORAZIO  
Administrative Law Judge