STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATED CALEXICO TEACHERS,	)	
	)	
Charging Party,	)	Case No. LA-CE-1630
	)	
v.	)	PERB Decision No. 357
	)	
CALEXICO UNIFIED SCHOOL DISTRICT,	)	November 22, 1983
	)	
Respondent.	)	
	)	

Appearances: James C. Romo, Attorney (Atkinson, Andelson, Loya, Ruud and Romo) for Calexico Unified School District.

Before Tovar, Jaeger, and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board on exceptions filed by the Calexico Unified School District (District) to the attached proposed decision finding that the District violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA).[1]

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

Section 3543.5 provides in relevant part:

> 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

We have reviewed the administrative law judge's proposed decision in light of the entire record in this matter and, finding it free from prejudicial error, adopt it as the Decision of the Board itself.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, and pursuant to Government Code subsection 3541.5(c) of the EERA, it is hereby ORDERED that Calexico Unified School District and its representatives shall:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the exclusive representative of its employees by taking unilateral action on matters within the scope of representation, as defined by section 3543.2;

(2) Denying the Associated Calexico Teachers the right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation;

(3) Interfering with employees' exercise of their right to select an exclusive representative to meet and

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> 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.

negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(1) Reinstate contractual step and column increments for certificated employees for the 1982-83 school year, with interest at the rate of 7 percent per annum on any amounts due from July 1, 1982, until the date of payment;

(2) Within 35 days after the date of service of this Decision, post at all work locations where notices to employees are customarily posted, copies of the Notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that this notice is not altered, reduced in size, defaced, or covered with any other material.

(3) Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his/her instructions.

Members Tovar and Burt joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-1630, Associated Calexico Teachers v. Calexico Unified School District in which all parties had the right to participate, it has been found by the Public Employment Relations Board that the Calexico Unified School District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act.

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

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with Associated Calexico Teachers (ACT) by taking unilateral action on matters within the scope of representation, as defined by section 3543.2;

(2) Denying ACT the right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation;

(3) Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the District on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

Reinstate contractual step and column increments for certificated employees for the 1982-83 school year, with interest at the rate of 7 percent per annum on any amounts due from July 1, 1982, until the date of payment.

Dated: _____ CALEXICO 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.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATED CALEXICO TEACHERS,	)	
	)	
Charging Party,	)	Unfair Practice
	)	Case No. LA-CE-1630[1]
v.	)	
	)	
CALEXICO UNIFIED SCHOOL DISTRICT,	)	PROPOSED DECISION
	)	(5/12/83)
Respondent.	)	
	)	

Appearances: Charles R. Gustafson, Attorney (California Teachers Association) for Charging Party Associated Calexico Teachers; James C. Romo, Attorney (Atkinson, Andelson, Loya, Ruud and Romo) for Respondent Calexico Unified School District.

Before Marian Kennedy, Administrative Law Judge.

PROCEDURAL HISTORY

On September 10, 1982, the Associated Calexico Teachers (hereafter ACT) filed a charge against the Calexico Unified School District (hereafter District) alleging that the District violated sections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (hereafter EERA)[2] by unilaterally imposing a freeze of step and column salary increases for all teachers in the school district without first giving notice to and bargaining with ACT over the change.

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[1]This case was consolidated for hearing with LA-CE-1608 by Order of February 1, 1982. Since the charge in LA-CE-1608 was withdrawn at hearing and the complaint was thereafter dismissed, only LA-CE-1630 is decided herein.

[2]Unless otherwise indicated, all references are to the Government Code. The Educational Employment Relations Act is

A complaint was issued on October 20, 1982, and the District filed its answer on December 16, 1982, admitting that the District unilaterally imposed the wage-freeze but asserting a business necessity defense.

An informal conference was conducted by an administrative law judge of the Public Employment Relations Board (hereafter PERB) on November 10, 1983, in San Diego, California but the dispute was not resolved.

Notice of Hearing was issued on December 29, 1982, and hearing was conducted in Calexico on February 14, 1983. Each party having filed briefs, the matter was submitted for proposed decision on April 29, 1983.

FINDINGS OF FACT

At all times relevant herein, ACT was the exclusive representative of certificated personnel at the District.

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found at Government Code section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> 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.
>
> (b) Deny to employee organizations rights guaranteed them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

A contract is in existence between the parties effective for the period July 1, 1980, through June 30, 1983. The salary and benefits article of the contract includes a provision for "step and column" increases, which are salary increases to be paid to teachers for completing additional years of service (steps) and for earning certain additional educational credentials (columns). Pursuant to Article I, section 2 of the contract, ACT reopened negotiations on the salary and benefits article, as well as on a grievance article, on March 1, 1982. From spring 1982 through the time of the hearing in this matter, the parties were engaged in bargaining these reopeners.

On March 9, 1982, ACT submitted its initial proposal on reopeners which included an across-the-board salary increase plus the addition of a new class (column) at the top of the salary scale. The parties met to negotiate regarding ACT's proposal on March 10, and again on March 23, when the District presented its counterproposal. The first paragraph of the District's counterproposal on salaries and benefits read: "Effective July 1, 1982, the salary schedule will remain the same as the 1981-82 salary schedule with the exception of the increments."

James Fowler, superintendent of the school district but not a member of the District's negotiating team, testified that this proposal was intended to mean that all salaries as well as step increases for employees would be frozen and only column

increments would be paid during the 1982-83 school year. Winfred Wolfe, chairman of the ACT negotiating team, testified that the District's proposal was understood in negotiations to be a proposal for a salary freeze which left intact both the step and column increments already contained in the existing contract. The parties stipulated at hearing that the subject of freezing step and column increases was never discussed during the negotiations on the reopener clause.

The parties met again on April 16, 1982, and April 26, 1982, to discuss the reopener proposals but were unable to reach an agreement on any of the items. On April 26 the parties mutually agreed to adjourn negotiations on reopeners until late August or early September. Wolfe testified without contradiction that negotiations were suspended in part because the amount of the District's budget for the 1982-83 school year was still uncertain and the District was therefore unwilling to discuss salaries or related items and in part because some members of the ACT negotiating committee planned to be out of the Calexico area during the summer of 1982. The parties did meet regarding other items apart from the reopener negotiations until June 9 or 10, 1982.

Fowler testified that at a school board meeting on the fourth Tuesday of June 1982, the board discussed a step and column freeze for certificated employees' salaries and proposed to adopt such a freeze at its next meeting on July 13, 1982.

After that meeting, both Fowler and his secretary attempted to contact representatives of ACT by telephone to notify them of the Board's imminent adoption of a step and column freeze. Fowler and his secretary testified that they tried to call Cheryl Miller, president of ACT, but learned that she was out of the area for the summer. They did not make any further attempts to reach her. Fowler's secretary also attempted several times during the course of one day to call Winfred Wolfe but was unable to reach him. Cheryl Miller testified that she had left her summer address and phone number with the principal of her school, as was required by school policy, and that she was reachable at all times at that phone number. Winfred Wolfe testified that he was in the Calexico area during the time in question and reachable by telephone.

Not having reached either Miller or Wolfe by telephone, Fowler sent a letter to Wolfe on June 30, 1982, which read as follows:

> This is to inform you of our counterproposal to the salary negotiations. When we meet in the fall, the District's position will be to maintain the 1981-82 salary schedule.
>
> At this time, we see no vertical or horizontal increase in the salary schedule as the result of our proposal.

Wolfe testified that he received this letter within a day or two of its June 30 date and that he understood the second paragraph of the letter to represent a change in the District's

previous bargaining position: the District added a proposal to freeze all step and column increments in addition to its previous-proposed general salary freeze. Wolfe testified that he did not contact other members of ACT's bargaining team or the school district in response to the letter.

The June 30 letter states that the District's proposal "when negotiations resume in the fall" would include a step and column increment freeze. It does not state or imply that the school district planned to adopt a step and column freeze at its July 13th meeting, Apart from a purely hearsay assertion by Fowler that he was told that Victor Palacio, a member of ACT, had picked up a copy of the agenda for the school board meeting of July 13, 1982, at the school board offices prior to July 13, there is no evidence in the record of any communication to ACT of the District's intention to adopt step and column freeze on July 13, 1982. Palacio was treasurer-elect of ACT for the 1982-83 school year, but was not a member of ACT's bargaining team and had not assumned his new office as of the summer of 1982.

The freeze of both across-the-board salary increases and step and column increments was adopted by the school board at its July 13, 1982 meeting and was implemented with respect to certificated employees in September 1982.

The resolution adopted by the school district on July 13 included the following paragraphs:

> Be it further resolved that classified and certificated employees' salaries, specifically, step and column increments shall be frozen in their 1981-82 level effective July 1, 1982,
>
> Be it also resolved that any salaries subject to negotiations under Government Code section 3540 et seq. will be subsequently adjusted to conform with any agreements reached pursuant to negotiations with the exclusive bargaining representatives,
>
> And be it also resolved that this action be in no way interpreted to preclude the negotiating process from continuing pursuant to Government Code section 3540 et seq.

The Business Necessity Defense

Superintendent Fowler testified that the District had to freeze teachers' step and column increments in July of 1982 because it had to prepare and present a balanced budget for the 1982-83 school year to the county prior to the reopening of school in September.[3] In his view, the financial condition of the District was such that the budget could not be balanced without the District implementing the step and column freeze. Although the wage-freeze for certificated employees did not actually go into effect until the teachers resumed working in September, a corresponding freeze of classified employees'

[3]There was testimony that a tentative budget had to be submitted prior to July 1. Since the disputed board action occurred after that date, it was apparently not taken as a step in preparing the tentative budget.

salaries became effective retroactive to July 1 upon its adoption by the school board.[4]

Fowler testified further that although the parties had agreed to suspend negotiations on contract reopeners until September 1982, the District was willing to negotiate with ACT regarding the step and column increments freeze proposal prior to taking action on that proposal on July 13. Negotiations did not take place, according to Fowler, because ACT did not respond to the District's June 30 letter announcing the freeze on step and class increments.

Assistant Superintendent of Business Services Gil Perez is director of finance for Respondent and has responsibility for preparation of the annual school district budget. Perez testified that in excess of 80 percent of the school district's financing comes from the State of California and the local county. The great majority of these funds are funneled to the school district through the county superintendent's office. The school district is obligated to present a tentative budget to the County authorities by the first of July preceding the

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[4]Fowler testified that the school board decision regarding freezing step and column increments for teachers had to be taken on July 13 because the corresponding freeze of classified employees' salaries had to be effective on July 1. Fowler did not explain why the time constraints regarding a decision on classified employees' salaries necessarily required a decision on certificated employees' salaries at the same time.

academic year to which the budget relates. A final budget must be in place by early September.

Perez testified that although the District technically could have balanced the budget which it had to submit to the county without imposing a freeze on teachers' step and column increments, such a budget would not have been financially responsible or practically feasible since it would have eliminated substantially all reserve funds necessary for the payment of day-to-day expenses. The school district receives uneven monthly installments of revenues over the school and calendar year making it difficult to estimate with accuracy what the actual cash on hand will be at any particular point. A reserve of 3 to 5 percent of the school year budget is therefore necessary to avoid periodic temporary cash-flow deficits. Perez testified that failure to impose the step and column increments freeze would have resulted in a cash flow deficit occurring by April or May, or perhaps as early as February of 1983. Furthermore, the only way the District could afford to reinstate the 1982-83 step and column increases would be if payment of those increases could be postponed at least in part until after the end of the fiscal year.

Perez testified that additional steps were taken to deal with anticipated budget deficits in the 1982-83 school year apart from freezing of teachers' salaries. Those steps consisted of limiting travel and maintenance costs and

postponing payment certain accounts payable beyond their due dates.

Finally, Perez testified that at the time the parties suspended their negotiations in the spring of 1982, the District did not know with any degree of certainty what its financial condition would be in the 1982-83 school year. As late as April 1982, it appeared that school districts would receive guaranteed increases over their previous year's operating budgets pursuant to Assembly Bill 777. In May and June the financial situation became less optimistic. In June it became clear that those moneys would not become available and the school district was forced to focus on how much its budget would be reduced rather than increased in the 1982-83 school year. The District did not learn what its actual revenues would be until sometime in August of 1982.

ISSUES PRESENTED

1. Was the District obligated to notify ACT and provide it with an opportunity to negotiate prior to the District adopting a freeze of step and column increments?

2. Did ACT waive its right to negotiate over the decision to freeze step and column increments by failing to demand bargaining over District's proposed action?

3. Was the District's unilateral imposition of a freeze of teachers' step and column increments justified by business necessity?

DISCUSSION AND CONCLUSIONS OF LAW

The District's Obligation to Bargain before making a Unilateral Change in Step and Column Increments

A school district's unilateral change in wages, hours or terms and conditions of employment within the scope of representation is unlawful if such changes are made without notice and an opportunity to negotiate being afforded to the exclusive representative. Such a unilateral change is inherently destructive of employee rights and is a per se violation of the duty to meet and negotiate in in good faith.[5]

In this case the District unilaterally imposed a salary freeze of contractually mandated[6] step and column salary

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[5]Davis Unified School District (2/22/80) PERB Decision No. 116; San Francisco Community College District (10/12/79) PERB Decision No. 105.

[6]An employer may not implement changes in wages, hours or terms and conditions of employment which are contained in a collective bargain contract at any time during the term of the contract without first obtaining the consent of the union. Offering to bargaining is not sufficient since the matter had already been bargained and agreed upon at the time that the contract was entered into. C & S Industries Inc. (1966) 158 NLRB 454 [62 LRRM 1043]; Oak Cliff-Golman Baking Co. (1974) 207 NLRB 1063 [85 LRRM 1035], enf'd mem., (5th Cir. 1974) 505 F.2d 1302 [90 LRRM 2615]; Gorman, Basic Text on Labor Law (1976) at pp. 463-464.

In this case, however, ACT does not allege that the District was obligated to obtain the Union's consent before withholding contractually-required step and column salary increments. It alleges that the District was obligated to bargain with ACT before making such changes. The nature of the District's obligation turns upon whether the contractually-mandated salaries and benefits, including the step and column increments, remained in effect and remained binding upon the

increments for bargaining unit employees. Step and column salary increases are obviously included within wages, a matter

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District throughout the period during which the reopener in the salaries and benefits clause was being negotiated. The Reopener clause appearing in Article I, section 2, of the contract provides:

> A. Not later than March 1, 1982, either party shall have the option of reopening this Agreement on two (2) articles each, to take effect upon ratification. The parties agree to meet and negotiate in good faith.

Clearly that clause contemplates that any modification to the contractual terms will not become effective until it is ratified. The clause does not, however, specifically indicate what the parties intended the status of the existing contract clauses to be during the period when changes in those clauses were being negotiated. Absent clear agreement that any clauses which are reopened shall be thereupon deemed terminated and of no further force or effect, those clauses remain binding until they are replaced by agreement of the parties or until the contract as a whole expires. Cf. KCW Furniture, Inc. (9th Cir. 1980) 634 F.2d 436 [106 LRRM 2112] and cases on the necessity for clear and unmistakable waiver of collective bargaining rights, e.g., Los Angeles Community College District (10/18/82) PERB Decision No. 252.

In this case, therefore, the District was obligated not only to meet and negotiate in good faith with ACT regarding step and column increments which were the subject of the reopener but also to maintain current contractual provisions on step and column increments in effect until such time as both parties agree to their modification. The District's unilateral freezing of step and column increments constituted a partial repudiation of the contract having a generalized effect and a continuing impact on wages of bargaining unit members. Such repudiation is a per se violation of section 3543.5(c). Grant Joint Union High School District (2/26/82) PERB Decision No. 196.

However, since ACT did not allege a violation based upon the District's repudiation of the contract and that issue was neither tried nor briefed by the parties and, further, since the remedy for a violation is unchanged whether the violation

specifically included with the scope of representation.[7] I therefore find that the District was obligated to give ACT notice of its intention to freeze step and column increments and an opportunity to bargain over that proposed change before it was implemented.

The District argues that its decision to freeze step and column increases, taken in July, was explicitly subject to modification after subsequent good faith negotiations with ACT and that the decision was taken in July only because the District labored under the obligation to present a balanced budget proposal to county authorities at that time. The District draws an analogy to PERB cases regarding unilateral adoption of a school calendar by a District. The PERB held in San Jose Community College District (9/30/82) PERB Decision No. 240 that a District may adopt a "tentative" calendar for student attendance "solely for operational purposes" without first negotiating with the exclusive representative of certificated employees where the District thereafter fulfills its obligation to negotiate in good faith over the actual dates

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is based upon repudiation of a term of the contract or upon unilateral changes in wages without first meeting and negotiating in good faith (see footnote 14), the finding of a violation herein (infra) is explicitly based independently upon the District's imposition of unilateral changes without first meeting and negotiating in good faith with ACT.

[7]Davis Unified School District, supra; San Mateo Community College District (6/8/79) PERB Decision No. 94.

of certificated service for the same school year. The ground for the Board decision was that student calendar was a matter outside the scope of negotiation because the District adopted the calendar "for the purposes of establishing dates of student attendance or other District operations unrelated to dates of certificated service." Thus this decision offers no support for the conclusion that a District may make unilateral changes in matters within the scope of negotiation so long as those unilateral changes are tentative and are the subject of subsequent good faith negotiations.[8]

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[8]In support of its argued analogy to school calendar cases for the proposition that tentative unilateral acts subject to subsequent negotiation do not constitute an unfair practice, the District cites the Administrative Law Judge's decision in Palos Verdes Peninsula Unified School District, LA-CE-122 (1978) which was subsequently appealed on a different point and decided by the PERB on 7/16/79, PERB Decision No. 96. The reasoning of the Administrative Law Judge in that case does not support the broad conclusion which the District would draw. The ALJ found that the District's "qualified [tentative] unilateral action combined with the defense of necessity, is sufficient to negate the unfair practice charge." (Emphasis in original.) The Administrative Law Judge reasoned further:

> Certainly the wording of the resolution cannot be used to excuse past unilateral action in every case. Each "unilateral action" case must be decided on its own facts. In the instant case . . . [t]he District waited as long as it reasonably could before it acted unilaterally, and even then, the School Board's resolution plainly demonstrates that the District is willing to continue to meet and negotiate over matters within the scope of representation.

The Palos Verdes case should therefore be distinguished from the instant one on two separate grounds. First, the

A similar argument was made in San Francisco Community College District (10/12/79) PERB Decision No. 105 in which the District's resolution unilaterally imposing a freeze on teachers' salaries and step and column increases "reaffirmed" the District's,

> . . . willingness to negotiate and consult in good faith with recognized employee representatives to reach equitable adjustment of the emergency resolutions hereby adopted, consistent with the District's ability to pay . . . .

There PERB did not find that the District's expressed willingness to continue negotiations after taking unilateral action was grounds for excusing the unfair practice. The obligation to meet and negotiate in good faith is one which must be fulfilled before changes are instituted regarding matters within the scope of negotiation.

Administrative Law Judge in Palos Verdes found that the District had a valid necessity defense and concluded only that the tentative nature of the District's unilateral action when combined with a valid necessity defense together overcame the unfair practice charge. As discussed below, in this case the District's necessity argument is properly rejected. Secondly, in the Palos Verdes case, the District did engage in negotiations with the exclusive representative on several occasions before taking unilateral action and postponed taking any tentative unilateral action on the school calendar as long as reasonably possible. In this case, by contrast, the District never raised the possibility of a freeze of step and column increments in negotiations and, as discussed below, did not convincingly show that it could not have postponed instituting the freeze until negotiations with ACT could have been held.

I therefore conclude that the District's asserted defense that it was willing to negotiate and modify the step and column freeze after it was imposed should be rejected.

ACT's Alleged Waiver of Bargaining

At the time that the parties adjourned negotiations over their contract reopeners in April of 1982, the District had already proposed an across-the-board freeze on teachers' salaries. A fair reading of the District's proposal as well as the clear weight of the testimony indicates that that freeze proposal encompassed only across-the-board increases and did not reach contractually required step and column increases. In late June of 1982, the District first considered expanding the salary freeze in its orginal proposal to include a freeze on step and column increases. A step and column freeze was discussed at a school board meeting occurring in late June and was scheduled to be adopted at the board's July 13 meeting.

The letter sent by Fowler to Wolfe regarding the District's intention to expand its wage freeze proposal to encompass a freeze of step and column increases made no reference to the impending school board action on this modified proposal and did not effectively notify ACT that the freeze would be adopted by the Board at its July 13 meeting. The letter merely informed ACT that there would be a change in the District's position on salary negotiations "when we meet in the fall." Fowler testified that he worded the letter as he did because, having

failed to reach the ACT president by telephone, he presumed there would be no further negotiations until fall, as had been previously agreed.

ACT Negotiating Chairman Wolfe noted the change in the District's position on step and column increases in the June 30 letter and understood it to mean that the District's expanded freeze proposal would be discussed by the parties when they resumed negotiations in September. Wolfe did not consider it necessary to contact other members of the ACT bargaining team which had "disbanded for the summer" nor to demand immediate negotiations with the school district on the expanded freeze proposal.

The District did not make any other efforts to notify ACT before implementing the freeze proposal on July 13 and there is no credible evidence in the record that ACT received effective notice that the District would adopt the freeze proposal on July 13.[9]

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[9]Superintendent Fowler testified that he had been told by an unnamed person that an ACT member had picked up a copy of the school board agenda prior to the July 13 meeting. The individual was not an officer of ACT at that time nor a member of ACT's bargaining team.

According to PERB Regulation 32176 (California Administrative Code, title 8, part III, section 32176) hearsay evidence is not in itself sufficient to support a finding unless it would be admissible over objection in civil actions. I find no basis upon which this hearsay evidence would be admissible in a civil action. Since the matter asserted in the hearsay statement is not supported by other evidence, I

The District asserts that ACT waived bargaining on the step and column freeze because of its failure to demand bargaining in response to Fowler's June 30 letter to Wolfe. Certainly an employer does not commit an unfair practice when it implements a change in wages, hours or terms and conditions of employment after it has given adequate advance notice to an employee organization of the proposed change and the employee organization has not requested negotiations within a reasonable time. Where as in this case, however, the employee organization has not been given advance notice of a proposed change, it cannot be found to have waived its right to

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conclude that the record does not support a finding that the Association had notice of the District's intention to adopt a step and column increments freeze prior to the July 13, 1982, meeting.

Even if the evidence offered were sufficent to support a finding that an ACT member and officer-elect picked up a copy of the board agenda a few days prior to the board meeting of July 13, that finding would not properly lead to the conclusion that ACT had waived its right to bargain over the proposed step and column freeze by not immediately demanding bargaining. The PERB held in Arvin Union School District (3/30/83) PERB Decision No. 300 that "general publication of the board agenda [by posting at all school locations] does not constitute effective notice to the exclusive representative of proposed changes in scope matters." Certainly the accident that a member and officer-elect of ACT, who had no role in negotiations on behalf of ACT, may have picked up a copy of the board agenda "a few days" before the board meeting at which unilateral changes were adopted is no more effective notice to the exclusive representative of the proposed changes than the posting found insufficient in Arvin. See also, Los Angeles Community College District (10/18/82) PERB Decision No. 252 (employee member of employee organization not deemed agents of organization such that their knowledge of unilateral changes should be imputed to organization).

negotiate on the subject of the change by failing to make a bargaining demand. Los Angeles Community College District (10/18/83) PERB Decision No. 252; Arvin Union School District (3/30/83) PERB Decision No. 300.

A fair reading of the letter sent by Fowler to Wolfe shows that it informed ACT that the District had expanded its wage freeze proposal to include step and column increments but it gave no indication that the District intended to implement this expanded freeze proposal prior to the resumption of negotiations. In fact, the letter identified the step and column freeze as a modified bargaining proposal to be discussed when the parties resumed negotiations. Given these facts, ACT cannot be found to have received adequate notice of the proposed change or to have waived its right to demand negotiations on the freeze of step and increment increases by failing to demand negotiations prior to July 13.[10]

The District's Business Necessity Defense

The District contends that its unilateral imposition of the step and column freeze was justified on the ground of business

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[10]Although Wolfe testified that he did not contact other members of the bargaining team after receiving the June 30 letter because "they had disbanded for the summer," the record reflects that several members of the team were available in the Calexico area or at least reachable. It cannot be presumed that ACT would have failed to respond and demand immediate negotiations had it been given advance notice of the District's intention to freeze salaries and step and column increases on July 13. Bargaining on the step and column freeze, as well as other items covered by the reopeners, did resume in September as planned.

necessity. The District did present convincing evidence of the difficult financial circumstances which it faced in 1982-83. What it must show in order to establish a business necessity defense to unilateral action on salaries, however, is an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action.[11]

Gil Perez testified that reponsible budget management required that the proposed school district budget for the 1982-83 school year include a freeze on all step and column increments for certificated employees. Perez acknowledged, however, that the District could have presented a balanced budget proposal to the county in the summer of 1982 without freezing those step and column increments. Furthermore, although Perez viewed the freeze on step and column increases as necessary to assure a 3 percent reserve in the budget and avoid cash-flow deficits during the school year,[12] he testified that had the step and column increments been included in the budget and had they been paid to the teachers regularly, the District would not have been confronted with a cash-flow

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[11]San Francisco Community College District (10/12/79) PERB Decision No. 105.

[12]Neither county authorities who must review and approve the District's budget nor any law or regulation require that the budget contain any reserve over projected expenses.

shortfall until April or May of 1983 or perhaps as early as February of 1983.

Thus while the District faced very difficult financial circumstances in the 1982-83 school year, it is clear from Perez's testimony that it would have been possible to present a balanced budget to the county authorities ln September 1983 (and a balanced tentative budget in July) without first unilaterally freezing step and column increments in the summer of 1982. According to Perez' estimates, there remained sufficient time, at least until February of 1983, for the District to negotiate any necessary freezes of employee salaries for the balance of the year before the District would be confronted with any actual cash-flow deficit. Moreover, alternatives to the imposition of a freeze on step and column increments were possible in the form of, for example, agreement by the teachers to accept a deferral of payments until later in the fiscal year.[13] Those alternatives could have been explored and perhaps agreed upon, had the issue been presented to ACT for bargaining before implementation of the freeze.

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[13]The District presented evidence that classified employees eventually agreed to such a deferral of payment of wage increases but that ACT refused a similar proposal. That refusal is of no significance to the resolution of this matter and certainly does not demonstrate that negotiations with ACT regarding alternatives to freezing step and column increases would have been fruitless, particularly if those negotiations had been undertaken before unilateral action by the District and before the consequent filing of this unfair practice charge.

Moreover, the District's unilateral action was not the unavoidable result of some sudden change of circumstances, the timing of which precluded the opportunity for negotiations. Certainly the financial pressure which caused the District to decide to freeze step and column increases in July was no surprise to the District, given its already serious financial condition in the spring of 1982. Moreover, the District was aware before the parties agreed to suspend negotiations in the spring that it would have to present a proposed balanced budget to the county during the summer. The District was also in a position to know before negotiations were suspended that a freeze of step and column increases might be one of the steps which the District would have to take to balance its 1982-83 budget. The District could therefore have raised the freeze issue and could have negotiated in good faith regarding a possible freeze well in advance of the time it had to submit a proposed budget. Instead the record reflects that the District refused to discuss salaries in the spring because of uncertainty about its financial position and this refusal was at least in part the cause of the suspension of negotiations.

Finally, the District failed effectively to notify ACT of the imminent step and column freeze even after the school board had explicitly considered a proposal to institute the freeze at its last meeting in June. As discussed above, it cannot be presumed that ACT would have been unable or unwilling to resume

negotiations at once when faced with a matter as serious as an imminent freeze on step and column increases. Nor was the time too short before a completed budget had to be in place for meaningful negotiations to take place.

I conclude that the District has shown neither the immediate fiscal necessity for instituting the step and column freeze in July nor the absence of reasonable opportunity to negotiate the possibility of a step and column freeze either before negotiations were suspended or after the District determined that such a freeze should be instituted.

PERB precedent in San Francisco Community College District (10/12/79) PERB Decision No. 105 directly supports this conclusion. In that case, the District unilaterally changed certain terms and conditions of employment including freezing teachers' salaries and step and column increases.

PERB held that the District's unilateral step and column freeze violated the EERA because the financial emergency alleged as a defense to the unilateral action was not so pressing, either in its fiscal or timing aspects, as to preclude negotiations with employee representatives regarding the cost-cutting measures necessary to deal with Proposition 13. The Board held, further, that to the extent the District's economic position was uncertain,

> . . . 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. Inability to pay is a negotiating position rather than an excuse to avoid the negotiating process entirely. (San Mateo County Community College District (6/8/79) PERB Decision No. 94.)

CONCLUSION

Based upon the foregoing findings of fact and the entire record in this case, I conclude that the District violated EERA sections 3543.5(a), (b) and (c) by unilaterally imposing a freeze on teachers' step and column salary increments prior to bargaining with ACT regarding that freeze. A unilateral change in violation of section 3543.5(c) necessarily constitutes a concurrent interference with employees' representational rights in violation of section 3543.5(a) and denies the exclusive representative its right to represent unit members in their employment relationship with the public school employer in violation of section 3543.5(b). San Francisco Community College District, supra, at p. 19.

The Remedy

Section 3541.5(c) gives PERB broad powers to remedy unfair practices. In this case, the District violated sections 3543.5(a), (b) and (c) by unilaterally withholding step and column increases for certificated employees for the 1982-83 school year. It is therefore appropriate to order restoration of those increments retroactive to July 1, 1982,[14] with

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[14]Restoration of the status quo prior to the District's unilateral change consists of restoration of the step and

interest paid at the rate of 7 percent. San Francisco Community College District (10/12/79) PERB Decision No. 105, at p. 20, San Mateo County Community College District, supra, PERB Decision No. 94 at p. 27; Cal. Civ. Code sec. 3287; Cal. Const. art. XXII, sec. 22.

PROPOSED ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, and pursuant to Government Code section 3541.5(c) of the EERA, it is hereby ORDERED that Calexico Unified School District and its representatives shall:

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the exclusive representative of its employees by taking unilateral action on matters within the scope of representation, as defined by section 3543.2;

(2) Denying ACT its right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation;

(3) Interfering with employees' exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally

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column increments which should have been paid during the 1982-83 academic year according to the provisions of the parties' contract. This remedy is appropriate as restoration of the status quo measured by the parties past practice as embodied in their contract and is not dependent upon a finding of partial contract repudiation. See fn. 6 supra.

changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION WHICH IS NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(1) Reinstate contractual step and column increments for certificated employees, for the 1982-83 school year, with interest at the rate of 7 percent on any amounts due from July 1, 1982, until the date of payment;

(2) Within seven (7) workdays following the date of service of the final decision, post at all school sites, and all other work locations where notices to employees customarily are placed, copies of the notice attached as an appendix hereto signed by an authorized agent of the District. Such posting shall be maintained for a period of 30 workdays. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material;

(3) Notify the Los Angeles Regional Director of the Public Employment Relations Board, in writing, within 20 calendar days from the date of the final decision, of what steps the District has taken to comply with the terms of the decision. All reports to the regional director shall be served concurrently on charging party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 1, 1983, unless a party files a

timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on June 1, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: May 12, 1983

Marian Kennedy
Administrative Law Judge