

determine whether the Long Beach Community College District Police Officers Association (Association) had by its conduct otherwise waived its right to bargain over the District's contracting out of police services to the City of Long Beach (City) that resulted in the layoff of all Association members. The ALJ found that the District failed to establish that the Association had, by its conduct, clearly and unmistakably waived its right to bargain. Consequently, the ALJ held that the District violated the Educational Employment Relations Act (EERA)¹ section 3543.5(a), (b) and (c) by unilaterally contracting out the work of the Association.

The Board reviewed the entire record in this matter as well as the Board's previous decision in Long Beach CCD. The Board finds the prior Board decision in Long Beach CCD to be inconsistent with long-established rules governing contractual waiver of the right to negotiate over mandatory subjects of bargaining.² For that reason, the Board reverses the portion of Long Beach CCD that overruled Barstow, and reinstates Barstow.

Following Barstow, the Board holds that pursuant to the management rights clause in Article 2 of the CBA between the District and the Association,³ the District has the exclusive right "to contract out work." While contracting out is generally within the scope of bargaining, we find that the Association waived its right to bargain over the decision to contract out police services by agreeing to the management rights clause in Article 2. We further hold that the District was required to bargain over the effects of contracting out police services.

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

²Long Beach CCD overruled Barstow Unified School District (1996) PERB Decision No. 1138 (Barstow), to the extent Barstow conflicted with the Long Beach CCD decision on the issue of contractual waiver of bargaining.

³The CBA was in effect from April 25, 2000 to June 30, 2003.

PROCEDURAL HISTORY

The Association filed its unfair practice charge against the District on June 23, 2003.⁴ A Board agent subsequently dismissed the unfair practice charge on July 25, 2003. The Association appealed the dismissal to the Board.

The Board reversed the dismissal and remanded the case to the PERB General Counsel's Office on December 18, 2003, for issuance of a complaint. (Long Beach CCD.)

The PERB General Counsel's Office issued a complaint against the District on December 19, 2003. The District filed an answer on February 6, 2004. A Board agent conducted informal settlement conferences on February 27, April 21 and May 24, 2004, but the case was not settled.

The ALJ conducted a formal hearing on October 12 through 15, and November 15 and 23, 2004. Following the filing of post-hearing briefs, the ALJ issued the proposed decision on December 13, 2005, finding that the District unilaterally and unlawfully contracted out police services.

The District filed its statement of exceptions and supporting brief on January 3, 2006. The Association filed a response on February 8, 2006. The City filed both a petition to submit an informational brief, and the informational brief itself on February 9, 2006, arguing against the ALJ's remedy of rescission of the contract between the City and the District.

REQUEST FOR ORAL ARGUMENT

The District requested oral argument in this matter. However, the Board typically denies requests for oral argument when there is an adequate record, the parties had sufficient opportunity to prepare briefs supporting their positions and availed themselves of that

⁴The Association also filed a request for injunctive relief on June 24, 2003, which the Board denied on July 14, 2003.

opportunity, and the issue before the Board is sufficiently clear to make oral argument unnecessary. (United Teachers of Los Angeles (Valadez. et al.) (2001) PERB Decision No. 1453; Monterey County Office of Education (1991) PERB Decision No. 913.) These criteria are met in this case. Therefore, we deny the request for oral argument.

FACTUAL SUMMARY

In 2002, the District had its own Police Department consisting of the Police Chief, a Police Lieutenant, two Shift Supervisors, Safety Officers and Police Officers. The District's thirteen (13) Safety and Police Officers (Officers) constituted the bargaining unit represented by the Association.

The CBA which is the central focus of this case was negotiated in 2000. Representing the District during these negotiations were Attorney and Chief Negotiator Spencer Covert, Vice President Wells Sloniger, and Chief of Police Michael Hole. The Association's representatives were outgoing President and Chief Negotiator Vernon Gates, incoming President Derek O'Malley (O'Malley), and Attorney Michael Howard. The parties agreed to include a management rights clause in Article 2 of the CBA, stating, in pertinent part:

2.1 Powers and Authority

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

terminate, and discipline employees, and all other rights and privileges not expressly waived by this Agreement or requirements of the law.

2.2 Limitation by Agreement

The exercise of the foregoing powers, rights, authority, duties and responsibilities by the District, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms are in conformance with the law.

(Emphasis added.)⁵

On August 22, 2002, the District's Executive Dean of Human Resources, Vic Collins (Collins), met with and informed O'Malley that pursuant to Article 2 of the CBA, the District was considering contracting out the District's police services to the City, which would result in a layoff of personnel. Collins also stated that the District "would be working with the police officer personnel in trying to assist them in . . . [finding] employment with the City. . . ." Collins requested that the Association members sign limited waivers to authorize the City's Police Department to examine their personnel files as a precursor to potential City employment.

⁵The record shows that this CBA was the first agreement negotiated by the Association on behalf of its unit members, after it was successful in separating from the California School Employees Association and its Long Beach Chapter No. 8 (CSEA).

The Master Agreement for the District and CSEA, effective between July 1, 1994 and June 30, 1997, and extended to June 30, 1998, included a management rights clause under Article XXVI, providing for the contracting out of services, and stating in part:

A. [T]he District, . . . retains and reserves all the customary and usual rights, powers, functions and authority to discharge its obligations as those rights, powers, and authority

2. To . . . determine the kinds and levels of services to be provided, and the methods and means of providing those services, including entering into lawfully permissible contracts with private vendors for service;

The Association claimed that after some discussion with the District over the form of the waivers, all thirteen (13) Association members⁶ signed the waivers in or about November 2002.

The District's Board of Trustees adopted Resolution Number 082702(F) on August 27, 2002, authorizing the District Administration to negotiate with the Association regarding the utilization of the City Police Department to provide police and safety services.⁷

⁶The District asserted that one member signed only a limited waiver.

⁷Resolution Number 082702(F) provides, in pertinent part:

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

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

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

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

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

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

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

Association officers responded to the resolution by sending a memorandum dated September 4, 2002, to the District's Board of Trustees:

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

(Emphasis added.)

At a meeting on October 25, 2002, the parties discussed the Officers' eligibility for transfer to the City Police Department. The Association's Attorney, Michael Lackie (Lackie), demanded that the Association be a party to the negotiations between the District and the City before it would agree to the District contracting out police services to the City. Lackie indicated that although Association members wanted to be employed with the City, they wanted a limited psychiatric evaluation, a limited background investigation, a limited physical examination, no probationary period, and re-employment rights with the District if they lost their job with the City other than for a "strong disciplinary reason." Collins understood that the Association members wanted these specific guarantees. In a subsequent letter, the District responded that it was willing to meet with the Association regarding the proposed contracting out of police services after the City completed its assessment of District personnel.

The Association emphasized to the Board of Trustees, in a memorandum dated October 28, 2002, that while the Association was "more than willing to cooperate in any negotiations" regarding the contracting out, it expected the District to address several of its concerns. Lackie sent a letter dated December 13, 2002, to the District's Attorney, Barbara Ginsberg (Ginsberg), stating that the District had yet to respond to his October 29, 2002 letter in

which he requested an on opportunity to meet and confer, and that the Association would invoke PERB jurisdiction if necessary.

Ginsberg stated to Lackie in a letter dated December 18, 2002, that the District would schedule a meeting with the Association regarding the issue of contracting out police services immediately after the City had reviewed the Officers' personnel files and sent an assessment report to the District. Ginsberg also stated that the City was willing to attend a meeting between the District and the Association to discuss the Officers' potential employment with the City. She encouraged the Association to submit questions, which the District would forward to the City.

Ginsberg advised Lackie in a letter dated January 24, 2003, that the City had completed its initial assessment of the Officers' personnel files, and that the District was prepared to schedule another meeting with the Association concerning the issue of contracting out police services. After receiving no response, Ginsberg wrote another letter on February 7, 2003, reiterating the District's preparedness to "meet and negotiate with [the Association] regarding the issue of contracting out of police services," and asking if the Association intended "to waive its right to meet and negotiate."

The Association's February 25, 2003 response to the District stated that it was not waiving its right to bargain over the contracting out decision. At a meeting held on March 31, 2003, the District provided "informational discussion," and took the position that it was not required to bargain before contracting with the City. Lackie repeated the Association's demand to "meet and negotiate" over the effects of contracting with the City on the unit members, and stated that the Association would not object to the District contracting out police services if all these discussions were satisfactory.

On June 17, 2003, both the Board of Trustees and the Long Beach City Council approved resolutions to enter into a contract whereby the City would provide the District with police and

security services effective August 1, 2003. On the same date, the Board of Trustees passed a resolution referencing the management rights clause in Article 2 of the CBA, and laying off all thirteen (13) classified employees within the bargaining unit.

On June 23, 2003, the Association filed this unfair practice charge alleging that the District had failed to negotiate with the Association over its decision to contract out police services and the effects of such a decision.

LONG BEACH CCD

Long Beach CCD relied upon the rule that a waiver of rights under EERA must be clear and unmistakable. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74 (Amador Valley).) Where contract language constitutes a clear and unmistakable waiver of rights, the waiver will be given effect without consideration of extrinsic evidence. (Amador Valley; Marysville Joint Unified School District (1985) PERB Decision No. 314.) On the other hand, where contract language is ambiguous, the conduct of the parties or other extrinsic evidence may be used to reflect the intent of the parties. (Rio Hondo Community College District (1982) PERB Decision No. 279; Pajaro Valley Unified School District (1978) PERB Decision No. 51.) Long Beach CCD found that the terms “contract out work” were ambiguous. Long Beach CCD cited the principal enunciated in Los Angeles Unified School District (2002) PERB Decision No. 1501, that “[i]t is axiomatic that, ‘it is not possible to “retain” something you do not otherwise have’ in a management rights clause.” Long Beach CCD reasoned as follows:

. . . The second sentence of section 2.1 provides examples of the power and authority retained by the District. That list includes fourteen separate items. Significantly, there would be little dispute that the first thirteen enumerated items are all functions traditionally reserved for management. Items such as determining the curriculum and building facilities are matters firmly within management’s prerogative.

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

.....

As already discussed, the phrase ‘contract out work’ can have a broad meaning when read in isolation. However, it is exactly because Barstow analyzed the phrase in isolation that the Board must overrule the Barstow decision. (Emphasis in original.)

Nevertheless, the District was given an opportunity to raise its defense of waiver based on the parties’ actions at a hearing before an ALJ. (Id.)

ALJ DECISION

In the proposed decision issued subsequently, the ALJ found that the District failed to prove waiver as a matter of fact, and, therefore, violated EERA section 3543.5(a), (b) and (c) by contracting out police services without bargaining.

DISTRICT’S EXCEPTIONS

In its exceptions to the ALJ’s proposed decision, the District argues, inter alia, that: (1) the decision to contract out was outside the scope of representation because it involved a fundamental change in the scope and direction of the enterprise; (2) the Board’s decision in Long Beach CCD was prejudicial and erroneous, because it overruled Barstow and reversed the dismissal of this case, and (3) the record demonstrates that the Association waived its right to bargain over the decision and effects of contracting out police services by its conduct or by

its agreement to the terms of the CBA and specifically, the language of the management rights clause.

RESPONSE TO EXCEPTIONS

In response, the Association argues the: (1) decision to contract out the bargaining positions is a matter within the scope of representation; (2) overturning of Barstow is irrelevant because it “does not answer the question of what both parties’ intents were at the time of reaching agreement on the ‘contract out’ language of the boilerplate management rights clause”; and (3) District failed to affirmatively show that the Association entered into a clear and unmistakable waiver of the right to negotiate over contracting out.

DISCUSSION

Standard of Review

In reviewing exceptions to an ALJ’s proposed decision, the Board reviews the record de novo, and is free to draw its own conclusions from the record apart from those made by the ALJ. (Woodland Joint Unified School District (1990) PERB Decision No. 808a.) The Board ordinarily gives deference to an ALJ’s credibility determinations based on considerations such as witness demeanor and appearance. (Beverly Hills Unified School District (1990) PERB Decision No. 789.)

Unilateral Change

Unilateral changes are considered “per se” violations of EERA section 3543.5(c) if certain criteria are met: (1) the employer implemented a change in policy or practice concerning a matter within the scope of representation; and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Stockton Unified School District (1980) PERB Decision No. 143; Walnut

Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

In the present case, it is undisputed that the District implemented a change by contracting out its police services to the City without providing the Association an opportunity to bargain. The District argues that its decision to contract out police services, however, was outside the scope of bargaining because it constituted “core restructuring” or a “fundamental change in the nature and direction of the enterprise.”

In general, PERB decisions have long established that the decision and effects of contracting out bargaining unit work are squarely within the scope of bargaining. (Lucia Mar Unified School District (2001) PERB Decision No. 1440 (Lucia Mar.) An employer’s decision merely to “replace existing employees with those of an independent contractor to do the same work under similar conditions of employment,” is subject to bargaining. (Id.; Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609] (Fibreboard),⁸ cited in State of California (Department of Personnel Administration) (1987) PERB Decision No. 648-S.) This rule is based on the rationale that any advantages that may be achieved by using contractors, including cost savings, are based upon factors which “have long been regarded as matters within the collective bargaining framework,” such as reduction of the work force, decrease of fringe benefits, and elimination of overtime payments. (Fibreboard.)

⁸In Fibreboard, the employer’s decision to contract out all maintenance work to reduce labor costs was held to be within the scope of bargaining, because the employer continued to perform maintenance work within the plant using contract employees. See also, Arcohe Union School District (1983) PERB Decision No. 360, holding that the District’s action in contracting out custodial services was within the scope of bargaining because the District did not determine that it would no longer provide such services.

On the other hand, a decision that involves a “core restructuring” of services would fall outside the scope of bargaining. “Core restructuring” occurs where a decision alters the employer’s basic operation, such as eliminating or changing a particular service. (Lucia Mar.⁹) “Core restructuring,” or a “fundamental change in the nature and direction of the enterprise,” would fall within the management prerogative.

In the present case, the District alleges that the purpose for contracting out police services was to obtain a higher quality of services.¹⁰ In Oakland Unified School District (2005) PERB Decision No. 1770 (Oakland USD), the Board adopted an ALJ’s proposed decision and its rationale, stating that the alleged ineffectiveness of the district’s police force did not “transform a negotiable decision into a managerial prerogative.” (Oakland USD, proposed dec. at p. 30.) Changes in matters which presumably would affect the quality of services, such as assignment of work, evaluation of officers, training, wages and benefits, are amenable to the collective bargaining process. “Contracting with [the Oakland Police Department] 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.” (Oakland USD, proposed dec. at p. 29.)

⁹In Lucia Mar, the Board held that the District’s decision to contract out transportation services did not involve a “core restructuring” of services where the contract bus drivers drove the same buses over the same routes.

¹⁰The District relies upon a Board of Trustees resolution stating that the District was unable “to hire and retain sufficient police officers and safety personnel with the required knowledge, experience, and abilities,” and that the City police department would provide specialized services such as “crime lab services, detective investigations, SWAT detectives, K-9 services, helicopter support services, intelligence services, community relations services, and peer support teams,” as well as “equipment, materials, facilities, and support services that are not feasibly available through the District.”

There is little evidence in the record to substantiate the District's allegation that the additional services provided by the City Police Department would constitute a core restructuring or fundamental change in the basic operation of District police services. The record tends to show that the District has not eliminated campus police, but rather, hired out the same work to the City. We therefore conclude that the District has not demonstrated any fundamental change in the police services provided at the campus. Under Fibreboard and the Board decisions cited above, the District's decision to contract out police services is within the scope of bargaining. Absent some viable defense, the District's refusal to meet and confer regarding its decision to contract out services constitutes a violation.

Waiver

The District next contends that the Association waived its right to bargain over the decision to contract out police services by agreeing to the management rights clause in Article 2 of the CBA. A union may waive its right to bargain the contracting out of unit work by agreeing in advance that the employer may unilaterally undertake such action. (Barstow; see also Island Creek Coal Co. (1988) 289 NLRB 851, *enfd.*, 879 F.2d 939 (D.C. Cir. 1989); American Stores Parking Co. (1986) 277 NLRB 1656 [121 LRRM 1173].)

Long Beach CCD held that that the phrase "contract out work" in the management rights clause of the CBA did not constitute an express waiver of the right to bargain over contracting out work. For the reasons stated below, we disagree and reverse that portion of Long Beach CCD that overruled Barstow. As such, we reinstate Barstow.

Long Beach CCD relied upon the principle that a contract phrase will not constitute a waiver where the language surrounding that phrase is limited. While that is a valid principle of contract interpretation, it does not apply here. Although Long Beach CCD was correct that the other 13 items listed in the same sentence as "contract out work" in the management rights

clause consisted of matters clearly within the managerial prerogative, the very next sentence of section 2.1 of the CBA references the retention of managerial rights to determine matters that may or most likely otherwise fall within the scope of representation. There does not appear to be other provisions in the CBA that would limit the scope of the phrase “contract out work.” Thus, we find it difficult to follow the reasoning in Long Beach CCD.

Additionally, in San Marcos Unified School District (2003) PERB Decision No. 1508 (San Marcos), relied upon by Long Beach CCD, the Board held that a CBA provision prohibiting “strike, work stoppage, slow-down, picketing or refusal or failure to fully and faithfully perform job functions and responsibilities, or other interference with the operations of the District” did not prohibit employees from engaging in peaceful, non-disruptive, informational picketing. San Marcos held that the term “picketing” was ambiguous. Employees passed out informational flyers outside a district board meeting, and others carried signs with phrases such as “fair contract now.”

The Board stated that peaceable, non-disruptive, informational picketing (as opposed to disruptive picketing that blocks ingress/egress and discourages business with the employer, etc.) is a protected activity under EERA. Additionally, the Board stated that a protected right may be divested only by a “clear and unmistakable waiver.” The Board observed that the Ninth Circuit overturned court orders that prohibit all picketing, and found that enjoining all picketing would run afoul of constitutional rights. Furthermore, the Board held that under the principle of “noscitur a sociis,” the term “picketing” must be read consistent with the other terms listed in the contract provision quoted above, which indicated that the provision was not meant to prohibit all picketing.

Note that the Board in San Marcos relied upon constitutional protections for picketing. However, there are no similar constitutional protections against contracting out, and thus

San Marcos is distinguishable. Therefore, we return to Barstow which held that a management rights clause giving the employer the right to “contract out work, which may lawfully be contracted for,” exempted the employer’s decision to contract out work from the requirement to bargain.

In Barstow, the parties negotiated over the subject of contracting out work, and the result of those negotiations were embodied within the language of the “district rights” article of the parties collective bargaining. The district rights provision in Barstow stated as follows:

4.1 It is understood and agreed that the District retain[s] all of its powers and authority to direct, manage and control to the full extent of the law. Included in but not limited to those duties and powers are the exclusive right to: determine its organization; . . . determine the kinds and levels of services to be provided, and the methods and means of providing them; maintain the efficiency of District operations; contract out work, which may lawfully be contracted for . . .
(Emphasis in original.)

The school district contracted out all transportation and vehicle maintenance services, which resulted in the layoff of 28 employees. Barstow stated that the contract language constituted a clear waiver of the right to bargain.

In applying the reinstated Barstow rule to the present case, the Association and the District negotiated over the subject of contracting out work, and those negotiations resulted in the inclusion of the contracting out provision in the management rights clause in Article 2 of the CBA. The language of the “contract out work” provision is clear and explicit. Article 2.2 of the CBA states that the District’s management rights shall be limited to only the specific and express terms of the CBA and only to the extent such specific and express terms conform with the law. There was no provision in the CBA limiting the phrase “contract out work” only to subjects outside the scope of negotiation, or to the past practice of contracting out for armed police services for special events. Accordingly, we find that the management rights clause

reserving to the District the right “to contract out work” constituted an unequivocal and unmistakable waiver by the Association of its right to negotiate over the District’s decision to contract out police services.

The Board has stated, “[w]hen considering contract interpretation disputes it is proper to consider the whole contract taken together, so as to give effect to every part.” (Riverside Community College District (1992) PERB Order No. Ad-229, at p. 3.) “Further, ‘[a]n interpretation which gives a reasonable, lawful, and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect.’” (Id. at pp. 3-4, quoting 1 Witkin, Summary of Cal. Law (9th Ed. 1987) sec. 686, p. 619.) When we consider the entire management rights clause, we give effect to the other provisions of Article 2 granting the District the exclusive right to “determine the kinds and levels of services to be provided,” to “determine the number and kinds of personnel required,” to “terminate ... employees,” as well as to “contract out work.” To give reasonable and effective meaning to the above-stated terms of Article 2, we interpret the management rights clause as giving the District the exclusive right to determine the level of services, and to “contract out work.”

The Association alleges that it understood the phrase “contract out work” in the management rights clause to be limited to contracting for armed services for special events. However, the parties’ intent as expressed in the contract governs. (Rossmoor Sanitation, Inc. v. Pylon, Inc. (1975) 13 Cal.3d 622, 633, stating that “it is the intent of the parties as expressed in the agreement that should control.”) In the CBA, the phrase “contract out work” does not appear to be limited to certain types of contracting out. Although the District has a past practice of contracting out for armed police services for special events, there is nothing in the

contract language indicating that the phrase “contract out work” is limited to contracting for armed services for special events.¹¹

The District was therefore exempt from having to bargain with the Association over its decision to contract out police services. The District was, however, required to bargain over the effects of the decision, unless the Association waived its right to bargain over the effects of contracting out, by contractual agreement or by its action or omission. (Barstow)¹²

Effects Bargaining

In this case, the CBA did not contain an express waiver of the right to bargain over the effects of contracting out. In contrast, the CBA did contain an express waiver of the right to bargain the effects of a layoff. By waiving this right, the parties clearly recognized the distinction between decisional bargaining and effects bargaining, and further acknowledged the need for an express waiver by the Association to waive its right to bargain effects. We, therefore, find the lack of a comparable waiver for contracting out to be strong evidence that

¹¹The fact that the Association failed to raise vehement objections when the District first provided notice of its intent to contract out all police services contradicts the Association’s allegation that the phrase “contract out work” was limited. We note that the Association sent a letter to the District stating that their position remained “neutral,” and that “While the [Association is] not philosophically opposed to a merger of the College Police Department with a contracted outside agency, final acceptance of any agreement ... can only be judged solely on the favorable disposition of all [Association] members.”

There was neither allegation nor evidence that the Association was deceived into agreeing to include a contracting out provision in the management rights clause in the CBA. Instead, the undisputed facts demonstrate that during negotiations for the CBA, both parties were represented by their respective officers, chief negotiators and attorneys. Moreover, when the same unit was represented by CSEA, the master agreement between the District and CSEA contained a management rights clause with a contracting out provision.

¹²While the Board held in Barstow that the decision to contract out transportation services was not negotiable, it held that the District was required to bargain over the effects of the contracting out and resultant layoffs. The Board held that the parties had engaged in some level of effects negotiation, and thus, there was insufficient evidence to support a conclusion that the District had violated EERA.

the Association did not waive this right. Thus, the District will be held to its obligation to bargain with the Association over the effects of contracting out police services, unless it has proven that the Association's conduct resulted in a clear and unmistakable waiver of its right to bargain.

The District finally contends that the Association's conduct resulted in a clear and unmistakable waiver of its right to bargain over the effects of contracting out. The Board has held that "union conduct in negotiations will make out a waiver if a subject was 'fully discussed' or 'consciously explored,'" and then abandoned by the union. (Compton Community College District (1989) PERB Decision No. 720; Los Angeles Community College District (1982) PERB Decision No. 252.) The right to meet and confer is a statutory right, and waiver of such a right will not be lightly inferred. (Oakland USD; Placentia Unified School District (1986) PERB Decision No. 595 (Placentia)). The burden of proving waiver rests with the party asserting it. (Placentia.)

The record shows that the Association demanded to bargain over the effects of contracting out. On October 25, 2002, the Association demanded at the table that it be made a party to the negotiations between the District and the City. The Association requested to negotiate over "what would happen to employees, and what their employment conditions would be with the Long Beach Police Department." Association members expressed their desire to be employed with the City based on a limited psychiatric evaluation; a limited background investigation; a limited physical examination; with no probationary period and re-employment rights with the District if they lost their job with the City other than for a "strong disciplinary reason."

Before the March 31, 2003 meeting between the Association and the District, Officers had signed the waiver forms allowing the City to review their personnel files, and the District

had received the assessment reports from the City. The Association wanted to negotiate numerous effects of contracting out, such as transfer of vacation times and employment with the City. The Association's position was that if all these discussions were satisfactory, then it would allow the District to contract with the City. Since the Association consistently maintained its right to negotiate over effects, and communicated its demand to negotiate to the District, the Board finds that the Association did not waive the right to bargain over effects by its conduct.

We next consider whether the District satisfied its obligation to negotiate over the effects of contracting out. Although the record indicates that the District attempted to facilitate discussions between the City and the Association to determine whether Association members could obtain employment with the City, the District failed to bargain with the Association over these matters. There is conflicting evidence regarding whether the October 25, 2002 meeting between the District and the Association constituted a meet and confer session. The record indicates that the parties were unable to "effectively" negotiate the effects of the contracting out at that time because the City had not yet reviewed the Officers' personnel files. Thus, the evidence shows that the District failed to satisfy its duty to negotiate effects at the October 25, 2002 meeting. Moreover, the District provided only "an informational discussion" at the March 31, 2003 meeting with the Association. The District refused to bargain, reiterating its position that it was not required to bargain before contracting with the City.

Under these circumstances, and pursuant to the reinstated Barstow rule, we find that the District violated EERA by failing to bargain with the Association over the effects of contracting out.

CONCLUSION

The Board hereby reverses the portion of the holding in Long Beach CCD that overruled Barstow, and consequently, reinstates Barstow. Applying the long line of National Labor Relations Board and Board decisions including Barstow, we find that the management rights clause in Article 2 of the CBA in this case provides the contractual waiver of the right to negotiate over the District's decision to contract out all police services to the City. The Board further finds that the District failed to bargain with the Association over the effects of contracting out, as required by Allison Corp. (2000) 330 NLRB 1363, 1365 and Barstow.

ORDER

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

Pursuant to EERA section 3541.5(c), and Public Employment Relations Board (PERB) Regulation 32325 (Cal. Code Regs., tit. 8, sec. 31001, et seq.), 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 Long Beach Community College District Police Officers Association (Association) about the effects of the District's decision to contract out its police services.
2. Denying the Association 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. Beginning ten (10) days following the date the Decision is no longer subject to appeal, the District shall begin paying the Association members who were laid off effective August 1, 2003, their salary and benefits at the rate being paid prior to their layoff until either: (a) the date the District bargains to agreement with the Association regarding the effects of contracting out; (b) the date the parties meet and confer to bona fide impasse; (c) the failure of the Association to request bargaining within ten (10) days following the date that this Decision is no longer subject to appeal; (d) the failure of the Association to commence negotiations within five (5) working days of the District's notice of its desire to meet and confer, unless through unavailability of the District; or (e) the subsequent failure of the Association to meet and confer in good faith.

However, in no event shall the sum paid to these employees exceed the amount they would have earned in wages and benefits from the date of their layoff to the time they secured or refused equivalent employment elsewhere.

2. 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.

3. 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 the Association.

Members McKeag and Wesley joined in this Decision.



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

After a hearing in Unfair Practice Case No. LA-CE-4532-E, Long Beach Community College District Police Officers Association v. Long Beach Community College District, in which all parties had the right to participate, the Public Employment Relations Board has found that the Long Beach Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c).

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 Long Beach Community College District Police Officers Association (Association) about the effects of the District's decision to contract out its police services.
2. Denying the Association 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 EERA:

The District shall begin paying the Association members who were laid off effective August 1, 2003, their salary and benefits at the rate being paid prior to their layoff until either: (a) the date the District bargains to agreement with the Association regarding the effects of contracting out; (b) the date the parties meet and confer to bona fide impasse; (c) the failure of the Association to request bargaining; (d) the failure of the Association to commence negotiations within five (5) working days of the District's notice of its desire to meet and confer, unless through unavailability of the District; or (e) the subsequent failure of the Association to meet and confer in good faith.

However, in no event shall the sum paid to these employees exceed the amount they would have earned in wages and benefits from the date of their layoff to the time they secured or refused equivalent employment elsewhere.

Dated: _____

LONG BEACH COMMUNITY COLLEGE DISTRICT

By: _____

Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.