REVERSED IN PART BY Mt. Diablo Unified School District (1984) PERB Decision No. 373b

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MT. DIABLO EDUCATION ASSOCIATION, CTA/NEA, Charging Party, and JOHN MILLS, PETER MOLINO, CAROL YOUNG, CATHERINE AVINGTON, LAURIE PETERSON AND LES GROOBIN, Intervenors, v. MT. DIABLO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-452 PERB Decision No. 373 December 30, 1983
MT. DIABLO FEDERATION OF TEACHERS, LOCAL 1902, CFT/AFT, AFL-CIO, JOHN MILLS, PETER MOLINO, CAROL YOUNG, CATHERINE AVINGTON, LAURIE PETERSON AND LES GROOBIN, Charging Parties, v. MT. DIABLO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-455

Appearances; Kirsten L. Zerger, Attorney for Mt. Diablo Education Association CTA/NEA; Margaret E. O'Donnell and Gregory J. Dannis, Attorneys (Breon, Galgani & Godino) for Mt. Diablo Unified School District; W. Daniel Boone, Attorney (Van Bourg, Allen, Weinberg & Roger) for individual charging parties.

Before Jaeger, Morgenstern and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Mt. Diablo Education Association, CTA/NEA (Association), the individual charging parties, and the Mt. Diablo Unified School District (District) to a hearing officer's proposed decision finding that the District violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA or Act)[1] by refusing to negotiate the implementation and effects of its decision to layoff certificated employees.[2]

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

Section 3543.5 provides, in pertinent part:

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

[2]The hearing officer dismissed the charge filed by the Mt. Diablo Federation of Teachers, Local 1902, CFT/AFT,AFL-CIO in Case No. SF-CE-455 based on the Board's determination in Hanford Joint Union High School District (6/27/78) PERB

The Board has reviewed the hearing officer's proposed decision in light of the parties' exceptions, and the entire record in this matter. We affirm the hearing officer's proposed decision in part and reverse it in part consistent with the discussion below.

FACTS

This dispute arose as a result of the District's decision to close schools, reduce programs and lay off certificated personnel effective June 30, 1980. Four hundred and fifty-five notices of layoff were served on certificated employees in March 1980. Ultimately, 130 certificated employees were laid off and approximately 296 were transferred.

At all times relevant herein, the Association was the exclusive representative of all certificated personnel in the District.

The Contract

From January through November 1979, the District and the Association met and negotiated a successor collective bargaining agreement to an agreement which expired on July 1, 1979.

After some 20 mediation sessions that began in September, a tentative agreement was reached on November 1, 1979. During

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Decision No. 58 that a nonexclusive representative is without standing to file a subsection 3543.5(c) charge. No exceptions were taken to this determination, and we adopt it as the determination of the Board itself.

negotiations, the Association attempted to include provisions in the agreement concerning layoffs, staffing ratios, and caseloads for counselors and librarians. However, the District refused to negotiate because it contended either that it wanted "complete flexibility" to act unilaterally in these areas or that these matters were not within the scope of representation.[3] On November 1, 1979, the executive board of the Association directed its negotiators to make sure that the District understood that the tentative agreement did not constitute an abandonment or waiver of the issues raised by the Association during the course of the negotiations. Pursuant to this instruction on November 1, Sondra Williams, executive director of the Association, and Aleita Hildebrand, president of the Association, met with Robert Galgani, the District's chief negotiator. Williams told Galgani that the Association was not waiving the issues encompassed in the then-pending PERB charge. Galgani replied with words to the effect that he understood. The representatives of the Association then signed

[3]AS a result of this conduct, the Association filed an unfair practice charge on September 19, 1979, alleging that the District refused to negotiate in good faith during the 1979 contract negotiations. The Association withdrew that charge on January 21, 1980. The District's conduct with respect to the matters alleged in the September 19, 1979 charge is not at issue in this case. However, the parties' actions during the 1979 negotiations are relevant to a determination of the District's assertions, infra, that the Association waived its right to negotiate certain subjects by abandoning proposals at that time.

the agreement. The term of the agreement was to be July 1, 1979 through June 30, 1982.

The Decision to Lay Off Certificated Personnel

During the summer and throughout the fall of 1979, there were rumors throughout the District of impending layoffs, school closures, and program cuts. Some members of the school board commented publicly that, because of the District's financial situation, program cuts and layoffs were required. Reports of possible layoffs also appeared in local newspapers during December 1979. However, at no time prior to the board's passage of the implementing resolutions in February 1980 did the District take any action to notify the Association of any intention or decision to lay off certificated personnel.

The record demonstrates that the District began preparatory actions to reduce its budget in November 1979, and that it contemplated layoffs as a means of accomplishing such reductions at that time. In November or December of 1979, Albert Zamola, the District's director of certificated personnel, was instructed by Galgani to update and rank the certificated employee seniority list in preparation for layoffs. Zamola testified that he employed the same criteria in December 1979 that the board eventually adopted on February 28, 1980 to determine the order of layoff of employees who had been hired on the same date.

In December 1979, the District established several special committees to study its financial situation. On December 19, 1979, the Select Advisory Committee on the 1980-81 budget issued a report containing 50 prioritized cuts and specified the dollar savings for each. The report (Jt. Ex. 12) detailed 50 general recommendations for program cuts, with an estimated savings of $12,313,970. It specifically recommended elimination of positions in order to accomplish this result.

On December 19, 1979, the Committee to Evaluate High School Vice Principals and Counselor Allocations submitted a report (Jt.Ex. 35) recommending, among other things, termination of the "global counseling" model[4] and standardization of the counselor caseload at 350 students per counselor. The Committee's report called for a net reduction of 4.67 counselors and an increase of 2 vice-principal positions. The report noted, however, that the negotiated agreement limited the duties which could be assigned to counselors. It also noted that any reduction in personnel must be accompanied by a corresponding reduction in services performed.

In a separate report (Jt. Ex. 36), also issued on December 19, 1979, the superintendent's cabinet submitted to the board of education a list of 146 possible budget cuts to meet the estimated $4.6 million deficit. In an addendum, the

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[4]The global counseling model required counselors to assume responsibility for major discipline problems as well as educational, career and personal counseling.

report listed 22 additional budget cuts which were suggested by various community groups but which were eliminated from consideration because they conflicted with contractual or statutory requirements.

The final report of the District Reorganization Committee was presented to the board of education at its January 14, 1980 meeting. The Committee recommended the conversion, or closing and sale, of 10 schools at a gross savings of $2 million. The Committee also recommended elimination of a number of certificated positions and the elimination or reduction of extra-duty stipends for drama and band instructors, department chairpersons, and coaches.

Throughout January, the board of education held numerous public hearings to discuss the District's budgetary crisis.

On February 5 and 6, 1980, the school board adopted a series of formal resolutions closing seven schools as of June 30, 1980 and reducing the number of certificated employees.[5]

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[5]These resolutions specified the following reductions:

1. Instructional aides would be provided for special education day classes only where enrollment would exceed 2/3 of the maximum allowable under state law.

2. The use of instructional aides in the science center program and Mt. Diablo High math laboratory would be discontinued.

3. Certain course offerings at the high school level would be discontinued, eliminating 29 positions.

On February 11, the school board formally resolved to close an additional school.

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4. Certain course offerings at the intermediate level would be discontinued, eliminating 7 positions.

5. The student/counselor ratio would be increased to 1 counselor for every 425 students, eliminating 13.7 counselor positions.

6. Nurses' services would be reduced by 9.6 positions.

7. Library services would be reduced by 11.2 positions.

8. The number of outside work experience instructors would be reduced by 3 positions.

9. The released periods in intermediate schools for administrative services would be eliminated.

10. The supplementary released periods for high school department chairs would be eliminated, with the exception of 1 period in the English and social studies department.

11. The number of guidance consultants would be reduced by 2.7 positions.

12. The number of elementary instrumental music instructors would be reduced by 3 positions.

13. The position of teacher media specialist would be eliminated.

14. Child welfare and attendance consultant services would be reduced by 1 position.

15. The position of elementary school resource teacher would be eliminated.

16. The curriculum development budget would be reduced by $25,000.

17. Audio-visual support, curriculum development, student government, and yearbook offerings at the intermediate

On February 13, 1980, the Association wrote the District demanding to bargain on the impact of the school board's recent decision. The letter (Jt. Ex. 6) stated in pertinent part:

> Please consider this demand to bargain on any and all impacts upon members of our bargaining unit in any and all mandatory subjects for negotiation resulting from your decisions of recent weeks. School closures and program reductions will, by necessity, impinge on the working conditions of certificated staff and we wish to bargain on all appropriate subjects including, but certainly not limited to, workloads, class size and assignments.

Assistant Superintendent Howard Moorman testified that, pursuant to Robert Galgani's advice, he attempted to schedule a meeting with the Association so as to clarify the issues about which the Association wanted to negotiate. At the meeting, which occurred on February 29, 1980, Moorman explained that the District was there to clarify issues and was not prepared to negotiate because a negotiator for the District had not been selected.

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school level would be reduced, eliminating 38 positions.

18. Program administrator positions would be reduced by 5 positions.

19. Five positions used for coordination of the different departments' work would be eliminated.

20. Instrumental music, teacher-media, child welfare, attendance consultant, counselor and guidance programs would be reduced, eliminating 11 positions.

The implementation of these reductions would result in the elimination of 130.2 positions.

Despite the outstanding demand to negotiate, on February 27 the District board of trustees unilaterally adopted a resolution establishing the criteria for determining the order of layoff of employees hired on the same date.[6]

Utilizing the criteria established by the February 27 resolution, on March 6, 1980, the District mailed 455 layoff notices to certificated personnel.

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[6]The resolution states:

> NOW, THEREFORE, BE IT RESOLVED by the Governing Board of the Mt. Diablo Unified School District that it hereby adopts the following criteria used, in the order listed, in determining relative seniority of those certificated employees rendering paid probationary service on the same day:
>
> (a) Specific program needs
>
> (b) Broadest teaching qualifications
>
> (c) Most years teaching, whether or not with the district
>
> (d) Most post-graduate units related to the profession
>
> (e) Long term substitutes who have taught over 75 percent of the days of the school year and home and hospital teachers who have not been selected in the more stringent processes applicable to permanent, probationary, and temporary teachers, shall be ranked after such teachers using the same criteria.
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> BE IT FURTHER RESOLVED that the Board hereby approves the exercise of judgment of the administrative staff in applying these criteria in the following [sic] manner.

The following day, March 7, the District responded in writing to the Association's February 13 request to negotiate. It indicated that it did not believe the effects of layoff were negotiable but that, because of the "unsettled state of the decisions," it would meet to negotiate " . . . any negotiable subject, affected by layoff or school closure in respect to which negotiations were not concluded with the agreement reached November 1." The District also requested that the Association submit specific negotiating proposals by the scheduled meeting date, March 20, 1980.

The Association responded on March 18. It accused the District of refusing to bargain and asserted its right to negotiate the impact and implementation of the layoff. The Association asked the District to return to the status quo ante by rescinding all of its layoff-related actions until negotiations could occur.

The parties met on March 20 and 27, April 9 and 28 and May 13, 1980. At the March 20 meeting, the Association presented an initial list of subjects for negotiation[7] and a

[7]The proposal (Jt. Ex. 11) stated:

> The Mt. Diablo Education Association proposes that status quo in current contract, policies and practice be presented to MDEA and bargained upon. When we have additional information from the District on proposed changes and their impact on unit members, we will present more specific

detailed proposal on counselor caseload. Sondra Williams testified that the Association could not present more detailed

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proposals, including but not necessarily limited to, the following subjects:

1. Counselors - workload and other working conditions
2. Librarians
3. Nurses
4. Resource Teachers
5. Music Teachers
6. O.W.E. Coordinators
7. Preparation Time
   Department Heads - workload and other working conditions
8. Administrative assistants - workload and other working conditions
9. Special education teachers - workload and other working conditions
10. Teachers of alternatives programs - workload and other working conditions
11. School closure and school openings
12. Early retirement incentives
13. Layoff procedures including criteria for same date hires
14. Transfer procedure
15. Rehiring procedure
16. Coaches - working conditions
17. Additional revenue

proposals because it lacked information. No negotiations occurred on that date.

At the March 27 meeting, the Association submitted detailed written proposals concerning nine areas impacted by the District's decision to lay off.[8] The District maintained that it was not obligated to negotiate over any of the proposals offered by the Association, asserting that: it was "too early" to negotiate the effects of its decision to lay off employees and "too late" to negotiate issues related to the implementation of layoff; some of the Association's proposals were outside the scope of representation; and the Association had waived its right to negotiate over other proposals. With respect to these issues, the District offered to "discuss" or "dialogue" with the Association, but asserted that it had no obligation to "negotiate." In addition, at the March 27 meeting, the Association made a request for all available information regarding the implementation and impact of the layoff.

At the April 9 meeting, the District responded to the request for information by presenting to the Association copies of the relevant minutes of the school board meetings and the

[8]These included: early retirement incentives; student/counselor ratio; librarian staffing; transfers; alternative program teachers; elementary resource teachers; preparation time; nurse staffing; and impact of layoffs (Joint Exhibits 15-22). The full text of these proposals appear, infra, p. 38 et seq.

task force reports. The Association complained that the information provided was insufficient because it failed to detail specific recommendations.

At the April 28 meeting, the District reiterated its justifications for not negotiating with the Association.

On May 13, 1980, the District cut off further negotiations when it announced it would no longer continue meeting.

On June 20 the Association made a renewed demand to negotiate. Although the District failed to respond prior to the commencement of the hearing in this matter, there is some indication that the parties conducted negotiations just before and during the hearing.

Impact of Layoffs on Bargaining Unit

As noted above, of the 455 employees who received layoff notices in March, 1980, 130 employees were ultimately laid off and approximately 296 were transferred. Moreover, the implementation of the District's decision to lay off had an effect on the working conditions of certain groups of District employees not subject to the layoff during the following academic year.

Counselors

As a result in the reduction in the number of counselors, the District increased the number of students assigned to the remaining counselors. For example, at the District's Clayton Valley School, the authorized counselor caseload in 1979-80 was

355 students for each counselor; in 1980-81, that caseload was increased to 444 students. At College Park School, the caseload was increased from 294 to 426 students. At Concord High School, the counselor caseload was increased from 263 to 430 students. At Mt. Diablo High School, the caseload was increased from 270 to 440 students.

In order to accommodate this increased caseload, the District required counselors to engage in group counseling and restrict the amount of individual counseling they performed. There was some evidence that this change in the method of counseling affected the number of hours that counselors worked. The past practice in the District had been for counselors to work the same hours as teachers, from 7:15 a.m to 2:45 p.m. each day. In addition, they worked several hours per week beyond their normal workday to complete their regular work assignments. There was conflicting testimony as to whether these extra hours were voluntary or mandatory. Several counselors testified, however, that as a result of the District's increase in caseload and elimination of individualized counseling, counselors were required to work more hours in order to complete their assigned duties.

Librarians

In 1979-80, the District employed 19 librarians. As a result of the District's layoff in 1980-81, there were only 15 librarians in the District. Prior to the layoff, two

librarians were assigned to work at one school each and the remaining librarians were assigned to work at two schools each. As a result of the reduction in the number of librarians, seven librarians who formerly serviced two schools were required to service three schools.

Librarian Virginia Jouris testified at length concerning the duties of librarians. She testified that librarians are responsible for providing individual assistance to teachers in the development of class projects, developing library skills programs for students, and training volunteers. In the course of their duties, they regularly provide bibliographies for teachers, students, and parents. In addition to their resource function, librarians have overall responsibility for maintaining the libraries they are assigned to service.

Jouris testified that for the previous 10 years, she had serviced 2 elementary school libraries, each with approximately 8000 books and other materials. As a result of the reduction in the number of librarians, she was assigned the responsibility for an additional school. As a result, the number of teachers she was required to work with increased from 36 or 37 in 1979-80, to 58 in 1980-81. She testified that these added responsibilities significantly increased her overall hours of employment and that, as a result of the increase in her assigned duties, she couldn't complete her assigned work within the normal 7:15 to 2:45 workday.

Unlike the evidence with respect to counselors, there is no indication that the District altered the responsibilities of librarians in order to make it possible for them to complete their assigned duties within the established workday.

Nurses

The only evidence introduced concerning nurses was their assignment sheets for the 1979-80 and the 1980-81 school years. This evidence establishes that nurses were assigned to various district schools or other facilities each day. It also indicates that in 1979-80, the District employed 29 nurses servicing various district facilities or programs and that in 1980-81, it employed 24 nurses servicing somewhat fewer facilities and programs. In addition, these assignment sheets indicate that a number of nurses were transferred to different work sites in the year following the layoffs. There was no evidence introduced concerning what criteria the District used in assigning nurses nor whether nurse assignments were tied to a certain caseload.

Resource Teachers

The District's decision to close certain schools had the effect of reducing the total number of resource teachers. Thus, during the 1979-80 school year, 28 schools in the District had resource teachers; in 1980-81, only 10 schools had resource teachers. As a result of the District's actions, 40 resource teachers were reassigned to other positions.

Coaches

As a result of the District's actions, three teachers who were transferred were not reappointed as coaches and, therefore, suffered a loss in coaching stipends. There was no evidence, however, that the District's actions impacted the working conditions of the remaining coaches.

DISCUSSION

The hearing officer found that the District's decision to lay off certificated employees was nonnegotiable but that it had a duty to negotiate the effects of that decision. He then analyzed the Association's various proposals and determined that some were outside the scope of representation.[9] He found other proposals to be within the scope of representation,

[9]The scope of representation under EERA is set forth in section 3543.2. That section provides, in relevant part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. . . .

and the District's failure to negotiate those proposals to be a violation of subsections 3543.5(a), (b), and (c) of the Act.

The District does not except to the hearing officer's basic determination that it failed to negotiate the effects of its decision to lay off, but asserts that provisions of the Education Code preclude all negotiations related to the implementation and effects of certificated layoffs. In addition, it asserts a separate Education Code supersession argument with respect to the Association's proposal concerning the criteria for determining the order of layoff of employees hired on the same date.

The Association excepts to the hearing officer's failure to find that the District was required, as a matter of law, to notify the Association of its intention to lay off prior to its promulgation of a formal governing board resolution reducing services. In addition, the Association excepts to the hearing officer's finding that certain of its proposals were outside the scope of representation. Finally, the Association excepts to the hearing officer's finding that it only requested to negotiate one issue related to the implementation of layoffs.

The individual charging parties except to the hearing officer's dismissal of their allegations that the District violated the Act by refusing to negotiate the number, timing, and identity of the employees who would be laid off.

All of the parties except to the hearing officer's proposed remedy.

Duty to Negotiate the Impact of Layoffs

In Newark Unified School District (6/30/82) PERB Decision No. 225, the Board held that the decision to lay off certificated employees is a managerial prerogative. See also Kern Community College District (8/19/83) PERB Decision No. 337; Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223. However, management is obligated to negotiate the effects of its layoff decision. Newark Unified School District, supra; Kern Community College District, supra; Oakland Unified School District (11/2/81) PERB Decision No. 178 (Oakland I); Solano County Community College District (6/30/82) PERB Decision No. 219; Oakland Unified School District (7/11/83) PERB Decision No. 326 (Oakland II). Although the Board has not fully determined the extent to which an employer is obligated to negotiate the effects of layoffs, it has specifically held that issues related to the implementation of layoffs, including notice and timing of layoffs, are negotiable. Oakland Unified School District (Oakland I), supra; Oakland Unified School District (Oakland II), supra; Solano County Community College District, supra.

An employer must provide an exclusive representative with notice and a reasonable opportunity to negotiate prior to taking action which affects matters within the scope of representation. Newark Unified School District, supra; San Mateo County Community College District (6/8/79) PERB

Decision No. 94; Florida Steel Corp. (1978) 235 NLRB 941 [100 LRRM 1187] enf'd, in part, (4th Cir. 1979) 601 F.2d 125.[10] Where an employer flatly refuses to negotiate a matter within the scope of representation, its conduct is a per se violation of its duty to negotiate in good faith. Sierra Joint Community College District (11/5/81) PERB Decision No. 179; John S. Swift & Co. (1959) 124 NLRB 394 [44 LRRM 1388]. However, where the parties engage in some negotiating, the determination of whether an employer has violated its duty to negotiate in good faith turns on whether there is sufficient evidence to establish, based on the totality of the circumstances, that it lacked subjective intent to reach agreement with the exclusive representative. Stockton Unified School District (11/3/80) PERB Decision No. 143; Atlas Mills, Inc. (1937) 3 NLRB 10 [1 LRRM 60]; NLRB v. Stevenson Brick and Block Co. (4th Cir. 1968) 393 F.2d 234 [68 LRRM 2086].

The record supports the hearing officer's determination that the District failed to negotiate in good faith with the Association over the effects of its decision to lay off. On February 13, 1980, the Association formally demanded to negotiate "any and all impacts upon members of our bargaining unit in any and all mandatory subjects for negotiation

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[10]The Board may rely on federal labor law precedent where applicable to the resolution of public sector labor relations issues. Firefighters v. City of Vallejo (1974) 23 Cal.3d 608 [116 Cal.Rptr. 507].

resulting from your decisions of recent weeks." Such a request was certainly sufficient to place the District on notice that the Association wished to negotiate the effects, including any negotiable issues related to the implementation of layoff, arising from its decision to reduce certificated services.[11] Despite this outstanding request to negotiate, on March 6, 1980, the District sent out layoff notices to targeted employees. Indeed, the District did not formally respond to the Association's request to negotiate until March 7, at which point the District's unilateral action had rendered any negotiations over issues related to the implementation of the layoff futile.[12] This unilateral conduct in the face of an

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[11]See Newman-Crows Landing Unified School District, supra, where the Board held that "although it is not essential that a request to negotiate be specific or made in a particular form . . . it is important for the charging party to have signified some desire to negotiate. . . ." See also Delano Joint Union High School District (5/5/83) PERB Decision No. 307; Colombian Enameling and Shaping Co. (1939) 206 U.S. 292 [4 LRRM 524]; Al Landers Dump Truck, Inc. (1971) 192 NLRB 207 [77 LRRM 1729]; Schreiber Freight Lines (1973) 204 NLRB 1162 [83 LRRM 1612]. The Association's letter was, in our view, a legally sufficient initial request to negotiate.

[12]The hearing officer found that the Association requested to negotiate only one issue related to the implementation of layoff, that is, its proposal concerning the criteria for determining order of seniority of employees hired on the same date. The hearing officer's finding was apparently based on the fact that, once the Association and the District did meet, the Association only submitted one detailed proposal related to an implementation of layoff issue. Implicit in the hearing officer's finding is a determination that because the Association never developed detailed proposals as to other implementation of layoff issues, it essentially "waived" its right to negotiate those issues.

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outstanding demand to negotiate was tantamount to an outright refusal to bargain and, absent a valid defense, constitutes a per se refusal to negotiate in good faith. Sierra Joint Community College District, supra.

In addition, the record reveals that when the Association and the District finally did sit down at the negotiating table in late March, the District used the meetings as little more than a forum for communicating its outright refusal to negotiate. Thus, the verbatim transcripts of those meetings indicate that the District asserted that, with respect to some of the Association's proposals, it was either "too early" or "too late" to negotiate, that other proposals were outside the

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There is no question that, after an employee organization has made an initial request to negotiate, an employer has a right to request that the employee organization develop and submit proposals that are sufficiently detailed so as to enable the parties to engage in effective negotiations, and that a failure to submit reasonably detailed proposals could result in a finding that the employee organization had waived its right to negotiate. Jefferson School District (6/19/80) PERB Decision No. 133. However, in this case, the District did not make such a request until after it had taken unilateral action to implement the layoff, thus effectively foreclosing bargaining on implementation issues. The Association cannot be held responsible for failing to submit detailed proposals when, by its own unlawful conduct, the District has acted in such a manner as to render further attempts to negotiate futile. NLRB v. Burton-Dixie Corp. (10th Cir., 1954) 210 F.2d 199 [33 LRRM 2483]; Solon Mfg. Co. (1976) 222 NLRB 542 [91 LRRM 1256] enfd (1st Cir., 1976) 544 F.2d 1375 [99 LRRM 2633]; Richardson Chemical Co. (1976) 222 NLRB 5 [91 LRRM 1235]. Therefore, we find that the hearing officer erred in concluding that the Association sought to negotiate only one issue related to the implementation of layoff.

scope of representation, or that the Association had waived its right to negotiate a particular subject matter. The District's representative repeatedly indicated that he was willing to "discuss" issues with the Association but would not "negotiate" with it. Ultimately, the parties never engaged in a give-and-take discussion as to any issue. Based on the totality of the circumstances, therefore, we conclude that the District did not, by meeting with the Association, discharge its duty to negotiate in good faith with the Association concerning the effects of its decision to lay off. Stockton Unified School District, supra.

In addition to our finding that the District engaged in conduct which, absent a valid defense, would violate its duty to negotiate in good faith, the Association urges the Board to conclude that the District violated the Act by failing to provide the Association with notice of its decision to lay off and an opportunity to negotiate the effects of that decision prior to the formal adoption of a resolution reducing services in February 1980. The Association argues that since the District was aware, as early as the fall of 1979, that layoffs were a distinct possibility, it was obligated at that time to provide notice of impending layoffs and to begin negotiating with the Association. Failure to do so, it argues, constitutes an independent violation of the Act.

As noted above, the Board has long held that an employer must provide an exclusive representative with notice and a reasonable opportunity to negotiate prior to taking action which affects matters within the scope of representation. Newark Unified School District, supra; San Mateo County Community College District, supra. However, the Board has not determined exactly when the duty to provide notice and an opportunity to negotiate arises in circumstances where, as here, the employer's decision is nonnegotiable, but the effects of that decision must be negotiated.

Under the National Labor Relations Act, where management must negotiate only the effects of an otherwise nonnegotiable decision, it is obligated to provide notice and an opportunity to negotiate only after it actually makes the decision to act on a matter within its managerial prerogative. Interstate Tool Co. (1969) 177 NLRB 686 [71 LRRM 1487]; NLRB v. Royal Plating and Polishing Co. (3d Cir. 1965) 350 F.2d 191 [60 LRRM 2033]; NLRB v. Transmarine Navigation Corp. (9th Cir. 1967) 380 F.2d 933 [65 LRRM 2861]. As the Court stated in Transmarine Navigation Corp., supra, 65 LRRM at 2866:

> This is not to hold that the employer is absolved of all duty to bargain with a union when he makes a managerial decision. Once such a decision is made the employer is still under an obligation to notify the union of its decision so that the union may be given the opportunity to negotiate the [effects of its] managerial decision. [Emphasis added.]

We agree with the National Labor Relations Board and the federal courts that it would be incongruous for an employer to be required to provide notice of its intention to make a nonnegotiable decision and negotiate the effects of that decision prior to the time at which the decision is firmly made. Accordingly, we find that an employer's duty to provide notice and an opportunity to negotiate the effects of its decision to lay off arises when the employer reaches a firm decision to lay off.

Turning to the facts of this case, we find that there is insufficient evidence to demonstrate that the District reached a firm decision to lay off prior to the time that it promulgated formal resolutions closing schools and reducing certificated services on February 5 and 6, 1980. Rather, the evidence indicates that, until just prior to the promulgation of the implementing resolutions, the District was still considering layoffs as one possibility among several alternative means of reducing costs. Thus, as late as December 1979, the various investigatory committees appointed by the District were meeting to discuss possible means of reducing the budget. Their reports were not issued until late December. In January and early February 1980, numerous meetings were held throughout the District to solicit input from members of the public concerning the District's budgetary

crisis and possible solutions to it. Elbert Zoriolo, director of certificated personnel, testified that at the time of these meetings, no definite decision had been made either to lay off employees or close schools, but that such actions were "under serious consideration." His testimony is corroborated by Association witness Sondra Williams. In response to questions concerning why the Association waited until February 13 to make a request to negotiate, Williams testified that as late as February, the Association still considered the District's actions "tentative" and that the Association hoped that by "intense lobbying" it could persuade the school board not to resort to layoffs. Indeed, she explained that the Association still hoped at that point that layoffs could be avoided without the Association having to "resort to an adversarial relationship" with the District.

In sum, we conclude that the District did not fail to provide prompt notice and an opportunity to negotiate at the point at which it reached a firm decision to reduce certificated services. Rather, the record demonstrates that the Association demanded to negotiate almost immediately after that decision was made. Therefore, no independent violation of the Act is established.

District's Defenses

A. Supersession;

The District asserts that the comprehensive layoff

provisions of Education Code sections 44949 and 4495513 preclude all negotiations concerning the effects of layoffs,

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[13]At the time of the hearing in this matter, Education Code section 44949 provided, in relevant part:

> Cause, notice, and right to hearing required for dismissal of probationary employee.
>
> (a) No later than March 15 and before an employee is given notice by the governing board that his services will not be required for the ensuing year, the governing board and the employee shall be given written notice by the superintendent of the district or his designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that such notice be given to the employee, and stating the reasons therefor.
>
> . . . . . .
>
> (e) Notice to the probationary employee by the governing board that his service will not be required for the ensuing year, shall be given no later than May 15.
>
> . . . . . .
>
> (h) In the event that the governing board does not give notice provided for in subdivision (e) of this section on or before May 15, the employee shall be deemed reemployed for the ensuing school year.

At the time of the hearing in this matter, Education Code section 44955 provided:

> No permanent employee shall be deprived of his or her position for causes other than those specified in Sections 44907 and 44923, and Section 44932 to 44947, inclusive, and no probationary employee shall be deprived of his or her position for cause other than as specified in Sections 44948 to 44949, inclusive.

Although, as noted above, the Board has found that an employer is obligated to negotiate the effects of layoffs on

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> Whenever in any school year the average daily attendance in all of the schools of a district for the first six months in which school is in session shall have declined below the corresponding period of either of the previous two school years, or whenever a particular kind of service is to be reduced or discontinued not later than the beginning of the following school year, and when in the opinion of the governing board of said district it shall have become necessary by reason of either of such conditions to decrease the number of permanent employees in said district, the said governing board may terminate the services of not more than a corresponding percentage of the certificated employees of said district, permanent as well as probationary, at the close of the school year; provided, that the services of no permanent employee may be terminated under the provisions of this section while any probationary employee, or any other employee with less seniority, is retained to render a service which said permanent employee is certificated and competent to render. As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof.
>
> Notice of such termination of services either for a reduction in attendance or reduction or discontinuance of a particular kind of service to take effect not later than the beginning of the following school year, shall be given before the 15th of May in the manner prescribed in Section 44949, and services of such employees shall be terminated in the inverse of the order in which they were employed, as determined by

certificated employees (Newark Unified School District, supra; Kern Community College District, supra; Solano County Community College District, supra), it has not specifically responded to the argument, urged here, that negotiations concerning the effects of layoffs are precluded by the comprehensive layoff scheme set forth in Education Code sections 44949 and 44955.

The District's argument is based on the supersession language contained in section 3540. That section provides, in relevant part:

> Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

In interpreting the supersession language of section 3540, the Board has previously held that an Education Code provision

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> the board in accordance with the provisions of Sections 44844 and 44845 of this code. In the event that a permanent or probationary employee is not given the notices and a right to a hearing as provided for in Section 44949, he shall be deemed reemployed for the ensuing school year.
>
> The board shall make assignments and reassignments in such a manner that employees shall be retained to render any service which their seniority and qualifications entitle them to render.

will not limit the scope of representation so long as it merely "authorizes a certain policy but falls short of [creating an] absolute obligation." Jefferson School District, supra. See also Holtville Unified School District (9/30/82) PERB Decision No. 250; Solano County Community College District, supra; Mt. San Antonio Community College District (3/24/83) PERB Decision No. 297 (Mt. San Antonio I); Calexico Unified School District (12/20/82) PERB Decision No. 265. In San Mateo City School District et al. v. PERB (1983) 33 Cal.3d 850, 864, the California Supreme Court specifically upheld PERB's test for determining Education Code supersession:

> In the Healdsburg case PERB interpreted this language to prohibit negotiations only where provisions of the Education Code would be replaced, set aside or annulled by language of the proposed contract clause. In the words of board member Moore, "Unless the statutory language [of the Education Code] clearly evidences an intent to set an inflexible standard or insure immutable provisions, the negotiability of the proposal should not be precluded. . . ." PERB's interpretation reasonably construes the particular language of section 3540 in harmony with the evident legislative intent of the EERA and with existing sections of the Education Code.

Education Code section 44949 establishes the rights of probationary certificated employees in the event of layoff. It provides that probationary employees must receive preliminary notice of layoff on March 15 and final notice of layoff by May 15, or they are deemed automatically reemployed. In

addition, it establishes that employees must be afforded administrative hearings. Education Code section 44955 is similar to section 44949, but applies to permanent as well as probationary certificated employees. It specifies the circumstances in which an employer is legally justified in laying off certificated employees, and provides that employees must be afforded administrative hearings in accordance with the procedures established by Education Code section 44949. It provides that employees must be provided preliminary notice of layoff in accordance with the procedures established by Education Code section 44949 and final notice of layoff by May 15, or they are deemed automatically reemployed.

The record indicates that the general practice in school districts is to provide preliminary notice on March 15 to more employees than the district intends to lay off. Thus, for example, in this case the District sent out 455 layoff notices on March 15 but ultimately laid off only 130 employees. Between March 15 and May 15, employees targeted for layoff are entitled to an administrative hearing to be completed prior to May 15. The scope of that hearing is limited to the determination of whether the district has good cause to lay off as established by Education Code sections 44949 and 44955. At the completion of the hearing, the administrative law judge's decision is sent to the governing board, which determines

whether it wishes to accept, reject, or reject in part the ALJ's determination. Thereafter, the district sends out final layoff notices to employees, which must be received by those employees no later than May 15. Employees who receive notice on May 15 are terminated upon the completion of the school year, June 30.

We find that there is nothing in Education Code sections 44949 and 44955 which create an inflexible standard precluding all negotiations concerning the effects of layoffs. Rather, as a general matter, these provisions of the Education Code create minimal statutory guarantees which do not conflict with attempts by an employee organization to gain additional rights through the collective negotiations process.[14]

However, there is one area in which we do find that the right to negotiate the effects of layoffs is, at least in part, superseded by the comprehensive layoff notice and timing provisions of the Education Code.

In assessing the District's supersession argument, the hearing officer drew a distinction between the negotiability of

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[14]For example, although Education Code section 44955 requires an employer to provide notice of layoffs "no later than" March 15, the Board has found there is nothing in such a provision which would preclude the parties from negotiating additional notice. See Oakland Unified School District (Oakland I), supra; Oakland Unified School District (Oakland II), supra.

issues related to the "implementation" of layoffs and those related to other "effects" of the decision to layoff. Generally, he defined "implementation" issues as those which concern the "manner in which layoffs occur." He found that, because Education Code sections 44949 and 44955 impose upon a public school employer a March 15 deadline to provide notice of layoff to employees, the District was excused by "operational necessity" from having to negotiate any implementation of layoff issues. Accordingly, he concluded that the District was excused from negotiating the Association's same-date-of-hire proposal, the only proposal related to the implementation of layoff which he found that the Association demanded to negotiate.

Although the Board has broadly stated that the "implementation and effects" of the decision to lay off are negotiable (Solano County Community College District, supra), we have yet to define the distinction between "implementation" issues and other "effects" of the decision to lay off.[15] While we agree with the hearing officer that such a distinction is useful in assessing the duty of an employer to negotiate in the layoff context and that the Education Code does place time

[15]We do not wish to imply that "implementation of layoff" is a separate subject of bargaining from "effects of layoff"; rather, the former is, broadly speaking, sub-category of the latter.

limits on the negotiability of certain implementation of layoff issues, we disagree with his conclusion that the District was excused by operational necessity[16] from negotiating implementation of layoff issues.

As noted above, Education Code sections 44949 and 44955 provide that an employer must provide preliminary notice to employees that they are targeted for layoff no later than March 15 and final notice no later than May 15 or they are deemed automatically reemployed. Clearly, therefore, these provisions create an inflexible deadline limiting the duty of an employer to negotiate in at least two areas related to the implementation of layoffs.[17] First, any negotiations concerning additional preliminary or final notice which employees may receive must be completed prior to March 15 and May 15 respectively. Similarly, any negotiations concerning the method of determining the identity of those employees to be laid off must be completed prior to the May 15 deadline for

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[16]We have found, supra, that the Association, by its general request to negotiate of February 13, 1980, did demand to negotiate more than one implementation of layoff issue and that its failure to develop more than one detailed proposal did not constitute a waiver of its right to negotiate such issues because the District's unilateral conduct rendered any further attempt to negotiate futile.

[17]Our discussion is not meant to establish a conclusive list of negotiating subjects which would fall under the definition of "implementation of layoff." A determination of the extent to which Education Code sections 44949 and 44955 supersede the right of employees to negotiate must be based on an analysis of specific negotiating proposals.

receipt of final layoff notices by employees. Thereafter, management may unilaterally implement the layoff in accordance with the provisions of the Education Code.[18]

Thus, we agree with the hearing officer that the Education Code creates certain deadlines for the completion of negotiations concerning the notice to be provided employees targeted for layoff and the method of determining the identity of those employees who will be laid off. However, we disagree with his conclusion that the District was excused by these fixed dates from negotiating these issues. In our view, a period of four months, from the date of the Association's demand to negotiate until May 15, was sufficient for the parties to negotiate through impasse concerning the method of determining the identity of those to be laid off. Rather than negotiating, however, the record indicates that the District took unilateral action to implement the layoff. Therefore, we reverse the hearing officer's finding that the District's failure to negotiate those issues related to the implementation of the lay off, including the Association's same-date-of-hire proposal, was excused by operational necessity.[19]

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[18]The District would, of course, still be obligated to continue to negotiate other in-scope effects of its decision to lay off.

[19]Nevertheless, as discussed infra at p. 45, we find the Association's same-date-of-hire proposal is superceded by the Education Code for other reasons.

B. Scope of Representation Defense;

Having resolved the District's general supersession defense, we turn to the individual negotiating proposals to assess the District's contention that several of the proposals are outside the scope of representation.[20]

1. Impact of Layoff Proposal

The Association sought to negotiate a proposal related to the impact of layoff. That proposal provided:

> 1. In the event that the District determines that some members of the bargaining unit shall be laid off pursuant to appropriate provisions of law and those affected members of the bargaining unit thereafter

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[20]The Association argues that the Board should not consider the District's defense that its proposals were outside the scope of representation and that we should reverse the hearing officer's determination that some proposals were nonnegotiable. Essentially, the Association asserts that the District's scope of representation argument is an "affirmative defense," which must be raised in answer to the unfair practice charge or it is waived.

The Association's argument is misplaced. While employers often raise the argument that a bargaining proposal is outside the scope of representation by way of an affirmative defense, it is the overall burden of the party alleging that an employer violated its duty to negotiate in good faith to prove that the respondent refused to negotiate concerning a matter within the scope of representation. Grant Joint Union High School District (2/26/82) PERB Decision No. 196. Thus, it was not only proper for the hearing officer to consider this issue, but it was required as a matter of law. Were we to rule to the contrary, the Board could find itself in the position of ordering an employer to negotiate over a subject of bargaining which it has no legal duty to negotiate. Such an order would exceed the Board's jurisdiction.

are laid off, then by the fifth working day of the immediately succeeding academic year those affected members of the bargaining unit shall be granted severance pay in the valued amount of their accumulated and unused sick leave. The valued amount shall mean the per diem rate (computed as 1/177 of the annual salary for the fiscal year in which the layoff takes effect) multiplied by the total number of accumulated and unused sick leave days.

2. The District shall reimburse a certificated employee in the amount of three hundred ($300) dollars whenever and at the same time that it rescinds a written notice of intent to dismiss, or notice to dismiss. Moreover, the District shall also reimburse any certificated employee who has received either of the above written notices for any expenses incurred in connection with such certificated employee's search for other employment.

3. Provisions set forth in #1 and #2 above shall not be construed to waive any right deriving from any provision of law which might otherwise have been enjoyed by members of the bargaining unit.

4. In the event that members of the bargaining unit receive notices of dismissal pursuant to appropriate provisions of law, then the Association may reopen this arrangement at any time after receipt of such notices by members of the bargaining unit in order to negotiate the impact of any proposed or effected reduction in force.

5. The criterion used to establish relative seniority of teachers with the same date of hire shall be a lottery drawing. If seniority has previously been determined by lottery, that determination shall

> stand. Subsequently, for employees first rendering such services on the same day, seniority shall be determined by lottery. If seniority has previously been determined by lottery that determination shall stand. Subsequent lotteries shall be held as needed prior to March 1, in the presence of an Association representative. Once decided, that determination shall stand.

The hearing officer found that paragraphs 1-4 of the Association's proposal were negotiable, but that the District was excused by operational necessity from negotiating the same-date-of-hire proposal set forth in paragraph 5. For the reasons set forth, supra, we have reversed this determination. In addition, however, the hearing officer rejected a separate District argument that paragraph 5 was superseded by a specific portion of Education Code section 44955, permitting the District to establish unilaterally the order of layoff of employees hired on the same date. In its exceptions, the District reasserts this contention. The District does not, however, except to the hearing officer's finding that paragraphs 1-4 of the Association's proposal were negotiable.

Although the Board will ordinarily not review portions of a proposed decision that are not specifically excepted to,[21]

21PERB rules are codified at title 8, California Administrative Code, section 31000 et seq. PERB rule 32300(c) provides: "An exception not specifically urged shall be waived."

where the issues raised are of important legal significance and the record is complete, the Board may review them sua sponte in order to avoid serious errors of law. Fresno Unified School District (4/30/82) PERB Decision No. 208.

In Anaheim Union High School District (10/28/81) PERB Decision No. 177,[22] issued subsequent to the hearing officer's proposed decision in this case, the Board established a test for determining the negotiability of subjects not specifically enumerated in section 3543.2. Although the hearing officer found paragraphs 1-4 of the Association's Impact of Layoff proposal negotiable, he did so without benefit of the Anaheim test. Therefore, we find it necessary to review the proposals contained in paragraphs 1-4 sua sponte in light of the Anaheim test. Fresno Unified School District, supra.

Under the Anaheim test, a nonenumerated subject will be found to be within the scope of representation 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

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22cited, with approval, by the California Supreme Court in San Mateo City School District et al. v. PERB, supra.

not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

Paragraph 1 of the Association's proposal seeks to establish a system of severance pay for laid-off employees. Applying the Anaheim test, we find this proposal to be negotiable.

There is no question that severance pay is logically and reasonably related to wages and hours, both of which are enumerated subjects.

Severance pay for laid-off workers is a matter of extreme importance to employees, who desire a certain level of financial security during the transition from employed to unemployed status. Management, for its part, desires an orderly layoff procedure which minimizes the negative impact of such an event on its relationship with its employees. In both instances, collective negotiations are a beneficial means of structuring the layoff process and ameliorating conflict between management and labor.

Finally, we can find no management prerogative which would be invaded by requiring the District to negotiate concerning severance pay for laid-off employees.

Accordingly, we find the severance pay proposal in paragraph 1 to be a negotiable effect of the decision to lay off.

Paragraph 2 is a proposal requiring the District to pay a fine and the costs incurred for issuing and then rescinding a notice of intention to lay off. In Jefferson School District, supra, the Board explicitly held that an identical contract proposal was nonnegotiable, since it was punitive and impermissibly interfered with an employer's statutory obligation under the Education Code to provide notice to employees potentially targeted for layoff. We reaffirm that holding, and therefore find the Association's proposal outside of the scope of representation.

Paragraph 3 contains language reserving to employees all rights provided by state law. Paragraph 4 similarly attempts to set out the Association's established right to negotiate the implementation and effects of a layoff. Both paragraphs are recitations of statutory rights already guaranteed to the Association and these proposals merely indicate that no waiver of those rights is intended. There is nothing, therefore, which precludes their negotiability.

Paragraph 5 seeks to negotiate a lottery system for establishing the order of seniority of employees who share the same date of hire. With respect to this particular proposal, the District asserts that a portion of Education Code section 44955 precludes negotiations.[23]

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[23]Education Code section 44955 provides in relevant part:

Education Code section 44955 was enacted to replace a previous Code provision which required that a lottery be used to determine the order of layoff for employees with the same-date-of-hire. Section 44955 requires that the District establish criteria for determining the order of layoff of employees hired on the same date based "solely on the . . . needs of the district and the students thereof." The primary intention of the Legislature, therefore, in enacting Education Code section 44955 was to eliminate a selection process based on chance and to permit an employer to determine the order of layoff based on educational policy concerns.

This conclusion is reinforced by the legislative committee reports analyzing the amendments to section 44955 contained in SB 274 (Behr).[24] Thus, the July 29, 1977 report of the Senate Education Committee (Dist. Ex. D), in describing SB 274, stated:

> This measure would eliminate the lot determination procedure for "same day" teachers, and leave the order of layoff to the governing board of the district based on the needs of the district and the students thereof.

> As between employees who first rendered paid service to the district on the same date, the governing board shall determine the order of termination solely on the basis of needs of the district and the students thereof.

[24]Enacted Stats. 1977 ch. 433, section 4.

Similarly, the "Legislative Counsel's Digest" which accompanied SB 274 (Dist. Ex. C), and which was voted on by the Legislature, provided:

> Existing law generally requires that certificated employees of a school district be laid off in the reverse order of their employment by the district and be reemployed in the order of initial employment, and that if two or more employees were first employed on the same date their order of employment, for layoff purposes, be determined by the drawing of lots.
>
> This bill would delete provisions for the drawing of lots and, instead, would require that the order of layoff and reemployment between employees having the same employment date be determined by the school district governing board solely on the basis of the needs of the district and its students.

Based on this legislative history and the clear affirmative language of the statute, we conclude that the Legislature, in amending section 44955, created an inflexible standard which supersedes the right of employees to negotiate the criteria for determining the order of layoff of employees with the same date of hire. San Mateo City School District et al v. PERB, supra. In our view, once management exercises its right to determine the order of layoff based "solely on the needs of the district and the students", there is no issue left to negotiate. Thus, we find that the District acted within its exclusive prerogative when it unilaterally adopted the criteria for determining the order of layoff of employees with the same date of hire.[25]

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[25]We note that this case arose before the scope of representation section of EERA (section 3543.2) was amended to add subsection 3543.2(c). That subsection provides:

Since we have found the Association's proposal concerning same-date-of-hire criteria to be outside the scope of representation, the District's refusal to negotiate that portion of the Association's impact of layoff proposal was not a violation of the Act. However, the District's refusal to negotiate paragraphs 1, 3, and 4 of the Association's proposal constitutes a violation of subsection 3543.5(c) and, concurrently, subsections 3543.5(a) and (b). San Francisco Community College District (10/12/79) PERB Decision No. 105.

2. Transfer Proposal

The Association sought to negotiate a proposal relating to transfer as a result of layoffs. That proposal provided:

> If teachers are transferred into a school due to an influx of students caused by exceptions made in the Board established attendance boundaries, then no teachers will be transferred from that school the following year because of decline in enrollment.

> (c) Notwithstanding Section 44955 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding procedures and criteria for the layoff of certificated employees for lack of funds. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Section 44955 of the Education Code shall apply. (Added Stats. 1981, ch. 100, sec. 34, effective January 1, 1982.)

The Board has yet to interpret the effect of the addition of subsection (c) to section 3543.2 on an employer's duty to negotiate in the layoff context, and it is not before us in this case.

The Association sought to negotiate this proposal as an addendum to the transfer provision of the parties' collective agreement. Article X, subsection 54(b)(5) of the collective agreement provides, in relevant part:

> Any teacher[s] . . . who are transferred involuntarily . . . shall not be subject to involuntary transfer for the year in which such removal from the site is effective and the two (2) following school years.

The proposal attempts to establish certain transfer rights which would be triggered by the District's decision to close certain schools. The District refused to negotiate, arguing that the issue was covered by the contract's transfer provision and that further negotiation was, therefore, waived. The hearing officer agreed and found the proposal nonnegotiable.

The Association excepts to this determination. Although it concedes that the existing agreement contains provisions related to involuntary transfer, it nevertheless asserts that because "the parties did not envision a layoff of this magnitude when they negotiated . . . the Association must be allowed to open up that item in the face of massive layoffs and transfers."

We agree with the hearing officer that the provisions of the 1979-82 agreement covered the issue of involuntary transfer and therefore foreclose reopening negotiations on that issue. Although the Board will not readily infer a waiver of the right to negotiate (Amador Valley Joint Union High School District

(10/2/78) PERB Decision No. 74; Sutter Union High School District (10/7/81) PERB Decision No. 175; Los Angeles Community College District (10/18/82) PERB Decision No. 252; Palo Verde Unified School District (6/20/83) PERB Decision No. 321), neither do we find that, merely because events arise which were not in the contemplation of the parties during prior negotiations, every contract term can be renegotiated. Kern Community College District, supra; Placer Hills Union School District (11/30/82) PERB Decision No. 262. Accordingly, we find that the provisions of the 1979-82 agreement concerning involuntary transfer constitute a waiver for the term of the agreement of the right to bargain over issues expressly covered therein.

Based upon the above analysis, we dismiss that portion of the Association's charge alleging that the District unlawfully refused to negotiate over its proposal concerning involuntary transfer.

3. Counselor Workload and Other Working Conditions

The Association sought to negotiate a proposal concerning the impact of layoffs on counselor working conditions. That proposal provided:

> There shall be a District-wide ratio of one counselor per 300 secondary students.
>
> In assigning counselors to intermediate and high schools the following guidelines shall be observed:

(1) The critical caseload shall be 300 students and the maximum caseload shall be 338 students.

(2) Counselors who handle discipline will have their caseloads reduced according to the following formula:

0% of disciplined handled - 0% caseload reduction

1-50% of discipline handled - 18% caseload reduction

51-100% of discipline handled - 36% caseload reduction

(3) All students for whom I.E.P.'s (Individual Educational Programs) are required will be counted as two regular students in computing counselor workload.

(4) Counselors in schools with a 35% or more student body turnover annually will have their counselors reduced by 10%.

(5) Counselors in schools in which 20% or more of the students fail one or more of the competency examinations will have their caseload reduced by 10%.

The hearing officer found this proposal to be negotiable, relying on the Board's determination in Fullerton Union High School District (5/30/78) PERB Decision No. 53 that counselor caseload is within the scope of representation. See also Rio Hondo Community College District (12/31/82) PERB Decision No. 279. He then concluded that the District's refusal to negotiate the proposal constituted a violation of its duty to negotiate in good faith.

Since the District failed to except to this finding, we adopt the hearing officer's determination as that of the Board itself. Accordingly, we find that the District, by refusing to negotiate the counselor workload proposal, violated subsections 3543.5(a), (b), and (c) of the Act.

4. Elementary Resource Teachers

The Association sought to negotiate a proposal concerning the impact of the reduction in the number of elementary school resource teachers on remaining employees. That proposal provided:

> The teachers at each elementary school shall be entitled to the services of one Resource Teacher whose duties shall be as outlined in current District policy.

The hearing officer concluded that the proposal was not negotiable because it attempted "to set . . . a minimum number of employees to be hired at each job site" and, therefore, impinged on a managerial prerogative. We agree.

The proposal, as written,[26] merely attempts to negotiate the District's decision to reduce the number of resource teachers in its employ. The Board has previously held that the decision to eliminate a position is a managerial prerogative. Newark Unified School District, supra; Mt. San Antonio

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[26]Had the proposal been more narrowly drawn so as to seek negotiations over the impact on the workload of teachers who no longer had the services of resource teachers, it would have been negotiable.

Community College District (8/18/83) PERB Decision No. 334 (Mt. San Antonio II); South Bay Union School District (4/30/82) PERB Decision No. 207. Thus, the Association's proposal is outside the scope of representation.

Accordingly, that portion of the Association's charge, alleging that the District violated the Act by refusing to negotiate the Association's proposal concerning resource teachers, is dismissed.

5. School Nurses

The Association sought to negotiate a proposal related to the impact of layoffs on school nurses. That proposal provided:

1. Staffing for school nurses shall be done according to the following:

    1. One nurse per high school
    2. One nurse per 1500 intermediate students
    3. One nurse per 2000 elementary students

2. Additional nurse time shall be provided in schools where one or more of the following conditions exist:

    1. Lower socio-economic level
    2. Cultural differences within student population
    3. Community and/or family health services not readily available
    4. Special Education Satellite program
    5. Large numbers of special education students main-streamed into regular classrooms.

The hearing officer did not reach the question of whether the Association's proposal was within the scope of

representation, dismissing the charge based on a finding that there was no evidence that the District's layoff affected nurses. The Association excepts to this determination.

We disagree with the hearing officer's apparent determination that the Association must prove that an actual unilateral change in employees' working conditions resulted from the layoff as a precondition to finding a duty on the part of the employer to negotiate the impact of the layoff. In our view, the Association need only produce sufficient evidence to establish that the decision to lay off would have a reasonably foreseeable adverse impact on employees' working conditions and that its proposal is intended to address employee concerns generated by that anticipated impact.

Paragraph 1 of the proposal seeks to establish a nurse caseload in an apparent attempt to ameliorate an anticipated increase in workload resulting from the layoff of nurses.

In Fullerton Union High School District, supra, the Board held that the caseload of counselors and school psychologists is within the scope of representation. See also, Moreno Valley Unified School District (4/30/82) PERB Decision No. 206; Rio Hondo Community College District, supra. The Board's rationale for finding the caseload of counselors and psychologists negotiable in Fullerton was two-fold: First, the evidence established that the number of students assigned to these employees was based on the student average daily attendance and

that an increase in student attendance necessarily affected hours of employment. Second, the Board found that the caseload of these two groups of employees was related to the specifically enumerated item of "class size" in section 3543.2. In both instances, the Board tied the concept of caseload to evidence of a numerical ratio between the work assignment of employees and the students whom they serviced.

The Board has yet to determine whether the caseload of nurses is negotiable. While we do not preclude a situation in which nurses may be shown to have a caseload similar to counselors and psychologists, we find that there is insufficient evidence in the record to establish that nurses had previously been assigned work on a caseload basis. Absent such evidence, we are unable to conclude that a decrease in nursing staff would cause a foreseeable increase in caseload. The only evidence which the Association presented concerning nursing work assignments were assignment rosters for the 1979-80 and 1980-81 work years. These documents merely indicate which District facilities nurses were assigned to and how many hours they spent at those facilities. Unlike the record in the Fullerton case or the Association's own evidence with regard to counselors in this case, the Association introduced no evidence concerning whether nurse assignments were any way related to a caseload system. We are simply unwilling to infer from the face of a document that such a

system existed. Therefore, we conclude that the Association failed to meet its burden of proving that the reduction in nursing staff would have a reasonably foreseeable impact on nurse caseload.

We also find paragraph 2 of the Association's proposal to be outside the scope of representation, since it seeks to establish the criteria by which management will determine its staffing needs.

6. Teachers in Alternative Programs

The Association sought to negotiate a proposal related to the impact of layoffs on teachers in alternative programs. That proposal provided:

> 1. Any alternative program currently existing in the District shall be maintained at no less than its present level for the duration of the contract unless fewer students volunteer to participate.
>
> 2. Teachers in alternative programs must be volunteers and selection of teachers for vacancies in alternative programs shall be made on the basis of credentials and competence by training or experience and the selection criteria currently used by each alternative program.
>
> 3. Notices regarding alternative schools shall be done as specified in Section 5811.5 of the Education Code.
>
> 4. In the event that an alternative program is housed in a school which the District decides to close, another appropriate site shall be mutually selected by the teaching staff of the program and the Superintendent.

5. Transfers of teachers in alternative programs shall be done in accordance with Article X.

The hearing officer found this proposal nonnegotiable since he found no evidence that the layoff had any impact on employees in the alternative program. Accordingly, he dismissed the Association's charge with respect to this proposal.

The Association did not except to this finding, and we therefore, affirm his dismissal of that portion of the charge alleging that the District violated subsections 3543.5(a), (b), and (c) by refusing to negotiate the Association's proposal concerning the alternative program.

7. Librarians/Staffing

The Association sought to negotiate a proposal related to the impact of layoffs on the staffing of District libraries. That proposal provided:

1. The library staff at each elementary and intermediate school facility shall include at least one full-time librarian.

   The library staff at each high school facility shall include at least two full-time librarians.

   A librarian shall be defined as a person who holds an appropriate California School Library Credential.

2. The library staff at each school facility shall include one full-time Instructional Media Assistant.

   The library staff at each high school facility shall include three full-time Instructional Media Assistants.

In the event that a librarian is absent, that librarian shall be entitled to substitute coverage by a holder of a California School Library Credential.

3. A librarian at each intermediate and high school facility shall be designated as department chairperson, and be entitled to all of the attendant benefits, including the established salary increment.

4. When any school librarian is responsible for the supervision of textbooks and/or audio visual equipment located outside the school's library facility, the District shall provide at least one additional Instructional Media Assistant at that school.

5. In the event that a school library is used as part of a summer session program, a credentialed librarian shall be hired to staff that school library for the duration of the summer session.

The hearing officer found that, with the exception of paragraph 3, the entire "staffing" portion of the Librarians' proposal was outside of the scope of representation since it attempted to set the staffing needs at each school. The Association excepts to this determination.

We find this proposal to be outside the scope of representation in its entirety.

Paragraphs 1, 2, 4, and 5 of the Association's proposal, as written, require the District to maintain a certain staffing level at the District's school libraries as well as specify the types of substitutes to be used in the event of absences. The determination of what services will be offered is a matter of managerial prerogative and, therefore, these portions of the

Association's proposal are outside the scope of representation. Alum Rock Union Elementary School District (6/27/83) PERB Decision No. 322; Newark Unified School District, supra.

The hearing officer found that paragraph 3 of the proposal, which requires the designation of a librarian at each intermediate and high school to be a department chairperson with appropriate benefits, was negotiable. The District failed to except to this determination. However, because we find that the hearing officer's conclusion would result in a serious error of law, we will review it sua sponte. Fresno Unified School District, supra.

In our view, a proposal which requires the District to designate one librarian at each library to be a "department chairperson" impinges on management's right to determine how it will structure its workforce. Whether or not management wishes to have a departmental chairperson system in its libraries or some other system of authority is a managerial prerogative. Mt. San Antonio Community College District (Mt. San Antonio II), supra.

Based on the above analysis, we find that the Association's entire proposal concerning library staffing is nonnegotiable, and dismiss that portion of the Association's charge alleging that the District's failure to negotiate the proposal was a violation of the Act.

8. Librarians' Working Conditions

The Association sought to negotiate a proposal related to the impact of layoffs on the working conditions of librarians. This proposal provided:

1. The librarian's work day and work year shall be the same as that established for the classroom teacher as shown in Article VI. Any additional work time required of the librarian shall be compensated at an amount which shall be daily pro-rated on the salary of the individual involved.

2. The library shall be closed at least five working days during the school year for inventory and clearance procedures. The specific date(s) of closing shall be mutually agreed upon by the principal and school librarian.

3. The librarian shall be reimbursed at the established pay scale for work performed either prior to the beginning or after the end of the established school year.

4. The school librarian shall be entitled to a "prep period" whenever classroom teachers at the same school are given a "prep period."

5. Each school librarian shall be given a duty-free lunch period. During that period, the school library shall be closed, or it shall be supervised by other certificated personnel.

6. In the event that the school library is open to students before and/or after regular school hours, during recess, or during brunch or lunch periods, the school librarian shall not be required to perform the additional supervisory duties including, but not limited to yard duty, bus duty, lunch area duty, etc.

7. The school librarian, by mutual agreement with the school library program administrator and principal, shall be responsible for establishing the policies and procedures for the operation of the library. These policies and procedures shall include, but are not limited to, selection of library materials, determination of the hours of operation of the library, scheduling of classes, determination of circulation procedures and policies for the use of materials, and the establishment of procedures for the use of the school library.

8. Students shall not be assigned to the library in lieu of a regular class period, or as a substitute for a study hall.

9. School librarians shall receive Professional Growth Credit for active participation in monthly professional meetings.

10. For increased and increasing responsibilities in fulfilling required job activities, the Technical Librarian shall be given one salary increment in addition to salary for the regular school year. Additionally, the extra twenty days of work performed before and after the regular school year shall be compensated for on a pro rata basis of the annual regularly scheduled salary.

11. In order to provide required services as stated in the librarian's job descriptions, the district budget shall reflect: at the intermediate and high school levels, $10.00 per ADA for library books, $5.00 per ADA for audio-visual materials; at the elementary level, $6.00 per ADA for library books, $3.00 per ADA for audio-visual materials. A separate amount shall be budgeted for supplies in the amount of $.50 per ADA at every level for supplies, e.g. charge cards, date due slips, forms, office supplies, etc.

12. The library staff at any and all site level libraries in the district shall be entitled to district level central library processing services (to include but not be limited to: ordering, receiving, cataloging, physical processing, bibliographic information, book repair, etc.) at no cost to the individual site.

The hearing officer found that paragraphs 2, 11, 12, and part of paragraph 8 of this proposal were outside of the scope of representation. He found paragraph 2 nonnegotiable because it would impinge on management's right to direct its employees during work hours. He found paragraphs 11 and 12 nonnegotiable because they seek to negotiate budgetary allocations and the type of services offered. He found paragraph 8 nonnegotiable to the extent to which it seeks to negotiate the assignment of students but that, insofar as the proposal might relate to the impact of layoffs on the number of hours librarians are required to work, it was within the scope of representation.

The hearing officer found all other portions of the proposal to be within the scope of representation and the District's failure to negotiate them to be a violation of the Act.

The Association excepts to the hearing officer's finding that certain of the proposals were outside the scope of representation.

Although the District does not except to the hearing officer's determination that the other parts of the proposal

were negotiable, we find it necessary to review them sua sponte in order to avoid a serious mistake of law. Fresno Unified School District, supra.

We affirm the hearing officer's determination that the proposals contained in paragraphs 2, 8, 11, and 12 are outside of the scope of representation.[27] All of these proposals, as the hearing officer noted, seek to negotiate matters we have previously found to be fundamental to managerial control and, as such, are outside of the scope of representation. Management has no obligation to negotiate over its budgetary process (Anaheim Union High School District (3/26/82) PERB Decision No. 201), its staffing needs (Alum Rock, supra), or the assignment of students to District programs (Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7/16/79) PERB Decision No. 96).

Similarly, we find paragraph 7 nonnegotiable in its entirety, since it clearly impinges on management's right to determine how it will structure its library operation, what library services it will offer, and who shall be in charge of the library system.

The remaining portions of the proposal (paragraphs 1, 3, 4, 5, 6,9 and 10) raise the question of whether employees may, in

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[27]We disagree, however, with the hearing officer's determination that paragraph 8 is partially negotiable. We find the entire paragraph nonnegotiable.

the course of negotiations over the effects of layoffs, demand to negotiate additional compensation or other benefits as a quid pro quo for increased workload or other effects of layoffs. We find that, as a general rule, such subjects are negotiable only to the extent that they are consistent with existing contractual benefits, do not represent an attempt to renegotiate terms and conditions of employment established by a collective agreement, and do not impermissibly interfere with managerial prerogatives.

Paragraph 1, in part, requires that librarians[1] hours and work year shall be the same as that established for teachers. Since the parties' collective agreement covers librarians and establishes the hours of employment and workyear of those employees, we can find no basis upon which the employer would be obligated to renegotiate this issue during negotiations concerning the impact of layoffs.

Paragraph 1, in part, also requires that librarians who perform overtime work be compensated on a pro rata basis for that work. Similarly, paragraph 3 requires that the District ' pay librarians for extra work performed prior to or after the end of the regular school year. Although, as a general matter, extra pay for overtime work resulting from a layoff would be negotiable, we find that the parties' collective agreement already covers this issue. Article XVIII, Subsection 106 of the collective agreement provides, in relevant part:

> Teachers[28] who are authorized to receive extra compensation on an hourly basis for work in addition to their regular assignment (i.e., summers, weekends, non-work days and evenings) shall receive $11.75 per hour for each additional hour computed to the nearest quarter hour. Assignments for which hourly compensation may be paid shall include but not be limited to:
>
> Drivers Education
> Summer School
> Curriculum Development
> Staff Development

Absent some evidence that the extra-compensation provisions of Article XVIII do not cover extra work performed by librarians, we must conclude that this issue has been negotiated by the parties and may not be required to be renegotiated in this context.

Paragraph 4 entitles librarians to the same amount of preparation time as classroom teachers. We find this proposal negotiable. Since the parties' agreement is silent as to preparation time, and there is sufficient evidence to indicate that layoffs could foreseeably result in increased workload for librarians, we find this proposal negotiable.

Paragraph 5 requires the District to give teachers a duty-free lunch period and close District libraries during those periods. We find this proposal nonnegotiable. Article VI, subsection 26 of the collective agreement already provides

[28]Article III, subsection 3 of the agreement makes all of its provisions applicable to all members of the certificated unit, including librarians.

that librarians "shall be entitled to a duty free, uninterrupted lunch period." The requirement that the District close its libraries during lunch periods is also nonnegotiable as it interferes with management's right to determine how to structure its operations and at what time of the day to offer its services to the public.

Paragraph 6 seeks to limit the type of extra duties which librarians may be required to perform before or after regular school hours. We find this proposal to be nonnegotiable. Article VI, subsection 22 of the parties' collective agreement provides:

> Each teacher may be assigned duties which are related to their responsibilities as a teacher. Such duties may include, but are not limited to:
>
> Staff meetings of reasonable length
>
> Parent Student Conferences
>
> IEP
>
> EAS/SAT.

Thus, the parties' collective agreement covers the extra duties that librarians may be required to perform. We conclude, therefore, that the Association waived its right to negotiate the extra duties of librarians for the term of the agreement.

We find that paragraphs 9 and 10 bear no discernible relationship to the District's decision to lay off and are,

therefore, nonnegotiable in the course of negotiations limited to the impact of layoffs.

Based on the above analysis, we find that only pararagraph 4 of the Association's proposal concerning librarians' working conditions is negotiable. The District's refusal to negotiate that portion of the proposal was a violation of subsections 3543.5(a), (b) and (c) of the Act. With respect to the other portions of the proposal, the Association's allegation that the District refused to negotiate in good faith is dismissed.

9. Transfers

The Association sought to negotiate a proposal related to the transfer of librarians as an impact of layoffs. That proposal provided:

> 1. Transfers of school librarians shall be done according to the procedures set forth in Article X.
>
> 2. Seniority in the District's library program shall be initiated from the date of employment as a credentialed librarian with the District.
>
> 3. A librarian shall not be reassigned to duties as a classroom teacher, on either a part-time or full-time basis except under the following circumstances:
>
> (a) Pursuant to the request of the librarian;
>
> (b) Pursuant to a drop in enrollment which forces the closing of the school at which the library is located, in which circumstances the policies regarding transfers and seniority shall apply.

The hearing officer found that this proposal was negotiable in its entirety, and that the District's refusal to bargain was a violation of its duty to negotiate in good faith. The District did not except to this determination. However, to avoid a serious mistake of law, we find it necessary to review the negotiability of the proposal. Fresno Unified School District, supra.

Parargraph 1 and part of paragraph 3 of the proposal seek to insure that librarians are transferred in accordance with the transfer provisions of the parties' collective agreement. Since the contract covers the issue at hand, the Association's proposal is superfluous, and need not be negotiated.[29]

Paragraph 2 of the proposal attempts to negotiate the method of determining the seniority of District librarians in the event of transfer. Article X, subsection 54(c) of the parties' collective agreement establishes the method of

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While we find that an employer has no obligation to negotiate the inclusion of preexisting contract rights in a mid-term addendum to a collective agreement, it is not similarly shielded from an obligation to negotiate the recitation of statutory rights in such an agreement. By including statutory rights in an agreement, the parties create a contractual remedy for violation of those statutory rights in addition to any remedies established by the statute itself. In contrast, the mere recitation of preexisting contract rights in a mid-term addendum to the parties' agreement has no legal significance. We can find no violation of the Act in an employer's refusal to include superfluous contract language in an addendum to the original contract where the inclusion of such language would have no effect on the rights of the parties.

determining seniority in the event of transfer. Since this issue is covered by the existing collective agreement, it need not be renegotiated.

Paragraph 3, in part, seeks to restrict the right of management to reassign librarians to teaching duties. In the absence of some evidence that reassignment of librarians to teaching duties was a foreseeable result of the District's decision to lay off, we cannot find this portion of the proposal negotiable.

Based on the above analysis, we dismiss that portion of the Association's charge alleging that the District violated the Act by refusing to negotiate the proposal related to transfer of librarians.

10. Early Retirement Incentives and Preparation Time

The Association sought to negotiate proposals related to early retirement and preparation time as an impact of the District's layoff decision. The hearing officer failed to make findings concerning these proposals. Neither the District nor the Association excepted to the hearing officer's failure to rule on the negotiability of these proposals. Since the scope of representation issues raised by these proposals were not briefed or litigated, we have no basis upon which to render a decision. Accordingly, the portion of the Association's charge alleging that the District refused to negotiate concerning these proposals is dismissed.

Request For Oral Argument

Pursuant to PERB rule 32315,[30] the District requests that the parties be permitted to present oral argument before the Board. Given the voluminous record in this case and the ample briefs of the parties, we see no purpose which would be served by granting such a request. Accordingly, its request is denied.

REMEDY

The hearing officer ordered the District to negotiate with the Association concerning those proposals found to be within the scope of representation. In addition, in order to facilitate effective negotiations, he ordered the District to pay a limited monetary award patterned after that long in use by the NLRB and federal courts. See Transmarine Navigation Corp., supra; NLRB v. Royal Plating and Polishing Co., supra; First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705]. Under such a remedy, the employer must pay wages lost by employees as the result of an employer's unlawful conduct until the parties complete negotiations or certain

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[30]PERB rule 32315 provides:

> A party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file, with the statement of exceptions or the response to the statement of exceptions, a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument.

other conditions are met. Rather than ordering the District to pay lost wages to those employees who were laid off, as is the more usual remedy, the hearing officer ordered the District to pay employees not subject to the layoff verifiable losses in extra-duty stipends or compensation for additional hours they worked as a result of the layoffs.

The hearing officer's back pay award was based, at least impliedly, on a finding that, in addition to refusing to negotiate the effects of its decision to lay off, the District unilaterally increased the caseload of counselors and librarians and eliminated the stipends of several employees who were not reappointed as coaches in the 1980-81 school year. Although he did not analyze these alleged unilateral changes as a distinct violation of the Act, he nevertheless ordered the District to pay compensation to the affected employees.

The Board has long held that an employer violates its duty to negotiate in good faith by unilaterally changing an established policy concerning matters within the scope of representation without negotiating with the exclusive representative. Such conduct, absent a valid defense, is a per se violation of an employer's duty to negotiate in good faith. Grant Joint Union High School District, supra; Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. While we agree that a unilateral change in wages and working conditions

of employees might constitute a discrete violation of the Act independent of the District's refusal to negotiate the effects of the decision to lay off, we cannot, in the posture of this case, find such a violation.

Whether or not the hearing officer correctly found, as he apparently did, that, as a result of the District's decision to reduce certificated services, it unilaterally increased the workload of District counselors and librarians and altered the stipends of coaches during the ensuing school year, we cannot find an independent violation of the Act since the Association never filed an independent unfair practice charge. The Association's unfair practice charge in this case was filed on March 25, 1980, and alleges that the District refused to negotiate in good faith concerning the effects of its decision to lay off certificated employees. Although evidence concerning unilateral changes that occurred in the fall of 1980 was introduced at the hearing, the Association neither amended its unfair practice charge nor filed a new charge independently alleging a violation of the District's duty to negotiate in good faith. As such, this later conduct can only be used as background evidence for adjudicating the earlier unfair practice charge and may not form the basis of a finding that the District independently violated the Act. Therefore, we conclude that the hearing officer's award of back pay based on

that conduct exceeded his jurisdiction within the confines of this case.[31]

We, therefore, turn to fashioning a remedy appropriate to the circumstances of this case.

Subsection 3541.5(c) empowers the Board to fashion a remedy which will best effectuate the purposes of the Act. We have found that the District violated its duty to negotiate in good faith by refusing to negotiate the implementation and effects of its decision to lay off certificated employees.

Since the District's decision to lay off was nonnegotiable, we find it inappropriate to order the reinstatement of the employees laid off. However, because the District unlawfully refused to negotiate the implementation and effects of its decision to lay off, we find it appropriate to order the District to negotiate, upon demand, those proposals which we have found to be within the scope of representation. However, with respect to implementation of layoff issues, we have found that, due to the District's unlawful unilateral conduct, the Association developed only one detailed bargaining proposal on such an issue. Accordingly, we find it appropriate to order the District to negotiate any implementation of layoff issue which is consistent with the decision herein.

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[33]Although the Board has, on several occasions, found Unalleged violations, it has never extended this principal to conduct occurring after the filing of the unfair practice charge. See Santa Clara Unified School District (9/26/77) PERB Decision No. 104.

In addition, in order to assure that meaningful negotiations occur, we find that a limited back pay order is appropriate. Solano County Community College District, supra.; NLRB v. Transmarine Navigation Corp., supra; NLRB v. Royal Plating and Polishing Co., supra. Accordingly, we order the District to pay to the employees laid off a sum equal to their wages at the time they were laid off from the first day the Association requests to bargain following issuance of this Decision, until occurrence of the earliest of the following conditions: (1) the date the parties reach agreement; (2) the date the statutory impasse procedure is exhausted; (3) the failure of the Association to request negotiations within thirty (30) days of service of this Decision; or (4) the subsequent failure of the Association to negotiate in good faith.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Mt. Diablo Unified School District violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act. Pursuant to Government Code subsection 3541.5(c), it is hereby ORDERED that the District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Mt. Diablo Teachers Association, CTA/NEA, concerning the effects of its decision to lay off certificated employees.

2. Denying the Mt. Diablo Teachers Association, CTA/NEA, the right to represent its members by failing and refusing to meet and negotiate in good faith over the effects of its decision to lay off certificated employees.

3. Interfering with employees in the exercise of rights guaranteed to them by the Educational Employment Relations Act by failing and refusing to meet and negotiate in good faith over the effects of its decision to lay off certificated employees.

B. TAKE THE FOLLOWING ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Upon request, meet and negotiate with the Mt. Diablo Teachers Association, CTA/NEA, within thirty-five (35) days after issuance of this Decision regarding the implementation of layoff and the following specific negotiating proposals related to the effects of layoffs which the Board has found to be within the scope of representation: paragraphs 1, 3, and 4 of the "Impact of Layoff" proposal; the "Counselor Workload" proposal in its entirety; paragraph 4 of the "Librarian Working Conditions" proposal.

2. Pay to the employees laid off a sum equal to their wages at the time they were laid off from the first day the Association requests to bargain following issuance of the PERB Decision, until occurrence of the earliest of the following conditions: (1) the date the parties reach agreement; (2) the date the statutory impasse procedure is exhausted; (3) the failure of the Association to request negotiations within thirty (30) days of service of this Decision; or (4) the subsequent failure of the Association to negotiate in good faith.

3. Within 35 days of service of this 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. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that said Notices are not reduced in size, altered, defaced or covered by any other material.

4. Notify the San Francisco regional director of the Public Employment Relations Board, in writing, of the steps the District has taken to comply herewith in accordance with her instructions.

5. The unfair practice charge filed by the Mt. Diablo Federation of Teachers, Local 1902, CFT/AFT,AFL-CIO in Case No. SF-CE-455 is DISMISSED.

6. The District's request for oral argument pursuant to PERB rule 32315 is DENIED.

This Order shall become effective immediately upon service of a true copy thereof on the Mt. Diablo Unified School District.

Member Burt joined in this Decision.

Member Morgenstern's concurrence and dissent begins on p. 75.

MORGENSTERN, Member, concurring in part and dissenting in part: I am in agreement with the majority's decision with the following exceptions.

I do not agree with the majority's conclusion that the Education Code renders the Association's same-date-of-hire proposal nonnegotiable. The statutory language directs that the governing board shall determine the order of termination solely on the basis of needs of the district and the students. Unlike the majority, I do not find this to establish an inflexible or immutable standard which is inconsistent with the duty to negotiate in good faith. San Mateo City School District v. PERB (1983) 33 Cal.3d 850. Specifically, while the current Code section replaced the previous provision which required the use of a lottery for selection among same-date-of-hire employees, the extant statutory language does not now decree that a lottery system, or any system, is necessarily and under all circumstances incompatible with the needs of the District and students. The current Education Code section simply eliminates the requirement that the lottery be universally used and, instead allows each local entity the discretion to decide upon any system it desires as long as the system selected is based on the statutory criteria.

The District is not prevented or excused from negotiating on a system that meets the statutory criteria, though it may not agree to any system which is not based solely on the needs

of the District and the students. The needs of the District and the students, whether or not specifically mandated by statute, are presumably the goal of every district decision. However, as meeting the employees' needs is a need of any employer, and as the collective bargaining process is the preferred way of meeting those needs under EERA, negotiations can and should occur within the constraints set forth by the Legislature.

I again diverge from the majority over a matter related to management's obligation to negotiate the impact or effects of layoff. The majority finds sufficient evidence to link the layoff to "a reasonably foreseeable adverse impact" even where management denied that such impact was foreseeable and no evidence was ever introduced to prove that any impact, in fact, materialized.

The Board's decision to require negotiating on the effect or impact of layoffs (or any other managerial decision or act) on matters within scope means that management cannot successfully defend against a charge that it unilaterally changed a matter within scope by arguing that the change was peripherally or essentially related to the decision to lay off. However closely related to a decision within management's exclusive purview, any decision that causes an impact on a matter within scope is negotiable. But there must be an effect or an impact, a unilateral change of a matter within scope,

before there can be a violation. Because the majority decision can result (and does here) in a violation being found where no actual change in a matter within scope occurs, I must dissent from that aspect of the decision.

It cannot possibly be denied that layoff will affect the wages or hours of the laid-off employee. The decision that an employee is to be laid off is also a decision that the employee's wages and hours will be changed and, thus, the latter aspect of that decision is always immediately negotiable.

Other impacts or effects of layoff, typically those that relate to retained employees, may be less certain. It may appear reasonably foreseeable that when a counselor (for example) is laid off, the remaining counselors will have their hours and/or caseload increased. However, in such circumstances, management may assert a good faith belief that an impact will not occur. Indeed, management may exercise its prerogative by unilaterally changing methods or operations not in scope in such a way as to avoid any actual change in negotiable matters. This course of action is pursued by management at its peril and, therefore, a refusal to bargain over a "reasonably foreseeable" impact may well evidence bad faith where and when such impact does occur. However, my dispute with the majority is that there is no violation in management's refusal to further negotiate over demands relative to a reasonably foreseeable impact if in good faith it foresees no such impact and, in fact, no such impact occurs.

Based on this conclusion, I would find that the District did not unlawfully fail to negotiate as to nurses, no evidence of actual impact having been presented.

As to the proposal seeking preparation periods for librarians, I find no evidence that preparation periods were eliminated or reduced. Thus, there is no impact. In my view, the likelihood of an impact on preparation periods is similar to the likelihood of librarians being reassigned to teaching duties as a result of the layoff, an eventuality the majority finds not foreseeable.

Finally, I must also disassociate myself from the majority's conclusion that a unilateral change in negotiable matters might constitute a discrete violation, independent of the duty to negotiate the effects of the layoff decision. To the contrary, the negotiable component of the layoff decision is, by definition, that which affects the wages, hours, and enumerated terms and conditions of employment. What the majority might envision as a separate unilateral change is none other than the demonstrable effect of management's decision to lay off some of its workers.

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. SF-CE-452, in which all parties had the right to participate, it has been found that the Mt. Diablo Unified School District has 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 we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Mt. Diablo Teachers' Association, CTA/NEA, concerning the effects of its decision to lay off certificated employees.

2. Denying the Mt. Diablo Teachers Association, CTA/NEA the right to represent its members by failing and refusing to meet and negotiate in good faith over the effects of its decision to lay off certificated employees.

3. Interfering with employees in the exercise of rights guaranteed to them by the Educational Employment Relations Act by failing and refusing to meet and negotiate in good faith over the effects of its decision to lay off certificated employees.

B. TAKE THE FOLLOWING ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Upon request, meet and negotiate with the Mt. Diablo Teachers Association, CTA/NEA regarding the implementation of layoff and the following specific negotiating proposals related to the effects of layoffs which the Board has found to be within the scope of representation: paragraphs 1, 3, and 4 of the "Impact of Layoff" proposal; the "Counselor Workload" proposal in its entirety; paragraph 4 of the "Librarian Working Conditions" proposal.

2. Pay to the employees laid off a sum equal to their wages at the time they were laid off from the first day the Association requests to bargain following issuance of the PERB Decision, until occurrence of the earliest of the following conditions: (1) the date the parties reach agreement; (2) the date the statutory impasse procedure is

exhausted; (3) the failure of the Association to request negotiations within thirty (30) days of service of the Decision; or (4) the subsequent failure of the Association to negotiate in good faith.

Dated: MT. DIABLO UNIFIED SCHOOL DISTRICT

By _____
Superintendent

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 DEFACED, ALTERED OR COVERED BY ANY MATERIAL.