STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TEMPLE CITY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-2789 LA-CE-2800
v.	)	
TEMPLE CITY UNIFIED SCHOOL DISTRICT,	)	PERB Decision No. 841
Respondent.	)	September 20, 1990

Appearances: Charles R. Gustafson, Attorney, for Temple City Education Association, CTA/NEA; John J. Wagner, Attorney, for Temple City Unified School District.

Before Craib, Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal of a proposed decision (attached) of an administrative law judge (ALJ), finding that the Temple City Unified School District (District): (1) violated section 3543.5(a), (b) and (e) of the Educational Employment Relations Act (EERA or Act)[1] by altering the status quo regarding unit members' fringe benefit levels for the 1988-89 school year; and (2) violated EERA section 3543.5(a) by interfering, through communications issued by the District's superintendent, with employees' exercise of rights guaranteed by EERA. Both the

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

District and the Temple City Education Association, CTA/NEA (Association) filed exceptions to the proposed decision.

We have carefully reviewed the entire record, including the proposed decision, the District's exceptions, the Association's response to the District's exceptions, and the Association's exceptions, and, finding the ALJ's findings of fact and conclusions of law to be free of prejudicial error, adopt the ALJ's proposed decision as the decision of the Board itself, insofar as it is consistent with the discussion below.

DISTRICT'S EXCEPTIONS

1. Exception to The ALJ's Taking of Administrative Notice of other Unfair Practice Files.

The District argues that the ALJ acted improperly in taking administrative notice of other PERB unfair practice files without first giving notice to the parties on the record that he intended to take administrative notice of these files. The District refers to that portion of the proposed decision wherein, as a matter of historical background, the ALJ noted a history of antagonism between the parties beginning with the negotiations leading to their 1986-1989 contract. Presumably to illustrate this antagonism, the ALJ quoted extensively from Temple City Unified School District (1987) PERB Decision No. HO-U-325, an earlier case between the parties to the dispute herein. (See Proposed Decision, pp. 15-16.) The District contends that the ALJ drew an inference of bad faith in the instant unfair practice

proceeding based upon the findings of the ALJ in the earlier Temple City case.

First, we note that based upon the facts of this case, a finding of bad faith bargaining on the part of the District in the earlier case is irrelevant to the issue of whether the District engaged in bad faith bargaining. Therefore, we find the ALJ's quotation from the earlier Temple City case to be irrelevant and inappropriate. However inappropriate the ALJ's reference to that case might have been, we find the reference to be nonprejudicial to the District. We reject the District's contention that the ALJ drew an inference of bad faith in this unfair practice proceeding based upon the finding of the ALJ in the earlier Temple City. In fact, the ALJ makes no reference to that case in the discussion portion of his proposed decision. Furthermore, the ALJ did not find that the District engaged in a course of overall bad faith bargaining during the negotiations or impasse process. The conclusion that the District failed to participate in good faith in the impasse procedures was based solely upon the District's unilateral change in the fringe benefit status quo, an act which constitutes a per se refusal to participate in good faith in the impasse procedures.[2] Nevertheless, for the above reasons, we do not adopt that portion

[2]As we reject the ALJ's use of the excerpt from the earlier Temple City decision based on the fact that that excerpt is irrelevant, and as the ALJ's ultimate conclusions were not based upon that information, we need not decide here under what circumstances notice to the parties and opportunity to respond is mandated before an ALJ takes official notice of an earlier case between the same parties.

of the proposed decision that refers to and quotes from the earlier Temple City case.

2. Exception to ALJ's Drawing of Adverse Inference as to Witnesses' Credibility.

The District objects to the ALJ's drawing of an adverse inference as to Richard Anthony's (Anthony) credibility with reference to what occurred in the 1986-89 contract negotiations. Both Association and District witnesses testified over the significance and placement of the asterisks in Appendix A of the contract. The Association contended that the location of those asterisks required the District, for the entire three year contract term, to make a contribution equivalent to the cost (whatever it might be) of the Blue Cross Health Plan for the employee and one dependent, together with the cost of the other asterisked mandatory plans and options. The District's witnesses, including Anthony, testified that the asterisks applied only to the second year of the contract, and for the third year there was no agreement on any amount.

Our review of the record has revealed no basis upon which to disturb the ALJ's credibility determinations concerning the significance and placement of the asterisks. The credibility determination challenged by the District was based, in part, on the ALJ's finding of fact that Anthony was "mistaken" about the testimony of another witness he heard testify on a prior day of the unfair hearing. (See Proposed Decision, p. 11-12, fn. 6.) Significantly, the ALJ discredited Anthony's testimony as to the

asterisks and reached the conclusions he did on Anthony's testimony based not only upon the specific inaccuracy referenced in the District's exceptions, but also upon his observations that: (1) had the District instructed the mediator that the asterisks did not apply to the third contract year, the mediator would likely have communicated that fact to the Association; (2) the contract language does not contain any qualification regarding applicability of the asterisks; and (3) the District's assertion to the Association of a third year exclusion was so untimely as to cast doubt on its validity. In fact, the ALJ stated: "Moreover, the overall record supports a finding that the District never clearly communicated to the mediator the condition for the third contract year." (Proposed decision, pp. 13-14.)

The Board normally gives deference to the credibility determinations of its ALJs, in recognition of the fact that, by virtue of witnessing the live testimony, they are in a much better position to accurately make such determinations than the Board, which reviews only the cold transcript of the hearing. (Santa Clara Unified School District (1979) PERB Decision No. 104, pp. 12-13; Beverly Hills Unified School District (1990) PERB Decision No. 789, pp. 8-9.) Based upon our review of the entire record, we reject the District's challenge to the ALJ's credibility determination and to his findings of fact based in part on that determination.

3. Exception to the Finding of an Unfair Practice Based Upon District Superintendent's September 27, 1988 and October 24, 1988 Written Communications.

The District's analysis in support of its exception to the ALJ's finding of an unfair practice based on his analysis of the September 27, 1988 and October 24, 1988 communications is sketchy at best. The District appears to be arguing that the ALJ relied upon these written communications "to effectively vitiate the entire bargaining effort the District went through prior to its adoption of its last, best and final offer." These documents were not, however, relied upon by the ALJ in finding a 3543.5(c) violation, but rather as the basis of his determination that a 3543.5(a) violation occurred. Thus, the ALJ found:

> Based on all of the above, the September 27, 1988, communication tends to interfere with employees' protected rights to file grievances and to be represented by their union in employment matters. Hence, the District violated EERA section 3543.5(a) by issuing the document to employees. (Proposed decision at p. 37.)

The ALJ further found:

> Under all the circumstances present here, the District violated EERA section 3543.5(a) by issuing the October 14, 1988, letter to its employees. (Proposed decision at p.38.)

Next, the District argues that the ALJ's finding of an unfair practice based upon these communications "has a great 'chilling' effect an [sic] any type of communications by a public employer with its constituency which is the public at large."

In Carlsbad Unified School District (1979) PERB Decision

No. 89, p. 10, the Board set forth the test for determining when an employer's actions interfere with the rights of employees guaranteed by EERA. Under the Carlsbad test, a charging party establishes a prima facie case of interference under EERA section 3543.5(a) only "[w]here the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA. . . ." As more fully explained below, employer speech causes no cognizable harm to employee rights granted under EERA unless it contains "threats of reprisal or force or promise of a benefit." Therefore, a prima facie case of interference cannot be based on speech that contains no "threats of reprisal or force or promise of a benefit."

In Rio Hondo Community College District (1980) PERB Decision No. 128, pp. 18-20, this Board looked to the National Labor Relations Act (NLRA) for guidance in formulating a test for determining when employer communications will be considered violative of the provisions of EERA. Specifically, the Board examined section 8(c) of the NLRA which provides:

> The expressing of any views, argument, or opinion, or the disssemination [sic] thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Noting that EERA contains no provision parallel to section 8(c), the Board nevertheless found that "a public school employer is nonetheless entitled to express its views on employment related

matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate" and set forth the test to be applied as follows:

> The Board finds that an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. (At p. 20.)

Whether the employer's speech is protected or constitutes a proscribed threat or promise is determined by applying an objective rather than a subjective standard. (California State University (1989) PERB Decision No. 777-H, Proposed Decision, p. 8.) Thus, the charging party must show that the employer's communications would tend to coerce or interfere with a reasonable employee in the exercise of protected rights. The fact that employees may interpret statements, which are otherwise protected, as coercive does not necessarily render those statements unlawful. (Regents of the University of California (1983) PERB Decision No. 366-H, fn. 9, pp. 15-16; B.M.C. Manufacturing Corporation (1955) 113 NLRB 823, [36 LRRM 1397].)

The Board has also held that statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. (Los Angeles Unified School District (1988) PERB Decision No. 659, p. 9 and cases cited therein.)

Additionally, the Board has placed considerable weight on the accuracy of the content of the speech in determining whether

the communication constitutes an unfair labor practice. (Alhambra City and High School Districts (1986) PERB Decision No. 560, p. 16; Muroc Unified School District (1978) PERB Decision No. 80, pp. 19-20.) Thus, where employer speech accurately describes an event, and does not on its face carry the threat of reprisal or force, or promise of benefit, the Board will not find the speech unlawful.

a. Communication of September 27, 1988

In this case, the District is accused of making two inappropriate communications to employees. We agree with the ALJ that the September 27, 1988 "Report on Negotiations" would tend to interfere with employees' protected rights to file grievances and to be represented by their exclusive representative in employment matters. Specifically, we agree with the ALJ's finding that the portions of the report stating that negotiations on financial matters could not continue and no financial commitments could be made until "all grievances are resolved" are threatening and coercive. We also agree that the District's statement that it could not even "offer" salary percentage increases as long as the grievances were being processed constitutes threat of a punishment (delay in economic benefits) based on the unit members' exercise of their rights to file grievances and participate in related activities.

We do not adopt, however, the ALJ's finding that the statements by the District blaming the Association for the breakdown in negotiations, and comparing the Association

unfavorably to exclusive representatives for other units who settled in a "cooperative and timely" manner, were improper. While this portion of the report may have been critical of the Association, we find that the District did not express a preference for one organization over another but, rather, merely stated its opinion on the character and status of its negotiations in a manner that cannot be construed as threatening or coercive. The ALJ cited no authority to support his supposition that, in circumstances such as these, an employer violates the Act merely by being critical of a union or making unfavorable comparisons with exclusive representatives for other units.

Furthermore, we do not adopt that portion of the ALJ's proposed decision wherein he characterizes the District's statement of intention to call in professional negotiators as a threat. We find that any implied threat of economic impact from such a decision is too attenuated to take the statements out of the realm of protected employer free speech.

b. Communication of October 24, 1988

Regarding the October 24, 1988 communication, we agree with the ALJ that some statements in the document can be construed as promising benefits to employees who have not filed grievances.

4. Exception to ALJ's Conclusion That, Having Committed an Unfair Labor Practice by Unilaterally Changing the Status Quo on Benefits, the District Was Not Lawfully Entitled to Implement its Last, Best and Final Offer on Health and Welfare Benefits.

The District argues that the fact it unlawfully implemented a unilateral change should not preclude it from implementing its "last, best and final offer." We find, contrary to the contentions of the District, that the ALJ presented a cogent argument based on relevant case law to support his conclusion that the District was not entitled to implement its "last, best and final" offer, having already illegally altered the status quo during the negotiations process. In short, the right to implement the "last, best and final" offer is dependent on having first bargained in good faith through the exhaustion of statutory impasse procedures.

In another exception, the District contends that the ALJ erred in finding that the District could not implement its "last, best and final" offer in light of his conclusion that the District engaged in "overall good faith bargaining for a 1990 contract." The District misconstrues the ALJ's decision.

PERB uses both a "per se" and a "totality of conduct" test in determining whether a party's negotiating conduct constitutes an unfair practice, depending on the specific conduct involved and its effect on the negotiating process. (Regents of the University of California (1985) PERB Decision No. 520-H; Pajaro Valley Unified School District (1978) PERB Decision No. 51.) The duty to bargain in good faith requires the parties to negotiate with genuine intent to reach agreement and a "totality of conduct" test is generally applied to determine if the parties have bargained in good faith. This test looks to the entire

course of negotiations to see whether the parties have negotiated with the required subjective intention of reaching an agreement. Certain acts have such potential to frustrate negotiations and undermine the exclusivity of the bargaining agent that they are held to be unlawful without any finding of subjective bad faith. These are considered "per se" violations. (Pajaro Valley Unified School District, supra.)

While the ALJ, applying the "totality of conduct" test, dismissed the Association's allegation that the District engaged in a course of overall bad faith during the entire impasse process, the ALJ specifically found that the District's failure to maintain the status quo on fringe benefits constituted a "per se" refusal to participate in good faith in the impasse procedures. Under existing case law cited by the ALJ, such a finding justifies the ALJ's conclusion that the District was precluded from implementing its "last, best and final" offer on fringe benefits at the conclusion of the impasse proceedings.

ASSOCIATION'S EXCEPTIONS

The Association takes exception to the Order on the ground that the Order is ambiguous as to the make-whole remedy accorded the unit members. The Association argues that the status quo ante can be restored if the District is ordered to pay all unit members the difference between the $3,000.00 and the contractually mandated $4,407.10 for the period of the 1988-89 school year (the third year of the contract) up to the point in time when the District adopted its "last, best and final" offer

of $3,500.00. Thereafter, unit members should be paid the difference between $3,500.00 and $4,407.10. The Association further contends that the unit members should be allowed the opportunity to purchase life insurance now and to put the balance of the money into their flexible spending accounts to pay for uncovered medical expenses. We decline to adopt the suggestion proffered by the Association. The Order set forth in the proposed decision provides a make-whole remedy and no more. The Order is consistent with orders issued by this Board in other unfair practice cases wherein this Board has found a unilateral change in health benefits to have occurred. (See Oakland Unified School District (1980) PERB Decision No. 126, pp. 9-10; Compton Community College District (1989) PERB Decision No. 720-a, p. 5.) To clarify the Order, however, we will specify that the monetary losses that are compensable are "out of pocket monetary losses."

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing the status quo regarding fringe benefits.

2. Interfering with the Association's and employees' rights to file grievances and exercise rights under the Educational Employment Relations Act.

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

1. Compensate unit employees for out of pocket monetary losses incurred as a result of altering the status quo concerning fringe benefits, measured by the cost of the options marked with an asterisk on Appendix A of the 1986-89 contract between the District and Association. The District's obligation to make employees whole for such losses covers the period beginning with October 1., 1988, and runs until the Association and the District reach agreement or exhaust impasse procedures in good faith over the subject, whichever occurs first.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

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

Members Craib and Camilli joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case Nos. LA-CE-2789 and LA-CE-2800, Temple City Education Association, CTA/NEA v. Temple City Unified School District, in which all parties had the right to participate, it has been found that the Temple City Unified School District (District) violated sections 3543.5(a), (b) and (e) of the Educational Employment Relations Act (Act). The District violated the Act when it changed the status quo in unit members' fringe benefits beginning with the 1988-89 school year. It also violated the Act when Superintendent Wesley Bosson issued two improper written communications to employees on September 27, 1988 and October 24, 1988.

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing the status quo regarding fringe benefits.

2. Interfering with the Association's and employees' rights to file grievances and exercise rights under the Educational Employment Relations Act.

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

1. Compensate unit employees for out of pocket monetary losses incurred as a result of altering the status quo concerning fringe benefits, measured by the cost of the options marked with an asterisk on Appendix A of the 1986-89 contract between the District and Association. The District's obligation to make employees whole for such losses covers the period beginning with October 1, 1988, and runs until the Association and the District reach agreement or exhaust impasse procedures in good faith over the subject, whichever occurs first.

Dated: TEMPLE CITY UNIFIED SCHOOL DISTRICT

By _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

TEMPLE CITY EDUCATION ASSOCIATION CTA/NEA, Charging Party, V. TEMPLE CITY UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case Nos. LA-CE-2789 LA-CE-2800 PROPOSED DECISION (4/12/90)

Appearances: Charles R. Gustafson, Attorney, for Temple City Education Association, CTA/NEA; John J. Wagner, Attorney, for Temple City Unified School District.

Before Manuel M. Melgoza, Administrative Law Judge.

PROCEDURAL HISTORY

The Temple City Education Association, CTA/NEA (Union, TCEA or Charging Party) filed Unfair Practice Charge LA-CE-2789 on October 6, 1988, and LA-CE-2800 on November 7, 1988. The General Counsel's Office of the Public Employment Relations Board (PERB or Board) issued a Complaint on January 17, 1989, based on both charges. The charges were formally consolidated on January 20, 1989. The Temple City Unified School District (District, Respondent or Employer) filed an Answer to the Complaint on January 26, 1989.

A PERB administrative law judge conducted a settlement conference between the parties on February 17, 1989. The parties did not settle the dispute, and the case was scheduled for a formal evidentiary hearing.

The TCEA filed a Motion to Amend the Complaint and an Amended Unfair Practice Charge on March 21, 1989. After giving the Respondent an opportunity to file a reply, the Motion was partially granted by the undersigned via Order dated April 25, 1989.

As amended, the Complaint alleges, essentially, that the District: a) failed to participate in good faith in PERB's impasse procedures evidenced by statements made at and away from the bargaining table; b) failed to participate in good faith in the impasse procedures by conditioning agreement on non-mandatory subjects of bargaining; c) interfered with the exercise of employee rights under the Educational Employment Relations Act[1] (EERA or Act) through written statements to employees; and d) unilaterally implemented a fringe benefits contribution rate in a manner inconsistent with the status quo.

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[1]The EERA is codified at Government Code section 3540 et seq. The pertinent portions read:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

On April 26, 1989, the first day of the evidentiary hearing, the matter was continued until May 18, 1989, to allow the District to prepare a response and defense to the amendment to the Complaint. The Respondent filed an Answer to the Amended Complaint and a Motion to Dismiss the Amendment on May 3, 1989. Respondent argued that the matter should be deferred to binding arbitration. The Charging Party filed a response to the Motion on May 12, 1989.

When the hearing resumed on May 18, 1989, the parties presented testimony, documents and further argument on the Motion to Dismiss. The undersigned denied the Motion to Dismiss on the record. The hearing was recessed, at Respondent's request, so the District could appeal the ruling to the Board itself.

The Respondent appealed the ruling on about June 8, 1989. The Union filed a Response to the Appeal. In Temple City Unified School District (1989) PERB Order No. Ad-190, the Board affirmed the undersigned's ruling.

The evidentiary hearing resumed on October 3 and 4, 1989. After the hearing ended, the Charging Party filed an opening brief. The Respondent filed a reply brief on January 3, 1990. The Charging Party elected not to file a closing brief. At the end of the briefing schedule, January 29, 1990, the case was submitted for proposed decision.

FACTS

The events in question occurred during the term of a collective bargaining agreement (contract) between the parties. The contract was effective from November 1, 1986, through June 30, 1989. In the second year (academic year 1987-88) of the contract, the Union had the right to reopen for negotiations only two subjects - salaries and calendar. In the third year (1988-89), either party could reopen negotiations on salaries, fringe benefits, calendar, and two other articles of their choice.

The contract, at Article I (Agreement) also contained the following paragraph:

> 7. The District agrees to increase its contribution to each unit member's fringe benefits equal to the increase in premiums.

Article XV of the contract (Health and Welfare Benefits) specified the available fringe benefits. The entire provision reads:

> 1. The District agrees to provide each eligible unit member with fully paid health and welfare benefits during the term of this Agreement. The fully paid coverages include the following:
>
> a) the unit member's participation in one of the medical plans offered by the District and described in Appendix A of this Agreement;
>
> b) the unit member's participation in one of the dental plans offered by the District and described in Appendix A of this Agreement;

c) the unit member's participation in the vision plan offered by the District and described in Appendix A of this Agreement;

d) the unit member's participation in a basic term life insurance plan offered by the District and described in Appendix A of this Agreement.

2. The District's contribution toward each unit members health and welfare benefits shall be the equivalent of the total cost of the options marked with an asterisk on Appendix A. Unit members who choose a set of options which exceed the total cost of the options marked with an asterisk must sign a payroll deduction for the difference. Unit members who choose a set of options which cost less than the total cost of the options marked with an asterisk may apply the unused fund at the teachers discretion for health and welfare purposes, as listed in Appendix A.

"Appendix A" is a form entitled "health and welfare benefit selection sheet." The form has blanks for each unit member's name, address, etc. In addition, the sheet lists various mandatory medical, mandatory dental, mandatory vision, mandatory life, optional life, and optional accident insurance plans.[2] Across from each insurance plan is the cost of each plan and/or option for the particular year that the selection sheet

[2]According to uncontradicted testimony, the District has traditionally required employees to buy certain types of employer-sponsored insurance plans.

designated.[3] The sheet contained a column for calculating the premium of each selection and for subtracting the District's contribution from the total if the premiums exceeded that contribution.

If the District's contribution exceeded the total cost of the benefits, the surplus was put in a "flexible spending account" for the employee. The employee could use the account to, inter alia, pay for uncovered medical expenses. If the cost of the benefits exceeded the District's contribution, the District deducted the difference from the employee's wages.

The "asterisks" mentioned in the contract were distributed only within the mandatory insurance plans and located at specific options. Appendix A was a copy of the "health and welfare benefit selection sheet" for the 1986-87 school year. The asterisks were distributed on that sheet as follows:

> Medical - Blue Cross (Base +) employee and one dependent
> Dental - CDS (Delta Dental) employee only
> Vision - Medical Eye Services of California
> Mandatory Life - United Olympic Life - employee and dependent coverage

On the sample sheet, the premiums in the asterisked areas totalled $270.00, an amount equalling the District's contribution for the 1986-87 year. Therefore, if the employee made choices

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[3]For example, in 1986-87, the cost for "Blue Cross Base +" for the employee only was $163.00, for employee and one dependent, $233.00, and for employee and two or more dependents, $270.00. The cost of Health Net was $99.17, $200.51, and $288.27 respectively. The dental, vision, and life insurance premiums remained constant whether or not the employee elected coverage for dependents.

outside the asterisked areas, he/she would have a surplus or deficit depending on the total cost of the options selected.

In the second year of the contract (1987-88), the premiums increased for most (all but Health Net) of the medical plans. The premiums for the dental insurance plans remained the same, as did those for the optional life insurance plans. The premiums for one of the vision plans remained the same, but a second plan, underwritten by PMI, was added at a slightly higher premium than the other vision carrier's plan. The premiums for the mandatory life insurance plans rose slightly.

For the 1987-88 school year, the District made a tenthly contribution of$300.00 toward each unit member's benefit package. The Employer's contribution of $300.00 was equivalent to the premiums for an employee and one dependent under the previous medical plan and under the other options asterisked in Appendix A ($299.88).[4]

In the third year (1988-89) of the contract, the Union chose fringe benefits as one of the topics for reopener negotiations. In March 1988, TCEA proposed that the District: increase its contribution sufficient to add a more expensive dental plan (Delta Dental Family Plan); add a tax sheltered annuity program and an income protection plan to the fringe benefit options; and establish a committee to explore the possibility of including

[4]The Blue Cross (Base+) premiums for that year were $213.00 (employee only) and $263.00 (employee and one dependent).

unit members in the Social Security program.[5] The District countered in May 1988, with the following proposal.

HEALTH AND WELFARE BENEFITS

1. The District agrees to provide each eligible unit member with a medical plan as offered by the District and described in Appendix A of this agreement.

2. The District's contribution toward each unit members health and welfare benefits shall be the equivalent of the total cost of the options marked with an asterisk on Appendix A. Unit members who choose a set of options which exceed the total cost of the options marked with an asterisk must sign a payroll deduction for the difference. Unit members who choose a set of options which cost less than the total cost of the options marked with an asterisk may apply the unused fund at the unit members discretion for health and welfare purposes, as listed in Appendix A.

The District did not attach an "Appendix A" to the proposal. Union witnesses testified they believed the reference was to Appendix A in the existing contract. Assistant Superintendent Richard Anthony, on the District's negotiating team, testified that the appendix mentioned in the counterproposal referred to an appendix which was still "being developed." In other words, there would be another Appendix A to negotiate. The District never explained this alleged meaning to the Union and no new

[5]The Union also submitted reopener proposals on the subjects of salaries and transfers.

appendix was ever given to the Union's team. There is no evidence that the District ever developed a new Appendix A.

After 2 or 3 bargaining sessions, the parties could not reach agreement on the reopened articles. The last face-to-face negotiating session occurred in August 1988.

In mid to late August the District distributed a fringe benefit selection sheet for unit members to select their options. The timing of the dissemination appears to have no connection with the negotiations. Rather, the District traditionally distributed the sheets weeks before the start of the school year, to be completed and returned by the second week of September. Normally, the health insurance contracts with the various carriers began on October 1 of each school year.

The selection sheet showed the District's contribution was $300.00 - the amount contributed for the previous school year. However, the premiums of the medical plans had increased to the point where $300.00 was not enough to pay for all of the previously asterisked plans and options. Indeed, the Blue Cross (Base +) plan covering the employee only, by itself cost $299.05. If employees selected that option, the District's contribution would not have been enough to purchase any of the other mandatory insurance plans.

On about September 14, 1988, the Union filed a grievance on behalf of Janice Murasko, TCEA president. The grievance alleged that the District breached the contract by limiting its benefit contribution to $300.00 tenthly. TCEA contended that the

contract required the District to contribute $440.71. This amount equalled the total premiums of Blue Cross (Base +) for the employee and one dependent ($402.91), Dental for employee only ($27.62), Medical Eye Services of California for the employee only ($7.26), and United Olympic Life for the employee and dependent coverage ($2.88). About fifty similar grievances were filed on behalf of other unit members.

The reopener negotiations proceeded to impasse and through mediation without agreement. After the parties exhausted the impasse procedures, they were still unable to agree. Then, in April or May 1989, the District unilaterally changed its contribution rate to $350.00 tenthly. It was made retroactive to October 1, 1988. Those employees who had selected a benefit package exceeding the District's former contribution of $300.00 were reimbursed up to $500.00 for the year. Those whose fringe benefit package did not exceed the contribution were credited with the $500.00 difference. The credit was applied to their flexible spending accounts. They could not, however, make retroactive changes or purchase additional benefits from the selection sheet.

The District's past practice was to allow employees to select a benefit package only once. No employee could change his/her package after initially selecting from the sheet.

A. The Bargaining History

One of the disputes here is over the significance and placement of the asterisks in Appendix A of the contract. The Union contends that the location of those asterisks required the District, for the entire three-year contract term, to make a contribution equivalent to the cost (whatever it might be) of Blue Cross (Base +) for the employee and one dependent, together with the cost of the other asterisked mandatory plans and options. The District claims the asterisks applied only to the second year of the contract, and for the third year there was no agreement on any amount, since it was subject to reopener negotiations.

According to TCEA negotiating team member Beverly Jones, the parties discussed the notion of the asterisks at one of the initial 1986 negotiations sessions. The Union proposed that, instead of specifying dollar amounts for fringe benefits - something that had always delayed agreement in past negotiations - the two teams should indicate by using asterisks on a sign-up sheet which plans would be paid by the District.[6] Tom Brown,

[6]Thomas Brown and Beverly Jones testified that using asterisks was the Union team's idea. I credit their testimony in this regard and discredit District witness Richard Anthony's assertions to the contrary. Brown's account, explaining the conversation during early negotiations surrounding the asterisk idea, was precise and detailed. District witness Steven Hodgson did not specifically deny that the Union had raised the idea of using asterisks before impasse was reached. Brown appeared candid while testifying on this subject, as did Jones. Also, Charging Party witnesses' accounts are consistent with Hodgson's testimony that the District's past philosophy was not to agree to commit itself to pay future unknown costs. When it did agree, Hodgson testified it signaled "a big departure" from previous

also on TCEA's team during the session, testified that he explained to Assistant Superintendent Richard Anthony that the asterisks were meant to identify those plans that the District would be responsible for paying in subsequent years of the contract. For the District, Anthony responded it was interested in healthy employees and healthy families and would be happy to provide a good program and plan. However, the District did not accept the proposal at that time.

District negotiations team member Steven Hodgson testified that the District was not willing to commit to unknown costs over such a long period. There is no evidence that this explanation was given to the Union's team, however. The subject did not come up again until the parties were engaged in mediation after impasse had been reached.

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practice. Anthony's testimony that it was the District's team who initially came up with the idea during mediation, is discredited. Although Anthony's account was detailed, it was given on the second day of the hearing, the first day of which Anthony was in the hearing room when Brown and Jones gave their accounts. And although Anthony testified with certainty that the idea was solely the District's, he also testified with equal certainty about something over which he was clearly in error. Specifically, he asserted forcefully that Union witnesses had testified the previous day that the asterisks were shown in the Union's initial written proposal. The record plainly demonstrates, however, that Brown and Jones both testified that the Union first proposed the asterisks during one of the initial sessions. They never said the asterisks were contained in their initial proposal. Since TCEA submitted its initial written proposal (Respondent's Exhibit A) to the District before any negotiation sessions took place, Union witnesses were obviously not testifying that the asterisks were contained in that initial proposal. Anthony's suspect testimony in other areas - e.g., that during 1988 reopeners the District was developing a new Appendix A to the contract, which was curiously never mentioned nor given to the Union - renders his testimony questionable in this area as well.

In mediation, no face-to-face discussions between the parties took place. During that time, the District team decided to make a departure from its previous unwillingness to commit to an unknown cost of future fringe benefits. According to Hodgson's testimony, the District decided to use asterisks to identify the plans it would pay for, but instructed the mediator to tell the Union they only applied to the second year of the contract. This portion of Hodgson's testimony is discredited for various reasons. It is based on an affirmative response to a leading question from the District's counsel. Indeed, Hodgson's overall testimony in this area is marked by repeated prodding with leading questions.

Anthony's testimony that the District instructed the mediator that the asterisks did not apply to the third contract year is also not credited. There is no evidence to dispute Union negotiators' testimony that neither the District nor the mediator told them the asterisks did not apply to the third year. It is implausible that the mediator would make such a material omission, especially in light of the District's allegedly strong previous philosophy against committing itself to unknown costs, and considering the apparent contradiction this would have revealed with language in Article XV, paragraph 1. That provision states that the District will provide fully paid benefits for the entire contract term.

Moreover, the overall record supports a finding that the District never clearly communicated to the mediator the condition

for the third contract year. The Union had no reason to believe there was such a condition and therefore was surprised to learn about it for the first time during the processing of the fringe benefits grievances in 1988. The contract's language does not contain any such qualification. The District traditionally funded fringe benefits at a level which always included the cost of the most expensive health benefit plan (Blue Cross (Base +•)) for the employee and one dependent. The District's initial reopener proposal alluded to an Appendix A and, since no such appendix was attached to it, ostensibly and logically it referred to the one in the existing contract, consistent with the District's traditional funding practices. Therefore, the timing of the District's assertion to the Union of a third-year exclusion is also suspect, warranting the conclusion that the District never bargained to exclude academic year 1988-89 from the fringe benefit provisions of the contract.

B. The District's Conduct During Mediation in 1988-89

The parties' past relationship is useful in understanding the Respondent's communications to employees during impasse, alleged to be unlawful here.

The PERB certified TCEA as the District's certificated employees' exclusive bargaining agent on June 20, 1977.[7] There

[7]Official notice is taken of PERB's official representation files Temple City Unified School District, LA-R-97, Temple City Unified School District, LA-M-1621, and Temple City Unified School District, LA-M-1908. Administrative agencies may officially notice matters within their files. Antelope Valley Community College District (1979) PERB Decision No. 97; Mendocino Community College District (1980) PERB Decision No. 144.

is little evidence available about the parties' bargaining relationship between 1977 and 1986. However, beginning at least with the negotiations leading to the 1986-89 contract, there was some antagonism.

In Temple City Unified School District (1987) HO-U-325 [11 18118], a PERB administrative law judge found the District to have violated EERA sections 3543.5(c), (a) and (b).[8] The decision stated:

> The evidence, in sum, shows that the District entered [the 1986] negotiations with a take-it-or-leave-it attitude. When the Association failed to agree to the District's condition that the existing contract be continued substantially unchanged, the District stalled negotiations for four months. Throughout this time period and until impasse, the District threatened the Association with the loss of its protected right to have dues withheld, an independent violation of the EERA. When the District returned to the table, it insisted to impasse that the Association waive its statutory rights to have dues deducted and to use employee mailboxes, also independent violations. During the negotiations prior to impasse, the District refused to discuss salary and fringe benefits until prior agreement was reached on all other contract terms. In addition, the District proposed that the Association agree to a procedure whereby it could be decertified as exclusive representative upon a finding by the District, a plan doubtlessly illegal under the EERA.

[8]The decision was not appealed. As such, the findings are binding on the parties, although the decision is without precedent for future cases. 8 Cal. Admin. Code sections 32215 land 32305. The findings in the quoted decision are set forth to provide a background for the events and statements occurring during the time in question.

> This evidence establishes an intent to subvert the negotiating process and an intent to delay and obstruct a timely agreement, in short, a failure to negotiate in good faith. For these reasons it is found the [sic] the District has violated EERA section 3543.5(c). . . .
>
> In addition, it is found that the District separately failed to negotiate in good faith by insisting to impasse that the Association agree to contractual language waiving its statutory rights to dues deduction and use of employee mailboxes. Finally, it also is found that the District interfered with the rights of both individual employees and the Association in violation of EERA sections 3543.5(a) and (b) by threatening to cancel the deduction of dues of Association members. Id., at pp. 21-22.

In the 1988 reopener negotiations, impasse was declared on August 29, 1988, the last negotiations session before mediation started.

At that session, the Union's team challenged the District's intent to limit its fringe benefit contribution to $300.00 per month for 10 months. The TCEA offered to move the asterisks (on attachment A of the current contract) to a cheaper health plan if the District would agree to increase the options as the Union had earlier proposed - Delta Dental Family Plan, tax sheltered annuity and income protection. The Union offered to place the asterisks in such a way that the total Employer contribution would be somewhat less than $350.00 per month - rather than the $440.00 the Union believed they were already entitled to. The District agreed with the concept that the total Employer contribution should be about $3500.00 per employee per school year. However, it rejected the offer because there were other

financial matters still on the table with undetermined costs. Therefore, the District indicated that, in the meantime, the contribution would remain at $300.00.[9]

In that context, the mediation process began. PERB determined that impasse existed on August 31, 1988. As noted earlier, the Union's grievances concerning the health and welfare benefit contribution were filed on or about September 14, 1988.

Between September 14 and 27, 1988, the parties met with a PERB appointed mediator.[10] The meeting was abbreviated and no progress was made.

On September 27, 1988, the District's superintendent, Wesley Bosson, issued for distribution a document entitled, "Public Report on Negotiations." The document began with introductory statements that negotiations With CSEA, a union representing another bargaining unit, had been completed "in a cooperative and timely manner." It followed with an explanation of the monetary and fringe benefits gained by employees in that unit. The flyer added that negotiations with another union had also been completed, yielding employees in that unit certain increases in salaries and fringe benefits.

The bulk of the document then discussed negotiations with TCEA. It reads as follows:

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[9]Other employee bargaining units had already been granted a fringe benefit contribution for the 88-89 school year of $350.00 per month.

[10]The exact dates and times are not sufficiently clear from the record. Charging Party's exhibit 7 seems to indicate that the session occurred on September 22, 1988.

Once again, negotiations have broken down with the teachers union. Although the District was available for negotiating with TCEA during the summer, no meetings could be scheduled until August 29, according to the new TCEA President. At that meeting, impasse was declared, by mutual agreement. Subsequently over 50 (so far) grievances were filed, all dealing with fringe benefits.

Mediation was set for September 22. The Mediator ended mediation by noon and instructed that he not be contacted until either party changed its position.

Grievances - Teacher grievances deal with the amount of District contribution already committed to fringe benefits. TCEA is interpreting current contract language as obligating the District to $4,400 for each Unit Member, without negotiating fringe for this year. Two years ago it was mutually agreed to not negotiate for the second year of the contract, and to negotiate the 3rd year of the 3-year contract. This is the 3rd year. At that time asterisks were used to determine the amount of the District contribution for the second year since negotiations were not going to occur. At all times, all parties understood that % and fringe would be negotiated the third year, which is now.

Approximately 50 grievances have been processed so far at Level I. The Union is now encouraging teachers to submit their grievances to Level II. If any grievance goes to arbitration, beyond Level II, the process could take several months.

The district cannot agree to any financial commitment until all grievances are completely processed, including binding arbitration. Once all grievances are resolved, negotiations could continue. The possible financial effect on the District, if it were to lose arbitration could be as much as $180,000.

% - No percentage increase has yet been offered to the Union. Of course, no increase can be offered as long as grievances are

being processed, due to the possible financial implications of arbitration. The current position of TCEA is a demand for 8%.

Language - No discussion has yet occurred on the District's position to freeze teachers on the salary schedule who receive a less than satisfactory evaluation. TCEA has maintained an inflexible position on transfers and leaves language. The District's position remains that current contract language, negotiated not long ago, is more than sufficient.

Salary Schedule - Although TCEA has requested a restructuring of the current Certificated salary schedule, which would alter class movement for units earned, the District simply cannot afford to expend several hundred thousand dollars to satisfy the request. The District is not opposed to attempting to work out a new schedule over a longer period of time which would be economically feasible to implement. The District cannot meet this request at this time and still provide a reasonable increase to salaries and fringe benefits.

Mediation - There seems to be some confusion as to what happened in mediation prior to the Mediator breaking it off. The District was told by the Mediator that Mr. Tom Brown, CTA spokesman at the table, made this statement, "the District will not get an agreement at 4% and $3,5000 [sic] fringe benefits, nor will it get an agreement unless it agrees to our language."

The District's position in mediation is that we cannot commit any dollars for negotiations until all grievances had been processed through the timeline outlined in the current contract or we received written assurance that no grievances (now or later) on the fringe benefit matter would be sent, by the Union, to binding arbitration.

Future Negotiations - And so we wait. No further negotiations are planned at this time. Additionally, for the first time in the history of this District, we are now requesting that the Governing Board authorize

the Superintendent to solicit bids from professional negotiating firms for the purpose of employment in our negotiations with CTA/TCEA in the years to come.

Negotiations with the teachers' union has become so unpleasant, uncooperative and unproductive, that the expenditure request seems justified at this time.

[Signed] Wesley A. Bosson, Ed.D, Superintendent

TCEA mailed to PERB charge number LA-CE-2789 on about September 30, 1988, attaching a copy of the above flyer.

On about October 24, 1988, Superintendent Bosson issued another communication, this time to those unit members who were not among the 50 who had filed grievances on the fringe benefit controversy. The pertinent portions read:

> The deadline for submitting a Level I grievance on the fringe benefit matter has passed. I am aware that your union president and CTA representative had urged you to submit a grievance, saying "in order to be included in the settlement, you must initiate the grievance as soon as possible."
>
> The purpose of this letter is to assure you of three things:
>
> 1. You have a right to submit a grievance, and the District would not interfere with that right. You have always had that right in this District . . . it's nothing new.
>
> 2. Your union president and CTA representative were wrong in telling you that you would have to file a grievance in order to be included. Whatever the outcome of any arbitration, we would like you to have the same benefits, without necessarily submitting a grievance.
>
> 3. And, finally, I want to thank you for trusting this District's leadership.

> You will not regret the faith that you have put in us to be fair. (Emphasis added.)

The parties next met with the mediator on about October 25, 1988. Out of the Union's presence, the District discussed with the mediator its concern over the potential liability (estimated at $180,000) which might result from the grievances. With the mediator's participation, the District prepared a proposal, which the mediator delivered to TCEA.[11] The substantive proposal reads:

> 1. The District cannot make any financial commitment until all grievances on the fringe benefit matter have been resolved, withdrawn or completed either the timeline for arbitration submittal or arbitration itself.
>
> 2. The District is, however, interested in discussing other issues of a non-financial nature, even though a PERB unfair charge is pending by TCEA on this matter.
>
> 3. The following could be agreed upon as a "package":
>
> a. 3% increase to the salary schedule and extra duty assignment schedule
>
> b. Income protection and family dental available as an option, at no expense to the District
>
> c. Agree to ad hoc committee to work with Assistant Superintendent to develop a plan for conversion of salary schedule to be presented to

[11]At this point, the mediator carried all communications between the parties. There were no face-to-face discussions.

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d. Agree to freeze less than satisfactory teachers on the salary schedule

e. Agree to current language in last year of the contract on Transfers and Leaves

f. Signed assurances of no further grievance procedures (binding arbitration or PERB review) of health and welfare matter. Also drop PERB unfair

When the mediator relayed the proposal to the Union, there was no discussion about the propriety or negotiability of any of the elements in the proposal. The Union's team did not tell either the mediator or the District that any matter contained there was outside the scope of representation or was otherwise an improper subject of bargaining. However, the Union did not accept the proposal.

The District continued to work through the mediator. A subsequent proposal from the District did not provide for the Union's dropping of the grievances or the unfair practice charge.

The parties did not arrive at a contract through mediation. Their negotiations disputes proceeded to factfinding in late November 1988. Six issues were submitted for a factfinding panel's consideration. The panel's final report, issued February 21, 1989, made recommendations regarding the pending grievances. However, it was not at the District's request. Rather, the District, through a memorandum to PERB dated December 6, 1988,

suggested that the fringe benefit matter be resolved separately through the grievance procedure.[12]

The parties met after the factfinding panel issued the report. The District then made a "last, best and final offer" without conditions on the grievances or the unfair practice charge. The proposal included an employer contribution rate for fringe benefits of $3500 per unit member per academic year or $350 per month. The TCEA did not accept it.

In the meantime, the District and the Union exchanged correspondence, arguing over whether the Union had to submit all 50 grievances to arbitration in order to get a remedy covering the entire unit. The Union advocated unsuccessfully to have one grievance serve as a "class action grievance." The District refused to so stipulate, arguing consistently to the TCEA that Murasko's grievance should result in a remedy, if any, only for Murasko. The Union eventually dropped all but one (Janice Murasko's) grievance, and the District implemented its "last, best and final offer."[13] That included the District's fringe benefit contribution of $350 per unit member per month,

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[12]See impasse file, Temple City Unified School District, LA-M-1908; and footnote 6, supra.

[13]The Union dropped the other grievances without having obtained the stipulation from the District, but hoping to successfully argue during arbitration that Murasko's grievance would resolve the fringe benefit question for the whole unit. This hope was based in part on the District's October 24, 1988, letter to employees described above at pages 20-21. The arbitrator later refused to consider the issues raised by the Murasko grievance as applying across-the-board to other unit members.

retroactive to October 1, 1988. As of the date of this hearing, the arbitrator had not issued an award on the remaining grievance.

DISCUSSION

An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and violative of EERA section 3543.5(c). Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94. When unilateral changes occur during EERA's impasse procedures, they are considered violations of EERA section 3543.5(e). Moreno Valley Unified School Dist. v. Public Employment Relations Bd. (1983) 142 Cal.App.3d 191 [191 Cal.Rptr. 60]. Health and Welfare benefits are enumerated subjects within the scope of representation under EERA section 3543.2.

A collective bargaining agreement may set forth established terms and conditions of employment. Grant Joint Union High School District (1982) PERB Decision No. 196. Where a contract is silent or ambiguous, established policy may be determined by examining past practice or the parties' bargaining history. Rio Hondo Community College District (1982) PERB Decision No. 279. If the contractual language governing the policy in question is not ambiguous, extrinsic evidence such as bargaining history is not considered. Regents of the University of California (1989) PERB Decision No. 771-H; Marysville Joint Unified School District

(1983) PERB Decision No. 314, at p. 9. Even where the language is somewhat ambiguous, extrinsic evidence may be considered only to establish a meaning to which the contract is reasonably susceptible. Victor Valley Community College District (1986) PERB Decision No. 570, at p. 18.

There is no ambiguity in Article I, paragraph 7 and the entire Article XV of the contract involved in this case. The former provision requires the District to increase unit member's fringe benefits contributions in an amount equal to yearly increases in premiums. The latter provisions plainly require the Employer to provide fully paid medical, dental, vision, and basic life insurance coverage. The District's contribution is dependent not only on the type of plans corresponding to the placement of asterisks on an appendix, but, according to the plain language of paragraph 2 of Article XV, by the cost of the options within those plans, as specifically marked by the asterisks. The asterisks on the appendix are placed on Blue Cross (Base +) - the most expensive medical plan - and, specifically, on the option labelled "employee and one dependent."

The District argues, pointing to evidence of bargaining history, that the above provisions were not meant to apply to the third year of the contract. Such an argument is inconsistent with the contract's plain meaning. Even if some ambiguity were assumed for the purpose of argument, the contract language is not reasonably susceptible to that meaning. Nowhere does the

contract state that the articles in question apply only to the first two years of the contract. At no time during the negotiations/mediation process did the District achieve an understanding from the Union that the articles above did not apply to the third year. If that were the District's intent, that qualification never found its way into the agreement. Certainly, the Union never considered or agreed to that interpretation.

The District extrapolates from other general contract provisions to conclude that it is not bound to absorb premium increases during the third contract year. It cites Article I, paragraph 5, which allows both parties to reopen negotiations only on salaries, fringe benefits, calendar and two other articles for the 1988-89 school year. From this, Respondent concludes that the specific issue of the fringe benefits contribution for the third year was excluded from the contract. According to District witnesses, its negotiators interpreted the language to mean that the entire fringe benefits article was therefore not effective for all three years of the contract.

That view must be rejected. It is not supported by evidence of at-table discussions between the parties demonstrating that anyone on the Union's team shared that interpretation. No one testified that that interpretation was expressed during bargaining in the presence of TCEA's negotiators. Whether it was the District's intent to exclude the third year from the contract is irrelevant if it was never communicated to and agreed upon by

the Union's negotiating team. The fact that Appendix A was a sample benefits selection form only for the 86-87 year cannot, by itself, support a finding that the entire benefits provisions were inapplicable in 88-89. Neither can the plain language of the contract be read to mean that the fringe benefits provisions were not applicable to the third year simply because the subject could be reopened for negotiations. Quite the contrary, Article XV, paragraph 1 unqualifiedly states that "[t]he District agrees to provide each eligible unit member with fully paid health and welfare benefits during the term of this Agreement." (Emphasis added.) The District cites no precedent for the seemingly illogical proposition that terms and conditions of employment are automatically exempted from contracts when the parties voluntarily elect to reopen them for negotiations during the contract's term.

The District asks rhetorically why the parties would agree to reopeners on fringe benefits if the District was already required to pay for increases in premiums. The answer is found simply by looking at evidence of what the parties actually did in this case. The Union sought to reopen the article in the spring of 1988 to include more options - a more expensive dental plan, to add to the fringe benefit options, a sheltered annuity program and an income protection plan, and to establish a committee to explore the possibility of including employees in the Social Security program - in addition to a contribution rate exceeding previous year levels. Likewise, the District could have reopened

the article to, for example, add or delete plans and options, argue for a reduced contribution rate, etc. Either party could have reopened the article for purposes other than simply changing the Employer contribution.

Even assuming, arguendo, the fringe benefits provisions were suspended for the third contract year, the District is required by law to maintain the status quo pending completion of negotiations. Compton Community College District (1989) PERB Decision No. 720; Marysville Joint Unified School District, supra, PERB Decision No. 314; Excelsior Pet Products, Inc. (1985) 276 NLRB 759, 763 [120 LRRM 1117]; Hinson d/b/a Hen House market No. 3 v. NLRB (1970) 428 F.2d 133 [73 LRRM 2667].[14]

In San Joaquin County Employees Assn. v. City of Stockton (1984) 161 Cal.App.3d 813 [207 Cal.Rptr. 876], the Court held that, pending negotiations, an employer must maintain the status quo in terms of an expired labor agreement by paying any increases in health insurance premiums needed to provide the previous level of insurance coverage to employees.[15]

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[14]It is appropriate to look at how courts construe provisions in other collective bargaining statutes for guidance in interpreting parallel provisions of the EERA. See San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 12-13 [154 Cal.Rptr. 893]; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616 [116 Cal.Rptr. 507].

[15]The case involved an employer's bargaining obligations under the Meyers-Milias' Brown Act (MMB) (Gov. Code section 3500 et seq.), a collective bargaining statute similar in many ways to the EERA. Section 3505 of the MMB requires a city to meet and confer in good faith with employee representatives before making any unilateral change in the level of wages or benefits. The MMB has also been interpreted to require, as does the EERA, an employer to maintain the status quo during negotiations. San

In an argument similar to the one advanced by this District, the employer in that case contended that it met its obligation to maintain the status quo by spending the same amount of money to provide benefits as it had done under an expired memorandum of understanding (contract). It argued that it was not bound to pay for increased premiums and was justified in deducting increased costs from employees' paychecks.

The Court held that the expired contract required the employer to provide a certain level of benefits, not to make a specific amount of premium contributions.[16] Therefore, the employer was required to absorb increases in premiums required to maintain that level of coverage.

Here, the contract language also requires the maintenance of a certain level of benefits, some of which the District deems mandatory. While the contract provided for a specific amount of money as the Employer's contribution for the first year of the contract, it did not provide for a specific dollar amount for the next two years because the premiums for those were not

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Joaquin County Employees Assn. v. City of Stockton, supra, at p. 820.

[16]The contractual provisions involved in that case stated:

> For the term of this Memorandum of Understanding, the City shall pay premiums that are necessary and sufficient to provide substantially equivalent benefits for hospitalization, medical, dental/orthodontic and vision benefits that were in effect January 1, 1981.

ascertainable at the time the contract was reached. Rather, for those years the contribution would be determined by the eventual cost of options identified by asterisks on a sample health and welfare benefit selection sheet.

For the third year of the contract (1988-89), the cost of those options originally asterisked in Attachment A to the contract were: $402.95 for Blue Cross (Base +); $27.62 for Delta Dental; $7.26 for Medical Eye Services of California; and $2.88 for United Olympic Life. In order to maintain the status quo, the District was required to make a total contribution per unit member of at least $440.71.

By making a contribution of only $300 per employee, the District therefore changed the status quo, thereby violating EERA section 3543.5(e) and, derivatively, 3543.5(b).[17]

Even assuming that any portion of the 1986-89 contract was ambiguous, it is determined that the bargaining history supports the interpretations made above.

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[17]An EERA section 3543.5(c) violation is not found for the following reasons. Although the benefit selection sheets were distributed earlier, the District's first official announcement to TCEA of the contribution rate occurred at the August 29, 1988, bargaining session. It was at this session that impasse was declared. PERB issued a determination of impasse two days later. Employees had to make their selections by the second week in September. The District implemented the change effective October 1, 1988, the date that health insurance carriers' contracts began. Hence, all but the first event occurred during impasse. When the Charging Party's motion to amend the Complaint in this case was partially granted, the ruling added this allegation to paragraph 5, one dealing only with events during impasse, governed by EERA section 3543.5 (e). The Charging Party did not object that the amendment failed to allege an additional violation under EERA section 3543.5 (c).

Normally, an employer may implement its "last, best and final offer" after the completion of good faith negotiations on the subjects in question. See e.g., Modesto City Schools (1983) PERB Decision No. 291, at pp. 32-33. Here, however, the District implemented its last, best and final offer ($350 benefit contribution rate per employee) not under normal circumstances, but in the context of a refusal to participate in good faith in the impasse procedures - i.e., the failure to maintain the status quo. By disturbing the status quo, the District unilaterally changed the health and welfare benefits levels under the contract, conduct considered per se bad faith. During this period, the Employer began to extract monetary contributions from some employees to pay for benefits it was bound to supply.

Moreover, the District did not attempt to negotiate a reduction of its contribution until well after the unilateral change and after the parties were involved in mediation. Its last, best and final offer, which included a contribution of $350 was not made until post-factfinding meetings. It was the Union that first offered in late August, 1988, to reduce the contribution to $350 on the condition that the District grant its other requests. Up to that point, the Employer had merely proposed virtually identical language from the existing contract.

Essentially, once the District did attempt to bargain for a lower contribution, it forced the Union to negotiate from an altered status quo. In such situations, the mutual dispute resolution process by definition ends because the employer loses

incentive to participate in the process since it has already imposed terms it deemed satisfactory. Moreno Valley Unified School District v. Public Employment Relations Bd. (1983) 142 Cal.App.3d 191, at pp. 197-200 [191 Cal.Rptr. 60]. For all of these reasons, the District was not lawfully entitled to implement its "last, best and final offer" on health and welfare benefits.

The unilateral change affected unit members directly in at least four ways. Those enrolling in the Blue Cross (Base +) for themselves and a dependent were charged with any amounts exceeding the Employer's contribution. Those employees who chose another plan only to avoid having the difference deducted from their pay were deprived of the coverage levels to which they were entitled. Next, all employees were given fewer options overall because of the limited initial Employer contribution of $300 and, later, because they could not make retroactive changes in the benefit package or purchase additional benefits. Finally, even the $350 contribution resulted in less money going into unit member's flexible spending accounts than they would have had available if credited with the proper amount of $440.71. For these reasons, the District's unilateral change interfered with these employees' rights to be represented by TCEA on a mandatory subject of bargaining. Hence, the District also violated EERA section 3543.5(a).

The Union next contends the District violated the EERA by conditioning agreement, during impasse, on non-mandatory subjects

of bargaining - dropping the fringe benefit grievances and withdrawing the unfair practice charges filed with PERB. When one party refuses to negotiate over withdrawal of grievances or unfair practice charges, non-mandatory subjects, it is unlawful for the other party to insist to impasse and during impasse upon inclusion of those subjects in the agreement. Lake Elsinore School District (1986) PERB Decision No. 603. In the Lake Elsinore case above, the Board held that a respondent is initially entitled to propose a non-mandatory subject, "but cannot legally insist upon their acceptance in the face of a clear and express refusal by the Union to bargain over it." However, merely proposing, during mediation, a nonmandatory subject, is not, by itself, an unlawful insistence. Ibid.

Here, the record fails to show an unlawful insistence or conditional bargaining. The District proposed withdrawal of the grievances during the initial phases of impasse process, but later proposals were not conditioned on acceptance of those subjects. A District flyer to employees, occurring away from the table, on September 27, 1988, arguably conditioned bargaining on the completion of processing of the grievances:

> The District cannot agree to any financial commitment until all grievances are completely processed, including binding arbitration. Once all grievances are resolved, negotiations could continue . . . . No [salary] increase can be offered as long as grievances are being processed . . . . The District's position in mediation is that we cannot commit any dollars for negotiations until all grievances had [sic] been processed through the timeline outlined in the current contract or we received written assurance

> that no grievances (now or later) on the fringe benefit matter would be sent, by the Union, to binding arbitration.

The evidence does not show, however, that the District's bargaining conduct comported with its admonitions to employees. Its official proposal of October 25, 1988, originally made in mediation, stated only that the District could not "make any financial commitments" until all the grievances were resolved. Initially, it offered a proposal which included dropping the grievances and the unfair practice charge. By later conduct, however, the District did not condition agreement on those matters and did make financial commitments - including granting salary increases - before the grievances were processed. The evidence of the District's bargaining conduct shows only that it proposed non-mandatory subjects, but did not insist on them throughout the impasse process. The District did not, therefore, insist during impasse on nonmandatory subjects and did not violate the EERA by merely proposing them. The statements made by the District to employees away from the table will be evaluated separately.[18]

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[18]While arguably unlawful statements away from the table may be offered as evidence to prove that bargaining conduct was also in bad faith, the Charging Party offered little specific evidence of bargaining table discussions for the reopener negotiations. From this record, the away-from-the-table statements cannot be evaluated under a totality-of-conduct test. Pajaro Valley Unified School District (1978) PERB Decision No. 51, at pp. 4-5. What little evidence exists of bargaining conduct relating to the statements was offered primarily by the District and militates against a finding of overall bad faith. See, e.g., Alhambra City and High School Districts (1986) PERB Decision No. 560, at pp. 10-12.

PERB has adopted National Labor Relations Board (NLRB) precedent which holds that an employer has a protected right to communicate with employees on employment-related matters, so long as that communication does not run afoul of the National Labor Relations Act section 8(c) standard or constitute an intent or attempt to bypass the exclusive representative.[19] Alhambra City and High School Districts (1986) PERB Decision No. 560, at pp. 15-16; Rio Hondo Community College District (1980) PERB Decision No. 128. Under the EERA, employer speech is deemed unlawful if it evinces reprisals, discrimination, interference with employee rights or coercion. Alhambra City and High School Districts, supra, at pp. 16-17.

Employers may lawfully urge employees to withdraw lawsuits or unfair practice charges regarding working conditions or attempt to dissuade employees from filing obviously nonmeritorious grievances, provided those communications are carried out in a noncoercive fashion. Rio Hondo, supra; Southwestern Bell Telephone Co. (1980) 251 NLRB 625, 631 [105 LRRM 1246]. An employer may not, however, promise benefits to those employees who think or act in conformity with its positions

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[19]The National Labor Relations Act (NLRA) is codified at 29 U.S.C, section 151 et seq. Section 8(c) states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

on issues disputed between management and the union. Rio Hondo, supra, at p. 24.

The NLRB has also found that employer statements linking the loss of work and overtime to a union's pursuit of grievances tend to create a chilling effect on the employees' rights to file and process grievances. St. Regis Paper Company (1980) 247 NLRB 745, 748 [103 LRRM 1180]. It is equally unlawful for an employer to announce to its employees that it is suspending merit salary increases until grievances are resolved. H.M.S. Machine Works (1987) 284 NLRB 1482 [127 LRRM 1056]. The reasoning is that such statements place the onus for management's decision to withhold the increases on the union who filed the grievances. Ibid. In S.E. Nichols, Inc. (1987) 284 NLRB 556 [127 LRRM 1298], an employer violated the NLRA by telling an employee that a previously promised raise was being withheld because of pending NLRB proceedings.

In this case, the District is accused of making two inappropriate communications to employees. The first - Superintendent Bosson's September 27, 1988, "Report on Negotiations" - must be found unlawful when read as whole and considering the relationship between TCEA and the District. As a whole, the document places blame for the breakdown of negotiations on the Union, citing Union delays over the summer, and the fifty grievances. It highlights this by comparing other employee unions who "cooperatively and timely" completed negotiations with the District, members of which are enjoying the

fruits of the bargaining efforts. In contrast, the District blames TCEA for "once again" - implicitly citing the previous negotiations which led to a PERB finding of District unlawful conduct and/or the impasse - causing the breakdown.

Two other messages intertwined in the report suggest that the overall communication was threatening and coercive. The first is evidenced by statements that negotiations on financial matters could not continue and no financial commitments will be made until "all grievances are resolved." The District states that it cannot even "offer" salary percentage increases as long as grievances are being processed. The message is a not-so-subtle punishment (delays in economic benefits) for the unit members' exercising their rights to file grievances and participate in TCEA's related efforts. Following that message is another threat to call in a professional negotiating firm for the first time in the District's history because "negotiations with [TCEA] has become so unpleasant, uncooperative and unproductive, that the expenditure request [for retaining the firm] seems justified at this time." Based on all of the above, the September 27, 1988, communication tends to interfere with employees' protected rights to file grievances and to be represented by their union in employment matters. Hence, the District violated EERA section 3543.5(a) by issuing the document to employees.

Bosson's October 24, 1988, letter to employees who had not filed grievances on fringe benefits also tends to interfere with

employees' exercise of EERA rights. Contextually, it promises to reward employees not filing grievances with "the same benefits" as those obtained by successful grievants. Respondent argues that the letter does not really make a promise because it states "we would like you to have the same benefits" rather than it will grant those benefits. Such a hypertechnical reading of the letter runs counter to the overall message viewed from the perspective of the employees. It is unlikely that employees would have viewed the letter as a statement of opinion devoid of a District intent to keep the promise.[20]

Adding to the message's impropriety is the superintendent's offered to give employees who did not file grievances what the Union was unsuccessful in achieving for them. The Union advocated for one representative grievance to cover all employees, asking that any benefit gained from arbitration would apply across-the-board. The District resisted these efforts, arguing successfully throughout the grievance/arbitration process that any remedy would apply only to a named grievant. The letter, therefore, tended to undermine TCEA's position and erode its support among unit members. Under all the circumstances present here, the District violated EERA section 3543.5(a) by issuing the October 24, 1988, letter to its employees.

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[20] The Board assesses employer speech in light of the impact that such communication had or was likely to have on the reader who, as an employee, may be more susceptible to intimidation or receptive to the coercive import of the employer's message. ~~Rio Hondo Community College District~~ (1980) PERB Decision No. 128, at p. 20.

CONCLUSION

Based on all the above, it is determined that the Respondent violated EERA sections 3543.5(a), (b) and (e) by altering the status quo regarding unit members' fringe benefit levels for the 1988-89 school year. The District also violated EERA section 3543.5(a) by interfering, through documents issued by Superintendent Bosson on September 27 and October 24, 1988, with employees' exercise of rights guaranteed by the Act. The record fails to show that the District conditioned agreement, during impasse, on inclusion of non-mandatory subjects of bargaining. That allegation is hereby dismissed. The District's failure to maintain the status quo on fringe benefits is an act which, by itself, is considered a per se refusal to participate in good faith in the impasse procedures. The Charging Party failed to establish, however, that the District engaged in a course of overall bad faith during the entire impasse process. The allegation that it did so is therefore dismissed.

REMEDY AND ORDER

The PERB has authority, under EERA section 3541.5(0), to fashion appropriate remedies for unfair practices. It is appropriate in this case to order the District to cease and desist from unilaterally changing the status quo on the subject of fringe benefits. An order that the Employer cease and desist from interfering with the employees and the TCEA's EERA rights is also warranted.

In cases involving unilateral action, the Board usually orders the employer to restore the status quo as it existed prior to the action. Santa Clara Unified School District (1979) PERB Decision No. 104. Offending parties have also been ordered to compensate affected unit members for monetary losses incurred as a result of unilateral reductions in benefit plan contributions. Compton Community College District (1989) PERB Decision No. 720, at p. 26. Here, it is impossible to completely restore the status quo ante because employees cannot purchase fringe benefits retroactively. However, the District will be ordered to compensate any affected unit employee for monetary losses incurred as a result of the District's failure to make a fringe benefit contribution of $4,407.10 per employee for the 1988-89 academic year. All monetary losses will include interest at 10 percent per annum. The District's liability to make employees whole for the unilateral change does not end with the District's implementation of its "last, best and final" offer after post-factfinding negotiations, for the reasons set forth above at pages 31-33. See also Compton Community College District (1989) PERB Decision No. 720, at p. 25. Therefore, the District will also be ordered to make affected unit members whole measured by the cost of the options in Appendix A of the 1986-89 contract from October 1, 1988 (the effective date of the insurance carriers' contracts with the District) until the parties reach agreement or exhaust impasse procedures in good faith on the issue.

It is also appropriate to require the District to post a notice incorporating the terms of this Order. The Notice should be subscribed by an authorized agent of the Employer, indicating that it will comply with the terms thereof. The Notice shall not be reduced in size, defaced, altered or covered by any other material. Posting such a notice will inform employees that the Employer has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the Employer's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeal approved a similar posting requirement.

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

A. Unilaterally changing the status quo regarding fringe benefits.

B. Interfering with TCEA's and employees' rights to file grievances and exercise rights under the Educational Employment Relations Act.

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

A. Compensate unit employees for monetary losses incurred as a result of altering the fringe benefits status quo measured by the cost of the options marked with an asterisk on Appendix A of the 1986-89 contract between the District and TCEA. The District's obligation to make employees whole for such losses covers the period beginning with October 1, 1988, and runs until TCEA and the District reach agreement or exhaust impasse procedures in good faith over the subject, whichever occurs first.

B. Sign and post copies of the attached Notice marked "Appendix" in conspicuous places where notices to employees are customarily placed at its headquarters office and at each of its campuses and all other work locations for thirty (30) consecutive workdays. Copies of this Notice, after being duly signed by an authorized agent of the Respondent, shall be posted within ten (10) workdays from service of the final decision in this matter. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other materials.

C. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with her instructions.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, sections 32300, 32305 and 32140.

Dated: April 12, 1990

Manuel M. Melgoza
Administrative Law Judge