STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

OAKLAND SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. OAKLAND UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. SF-CE-476 PERB Decision No. 326 July 11, 1983

Appearances: Richard V. Godino, Attorney (Breon, Galgani, Godino & O'Donnell) for Oakland Unified School District; Andrew Thomas Sinclair, Attorney for Oakland School Employees Association.

Before Tovar, Morgenstern and Burt, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the hearing officer's proposed decision filed by the Oakland Unified School District (District). The District contests the hearing officer's finding that it violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)[1] by failing to fulfill its obligation to

[1]EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise indicated.

Subsections 3543.5(a), (b) and (c) provide:

> It shall be unlawful for a public school employer to:

bargain in good faith with the Oakland School Employees Association (OSEA or Association).

FACTS

The Association and the District were parties to a collective bargaining agreement effective April 4, 1979 to June 30, 1981. During 1980, the parties conducted two separate sets of negotiations. The first began in April 1980 and covered the layoffs which the District announced would occur on June 30. The second set of negotiations began in August 1980 and covered reopeners on wages, annuity contributions, and health and welfare benefits. OSEA attempted to combine these two sets of negotiations, but the District refused.

The thrust of the instant case involves the layoff negotiations. In the fall of 1979, the District learned that it was facing a serious budget deficit. Beginning in November 1979, W. B. Lovell, then the District's business manager, conducted a series of budget workshops at which the

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(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.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

deficit was discussed. As a means of compensating for the deficit, the District began considering the possibility of staff reductions, including layoffs of many classified employees. According to Lovell, had the District continued at the same staffing level for the 1980-81 school year, there would have been a five million dollar deficit even without a salary increase.

Beginning in January 1980, Ann Sprague, OSEA president, made several presentations to the board of education regarding the potential layoffs. The District did not officially announce layoffs until April 30. However, during the budget workshops conducted prior to April, it became increasingly obvious that layoffs were a certainty. Sprague repeatedly asked for negotiations to begin as soon as possible and for certain information, including a list of positions and the names of employees targeted for layoff. Superintendent Ruth Love referred these requests to her staff and told Sprague that the staff would respond. The staff did not respond.

OSEA Attorney Andrew Thomas Sinclair followed up on Sprague's requests. On February 20, 1980, he wrote to Loma Reno, then the acting director of classified personnel and the District's chief negotiator, stating that OSEA wished to begin negotiations on "all matters that are negotiable for the 1980-81 school year contract."

The District did not respond to OSEA's requests. At an April 1 meeting called to discuss the proposed preliminary budget, the layoffs were discussed and Lovell announced that they could exceed 200. This meeting was attended by Ruth McClanahan, who at this time had replaced Loma Reno as the District's chief negotiator.

Immediately after the April 1 meeting, Sinclair wrote to McClanahan asking for negotiations on the following subjects:

1. Wages and health and welfare benefits; OSEA proposes a 15% salary increase; a more detailed proposal for health and welfare benefits will be presented during the course of negotiations;

2. The effects of the proposed lay-offs;

3. The decision to lay off any bargaining unit employees;

4. The consolidation of bargaining for the White Collar and Paraprofessional bargaining units.[2]

McClanahan responded to Sinclair's letter on April 14. She agreed to negotiate about fringe benefits, but stated that negotiations could not begin until the proposals had been received and sunshined. She also agreed to negotiate about the "effects of the proposed layoffs," beginning on April 21. However, she refused to bargain about the decision to lay off

[2]The instant case involves negotiations in the unit of white collar employees. The District eventually refused to negotiate point four above because it viewed it as an improper subject for negotiations.

employees because it was not, in her view, within scope. Her letter makes that clear:

> [bargaining on [the effects of layoffs] will take place separate and apart from any subsequent bargaining on wages and fringe benefits that might occur.

The parties held another meeting on April 21. The meeting prompted a lengthy letter from Sinclair to McClanahan the following day. Sinclair complained that the parties were "not getting off to a very good start for this round of negotiations." Among other things, Sinclair contended that the time, place and subject matter of particular negotiations were negotiable and could not be set unilaterally. He asked to negotiate about these items. He requested "at least 10 sessions of 3 hours each for each of the 2 bargaining units represented by OSEA." He also asked that at least five of the ten sessions be scheduled immediately and that negotiations be accelerated from May 23, the date set by the District. Sinclair also reiterated Sprague's earlier demands for all information about whom the District was planning to lay off or the positions involved. The District did not respond to these requests.

By letter of April 25, Sprague specifically requested that Superintendent Love provide OSEA with the list of proposed layoffs and recommended reductions in monthly work schedules of classified employees in the white collar unit, the number of positions being recommended for layoff or reduction in months

of employment by department and by specific classification and the classification, number of positions, and the proposed number of months of employment designated for reduction. Sprague insured Love that the information was needed to protect the employees OSEA represents but would be kept in confidence.

The response to this request came on April 28 from Charles Mitchell, Deputy Superintendent of Schools. Mitchell advised Sprague that the information which she requested was currently being prepared for release by the board of education in public session at the April 30 meeting.

He wrote:

> Until such time as the information is released by the Board, it is not a public document and cannot be provided to you or to other units. The delay in making this information public is to give each department head/supervisor the opportunity to personally advise each person whose position is being eliminated or having his/her work year changed.

Loma Reno testified that, early in the year, the District had not been in a position to provide the names of those to be laid off. According to Reno, the complicated bumping procedures made the list uncertain. However, she did have a fairly accurate list on May 9. She conceded that, though the list changed weekly, this information was available to the District and could have been shared with OSEA, but she resisted.

> I question that being good personnel practice to give out a name of a person who

> might not be laid off and it becomes [sic] out in the public as knowledge.
>
> . . . . . .
>
> I did not want to give any names . . . I do not think it is a good idea to give any name unless we are absolutely certain it is that person who is affected. And, I won't give those names and that sort of information to anyone.

On April 30, the board of education passed a resolution announcing the decision it made approximately one week earlier in executive session. It directed the superintendent to:

> . . . abolish or reduce the work year, no later than June 30, 1980, of . . . 328 classified positions 3

A list of the number of targeted positions within classifications of employees to be laid off was attached to the resolution. OSEA was provided with this information when the resolution was made public on April 30.

By letter of May 5, McClanahan agreed to use the previously scheduled session of May 23 for negotiations on effects of layoff. The May 5 letter also informed Sinclair that the information requested by Sprague would be mailed to her. McClanahan wrote:

> I have discussed with Mr. Lovell, Mrs. Sprague's request for the names of

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[3]On May 7, another resolution was passed reducing this number to 315. The number was continually reduced. Only 17 notices were sent out. Of these 17, 12 were recalled. Thus, at the time of the hearing, the actual number of employees still laid off was 5.

> individuals whom the District proposes to lay off and the identities of the positions from which employees will be laid off. I have received assurances that the information will be mailed to her on or about Friday, May 2, 1980.

The information was not forwarded as promised by McClanahan.

On May 20, OSEA submitted a detailed written proposal to the District covering the effects of layoffs. The proposal included a cover letter stating that OSEA maintained its position that "layoffs per se" were negotiable. The proposal on effects stated:

> EFFECTS OF LAY-OFFS
>
> The following shall be observed with regard to the effects of any lay-offs carried out by the Oakland Unified School District:
>
> 1. All lay-offs shall be preceded by 180 days written notice, [sic]
>
> 2. All laid off employees shall be entitled to 180 days of severance pay;
>
> 3. All laid off employees shall be entitled to remain on all health and welfare programs for 180 days following the effective date of the lay-off;
>
> 4. All laid off employees shall continue to receive payments to their annuity account for 180 days following the effective date of their lay-off;
>
> The following shall apply to employees who continue to work for the school district:
>
> 1. No employee's work load shall be increased as a result of any lay-off of another employee in the bargaining unit;
>
> 2. No employee shall be transferred to another site as a result of the lay-off

of another employee in the bargaining unit;

3. No employee shall be required to work mandatory overtime as a result of the lay-off of another employee in the bargaining unit;

4. No employee shall have their hours reduced as a result of the lay-off of another employee in the bargaining unit.

Also on May 20, OSEA made the following written proposal on the decision to lay off classified employees:

> No employee in the White Collar Bargaining Unit shall be laid off during the 1980-81 school year, or any part of it, after May 15, 1980. The District shall not be required to fill vacancies which occur during the 1980-81 school year in the White Collar Bargaining Unit.

The parties met on May 23. The District repeated its position, first stated in McClanahan's April 14 letter, that negotiations on economic items could not proceed until the board of education had an opportunity to respond to the OSEA proposals. The District agreed to go ahead with negotiations on the effects of the layoffs and scheduled another session for June 9.

In anticipation of the June 9 session, Sinclair again requested information from the District. In a May 27 letter, he asked McClanahan for the following data:

1. The names, classifications and locations of all employees the District intends to lay-off;

2. The time at which the District intends to lay-off each individual identified;

3. The seniority of each employee the District proposes to lay-off, and the names and classifications and locations of each person who could be bumped by each individual who is to be laid off;

4. The proposed duration of the lay-off for each employee.

Also on May 27, the District sent out layoff notices to employees. Sprague testified that OSEA protested the notices being sent while the layoff negotiations were in progress. OSEA requested the notices be withdrawn pending the outcome of negotiations.

On June 2, Sinclair sent a letter to McClanahan protesting the amount of time (2 hours) that the District had set aside for negotiations scheduled for June 9. He also stated that, by sending layoff notices to employees during the course of bargaining, the District acted unilaterally and should withdraw the notices forthwith.

OSEA received the requested information, including the list of employees to be laid off, on June 4. Asked why it took the District 8 days to provide OSEA with the list, Reno testified that this was due to the overall volume of work her office had at the time. The list included the names of 17 employees. This was the first time such a list had been provided to OSEA.

Substantive negotiations on the effects of layoffs were to begin on June 9. The OSEA negotiating team appeared at 9:00 a.m. as scheduled. However, the District team was not present. OSEA grievance officer Bill Freeman went to

McClanahan's office to find out where the District team was. He was told by Rosalie Astrada, McClanahan's secretary, that McClanahan cancelled the session because OSEA had filed charges with PERB.[4] After several telephone calls, the OSEA team succeeded in getting the District's team to appear at the table. By this time, it was about 10:00 a.m.

McClanahan testified that she had not refused to bargain on June 9 but, rather, she had:

> . . . naively and stupidly assumed that the filing of the unfair meant that [OSEA] was not going to bargain any more.

She cancelled the session without checking with OSEA. After Freeman came to her office, she attempted to contact Michael Sorgen, attorney for the District, to get advice on what she should do. However, she was not able to reach him and decided to wait for his arrival before going to the bargaining session, even though the OSEA team was present and prepared to bargain. She testified that Sorgen eventually arrived and advised her to go to the session and explain that she had made a "genuine error." She did so.

The session was scheduled for 9:00 a.m. to 12:00 noon but began at 10:00 a.m. and lasted until approximately 12:00 noon. OSEA was under the impression, based on a discussion with Reno

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[4]The charge referred to was SF-CE-469 filed on May 28, 1980. It charged that the District had failed to bargain in good faith on negotiable subjects unrelated to the instant charge.

at the previous session, that the District would present a written counterproposal on June 9. When the District's team arrived without a written proposal, OSEA demanded one. McClanahan testified that Sinclair "badgered" her and threatened to file an unfair practice charge unless the counterproposal was presented. Shortly after 10:00 a.m., the District team caucused to prepare its counterproposal.

The District returned at approximately 12:15 p.m. and presented the following counterproposal:

> The following shall be observed with regard to the effects of any lay-offs carried out by the Oakland Unified School District:
>
> 1. All lay-offs shall be preceded by at least thirty (30) days written notice. The District will endeavor to give more wherever business necessity permits.
>
> 2. All laid off employees shall be entitled to all accrued vacation.
>
> 3. All laid off employees shall be entitled to remain on all health and welfare programs at their own expense for thirty (30) days following the effective date of the lay-off.
>
> 4. No laid off employee shall continue to receive payments to his/her annuity account following the effective date of his/her lay-off.
>
> The following shall apply to employees who continue to work for the School District:
>
> 1. The District shall make every effort to re-distribute work loads wherever it determines that an employee's work load has been substantially increased as a result of the lay-off of another employee in the bargaining unit.

2. No employee shall be transferred to another site as a result of the lay-off of another employee in the bargaining unit except pursuant to application of the seniority rules.

3. No employee shall be required to work mandatory overtime in excess of twenty-five (25) hours as a result of the lay-off of another employee in the bargaining unit.

4. No employee shall have his/her hours reduced as a result of the lay-off of another employee in the bargaining unit, but shall have a right to voluntarily accept a reduction in hours where offered.

Evidence as to whether any substantive discussion occurred after the counterproposal was presented is in conflict. OSEA witnesses testified that, after presenting the counterproposal, the session ended. McClanahan testified that, when the District team returned, the parties began bargaining on it.

The next bargaining session took place on June 11. During this session, OSEA made a verbal proposal concerning the office of community relations which, under the impending layoffs, was targeted to lose its last three community relations assistants. This cut would have left three clerical personnel as support staff for the only other remaining employees, the director and assistant director. OSEA proposed that the District lay off the least senior intermediate typist-clerk and retain the most senior community relations assistant. The rationale offered for the proposal by OSEA involved saving the position of Bill Freeman, one of the three community relations

assistants who had the right to released time in his role as union grievance officer under the collective bargaining agreement. OSEA argued that the proposal was reasonable in that the two remaining management employees would not need the full clerical staff which had supported the office when the three community relations assistants were employed.[5]

OSEA viewed the proposal as involving the identity of the layoff, a negotiable effect of the District's decision. The District saw the proposal as nonnegotiable.

Lovell's testimony about the budget-cutting procedure bears directly on the community relations proposal. Lovell testified that the District had delegated to specific fund managers the authority to determine where the layoffs would occur in their particular areas of responsibility. However, not all departments were cut by the same amount under the District's approach. The community relations unit was at the "low end of the scale" in terms of needed reductions. Superintendent Love was the fund manager who had responsibility for the office of community relations. Lovell testified regarding that role:

> But it was up to the fund manager to come back and say, identify either positions and dollars or non-salary types of things which they would meet their target which had been presented to them.

5This office had had 12 community relations assistants before Proposition 13. The support staff had been reduced from 8 to 3 after Proposition 13 passed.

According to Lovell, the authority was delegated because:

> . . . each fund manager was in the best position to ascertain what they could afford to give up to achieve their [budgetary] target.

From a budgetary standpoint, Lovell testified, it did not matter where the cuts came from.

Lovell also testified that there was "nothing magic" about the June 30 layoff date and that the layoffs could have been made effective at some later date but, the later the layoff date, the less money saved. Money not saved by keeping employees on the rolls after June 30 would have had to have been made up from some other source. For example, the money could have come out of salary increases, an item the District had already budgeted for. It made no difference to Lovell if the budget was balanced in this way.

During the June 11 session, the District wrote down the community relations office proposal and, after the session, posted it in a glass-enclosed bulletin board at the entrance to the administration building. There is a dispute as to whether posting this proposal was appropriate. All of the OSEA witnesses, including Sprague who had negotiated for OSEA since 1977, testified that the District had never posted a verbal proposal. McClanahan testified that she had been informed by her secretary that it was District practice to "sunshine" counterproposals in this manner within 24 hours if they materially affected a pending proposal. McClanahan also

testified that this posting requirement applied to counterproposals only, not to initial proposals. She testified that there was only one other counterproposal posted in this manner during the spring of 1980, when McClanahan was participating in 11 sets of negotiations in addition to the OSEA talks.

At the time the community relations office proposal was posted, the District policy regarding sunshining new proposals was contained in Administrative Bulletin 8095. That bulletin provides, in relevant part:

> Within twenty-four (24) hours after presentation of any new subject matter proposals within the scope of negotiations by either party during meeting and negotiations, the Board of Education shall make such proposals available in printed form for public study and review.

McClanahan testified that the board of education has a role in sunshining the proposals and counterproposals but that the community relations unit proposal was never presented to the board in an open meeting. She also testified that OSEA's May 20 proposals had never been presented to the board of education for public comment.[6]

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[6]McClanahan testified that Sinclair sent her a letter waiving the sunshining of the May 20 proposals. No such letter appears in the record. In his April 22 letter to McClanahan, Sinclair only requested that negotiations proceed "prior to sunshining."

OSEA witnesses testified that, toward the end of the June 11 session, McClanahan threatened to cancel subsequent bargaining sessions if OSEA filed another unfair practice charge. A letter from Sinclair to McClanahan following the session indicates that the threat was made after OSEA demanded a response to another subject of bargaining, "temporary extra time assignments." The letter also informed McClanahan that charges would be filed with PERB if no response was made.[7]

McClanahan testified that she had not threatened to cancel the session because of OSEA's statement that charges would be filed, but rather because Sinclair had called Loma Reno a liar in front of classified employees. Despite this explanation, McClanahan admitted during the second day of hearing that her notes from June 11 contained the following:

> Tom [Sinclair] threatened to file another Unfair if I did not respond within two days to his May 28th letter. I responded that I will not meet if he continues to threaten me. We are . . . refusing or considering refusing to meet Wednesday in light of the threats.

Reno testified that she couldn't remember the incident where Sinclair allegedly called her a liar and said that she did not pay much attention to that sort of thing.

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[7]McClanahan testified that she could not remember if she had responded to this letter, but there is no indication in the record that she had. This charge (SF-CE-501) was filed on October 10, 1980, after the District refused to respond to an OSEA request for bargaining. A settlement was eventually reached and the charge was withdrawn on November 14, 1980.

At the next session, the District representatives seemed willing to try to reach a compromise on the severance pay and notice proposals. With regard to severance pay, McClanahan testified:

> I don't recall us ever making a specific money value. We talked in terms of where we might be able to go to reach some type of an agreement. District asked OSEA if it were willing to negotiate severance pay in exchange for giving up their rights to rehire. We had that kind of a discussion as we were going through item by item trying to establish where we might be able to come together.

She conceded that the June 18 discussion regarding notice amounted to the District agreeing to "explore" the issue. Regarding the discussion about the notice proposal, McClanahan testified:

> I remember making the statement that the district was willing to consider 60 days of notice with a proviso that 30 of those days represent the 30-days notice that were currently in effect and the employees who were affected by it.

Freeman similarly testified that McClanahan said she "could possibly adjust" her notice proposal to 60 days.

The record reveals that no firm offer beyond the 30 days required by the Education Code was ever made.[8]

Also during the session on the 18th, McClanahan read a prepared statement to OSEA. The statement said that the

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[8]Education Code section 45117, infra, at p. 30.

District and OSEA had reached agreement on layoffs and effects of layoffs in the current contract. In the statement, McClanahan asserted that the District had complied with these aspects of the contract. However, the statement reaffirmed the District's agreement to negotiate effects of layoffs, including "identity and number of layoffs, severance pay, location of layoffs and other rights of the employees."

During the June 18 session, OSEA requested that the layoffs be postponed pending further negotiations. The District refused to do so, adhering to the June 30 date. As stated earlier, Business Manager Lovell testified that, while June 30 was the end of the fiscal year, the layoffs could have been postponed until a later time, such as August or September, but this would have had a greater impact on the budget. According to Lovell, if OSEA had agreed to accept a lower salary increase in exchange for severance pay or additional notice, it would not have mattered to the District from a financial point of view.

In a June 19 letter, OSEA sought a response to its request that no layoffs take place until negotiations were concluded. The letter also asked for a response to the proposal about the office of community relations. OSEA had apparently been encouraged by the June 18 discussion of the notice and severance pay proposals, as the letter concluded with the following comment by Sinclair:

> I think that we are making some progress with regard to the effects of layoff and negotiations and hope that we can continue to do so.

When the parties met again on June 26, the last session before the layoffs became effective, the District took the position that they were sticking to their counterproposal of June 9 and that no additional notice or severance pay would be agreed to.

At that time, OSEA modified its prior notice proposal and asked for 31 days of notice. The District rejected this proposal for fear it would set a precedent. According to Sprague, the District took the position that "not one additional minute would be given." The reason given, Sprague said, was that "30 days was required by law and that's all they would give." Freeman and Patricia McMillon, an OSEA negotiating team member, corroborated Sprague on this point.

McClanahan's testimony was that the 31-day notice proposal was rejected because the notices had been sent "under the code" and she was afraid of jeopardizing the layoffs.

At the June 26 session, OSEA also modified its prior severance pay proposal and sought $1.00 severance pay per employee. The District took the position that "not one penny would be given because it would set a precedent."

Additionally, the District took the position that it did not have a duty to bargain about the office of community relations proposal. McMillon testified that the District also

refused to extend health and welfare benefits, and it was adamant in refusing annuity payments after layoff.

During this session, OSEA again requested that the layoffs be put off pending further negotiations. This request was refused by the District.

McClanahan was asked if the District at any time during the negotiations made any firm counteroffers to the OSEA proposals other than those of June 9. In response, she stated that there had been various "exchanges across the table" and that she had agreed to "seek the fullest extent of [her] ability to move." She stated that the District had made a verbal proposal during one of the June sessions to give severance pay in return for giving up rehire rights. But when she was asked on cross-examination to state how much the District had actually offered in severance pay, she stated:

> A. I don't think we made a dollar amount. We offered to negotiate on severance pay. Our first position was no severance pay; we didn't want to negotiate over that. We offered then to move the next session, we said, 'Okay, if you'd be willing to negotiate away rehire rights, we'd be willing to negotiate the severance pay.' Another offer was made on severance pay in exchange for notice. You decrease the amount of notice you are asking for and we would counter with seeking a monetary figure comparable — a six-month period of notice decrease six months severance pay. We never came out with a specific figure, but we offered to move in that direction.
>
> Q. Ms. McClanahan, did you ever make an offer that OSEA could have accepted of a

> specific amount of severance pay in return for no rehire rights? Yes or no?
>
> A. To my recollection we never put a dollar figure on severance pay on the table.

As discussed above, McClanahan's testimony regarding proposals about notice were actually only offers to "explore" the issue.

Asked about any other firm offers made by the District, she stated with regard to the retention of health and welfare benefits:

> I believe the offer was this way: 'We will check the cost figures to see what it costs and see what the problems are in allowing them to stay on.' And that was on the 18th and the offer was made that way.

She later stated that she felt the District would have agreed to some retention of health and welfare benefits if OSEA had dropped its demand for a 31-day notice period. But there is no evidence that this thought was ever conveyed to OSEA.

McClanahan's notes for June 18 indicate that the District was "willing to reach a compromise" in the areas of "notice/for severance pay" and exchanging benefits for a longer period of time.

McClanahan testified as to other items she said were agreed to by the parties. First she said that the parties agreed to three or four items in the second group of proposals (those concerning the effects on retained employees) submitted by OSEA on May 20. The parties, however, did not initial or sign off on these proposals and, when further questioned about the

specifics of the agreement, her testimony was that the parties had reached agreement on three or four items in the second group of the District's June 9 counterproposals, not OSEA's May 20 proposal. However, she testified that the second group of OSEA's proposals were the same as the second group of the District's counterproposals.[9]

When McClanahan was asked for her opinion on what was separating the parties on June 26, she stated that it was OSEA's "demand that we reach total agreement on the entire package" and "[OSEA's] contention that you have more notice than what the Education Code allowed . . . ." According to McClanahan, another obstacle to an agreement was OSEA's refusal to accept her "rationale" that the already-announced layoffs could not be jeopardized.

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[9]Compare OSEA's proposals at pp. 8-9 with the District's proposals at pp. 12-13. In the first item, OSEA proposed that "[n]o employee's workload shall be increased" as a result of the layoff. The District's proposal said that it would "make every effort to re-distribute" workloads when "it determines" an employee's workload has been "substantially increased" as a result of the layoff. In the second item, OSEA proposed that no employee be transferred as a result of the layoff. The District made the same proposal, but added the proviso "except pursuant to the application of the seniority rules." In the third item, OSEA proposed that "no employee shall be requested to work overtime" as a result of the layoffs. The District proposed that "no employee shall be required to work mandatory overtime in excess of twenty-five (25) hours" as a result of the layoff. In the fourth item, OSEA proposed that "no employee shall have their hours reduced" as a result of the layoff. The District's proposal was the same, with the proviso that an employee had the "right to voluntarily accept a reduction in hours where offered."

On June 27, McClanahan sent a memo to Deputy Superintendent Mitchell regarding the status of the negotiations.[10] The memo recognized, among other things, that there had been no agreement on economic items. McClanahan described OSEA's proposals on economic items as "fairly substantial ($90,000 worth)." In connection with her description of OSEA's "fairly substantial" proposals, she said OSEA was asking for, among other things, a 180-day notice period and 180 days of severance pay.

McClanahan summed up the memo as follows:

> In short, the District has maintained that:
>
> 1. The District cannot extend the notice as the layoffs must go forth on June 30, 1980, in order to achieve the maximum savings possible;
>
> 2. The District cannot agree to severance pay, annuity and health benefits for laid-off employees;
>
> 3. The District will not agree to lay off the most junior Clerk Typist in the Community Relations Office in place of the most senior community relations assistant scheduled for layoff;
>
> 4. Continued bargaining on these economic items is fruitless because the District does not foresee a change in its position.

Although McClanahan invited Mitchell to direct her to engage in further negotiations, he did not do so and none transpired.

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[10]Pursuant to stipulation of the parties at the hearing, this memo was introduced into evidence after the close of the hearing.

Part of the instant charge is the allegation that the District failed to bargain in good faith because McClanahan, its chief negotiator, lacked sufficient authority. The following facts relate specifically to this aspect of the charge.

During one of the sessions in June, OSEA questioned the authority of the District's representatives to bargain over the economic aspects of the layoff proposals. The question was raised because the District, while purporting to negotiate about the economic impact of layoffs, was simultaneously taking the position that it could not negotiate about economic reopeners until the budget for the following year was known. Immediately after this question was asked, according to the testimony of Freeman and McMillon, the District's team caucused. When it returned, according to McMillon, McClanahan stated that she "had the authority to negotiate on items of an economic nature that had been sunshined."

On cross-examination, McClanahan testified that she told the OSEA negotiators on June 26 that she "had the authority to bargain over all items that had been sunshined." Further questioning established that, as of the end of June, the District had not yet sunshined the OSEA layoff proposals of May 20 or the District's counterproposal of June 9. In fact, these proposals were never sunshined.

McClanahan changed her testimony to state that she "had the authority to bargain over these proposals that were on the table that had not been sunshined."

McClanahan later testified further as to her authority with specific reference to economic items. In the context of this testimony, she described her authority as follows:

> I received no limitations on my authority to bargain over all of the items that were on the table, as long as they had been sunshined and as long as they were legal. . . .

Still later, she testified that she did not have authority to reach agreement on economic issues until the District knew what the budget would be. In fact, she admitted to being instructed by Drs. Love and Mitchell between June 18 and June 26 to reach no agreement on "large" and "major" economic items until the budget was known.

When asked whether she had informed OSEA that these were her instructions, she stated, "No, I don't recall ever stating that was our position." However, she testified that OSEA "knew" those were her instructions. When asked essentially the same question in cross-examination, she stated that she had informed OSEA at some point in the negotiations that she was so limited because she did not yet know what the budget would be.

During her second day of testimony, McClanahan testified that she had decided to declare impasse rather than continue negotiations because:

> I could not reach agreement that would obligate us to a large monetary package and we were still talking about a substantial amount of money.

Asked whether she had the authority to settle for as little as $1.00 in severance pay, she stated:

> I had the authority to settle with OSEA for one dollar of severance pay if, in my judgment, it were the right way to settle it.

She then stated that she did not have the authority to settle for six months of severance pay (at about $15,000 per month or $90,000), "because I did not have a good picture of the budget." She testified that economic items became "substantial" when they reached the $100,000 level. She said she did not know if she had authority in the $50,000 range. However, she then testified as follows:

> Q. [By Mr. Sinclair]: Was there a figure you felt you were free to reach agreement?
>
> A. [By Ms. McClanahan]: If taken alone and that would totally resolve the contract, I believe I could have.
>
> Q. What was that figure?
>
> A. I don't know. Up to — anywhere up to $100,000 if I felt I could have reached it.

This figure was meant to apply only to the layoffs, not the reopeners.[11]

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[11]The parties began negotiations on the economic reopeners in late July or the first week of August when the

DISCUSSION

In its exceptions, the District maintains that the notice and timing of a layoff decision are nonnegotiable subjects. Specifically, it refers to OSEA's proposal which sought a 180-day notice period and the proposal which sought to prohibit layoffs of classified employees after May 15, 1980.

The scope of representation under EERA is defined in subsection 3543.2(a) which provides:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and

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financial position became clear and the proposals were sunshined.

On September 15, 1980, the parties reached agreement on the reopener provisions of the contract. One provision of this agreement concerned the withdrawal of all other proposals previously submitted "during the course of these negotiations." The hearing officer concluded that the parties did not agree to withdraw the proposals relevant to layoff effects and the District did not except to this finding.

> the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

In Anaheim Union High School District (10/28/81) PERB Decision No. 177, the Board adopted a test for assessing negotiability finding a nonenumerated subject to be within scope if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission. A subject which satisfies the Anaheim test may nonetheless be beyond the scope of representation if, in accordance with section 3540,12 provisions of the Education

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[12]Section 3540 provides in pertinent part:

> Nothing contained herein shall be deemed to supersede other provisions of the Education Code. . . .

Code evidence an intent to set an inflexible standard or ensure immutable provisions.[13]

Prior decisions of this Board have concluded that, while the decision to lay off employees is nonnegotiable, certain effects of that decision are within the scope of representation. Oakland Unified School District (11/2/81) PERB Decision No. 178; Solano County Community College District (6/30/82) PERB Decision No. 219; Newark Unified School District (6/30/82) PERB Decision No. 225.

Notice and timing of layoff are negotiable effects of the decision to lay off and are not precluded by Education Code provisions. Education Code section 45117 pertains specifically to layoff notices. It provides:

> (a) When, as a result of the expiration of a specially funded program, classified positions must be eliminated at the end of any school year, and classified employees will be subject to layoff for lack of funds, the employees to be laid off at the end of such school year shall be given written notice on or before May 29 informing them of their layoff effective at the end of such school year and of their displacement rights, if any, and reemployment rights. However, if the termination date of any specially funded program is other than

[13]See, for example, the majority's decision in Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223 holding that the order of layoff and seniority of classified employees are nonnegotiable because section 45308 of the Education Code subjects classified employees to layoff for lack of work or funds and sets the order of layoff by length of service in a class.

> June 30, such notice shall be given not less than 30 days prior to the effective date of their layoff.
>
> (b) When, as a result of a bona fide reduction or elimination of the service being performed by any department, classified employees shall be subject to layoff for lack of work, affected employees shall be given notice of layoff not less than 30 days prior to the effective date of layoff, and informed of their displacement rights, if any, and reemployment rights.
>
> (c) Nothing herein provided shall preclude a layoff for lack of funds in the event of an actual and existing financial inability to pay salaries of classified employees, nor layoff for lack of work resulting from causes not foreseeable or preventable by the governing board, without the notice required by subsection (a) or (b) hereof.
>
> This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 6 (commencing with Section 45240) of this chapter.

We find that OSEA's proposal seeking a 180-day notice period is not in conflict with this section because the 30-day notice demanded by subsections 45117(a) and (b) requires only that a minimum of 30 days notice be provided. Oakland, supra. The provision in subsection 45117(c), which permits the employer to avoid notice, applies to certain circumstances only. OSEA's proposal is reasonably read as an effort to gain additional notice in circumstances not contemplated by subsection 45117(c).[14]

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[14]See Oakland, supra, where the Board reviewed a proposal

In contrast, we find OSEA's proposal seeking to impose a May 15 deadline for layoffs to be outside the scope of representation. The Education Code specifically permits the employer to lay off classified employees for lack of work or funds. OSEA's proposal prohibits all layoffs after the deadline date and thus intrudes on the express statutory grant of authority to the District. For that reason, it is nonnegotiable.[15]

The District also disputes the negotiability of OSEA's community relations unit proposal. We find it to be nonnegotiable because, by seeking to direct the District to target a specific position for layoff, OSEA's proposal interferes with the decision to lay off. We are not otherwise persuaded by

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similarly seeking notice beyond 30 days and found, as to subsection 45117(c), that:

> The district could not rely on this provision to find the Association's proposal totally out of scope; rather it could legitimately object to the absence of an emergency provision in the proposal.

[15]In its exceptions, the District argues that the hearing officer's decision was at odds with the Board's decision in Healdsburg Union High School District (6/19/80) PERB Decision No. 132, which held that a proposal limiting layoffs to the end of the academic year was nonnegotiable. On May 19, 1983, the Supreme Court issued its decision in Healdsburg Union High School District v. PERB (1983) 33 Cal.3d 850 affirming the Board's test for negotiability as stated in Anaheim, supra, and remanding the case to PERB for further proceedings consistent with the Court's opinion. In rendering the instant decision, we have followed the directive of the Court.

the hearing officer's conclusion that the purpose of the layoff was to save money or that the essential managerial concern was living within the budget. These facts do not suggest that layoffs implemented due to budgetary difficulties are not a matter of educational or public policy consideration. To the contrary, the District is specifically authorized to lay off employees when a lack of funds so demands and it is assumed that it will effectuate that decision with educational and public policy considerations well in mind.

We are in agreement with the hearing officer's conclusion that the District evidenced no real desire to reach agreement and, based on the totality of circumstances, engaged in surface bargaining.

Beginning in January, OSEA President Sprague made nearly weekly requests to negotiate. The District delayed in scheduling a negotiation session until April.

The record reveals that, after the meeting on April 1, the parties met on April 21. Thereafter, the District's next available date was May 23, more than a month later. OSEA protested this delay on April 28, but the District did not respond until May 5. The meeting remained scheduled for May 23 but was extended from three to six hours. OSEA presented its written proposal on May 20, but the District did not respond during the May 23 meeting. The District sent the layoff notices on May 27. In June, the parties met for two hours on June 9,

when the District arrived late and unprepared,[16] on June 11, and on June 18, when the District refused to postpone the layoffs scheduled for June 30. On June 26, the parties met and agreed that they were at impasse.

When considered as a whole, the hearing officer's conclusion is supported by the record and is upheld. Rather than demonstrating a good faith bargaining effort, the negotiating process was manipulated by the District to delay and obstruct a timely agreement.

The District contests certain factual findings regarding the course of negotiations. It urges that we reject the hearing officer's finding that substantive negotiations began on June 9 and it argues that bargaining sessions were conducted on April 8, May 7 and May 23.

The basis for the District's argument rests on McClanahan's calendar summary. However, that document was prepared by

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[16]In its exceptions, the District also charges that the hearing officer's decision "is permeated with bias and prejudice towards the District's chief negotiator." It asserts that the hearing officer selectively focused on McClanahan's testimony that her failure to appear at the June 9 session was based on a "naive and stupid assumption." His conclusion that the assumption was unwarranted, according to the District, reveals his unwillingness to fairly consider all the evidence, including McClanahan's inexperience.

The District's argument is without merit. The hearing officer found that McClanahan's assumption (that OSEA did not want to continue negotiations because it had filed an unrelated unfair practice charge) was "completely unwarranted." This conclusion and the citation to McClanahan's testimony fail to evidence bias.

McClanahan's secretary and, according to her testimony, contained two errors. The errors were not identified. More importantly, however, there is no testimony with regard to what transpired at these meetings. Neither McClanahan nor any other witness testified that substantive negotiations regarding layoffs in fact took place on these dates.

The District also disputes the hearing officer's conclusion that no progress was made during the negotiating session of May 23. The District correctly states that no evidence appears in the record as to the substantive aspects of that meeting. We find, therefore, that the hearing officer's finding of "no progress," while technically inaccurate, was nonetheless nonprejudicial. The appropriate conclusion, that the record failed to demonstrate what, if any, progress was made during the May 23 session, would not aid the District in refuting the allegation that it did not in fact bargain in good faith.

The District also contests the hearing officer's finding that its counterproposal was not discussed at the negotiating session on June 9. McClanahan testified that the District team caucused to prepare its counterproposal and then returned and "began bargaining on it." Freeman's testimony, however, was that he did not remember a lengthy discussion of the District's counterproposal. The hearing officer failed to credit McClanahan's testimony because there was no other evidence that any discussion occurred. Since the record shows that the

session began at 10:00 a.m. and the District team returned with their counterproposal at 12:15 p.m., and since McClanahan's records show a two-hour meeting, it was reasonable for the hearing officer to conclude that the session ended after the counterproposal was presented. Moreover, even if the hearing officer's finding is not affirmed, the fact that the parties may have discussed the counterproposals does not refute the remainder of the record supporting bad faith bargaining.

The District argues that the list of laid off employees was not available until after May 9. Prior to that time, the information was preliminary and subject to verification and cross-checking. OSEA received the list naming the 17 employees to be laid off on June 9.

Loma Reno testified about preparation of the list. She stated that she worked on Saturday, May 9, to prepare an accurate list and that it was an extremely complicated procedure involving seniority and bumping rights. The notices to employees were sent on Tuesday, May 27, however, and OSEA did not receive the list until June 4. Although she testified that the District never considered deliberately delaying the release of information to OSEA, she stated that, in her opinion, it would not be a good personnel practice to disclose the names of individuals until absolutely certain as to the persons affected.

Based on this testimony, the hearing officer concluded that a fairly accurate list was available on May 9, and that the District deliberately delayed in releasing the list based on its erroneous view that the names were confidential. The record provides ample support for the hearing officer's finding regarding the date when the information was available.[17]

The District raises another issue concerning the requested information and the availability of the list. It asserts that since OSEA was provided with a list of positions and sites of the layoff on April 30, its obligation to provide information to the bargaining agent was satisfied. This argument is rejected. As the exclusive representative, OSEA was entitled to all necessary information. Stockton Unified School District (11/3/80) PERB Decision No. 143. A list of the names is different from a list of positions. In negotiations, names might be valuable in a manner which the information on targeted positions would not be. The hearing officer correctly

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[17]The District disputes the hearing officer's reference to McClanahan's letter of May 5 in which she told OSEA that the names of laid off employees, as requested by OSEA, would be mailed "on or about Friday, May 2, 1980." The hearing officer relied on this inconsistency as one factor among many to support his conclusion that the District acted in bad faith in refusing to supply this information. We reject the District's argument that the date was a typographical error. No basis for that conclusion exists. The fact that the information was not available on May 2 does not disturb the conclusion drawn by the hearing officer. The discrepancy in the date can reasonably be perceived as evidence that McClanahan's representation was disingenuous.

concluded that the manner in which the District responded to OSEA's information requests suggested bad faith.

The District maintains that its counterproposals were not predictably unacceptable in spite of the fact that they closely followed Education Code requirements. Examination of the counterproposals support the hearing officer's conclusion that the District's counterproposals may be reviewed as evidence of its bad faith.

As outlined in footnote 9, supra, the District's counterproposals made little concession to OSEA's demands. Thus, while the District is not required to offer more than demanded by the Education Code (see Oakland Unified School District (12/29/82) PERB Decision No. 275), the content of the proposals, when viewed in the context of the negotiating process, is one aspect demonstrating the District's bad faith.

The record also belies the District's assertion, notwithstanding the testimony of McClanahan, that OSEA's insistence on an entire package agreement prevented the parties from reaching agreement. On June 18, the District offered to "explore" some severance pay in exchange for rehire rights and offered to consider a 60-day notice period if 30 days were waived. While these "offers" did not amount to firm proposals, OSEA was reasonably led to believe that some movement on the part of the District was possible. When the parties next met on June 26, however, the District returned to its position per

its counterproposals. It rejected OSEA's offer of a 31-day notice period and one dollar in severance pay. This bargaining scenario, played against the District's imposed deadline of June 30, smacks of bad faith on the part of the District. The hearing officer's decision is upheld.

The District takes exception to the hearing officer's finding of bad faith with regard to its posting of the community relations unit proposal. It argues that, while McClanahan was incorrectly advised as to sunshining obligations, the posting was one isolated incident of truthful, noncoercive management communication.

The District's argument, as OSEA states in its response, misses the point. The community relations proposal was not posted as directed by the District's administrative bulletin 8095. McClanahan's testimony was that new counterproposals were posted in the glass-enclosed bulletin board, but the community relations item was not a counterproposal. The District's failure to sunshine any of OSEA's other proposals clearly suggests that it posted this particular proposal because it sought to embarrass the organization. The Board upholds the hearing officer's conclusion that the District posted this proposal to discredit OSEA by announcing that it sought to preserve the employment of Freeman, a union grievance officer, at the expense of a typist-clerk.

The hearing officer found that the District's failure to sunshine OSEA's proposals evidenced bad faith. The District argues that it did so in response to OSEA's request. Evidencing this request, according to the District, is Sinclair's letter of April 22 in which he wrote "bargaining on the effects of the layoffs . . . could go forward prior to sunshining."

This statement in no way indicates that OSEA requested its proposals not be sunshined. Indeed, the District's obligation to sunshine proposals cannot be waived by the employee organization. Los Angeles Unified School District (12/30/80) PERB Decision No. 152. The hearing officer did not err in concluding that the District's failure to satisfy its obligation to sunshine suggests a lack of good faith.

With regard to two points, the Board reverses the hearing officer's conclusions. The first concerns the hearing officer's finding that, at the negotiating session conducted on June 11, McClanahan threatened to cancel further negotiations if OSEA filed another unfair practice charge. While noting that McClanahan testified that her threat to cancel was made because the OSEA chief negotiator called Reno a liar, the hearing officer found that, for several reasons, her testimony was not believable. The hearing officer referred specifically to McClanahan's notes which she read into the record:

> "Tom threatened to file another unfair if I did not respond within two days to his

> May 28th letter. I responded that I will not meet if he continues to threaten me. We are . . . " I don't know, I've written over something — could be "refusing or considering refusing to meet Wednesday in light of the threats."

We find that, while it is significant that McClanahan's contemporaneous notes do not refer to the alleged name-calling, the hearing officer's conclusion is not well founded. The record is too ambiguous to determine what actually transpired. Clearly, McClanahan could not cancel or threaten to cancel bargaining sessions in response to the filing of unfair practices. On the other hand, the District's negotiator could have simply refused to negotiate in the face of threats passed across the bargaining table. In our opinion, McClanahan could have legitimately told Sinclair that she was at the table to negotiate and, while OSEA was entitled to pursue unfair practice charges if it believed violations to have occurred, she would conclude the session if he persisted in threatening to file charges unless bargaining concessions from the District were forthcoming. In sum, the line between unlawfully retaliating against OSEA for engaging in protected activity and lawful tactics during bargaining sessions is difficult to draw with such scarce and ambiguous testimony.

We are also in disagreement with the hearing officer's conclusion that McClanahan lacked sufficient authority to engage in good faith negotiations on the District's behalf. Undeniably, McClanahan's testimony was highly contradictory

and, as the hearing officer concluded, demonstrated that she had no clear understanding of the extent of her authority. However, her inability to articulate the parameters of her authority is not significant unless there is a showing that her conduct at the table proved to be an obstruction to the bargaining process.

As the hearing officer correctly stated, a negotiator may legitimately discuss issues and offer proposals that must thereafter be ratified by the principal. (Fry Roofing Company v. NLRB (9th Cir. 1954) 216 F.2d 273 [35 LRRM 2009].) It is the absence of that amount of authority which delays and thwarts the bargaining process that evidences bad faith bargaining. Evidence that the negotiator's limited power was intended to or was used to foreclose the achievement of any agreement is lacking. Capital Transit Co. (1953) 106 NLRB 169. Neither the content of the counterproposals nor McClanahan's reluctance to make even small concessions demonstrates that she lacked the authority to reach agreement on the District's behalf. There is no evidence that the parties' ability to reach agreement was thwarted by delays caused by McClanahan's need to question the District's officials or to get clarification on the District's position regarding OSEA's proposals. McLean-Arkansas Lumber Company, Inc. (1954) 109 NLRB 1022. In short, while the record perhaps reveals McClanahan to be an unsophisticated or incompetent

negotiator, the evidence falls short of demonstrating that the District administrators vested McClanahan with insufficient authority to act on their behalf.

In spite of these two points of divergence with the hearing officer, we find sufficient evidence to affirm his conclusion that the District failed to engage in good faith bargaining with OSEA.[18]

As discussed above, we uphold the hearing officer's finding that the District violated subsections 3543.5(a), (b) and (c) by failing to negotiate in good faith with OSEA about the effects of the decision to lay off classified employees.[19]

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[18]The District disputes the hearing officer's conclusion that, even if the totality of circumstances did not demonstrate surface bargaining, the unilateral implementation of the layoffs while negotiations were in progress constitutes a per se violation. In the District's view, it satisfied its responsibility by notifying OSEA of the decision to lay off and by bargaining to a point where the parties agreed they were at impasse.

The facts reveal, however, that the regional director failed to certify that the parties were at impasse in spite of their agreement to the contrary. More importantly, there can be no genuine impasse where the parties' negotiations have stalemated as a result of bad faith negotiations. Mt. San Antonio Community College District (12/30/81) PERB Order No. Ad-124; Schuck Component Systems (1977) 230 NLRB 838 [95 LRRM 1607]. Because the District did not engage in good faith negotiations with OSEA, it never reached genuine impasse, the point at which it would have been free to act unilaterally and fully implement its layoff decision. See Modesto City Schools (3/8/83) PERB Decision No. 291. We therefore affirm the hearing officer's conclusion based on a finding that no genuine impasse existed at the time the employees were laid off.

[19]In so holding, we affirm the hearing officer's conclusion that OSEA did not waive its right to negotiate

The District's final exception concerns the remedy of reinstatement and back pay of the five employees laid off as ordered by the hearing officer. The thrust of the District's argument is that the remedy ordered does not comport with the District's obligation. The failure to bargain the effects of the layoff, according to the District, does not warrant reinstatement of laid off employees because the District was never obligated to negotiate the decision to lay off.

In considering the appropriate remedy, subsection 3541.5(c) permits the Board to direct an offending party to cease and desist and "to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter."

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layoff effects. While the contract does contain a detailed layoff article and a broadly worded zipper clause, the District agreed at the outset to negotiate over OSEA's layoff proposals. The statement read by McClanahan at the June 18 negotiating session referred to various collective bargaining provisions and claimed the District "had fully negotiated and reached agreement on the topics of layoffs and effects of layoff. . . ." However, it also gave assurances that it would "continue to negotiate in good faith . . . in such areas as identity and number of layoffs, severance pay, location of layoffs and other rights of the employees." Article XXVI, the zipper clause, precluded bargaining over any provision "except by mutual consent," and Article XXXI set forth the duration of the agreement subject to the parties' mutual agreement to alter or amend or either party's desire to modify if noticed by April 1. Based on the District's conduct and on the foregoing contract provisions, we perceive the District to have agreed to negotiate the layoff effects with OSEA and will not now be heard to argue that it was under no obligation to negotiate because of its contract with OSEA.

Thus, as a preliminary matter, nothing in the language of EERA precludes the reinstatement remedy. Reinstatement and back pay may be the appropriate remedy for the employer's failure to negotiate the decision itself or the failure to negotiate the effects of that decision provided that so ordering will effectuate the purposes of EERA. The statute poses no obstacle; the District may be ordered to reinstate and provide back pay to those employees who were laid off without first granting OSEA the opportunity to negotiate the effects of that layoff decision.

The hearing officer cites several PERB decisions as evidence that this Board has issued status quo ante remedies in cases involving unilateral changes in negotiable matters other than layoffs. While this assertion is correct, the cited cases involved unilateral changes of negotiable subjects. San Mateo Community College District (6/8/79) PERB Decision No. 94 and San Francisco Community College District (10/12/79) PERB Decision No. 105 involved changes in employees' wages; Sutter Union High School District (10/7/81) PERB Decision No. 175 and North Sacramento School District (12/31/81) PERB Decision No. 193[20] involved unilaterally changed hours. Oakland

[20]But see footnote 5, page 5 of North Sacramento where the Board suggests that the District still violated the Act even if what it did was a layoff rather than a reduction in hours because it had the obligation to negotiate the effects of the layoff.

Unified School District (4/23/80) PERB Decision No. 126 involved unilateral changes of health and welfare benefits. See also Lodi Unified School District (9/29/82) PERB Decision No. 239 where the Board ordered the employer to grant all affected employees the right to take vacation time off in order to restore the status quo ante and to remedy the unilaterally altered vacation benefits.

In certain situations, however, the Board has failed to order reinstatement or other make whole remedies and has framed a more limited remedy borrowed from the National Labor Relations Board in Transmarine Navigation Corp. (1968) 170 NLRB 389 [67 LRRM 1419].

Where the employer is privileged to make a particular unilateral change and is obligated to negotiate only as to the effects of that decision, the Board has ordered remedial action short of restoration of the status quo. Moreno Valley Unified School District (4/30/82) PERB Decision No. 206; South Bay Union School District (4/30/82) PERB Decision No. 207 and (8/19/82) PERB Decision No. 207a; Rialto Unified School District (4/30/82) PERB Decision No. 209; Holtville Unified School District (9/30/82) PERB Decision No. 250. The reconsideration decision in South Bay specifically concludes that the refusal to negotiate the effects of a nonnegotiable decision warrants a more limited back pay award.

Thus, although we find nothing in relevant case law or in statutory provisions which precludes a reinstatement or back pay award, we are disinclined to order the remedy advanced by the hearing officer in the instant case. We oppose ordering the District to reinstate the five laid-off employees because such an order would accomplish more than the District was ever required to do. Since the District was never obligated to negotiate with OSEA as to its decision to use layoffs to cure the budget deficit, it should not now be made to rescind that action through the process of reinstatement. Rather, we are ordering the District to compensate those employees improperly laid off by the District for a period of time beginning ten days from service of this Decision and continuing until the District satisfies its obligation to bargain in good faith with OSEA or until the Association fails to make a timely request to negotiate or fails to negotiate in good faith.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is hereby ORDERED that the Oakland Unified School District shall:

A. CEASE AND DESIST FROM:

1. Violating subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act by failing to meet and negotiate in good faith with the exclusive representative on matters within the scope of representation, as defined by section 3543.2;

2. Denying the Oakland School Employees Association its right to represent its unit members by failing and refusing to meet and negotiate in good faith about matters within the scope of representation; and

3. Interfering with the employees' right to select an exclusive representative and participate in its activities by failing and refusing to meet and negotiate with the exclusive representative on matters within the scope of representation.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

1. Upon request, bargain with the Association over the effects of the decision to lay off the employees and pay to the affected employees compensation at the rate of pay which reflects the pro rata share of their salary for the period beginning ten days from the date of service of this Decision until the occurrence of the earliest of the following conditions: (a) the date the District negotiates an agreement with the Association over the effects of the decision to lay off these employees; (b) a bona fide impasse is declared; (c) the failure of the Association to request negotiations within ten days of service of this Decision or to commence negotiations within four days of the District's notice of its desire to negotiate with the Association; or (d) the subsequent failure of the Association to negotiate in good faith. In no event shall the sum paid to any of these employees exceed the

pro rata amount they would have earned from the date on which the District instituted the layoff to the time they secured or refused equivalent employment elsewhere. However, in no event shall this sum be less than these employees would have earned for a two-week period at the rate of pay in effect when employed prior to the District's unilateral action.

2. Within thirty (30) workdays of service of this Decision, post copies of the appended Notice to Employees (Appendix) at all school sites and all work locations where notices to employees are customarily placed. Such posting shall be maintained for a period of thirty (30) consecutive workdays and reasonable steps shall be taken to insure that such Notices are not reduced in size, defaced, altered or covered by any material.

3. Notify the San Francisco regional director of the Public Employment Relations Board in writing within forty-five (45) workdays following the service of this Decision of the steps taken to comply with this Order.

Members Burt and Tovar joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-476 in which all parties had the right to participate, it has been found by the Public Employment Relations Board that the Oakland Unified School District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act. Specifically, the District was found to have unlawfully failed to negotiate in good faith with the Oakland School Employees Association about the effects of the decision to lay off certain classified employees in June 1980.

As a result of this conduct, we have been ordered to post this Notice and will abide by the following. We will:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to meet and negotiate in good faith with the Oakland School Employees Association, as the exclusive representative of employees in a unit of classified employees;

(b) Denying the Oakland School Employees Association its rights guaranteed by the Educational Employment Relations Act, including its right to represent bargaining unit members in negotiations with the District; and

(c) Interfering with employees because of the exercise of rights guaranteed by the Educational Employment Relations Act, including the right to be represented by their chosen representative.

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

In accordance with the Order of the Public Employment Relations Board, compensate all laid off classified employees (white collar unit).

Dated: _____ OAKLAND UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent

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