STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

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| **CALIFORNIA** SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. DAVIS UNIFIED SCHOOL DISTRICT, Respondent. | Case No. S-CE-78 |
| NEW HAVEN TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. NEW HAVEN UNIFIED SCHOOL DISTRICT, Respondent. | Case No. SF-CE-126 |
| NEWARK TEACHERS ASSOCIATION, Charging Party, v. NEWARK UNIFIED SCHOOL DISTRICT, Employee Organization. | Case No. SF-CE-127 |
| CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, STATE CENTER COMMUNITY COLLEGE DISTRICT, Respondent. | Case No. S-CE-80 |
| CENTINELA VALLEY SECONDARY TEACHERS ASSOCIATION, Charging Party, v. CENTINELA VALLEY UNION HIGH SCHOOL DISTRICT, Respondent. | Case No. LA-CE-180 |

PERB DECISION NO. 116

February 22, 1980

**Appearances; Charles** L. Morrone, Attorney, for California School Employees Association; Gary G. Mathiason and Harlan E. Van Wye, Attorneys (Littler, Mendelson, Fastiff & Tichy), for Davis Joint Unified School District; J. Michael Amis, Attorney (White, Giambroni & Walters), for New Haven Teachers Association, CTA/NEA and for Newark Teachers Association; Jon A. Hudak, Attorney (Breon, Galgani & Godino), for New Haven Unified School District; Lee T. Paterson, Attorney (Paterson and Taggart), for Newark Unified School District; Robert W. Stroup, Attorney (Paterson & Taggart) for State Center Community College District; Charles R. Gustafson, Attorney for Centinela Valley Secondary Teachers Association; William Kay, Attorney (Whitmore & Kay) for Centinela Valley Union High School District.

Before Gluck, Chairperson; Gonzales, Member.[1]

## DECISION

These cases are before the Public Employment Relations Board (hereafter PERB or Board) on exceptions by the State Center Community College District (hereafter State Center District), the New Haven Unified School District (hereafter New Haven District), the Newark Unified School District (hereafter Newark District), the Davis Unified School District (hereafter Davis District), the Centinela Valley Union High School District

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[1] Board Member Moore did not participate in this decision.

(hereafter Centinela District), and the California School Employees Association (hereafter CSEA) to five hearing officers' proposed decisions. They have been consolidated for decision because they concern the same issue: Whether a public school employer may unilaterally freeze "step and column" salary increases of its employees.

Each hearing officer's decision found that the step and column salary freezes in question were unilateral changes in employment conditions which constituted unlawful refusals to meet and negotiate. Additionally, in each case the hearing officer found, citing San Dieguito Union High School District,[2] that the salary freeze had the natural and probable consequence of interfering with employees because of their exercise of rights guaranteed by the Educational Employment Relations Act[3] so that the District's conduct violated section 3543.5(a). All five districts have excepted to the findings of the hearing officers that their actions in freezing step and column salary increases violated sections 3543.5(a) and

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2(9/2/77) EERB Decision No. 22. In Carlsbad Unified School District (1/30/79) PERB Decision No. 89, a majority of the Board overruled San Dieguito to the extent it held that an unlawful motive must be shown in proving a violation of section 3543.5(a).

[3]The Educational Employment Relations Act (hereafter EERA) is codified at Government Code section 3540 et seq. All further statutory citations are to the Government Code unless otherwise specified.

3543.5(c).[4] CSEA has taken exception to the findings of the hearing officer in State Center that CSEA had waived any claim to retroactive payment of salary increments.

We have considered each of the records as a whole in light of all the exceptions filed and affirm the findings of the hearing officers that, in each case, the district failed to negotiate on matters within the scope of representation. However, in State Center we find there was no waiver of the rights of employees to retroactive payment of salary increments.

The two Board members participating in these cases disagree on whether a failure to meet and negotiate necessarily constitutes an interference with employees because of their exercise of rights under the EERA in violation of section 3543.5(a) and therefore reach no decision on that issue here. See San Francisco Community College District (10/12/79) PERB

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[4]Sections 3543.5(a) and (c) provide:

> It shall be unlawful for a public school employer to:
>
> (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.
>
> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

Decision No. 105 for a discussion of this issue as decided by a majority of the present Board.

The Newark and Davis Districts have requested an opportunity to orally argue the issues in their cases before the Board. We deny these requests; the issues have been adequately developed in the briefs submitted to the Board.

## FACTS

### Step and Column Salary Increases

These cases concern the freeze on salaries which occurred when the public school employers in question unilaterally eliminated so-called step and column increases during negotiations for a 1977-78 contract. Step and column increases are methods of automatically increasing employees' salaries for longevity (step) and qualifications (column).

For instance, in Newark, a portion of the 1976-77 salary schedule for certificated employees was as follows:

| STEP | CLASS I AB | CLASS II AB + 15 | CLASS III AB + 30 | CLASS IV AB + 45 | CLASS V AB + 60 | CLASS VI AB + 75 |
|---|---|---|---|---|---|---|
| 1 | 9,414 | 10,005 | 10,596 | 11,181 | | |
| 2 | 10,005 | 10,596 | 11,188 | 11,780 | 12,371 | |
| 3 | 10,596 | 11,188 | 11,780 | 12,371 | 12,962 | 13,544 |
| 4 | 11,188 | 11,780 | 12,371 | 12,962 | 13,544 | 14,146 |
| 5 | 11,780 | 12,371 | 12,962 | 13,544 | 14,146 | 14,737 |
| 6 | 12,371 | 12,962 | 13,544 | 14,146 | 14,737 | 15,329 |
| 7 | 12,962 | 13,554 | 14,146 | 14,737 | 15,329 | 15,920 |
| 8 | 13,544 | 14,146 | 14,737 | 15,329 | 15,920 | 16,512 |
| 9 | 14,146 | 14,737 | 15,329 | 15,920 | 16,512 | 17,103 |
| 10 | 14,737 | 15,329 | 15,920 | 16,512 | 17,103 | 17,695 |
| 11 | | | 16,512 | 17,103 | 17,695 | 18,286 |
| 12 | | | 17,103 | 17,695 | 18,286 | 18,878 |
| 13 | | | 17,695 | 18,286 | 18,878 | 19,469 |

As employees gained longevity, they moved from one step to the next each year. As they attained more educational training, they moved from one column to the next.

In each case before the Board, the district admittedly implemented policies which placed the employees in question at the same position and dollar amount on the 1977-78 salary schedule as they had attained during the 1976-77 fiscal year.

In Davis, New Haven, Newark, State Center, and Centinela the hearing officers' statements of procedural history and facts are without prejudicial error and are adopted as the findings of the Board itself.[5]

## DISCUSSION

In their exceptions and supporting briefs, the districts make the following arguments:

1. PERB should not follow federal precedent that a unilateral salary freeze may be a failure to negotiate; PERB should instead look to certain public sector precedent which finds such a freeze to be lawful.

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[5]In Centinela, the record does not support the hearing officer's statement that when the budget was adopted, the superintendent was aware that additional savings could be achieved by alterations in class size. However, since our decision does not rest on a finding that the Centinela District had the financial ability to pay increments as of September 7, we do not find this error to be significant.

2. Even if PERB does follow federal precedent, there was no change in the status quo because there was no past practice of paying salary increments.

    a. The past practice has been to reach agreement on salary increments before implementation.

    b. Past practices cannot be established by evidence of conduct prior to implementation of the EERA.

    c. The practice was terminated by an interim agreement between the parties.

3. The district fulfilled its obligation by negotiating before freezing salaries.

4. The totality of circumstances indicates that the district negotiated in good faith; therefore under federal precedent no violation should be found.

5. Since California case law indicates that salaries cannot be reduced after July 1,[6] the freeze was justified:

    a. by fiscal necessity;

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[6]See, e.g., Rible v. Hughes (1944) 24 Cal.2d 437, 444 [150 P.2d 455, 154 A.L.R. 137]; Abraham v. Sims (1935) 2 Cal.2d 698, 711 [34 P.2d 790, 43 P.2d 1029]; A.B.C. Federation of Teachers v. A.B.C Unified Sch. Dist. (1977) 75 Cal.App.3d 332, 337-339 [142 Cal. Rptr. 111]. Also see San Mateo County Community College District (6/8/79) PERB Decision No. 94; San Francisco Community College District (10/12/79) PERB Decision No. 105.

b. to preserve the negotiating position of the district and maintain flexibility in negotiations.

Two of these arguments, raised by all the districts, go to the overall issue of whether unilateral wage freezes in general constitute an unlawful failure to negotiate in good faith. These are: whether PERB should follow that public sector precedent which finds wage freezes to be lawful, and whether such wage freezes should be justified by California case law that certificated employee wages cannot be reduced by the District after July 1.

PERB has already responded to these arguments in San Mateo County Community College District, supra PERB Decision No. 94 and San Francisco Community College District, supra PERB Decision No. 105. In those cases, the Board decided that the district's unilateral salary freeze in the face of a perceived financial emergency engendered by the passage of Proposition 13 constituted an unlawful failure to negotiate in good faith.

In its decision in San Mateo, the Board set forth its reasons for prohibiting unilateral changes in terms and conditions of employment. In so doing, it rejected the district's argument that PERB should follow those jurisdictions that have held that withholding salary increments does not constitute unilateral change or is justified by the differences between public and private employers. See, e.g., Board of Cooperative Educational Services of Dockland County v. New York

State Public Employment Relations Board (1977) 41 N.Y.2d 753 [95 LRRM 3046]. This position was affirmed in San Francisco Community College District, supra, PERB Decision No. 105, at page 7.

In neither San Mateo nor San Francisco did the Board directly address the issue of whether a salary freeze is a unilateral change in employment conditions; in those cases, the districts acknowledged that they had changed employment conditions, but argued that their changes were necessary under the circumstances. Several districts in the present cases argue that a salary freeze is not a unilateral change, but rather is necessary to maintain the status quo, relying on certain public sector cases.[7] As is implicit in San Mateo and San Francisco, we reject these arguments. We believe that the status quo must include past practices with respect to terms and conditions of employment. In Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51, we noted that "the [National Labor Relations Board] has held that the 'status quo' against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the

[7]See, e.g., Board of Cooperative Educational Services of Rockland County v. New York State Public Employment Relations Board, supra, 41 N.Y.2d 753; Pinellas County Police Benevolent Association v. City of St. Petersburg (1977) 3 FPER 205 [95 LRRM 3027].

conditions of employment,"[8] and found the district's action lawful because it was consistent with the district's past practice. And in NLRB v. Allied Products Corp. (6th Cir. 1977) 548 F.2d 644 [94 LRRM 2433], the court stated, "The [NLRA] is violated by a unilateral change in the existing wage structure whether that change be an increase or the denial of a scheduled increase." Public employment relations boards and courts in other states have also considered incremental salary increases as part of the status quo. See, e.g., Hudson County (1978) 4 NJPER 87; Ledyard Board of Education (1977) Connecticut State Board of Labor Relations Decision No. 1564; Springfield Board of Education v. Springfield Education Association (1977) 47 Ill.App.3d 193 [95 LRRM 3000]. Also see Hernando County School Board (Fla. 1977) 3 FPER 246; University of Maine (1979) Maine Labor Relations Board Case No. 79-08, which hold that the unilateral elimination of regularly scheduled salary increments during negotiations for a first collective bargaining agreement is an unlawful refusal to negotiate.

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[8]While the PERB is not bound by case law developed under the National Labor Relations Act, 29 U.S.C. section 151 et seq. (hereafter NLRA), it may take cognizance of federal precedent in interpreting provisions of the EERA which are similar to provisions in the NLRA. See, e.g., Sweetwater Union High School District (11/23/76) EERB Decision No. 4; also see Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608. Both the NLRA and the EERA provide that it is unlawful for an employer to refuse to negotiate in good faith with an exclusive representative (29 U.S.C. sec. 158(a)(5); Gov. Code sec. 3543.5(c)).

In all of the present cases, the consistent past practice was that employees would advance in pay grade annually according to their increasing level of experience and, for certificated employees, educational attainment. The status quo was not the dollar amount paid to each employee on July 1, 1977. The status quo was that employees would obtain salary increases each fall if they met certain requirements. Thus, each district's unilateral decision to eliminate the regularly scheduled salary advancements constituted a change in the status quo.[9]

In each of the cases before us, the district argues that even if its action in freezing salaries was a unilateral change, it had to take this action by the beginning of the school year (July 1) since it would be unable to lower the increments after that date.10 Because of this, the districts argue, they lose

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[9]For a further discussion of this issue with respect to the Centinela District, see pages 23-24, infra.

[10]In County and City of San Francisco v. Cooper (1975) 13 Cal.3d 898, 930, fn. 18 [120 Cal.Rptr. 707, 534 P.2d 403], the California Supreme Court noted: ". . .Past cases clearly indicate . . . that a school board may not lower salaries fixed by its salary schedule after the beginning of the school year. . . ." The Court cited Rible v. Hughes, supra, 24 Cal.2d 437; Abraham v. Sims, supra, 2 Cal.2d 698; Aebli v. Board of Education (1944) 62 Cal App.2d 706 [145 P.2d 601]. The most recent case on this issue is A.B.C. Federation of Teachers v. A.B.C. Unified School District, supra, 75 Cal.App.3d 332.

California Education Code section 79000 states:

> The school year begins on the first day of July and ends on the last day of June.

any flexibility to negotiate lower increments, even in the face of financial difficulties. Therefore, they must unilaterally freeze salaries, or even lower them as was done in San Mateo, in order to preserve all negotiating options. In both San Mateo and San Francisco, PERB rejected such arguments.

In San Mateo, which involved classified employees, PERB found the line of cases ending with A.B.C. Federation of Teachers v. A.B.C. Unified School District, supra, 75 Cal.App.3d 332, to be inapplicable since those cases were decided before the EERA was enacted and applied to teachers, not classified employees. San Francisco, however, involved certificated employees, including teachers. In that case, the Board noted:

> The District's argument that it had to adopt a salary schedule by July 1 is not persuasive. While the tentative budget is due on July 1, the final budget is not due until August 8. (Cal. Ed. Code secs. 85023(b), (d).) The Act directs parties to begin the meeting and negotiating process "prior to the adoption of the final budget for the ensuing year . . . so that there is adequate time for agreement to be reached or for the resolution of an impasse." (Gov. Code sec. 3543.7, emphasis added.) In other words, EERA itself authorizes a district and an exclusive representative to negotiate a wage schedule after July 1. Thus, the District here was not constrained to adopt and implement a salary schedule by July 1.

Furthermore, the cases cited by the districts involve factual situations that arose prior to the enactment of the EERA. In these cases, the courts first note that school governing boards have the authority to raise and lower salaries

unilaterally. Among the few limitations on this authority was that it must be exercised before the beginning of the school year. Thus, in Abraham v. Sims, supra, 2 Cal.2d 698, 711, the court stated:

> The power of the trustees to raise or reduce the salaries of permanent teachers cannot be doubted, provided it is reasonably exercised and no attempt is made after the beginning of any particular school year to reduce the salaries for that year. (Emphasis added.)

And in Rible v. Hughes, supra, 24 Cal.2d 437, 444, it said:

> [A] board of education may exercise its discretion in adopting salary schedules fixing the compensation to be paid permanent teachers although (1) the schedule must be adopted prior to the beginning of the school year. . .11 (Emphasis added.)

The EERA, however, limited the discretionary authority of school governing boards. After employees in an appropriate unit have selected an exclusive representative, that representative has the right to negotiate with the district about wages, hours of employment, and other terms and conditions of employment. (Gov. Code sec. 3543.3, 3543.1, 3543.5(c).) The district cannot change employment conditions without first meeting and negotiating with the exclusive representative. (Pajaro Valley Unified School District, supra, PERB Decision No. 51.) Thus,

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11The other limitations listed by the court are:

> . . .(2) any allowance based upon years of training and experience must be uniform, and subject to reasonable classification; and (3) the schedule must not be arbitrary, discriminatory or unreasonable.

collective negotiations supersedes the manner in which salaries were previously set.

The system of collective negotiations under the EERA is incompatible with the cases cited by the districts. If those cases applied, negotiations would be distorted in any of three alternative ways. (1) Districts would be precluded from attempting to negotiate a salary decrease; this would impose a limitation on the district's ability to negotiate an item which is clearly within the scope of representation under the EERA. (2) Districts would be forced to attempt to complete negotiations by the July 1 deadline, an unrealistic solution since necessary financial information may be unavailable at that time. (3) Districts would be forced to take unilateral action to maintain their flexibility. Such action is so antithetical to the give and take of the negotiating process that we have found it to be a refusal to negotiate. See San Mateo County Community College District, supra, PERB Decision No. 94, at pages 14-17.

Since the cases cited by the districts are incompatible with the collective negotiations system mandated by the EERA and were based on situations arising before the implementation of the EERA, they do not persuade us that they compel an exception to our holdings prohibiting unilateral change.

In summary, we affirm our decision in San Mateo County Community College District, supra, PERB Decision No. 94, and

San Francisco Community College District, supra, PERB Decision No. 105, that the unilateral elimination of a past practice of granting annual step and column salary increases constitutes a change in the status quo and may be a violation of the duty to negotiate in good faith.

There are, however, defenses to a charge of unlawful unilateral change. For an employer's unilateral action to be considered unlawful, that action must constitute a change in the status quo relating to a matter within the scope of representation, made without notice and an opportunity to negotiate extended to the exclusive representative.12

Thus, an employer action affecting an employment condition may be lawful if it is consistent with an established practice.[13] Also, an employer action may be lawful if the

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[12]NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].

[13]In Pajaro Valley Unified School District, supra, PERB Decision No. 51, the District's action in passing on to employees the cost of increased insurance premiums was consistent with its past practice of contributing only a sum certain for employee health benefits pending the outcome of negotiations, and the Board found no unlawful unilateral change. Also see NLRB v. Ralph Printing and Lithog. Co. (8th Cir. 1970) 433 F.2d 1058, cert. denied (1971) 401 U.S. 925, where the court said:

> Where there is a well-established company policy of granting certain increases at specific times, which is a part and parcel of the existing wage structure, the company is not required to inform the union and bargain concerning these increases.

exclusive representative has waived its right to negotiate, either through agreement or through a failure to request negotiation when notified of a proposed change. Several districts have argued that, in light of the circumstances in their districts, their actions in freezing salaries were not unlawful unilateral changes.

Since these contentions rest on the facts in each case, we will discuss each case individually.

Davis District

On June 29, 1976, the Davis District and CSEA entered into an interim agreement, which provided in pertinent part:

> During this period of negotiations, the District and CSEA agree that policies covered under the meet and negotiate provisions of the Rodda Act (SB 160) (and any applicable subsequent legislation) will remain in effect until a written agreement is reached and ratified by the parties or the impasse mechanism under the Rodda Act has been utilized. During this interim period the above policies will be modified by the Board only if required by emergency conditions or state and/or federal laws or regulations.
>
> This agreement shall become effective July 1, 1976 and shall remain in effect for twelve calendar months or until completion of a binding written agreement by the parties, but shall terminate no latter than June 30, 1977.

The Davis District argues that CSEA, having bargained for this agreement making policies constant during a limited time, should not complain when the District did not grant salary

increments after the agreement expired. This is essentially a waiver argument: the exclusive representative, by making a limited term agreement to maintain the status quo, has waived its right to negotiate changes in the status quo after the expiration of that agreement. We disagree. As we stated in San Francisco Community College District, supra, PERB Decision No. 105, we will not readily infer that a party has waived its rights under the EERA; we will find a waiver only when there is an intentional reliquishment of these rights, expressed in clear and unmistakable terms. 14 There is no indication in the agreement that by obtaining a contractual right to continued employment policies for a specified period, CSEA intended to relinquish its statutory right to an unchanged status quo pending negotiations, thereby waiving its right to negotiate proposed changes.

The Davis District also argues that it negotiated in good faith, all wage items remained on the table, and it had no intent to undermine CSEA's position as exclusive representative. It states that in private sector unilateral change cases, the NLRB and the courts focus on "the entire scope of conduct" in determining whether the employer refused to negotiate in good faith.

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[14]Also see Amador Valley Joint Union School District (10/2/78) PERB Decision No. 74.

We believe this is a misreading of federal precedent. In NLRB v. Katz, supra, 369 U.S. 736, the United States Supreme Court said:

> Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact . . . . A refusal to negotiate in fact as to any subject within section 8(d), and about which the union seeks to negotiate, violates section 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of section 8(a)(5) much as does a flat refusal.

Furthermore, in NLRB v. Allied Products Corp., supra, 548 F.2d 644, the court said:

> Proof of violation of section 8(a)(5) by showing unilateral changes may not be rebutted by proof of the employer's good faith or of the absence of anti-union animus . . . . [Par.] The fact that the Company offered to discuss re-institution of the merit increases does not mitigate its violation by unilaterally discontinuing without negotiation with its employees' representative, the established merit review procedure.

And PERB, in San Mateo County Community College District, supra, PERB Decision No. 95, stated:

> These reasons [for prohibiting unilateral changes] are convincing even though case-by-case determinations of employer intent might reveal, as in this proceeding, that the employer did not act with subjective bad faith.

Thus, whether or not the Davis District acted with subjective good faith, we nevertheless determine that it violated section 3543.5(c) by unilaterally eliminating annual salary increments.

Newark District

Before the Newark Teachers Association was certified as the exclusive representative of certificated employees, the Newark District and the Certificated Employees Council (CEC) agreed to a one-year extension of the memorandum of understanding expiring on June 30, 1976. The Newark District argues that the salary schedule contained in this agreement should not be implemented beyond the expiration date of that agreement because "[t]here was no agreement that notwithstanding the expiration of the interim agreement that the salary schedule would nevertheless continue." The District apparently believes that by signing an agreement as a member of the CEC, the Newark Teachers Association waived its right as exclusive representative to negotiate any proposed changes in employment conditions after that agreement expired. For the reasons expressed above in Davis, we find no "clear and unmistakable language" pointing to any such waiver.

The Newark District also argues that its unilateral action was motivated by budgetary limitations. The District is not claiming that its action in freezing salaries was necessary because sufficient funds were not available, since it acknowledged that it had reserved enough funds to pay step and column increases. The District's argument is based on its belief that once the increments have been given, it will have no flexibility to negotiate any other uses for these limited funds after July 1. As noted above, we believe the cases cited by the District (note 6, ante) are inapplicable because they arose prior to the enactment of a system of collective negotiations in the EERA.

New Haven District

The New Haven District argues that the Board should exclude evidence of pre-EERA practices, citing prior Board unit determination proceedings.15

Those cases are not really applicable, having been decided in a unit determination context where we were looking at representational practices. In any event, the Board did admit and examine pre-EERA evidence to determine the extent to which "established practices" within the meaning of section

[15]Fremont Unified School District (12/16/76) EERB Decision No. 6; Sweetwater Unified school District (11/23/76) EERB Decision No. 4; Oakland Unified School District (3/29/77) EERB Decision No. 15.

3545(a)16 would influence its unit determinations in those cases. We found pre-EERA representational practices under the Winton Act[1]-[7] sufficiently different from those under the EERA to give little weight to the established practices criterion in determining the appropriateness of a unit. In so finding, we never intended to indicate that past employment practices have little significance when considering employers' obligation to maintain the status quo during negotiations under the EERA. Since the EERA existed for only a year at the time the districts froze employees' salaries, we necessarily look to pre-EERA employment conditions to determine the status quo. See Pajaro Valley Unified School District, supra, PERB Decision No. 51, in which we examined pre-EERA practices to determine whether the district's conduct, alleged to be a unilateral change, was actually consistent with the district's past practice of paying a set amount for health benefits.

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16Section 3545(a) provides:

> In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

[17]Former Education Code section 13080 et seq. repealed Stats. 1975, chapter 961, section 1, effective July 1, 1976.

State Center District

State Center District contends that, in the absence of an express reservation of rights, the charges against it were rendered moot by CSEA's conscious choice of an agreement with a higher immediate pay increase but without retroactive reinstatement of salary increments. That choice, State Center District contends, constituted a clear settlement of the issues between the parties and a waiver of the rights of the employees.

The Board discussed the related issues of waiver of rights, settlement of disputes, and the resulting mooting of cases in Amador Valley Joint Union School District, supra, PERB Decision No. 74. In Amador, the Board held that a negotiated agreement was prospective only and did not serve as a settlement of the already pending charge involving a unilateral salary freeze. We stated that a waiver of such a charge must be established by clear and unmistakable language. As the underlying question of the propriety of the employer's conduct had not been resolved, we held that the case was not moot.

Similarly, the negotiated agreement in State Center is neither a settlement nor a waiver. The dispute as to whether the District committed an unfair practice remains. The negotiated agreement does not contain an express waiver or settlement clause, nor did the District ever request such a waiver or settlement of CSEA. The fact that CSEA rejected salary proposals providing retroactive increments does not imply

that the parties settled their dispute as to whether the District had the right to withhold those increments or that CSEA intended to waive its right to continue to pursue its unfair practice charge against the District.[18]

Centinela District

The Centinela District argues that in two previous years, the parties had negotiated step and column increments and had reached agreement on that issue before employees were advanced on the salary schedule. Therefore, the District argues, automatic advancement on the salary schedule was not a past practice and the District's salary freeze was not an unlawful unilateral change.

It is undisputed that salaries had never been frozen in the past; since at least 1971, eligible employees had without exception received annual increments. If the Association and the District had not reached agreement on a new schedule, the eligible certificated employees advanced on the previous year's schedule. For example, the parties did not reach agreement on the 1976-77 salary schedule until November 1, 1976. Teachers

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[18]Cf. Beacon Piece Dying & Finishing Co. (1958) 121 NLRB 953 [42 LRRM 1489], where the NLRB found that a union's action in abandoning a bargaining demand in return for other concessions does not constitute an implied waiver of a statutory right to bargain on that topic since dropping a demand is not a clear and unmistakable showing that there was a waiver, and such a waiver will not be readily inferred.

entitled to step and column increases advanced on the 1975-76 salary schedule until the new schedule went into effect.

The District does not dispute this, but states that the parties negotiated a separate agreement regarding step and column increases in August 1976 before such increases were granted. This, the District argues, indicates that the past practice had changed: annual increments would not be granted unless the parties reached an agreement.

The Association representative has no recollection of specific negotiations on salary increments or of reaching a separate agreement on that subject in August. There is no indication that the Association was ever aware of a possibility that the District would not have provided increments if an agreement was not reached. In fact, the Association representative believes that he has never negotiated step and column increases.

However, assuming for the sake of argument that the Association and the District did agree in August that employees would receive increments, the District was merely agreeing to do what it was already obligated to do—pay salary increments pending the negotiation of a new agreement. An agreement to maintain the status quo does not demonstrate a change in the status quo; thus the alleged agreement to pay salary increments does not indicate a new practice of withholding increments until such an agreement is reached.

The Centinela District also argues that its action was not an unlawful unilateral change because the parties were negotiating salary increments when the District froze salaries. This argument fails for two reasons. Assuming that the parties were, in fact, negotiating salary increments at the time the District implemented the salary freeze, they had certainly not reached agreement on that issue, nor were they at impasse. In the private sector, a unilateral change made during negotiations and before impasse is no more lawful than a unilateral change made without giving the exclusive representative notice and an opportunity to bargain. In NLRB v. Katz, supra, 369 U.S. 736, the Court found the employees' unilateral action on a subject under negotiation to be unlawful. While we do not here decide whether an employer is free to take unilateral action after impasse has been reached, we find that a unilateral change on a subject under negotiations, in the absence of circumstances which might necessitate the unilateral action, is a failure to negotiate in violation of section 3543.5(c).

In addition, the record does not indicate that the parties negotiated the issue of whether or not the employees would receive salary increments prior to September 7, 1977, when the Association was informed of the District's decision to freeze salaries. The Association initially proposed a formula in which the percentage of available funds the District spent on wages and fringe benefits for certificated employees in 1976-77 would

remain the same in 1977-78. Since the formula included all funds spent by the District, it included amounts spent on annual salary increments. But this does not mean that the Association was negotiating for something it believed it already had: annual salary increments pursuant to a salary schedule. The amount spent by the District also included the teachers' previous salaries, but this fact does not indicate that the parties negotiated whether or not the teachers would continue to receive the same amount. Furthermore, during negotiations, the parties discussed the issue of whether teachers returning from unpaid leaves of absence would receive increments. Surely such a discussion would have been premature if there had been any doubt that eligible teachers who had not been on leave would advance on the salary schedule. In summary, there is no clear and unmistakable indication that the parties actually negotiated whether or not teachers would receive increments; we will not infer such negotiations from the fact that the parties negotiated the general subject of salaries.

The District also argues that Katz stands for the proposition that the employer's only obligation is to provide an opportunity to negotiate; whether or not the parties actually negotiated, the Association had a three-month period to negotiate before the salary freeze would affect the employees' first paychecks. This argument assumes that the Association knew that the District intended to freeze salaries. We find

this assumption unwarranted. The District acknowledges that it never specifically told the Association that it would freeze salaries until negotiations on increments were completed, but claims that the Association should have known the District's intention from the proposed budget, which provided for no increase in teachers' salaries. To expect the Association to infer from that budget item the knowledge that the District intended to make a major change in the status quo is unrealistic, particularly when it is possible that the budgeted amount could remain the same and still provide for regular increments due to personnel attrition. Therefore, we find that the Association did not have knowledge of, and an opportunity to negotiate on, the salary freeze until September 7, 1977. This did not allow sufficient time for effective negotiations before September 12, the date by which salaries had to be set in order to issue September paychecks.

The District attempts to make a distinction between negotiations prior to a first contract and negotiations subsequent to an expired contract. We find this distinction is irrelevant in unilateral change cases. An employer may change negotiable terms and conditions of employment when no contract is in effect. But the employer must first provide an opportunity to negotiate and, if negotiations are requested, must negotiate in a good faith attempt to reach agreement before

making changes.[19] As noted above, the Centinela District did not provide an adequate opportunity to negotiate.

The District also argues that the totality of circumstances demonstrates that it negotiated in a good faith effort to reach agreement. As discussed above, in responding to the Davis District's similar argument, good faith is not a defense to a section 3543.5(c) charge involving a unilateral change of a subject within the scope of representation under section 3543.2.

Finally the District argues that its action in unilaterally freezing salaries was justified by its financial situation; it states that it did not have sufficient funds to pay increments for the next year. Whether or not the District did have money available, a point disputed by the parties, the District had an obligation to negotiate proposed changes in employment conditions before implementing them. This obligation to negotiate does not in any way entail an obligation to reach agreement, but it does entail an obligation to meet and

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[19]See, e.g., Hinson v. NLRB (8th Cir. 1970) 428 F.2d 133, 136 [73 LRRM 2667; 74 LRRM 2194]:

> The spirit of the National Labor Relations Act and the more persuasive authorities stand for the proposition that, even after expiration of a collective bargaining contract, an employer is under an obligation to bargain with the Union [fn. omitted] before he may permissibly make a unilateral change in those terms and conditions of employment comprising mandatory subjects of bargaining.

negotiate in a good faith effort to reach an agreement before implementing proposed changes.

The Board has held that even the financial uncertainty engendered by Proposition 13 did not relieve the districts of their obligation to negotiate proposed changes. San Mateo County Community College District, supra, PERB Decision No. 94; San Francisco Community College District, supra, PERB Decision No. 105. In San Francisco, the Board said:

> Even when a District is in fact confronted by an economic reversal of unknown proportions, it may not take unilateral action on matters within the scope of representation, but must bring its concerns about these matters to the negotiating table. An employer is under no obligation at any time to reach agreement with the exclusive representative. The duty imposed by the statute is simply—but unconditionally—the duty to meet and negotiate in good faith on matters within the scope of representation. Thus the confusion bred by the passage of Proposition 13 did not excuse the District's obligation to meet and negotiate with the Federation, nor did it justify the District's unilateral actions.

In this case, the District, with its early knowledge of its financial situation, had no excuse for failing to notify the union of its proposal to freeze salary increments with enough time to allow meaningful negotiations to take place. The District failed to do so and thus breached its duty to meet and negotiate in violation of section 3543.5(c).

## REMEDY

Under section 3541.5(c),[20] PERB has broad powers to remedy unfair practices. In each of these cases, the district violated section 3543.5(c) by unilaterally withholding scheduled salary increases from eligible employees. The Board finds it appropriate to order each district to cease and desist from making unilateral changes in matters within the scope of representation and to post the appropriate attached notice. Furthermore, the Board finds it appropriate to order the reinstatement of salary increments and retroactive backpay in the Davis, Newark, Centinela, and State Center Districts. This remedy is unnecessary in the New Haven District because the parties reached an agreement in which the District agreed to made a retroactive payment of the withheld salary increments.

In Davis, Newark, and Centinela, the districts and employee organizations had not reached agreements including retroactive salary increments as of the date of the unfair practice hearings in those cases. It is therefore appropriate to order each

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[20]Section 3541.5(c) states:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

district to lift its freeze on salary increments and to pay any step or column increases that eligible employees would have received if salaries had not been frozen, with interest at the rate of 7 percent. (San Mateo County Community College District, supra, PERB Decision No. 94, at p. 27; San Francisco Community College District, supra, PERB Decision No. 105, at p. 20; Cal. Civ. Code sec. 3287; Cal. Const, art. XXII, sec. 22. See also Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 261-263.) For the Davis and Newark Districts, such payment shall be retroactive to July 1, 1977. For the Centinela District, such payment shall be retroactive to September 7, 1977.

In the event that any of these districts has reached an agreement with the exclusive representative which includes the retroactive restoration of the withheld salary increments, that District may notify the Board so that a revised Order and notice may be issued.

In State Center, the District and CSEA had reached an agreement prior to the unfair practice hearing which did not include retroactive salary increments. The hearing officer found that the negotiations history indicated that CSEA waived its demand for retroactive reinstatement of step increases. We disagree. The negotiations between CSEA and the District were conducted with the knowledge that this unfair practice charge was pending. The normal remedy for an unlawful unilateral

withdrawal of a benefit is the restoration of that benefit.[21] Given this, CSEA's acceptance of the District proposal granting a 7.8 percent pay increase with no retroactive increments, coupled with CSEA's continued insistence that it intended to continue to seek the retroactive increments via the unfair practice proceedings, cannot be read as an indication that CSEA consciously chose a higher immediate pay increase in lieu of the retroactive increments. It is more likely an indication that CSEA went as far as it could in negotiations with the District, while continuing to seek a remedy for the District's unfair practice through this unfair practice proceeding. If the District had coupled its 7.8 percent proposal with a condition that CSEA agree not to seek retroactive increments, and CSEA had accepted, it would be clear that CSEA had waived any demand for retroactive increments. This is not the case, however, and it appears unlikely that CSEA would have accepted such an offer.

We do not know how negotiations would have proceeded if the District had not acted unlawfully by freezing step increments. In the absence of an agreement in which CSEA clearly waived the right of the unit members to be made whole for the losses caused by the District's unlawful acts, we find it appropriate to remedy the District's unfair practice by granting increments pursuant to the 1976-77 salary schedule to eligible employees

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[21]See Morris, The Developing Law Law (BNA 1971) at p. 858).

retroactive to July $l_f$ 1977, plus interest at 7 percent per annum.

## ORDER

Upon the foregoing facts, conclusions of law and the entire records in these cases, the Public Employment Relations Board ORDERS that:

1. The Davis Unified School District, the New Haven Unified School District, the Newark Unified School District, the State Center Community College District, and the Centinela Valley Union High School District shall cease and desist from taking unilateral action with respect to employee wages, hours, or terms and conditions of employment as defined by Government Code section 3543.2, without providing the exclusive representative with notice and opportunity to negotiate.

2. The Davis Unified School District shall reinstate yearly salary increments for classified employees, with interest at the rate of 7 percent for the amount due from July 1, 1977, to the date of reinstatement.

3. The Newark Unified School District shall reinstate yearly salary increments for certificated employees, with interest at the rate of 7 percent for the amount due from July 1, 1977, to the date of reinstatement.

4. The State Center Community College District shall reinstate yearly salary increments for classified employees, with interest at the rate of 7 percent for the amount due from July 1, 1977, to the date of reinstatement.

5. The Centinela Valley Union High School District shall reinstate yearly salary increments for certificated employees, with interest at the rate of 7 percent for the amount due from September 7, 1977, to the date of reinstatement.

6. Each district shall:

   (a) Post at all school sites, and all other work locations where notices to employees customarily are placed, immediately upon receipt thereof,

copies of the appropriate notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 consecutive days from receipt thereof. Reasonable steps should be taken to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the appropriate regional director of the Public Employment Relations Board, in writing, within 20 days from the date of this Decision, of what steps the District has taken to comply herewith.

This Order shall become effective immediately upon service of a true copy thereof on each district.

J&p. Raymond J. Gonzales, Member Harry Gluck, Chairperson

Appendix; Notice.

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

After a hearing in which all parties had the right to participate, it has been found that the Davis Unified School District violated the Educational Employment Relations Act by taking unilateral action regarding proposed changes of employee wages and step increments, without providing the exclusive representative, California School Employees Association, with notice and opportunity to negotiate. As a result of this conduct, we have been ordered to post this notice. We will abide by the following:

(a) WE WILL NOT take unilateral action regarding proposed changes of employee wages, hours or terms or conditions of employment, without providing the exclusive representative with notice and opportunity to negotiate.

(b) WE WILL reinstate step increment payments for classified employees, with payment of interest at 7 percent for the amount due from July 1, 1977 to the date of reinstatement.

DAVIS UNIFIED SCHOOL DISTRICT

By: _____
Superintendent

Dated:

This is an official notice. It must remain posted for 30 consecutive days from the date of posting and must not be defaced, altered or covered by any material.

Appendix; Notice.

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

After a hearing in which all parties had the right to participate, it has been found that the New Haven Unified School District violated the Educational Employment Relations Act by taking unilateral action regarding salary increments, without providing the exclusive representative, New Haven Teachers Association CTA/NEA, with notice and opportunity to negotiate. As a result of this conduct, we have been ordered to post this notice. We will abide by the following:

WE WILL NOT take unilateral action regarding proposed changes of employee wages, hours or terms or conditions of employment, without providing the exclusive representative with notice and opportunity to negotiate.

NEW HAVEN UNIFIED SCHOOL DISTRICT

By:_____
Superintendent

Dated:

This is an official notice. It must remain posted for 30 consecutive days from the date of posting and must not be defaced, altered or covered by any material.

Appendix; Notice.

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

After a hearing in which all parties had the right to participate, it has been found that the Newark Unified School District violated the Educational Employment Relations Act by taking unilateral action regarding salary increments, without providing the exclusive representative, Newark Teachers Association, with notice and opportunity to negotiate. As a result of this conduct, we have been ordered to post this notice. We will abide by the following:

(a) WE WILL NOT take unilateral action regarding proposed changes of employee wages, hours or terms or conditions of employment, without providing the exclusive representative with notice and opportunity to negotiate.

(b) WE WILL reinstate step increment payments for certificated employees, with payment of interest at 7 percent for the amount due from July 1, 1977 to the date of reinstatement.

NEWARK UNIFIED SCHOOL DISTRICT

By: _____
Superintendent

Dated:

This is an official notice. It must remain posted for 30 consecutive days from the date of posting and must not be defaced, altered or covered by any material.

Appendix: Notice.

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

After a hearing in which all parties had the right to participate, it has been found that the State Center Community College District violated the Educational Employment Relations Act by taking unilateral action regarding salary increments, without providing the exclusive representative, California School Employees Association, with notice and opportunity to negotiate. As a result of this conduct, we have been ordered to post this notice. We will abide by the following:

(a) WE WILL NOT take unilateral action regarding proposed changes of employee wages, hours or terms or conditions of employment, without providing the exclusive representative with notice and opportunity to negotiate.

(b) WE WILL reinstate step increment payments for classified employees, with payment of interest at 7 percent for the amount due from July 1, 1977 to the date of reinstatement.

STATE CENTER COMMUNITY COLLEGE DISTRICT

By: _____
Superintendent

Dated:

This is an official notice. It must remain posted for 30 consecutive days from the date of posting and must not be defaced, altered or covered by any material.

Appendix; Notice.

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

After a hearing in which all parties had the right to participate, it has been found that the Centinela Valley Union High School District violated the Educational Employment Relations Act by taking unilateral action regarding salary increments, without providing the exclusive representative, Centinela Valley Secondary Teachers Association, with notice and opportunity to negotiate. As a result of this conduct, we have been ordered to post this notice. We will abide by the following:

(a) WE WILL NOT take unilateral action regarding proposed changes of employee wages, hours or terms or conditions of employment, without providing the exclusive representative with notice and opportunity to negotiate.

(b) WE WILL reinstate step increment payments for certificated employees, with payment of interest at 7 percent for the amount due from September 7, 1977 to the date of reinstatement.

CENTINELA VALLEY UNION HIGH
SCHOOL DISTRICT

By:_____
Superintendent

Dated:

This is an official notice. It must remain posted for 30 consecutive days from the date of posting and must not be defaced, altered or covered by any material.