STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTERS 759 & 724, Charging Party, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4724-E PERB Decision No. 1883 January 25, 2007
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 788, Charging Party, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4725-E

Appearances: California School Employees Association by Maureen C. Whelan, Staff Attorney, for California School Employees Association & its Chapters 759, 724 and 788; Jose A. Gonzales, Assistant General Counsel for San Diego Unified School District.

Before Duncan, Chairman; McKeag and Neuwald, Members.

DECISION

McKEAG, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the California School Employees Association & its Chapters 759 & 724 (CSEA) of a proposed decision (attached) by an administrative law judge (ALJ). The charge alleged that the San Diego Unified School District (District) violated the

Educational Employment Relations Act (EERA)[1] by refusing to implement a two-tiered leave accrual system for the three bargaining units. CSEA alleged that this conduct constituted a violation of EERA section 3543.5(b) and (c).

The following three units are subject to the instant unfair practice charge: the Operations Support Services unit (OSS); the Paraeducators unit (PARA) and the Office-Technical and Business Services unit (OTBS). The main focus of this case is whether the District committed an unfair labor practice when it failed to implement a two-tiered leave accrual system. The ALJ ruled the District did not commit an unfair labor practice when it failed to implement the two-tiered system for the OSS and PARA units, but did commit an unfair practice when it failed to implement the two-tiered system for the OTBS unit.

We have reviewed the entire record in this matter, including the proposed decision, CSEA's exceptions and the District's response and conclude that the proposed decision is free of prejudicial error. With regard to the OSS and PARA units, we agree with the ALJ's analysis and conclusion and, therefore, adopt that portion of the proposed decision as a decision of the Board.

With regard to the OTBS unit, the ALJ addressed a defense raised by the District seeking rescission of contractual provision based on a unilateral mistake of fact. Although we agree with a majority of the ALJ's analysis and conclusion regarding the OTBS unit, we believe the discussion regarding rescission should be modified as set forth below. Accordingly, we adopt this later portion of the proposed decision as a decision of the Board

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

itself, subject to the modification set forth below regarding rescission based on a unilateral mistake of fact.

DISCUSSION

In its post hearing brief, the District acknowledged that the leave accrual language in the OTBS contract was the product of a mistake. Thereafter, the District argued, among other things, that the language should be deemed void because it would be unconscionable to impose upon taxpayers a liability in excess of $1,200,000 that could have been avoided but for the mistake.[2] The ALJ ruled that under the facts of this case, it was not appropriate to excuse the terms of the OTBS contract regarding accrual on the basis of unconscionability.

Based on our review, we conclude that, under extraordinary circumstances, rescission of a contract provision may be appropriate. Further, we agree with the ALJ and conclude that rescission is not appropriate in this instance.

Contract Rescission in California

When interpreting collective bargaining agreements (CBA), the Board has applied traditional rules of contract law. (Grossmont Union High School District (1983) PERB Decision No. 313.) In California, a party is authorized to rescind a contract if the consent of the party seeking rescission was given by mistake. (Civ. Code sec. 1689(b)(l).) A mistake of fact is defined as:

> [A] mistake, not caused by the neglect of a legal duty on the part of the person making the mistake, and consisting in:

[2]In reaching her decision, the ALJ addressed several issues associated with the OTBS unit. Except for the rescission discussion, which we address below, we agree with the ALJ's analysis and conclusion regarding these other issues. Accordingly, we do not address these issues herein.

> 1. An unconscious ignorance or forgetfulness of a fact past or present, material to the contract; or,
>
> 2. Belief in the present existence of a thing material to the contract, which does not exist, or in the past existence of such a thing, which has not existed. (Civ. Code sec. 1577.)[3]

In the instant case, the District was unaware of the costs associated with the two-tiered leave accrual system. Consequently, the District made a mistake of fact when it assumed the costs associated with the two-tiered leave accrual system were negligible.

In Donovan v. RRL Corporation (2001) 26 Cal. 4th 261 [109 Cal.Rptr.2d 807] (Donovan), the California Supreme Court clarified the applicable standard for rescission cases based on unilateral mistakes of fact. According to the court:

> Where the plaintiff has no reason to know of and does not cause the defendant's unilateral mistake of fact, the defendant must establish the following facts to obtain rescission of the contract: (1) the defendant made a mistake regarding a basic assumption upon which the defendant made the contract; (2) the mistake has a material effect upon the agreed exchange of performances that is adverse to the defendant; (3) the defendant does not bear the risk of the mistake; and (4) the effect of the mistake is such that enforcement of the contract would be unconscionable. (Donovan, at p. 282.)

Thus, rescission based on a unilateral mistake of fact is available under California law if a party seeking rescission shows: (1) the party made a material mistake regarding a basic assumption of the contract; (2) the party seeking the rescission did not bear the risk of the mistake (i.e., the mistake was not caused by the neglect of a legal duty); and (3) the mistake was so significant that enforcement of the contract would be unconscionable.

[3]Both mistakes of fact and mistakes of law are recognized in California. Rescissions based on unilateral mistakes of law, however, are governed by a different standard. (Civ. Code secs. 1577 and 1578.)

Neglect of Legal Duty

The National Labor Relations Board (NLRB) has held, and we agree, that due to the unique nature of collective bargaining, the technical rules of traditional contract law do not necessarily apply to CBAs. (Pittsburgh-Des Moines Steel Co. (1973) 202 NLRB 880, 888 [83 LRRM 1187].) In this case, we conclude that one element (i.e., neglect of legal duty) of the test set forth in Donovan requires some modification to better reflect the unique nature of collective bargaining.

As stated above, a party seeking rescission must demonstrate it does not bear the risk of mistake. In other words, the mistake may not be caused by the neglect of a legal duty by the requesting party. (Civ. Code sec. 1577.) Regarding this element, the court acknowledged that ordinary negligence does not necessarily constitute a neglect of a legal duty. (Donovan, at p. 285.) According to the court, "[t]he mere fact that a mistaken party could have avoided the mistake by the exercise of reasonable care does not preclude.. .avoidance... [on the ground of mistake]." (Id, at p. 283, quoting Rest.2d Contracts, sec. 57, com. a, pp. 416-417.) For the reasons set forth below, we believe this definition is too narrow in the collective bargaining context.

In the labor relations arena, unlike a typical commercial setting, the employer and the exclusive representative have an on-going, mutual obligation to bargain in good faith on matters within the scope of representation. Needless to say, mistakes can be made. However, because of the continuing nature of the relationship between the parties, virtually all mistakes should be resolved at the bargaining table.

Under the Court's definition, the term "mistake" does not include the failure to exercise ordinary diligence. In our opinion, such diligence is a significant factor in the collective

bargaining context. In order to engage in productive and meaningful negotiations, both parties must be adequately prepared to address and resolve the issues before them. Clearly, the lack of preparation leads to needless mistakes. If we permitted rescission based on alleged lack of preparation, we would both open the door to contract challenges based on careless bargaining and undermine the need for adequate preparation. Accordingly, we conclude that rescission is appropriate only if the party seeking rescission did not neglect a legal duty or otherwise fail to exercise ordinary diligence.

PERB has long shown a "strong interest in labor relations stability" and is "loathe to upset working relationships." (Redondo Beach City School District (1980) PERB Decision No. 114.) Accordingly, rescission requests should only be granted in extraordinary cases. We believe that holding the parties accountable for their preparation is a necessary safeguard to protect the integrity of agreements between the parties and preserve stability in labor-management relations.

For these reasons, we conclude that a party seeking rescission based on a unilateral mistake of fact must show that: (1) the party made a material mistake regarding a basic assumption of the contract; (2) the party seeking the rescission did not neglect a legal duty or otherwise fail to exercise ordinary diligence; and (3) the mistake was so significant that enforcement of the contract would be unconscionable.

The District's Conduct

Applying the facts to the current case, the District admitted that it made a mistake regarding the costs associated with the two-tiered leave accrual system. Moreover, if the District is compelled to apply the two-tiered system, it will incur a significant monetary liability. Clearly, when it erroneously assumed the costs of the new leave accrual system

would be negligible, the District made a material mistake regarding a basic assumption of the agreement. Thus, the first element of the test is satisfied.

Regarding the second element, the District explained to CSEA that unit employees would benefit from the two-tiered system because their accrual rates would be rounded up. Clearly, the District was aware that some additional costs would be associated with the conversion. However, notwithstanding this fact, the District failed to conduct an analysis of those costs until after the parties approved an OTBS CBA that provided for the two-tiered leave accrual system. The District's mistake was not due to an inadvertent clerical error or any mistake regarding the actual offer. Rather, the mistake was the product of the District's negligence and lack of preparation for negotiations.

Based on the foregoing, we conclude the District failed to exercise ordinary diligence when it negotiated the two-tiered leave accrual system in the OTBS CBA. Thus, the two-tiered leave accrual system in the OTBS CBA may not be rescinded due to the District's unilateral mistake of fact.[4] Accordingly, the District is obligated to comply with its contractual responsibility regarding the two-tiered leave accrual system set forth in the OTBS CBA.

CONCLUSION

The District unilaterally changed its policy regarding sick leave and vacation accrual benefits for employees in the OTBS bargaining unit. By this conduct the District breached its duty to negotiate in good faith with CSEA, in violation of EERA section 3543.5(c). By the same conduct, the District interfered with employee rights to be represented by CSEA, in violation of Section 3543.5(a) and denied CSEA its right to represent employees, in violation of Section 3543.5(b).

[4]Because we conclude the District failed to exercise ordinary diligence, we need not address whether enforcement of the contract would be unconscionable.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, the unfair practice charge and complaint in Case No. LA-CE-4724-E, California School Employees Association & its Chapters 759 and 724 v. San Diego Unified School District, are hereby DISMISSED.

The complaint in Case No. LA-CE-4725-E, California School Employees Association & its Chapter 788 v. San Diego Unified School District, is hereby UPHELD. The San Diego Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b), and (c) by breaching its duty to negotiate in good faith with CSEA, in violation of EERA section 3543.5(c). By the same conduct, the District interfered with employee rights to be represented by CSEA, in violation of Section 3543.5(a) and denied CSEA its right to represent employees, in violation of Section 3543.5(b).

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to bargain in good faith with CSEA and its Chapter 788 by unilaterally changing its policy regarding sick leave and vacation accrual benefits;

2. Continuing to provide sick leave and vacation accrual benefits for employees in the Office-Technical and Business Services (OTBS) unit on a pro-rata basis rather than on the contractual two-tier basis;

3. Interfering with the rights of OTBS employees to be represented by CSEA;

4. Denying to CSEA the right to represent its OTBS members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF EERA:

1. The District shall discontinue use of the pro-rata leave accrual system for the OTBS bargaining unit and implement the two-tier leave accrual system set forth in the parties' July 1, 2003 to June 30, 2006, collective bargaining agreement (CBA). In the event the parties have adopted a successor to the CBA, the District shall utilize the leave accrual method set forth in such successor agreement.

2. The District shall also credit the employees in the OTBS unit with sick leave and vacation benefits on a two-tier leave accrual system retroactive to July 1, 2003. In the event the parties have adopted a successor to the CBA that does not provide for a two-tier leave accrual system, the District shall grant such retroactive sick leave and vacation benefits from July 1, 2003, to the effective date of such successor agreement.

3. In addition to the grant of sick leave and vacation benefits set forth in paragraph 2 above, the District shall compensate employees in the OTBS unit for direct out-of-pocket expenses, if any, they incurred due to the District's failure to grant leave in accordance with the two-tier accrual system set forth in the CBA.

4. In addition to the foregoing, the District shall post at all work locations where notices to employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

Chairman Duncan and Member Neuwald joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-4724-E, California School Employees Association & its Chapters 759 & 724 v. San Diego Unified School District and Unfair Practice Case No. LA-CE-4725-E, California School Employees Association & its Chapter 788 v. San Diego Unified School District, in which all parties had the right to participate, it has been found that the San Diego Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c). The District breached its duty to negotiate in good faith with CSEA, in violation of EERA section 3543.5(c). By the same conduct, the District interfered with employee rights to be represented by CSEA, in violation of Section 3543.5(a) and denied CSEA its right to represent employees, in violation of Section 3543.5(b).

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing to bargain in good faith with CSEA and its Chapter 788 by unilaterally changing its policy regarding sick leave and vacation accrual benefits;

2. Continuing to provide sick leave and vacation accrual benefits for employees in the Office-Technical and Business Services (OTBS) unit on a pro-rata basis rather than on the contractual two-tier basis;

3. Interfering with the rights of OTBS employees to be represented by CSEA;

4. Denying to CSEA the right to represent its OTBS members.

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

1. The District shall discontinue use of the pro-rata leave accrual system for the OTBS bargaining unit and implement the two-tier leave accrual system set forth in the parties' July 1, 2003 to June 30, 2006, collective bargaining agreement (CBA). In the event the parties have adopted a successor to the CBA, the District shall utilize the leave accrual method set forth in such successor agreement.

2. The District shall also credit the employees in the OTBS unit with sick leave and vacation benefits on a two-tier leave accrual system retroactive to July 1, 2003. In the event the parties have adopted a successor to the CBA that does not provide for a two-tier leave accrual system, the District shall grant such retroactive sick leave and vacation benefits from July 1, 2003, to the effective date of such successor agreement.

3. In addition to the grant of sick leave and vacation benefits set forth in paragraph 2 above, the District shall compensate employees in the OTBS unit for direct out-of-pocket expenses, if any, they incurred due to the District's failure to grant leave in accordance with the two-tier accrual system set forth in the CBA.

Dated: _____ SAN DIEGO UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 759 & 724, Charging Party, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-4724-E PROPOSED DECISION (3/7/05)
CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 788, Charging Party, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-4725-E PROPOSED DECISION (3/7/05)

Appearances: Leticia Munguia, Labor Relations Representative, for California School Employees Association and its Chapters 724, 759 and 788; Jose A. Gonzales, Assistant General Counsel, for San Diego Unified School District.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

On February 10, 2004, California School Employees Association (CSEA) filed an unfair practice charge in Case No. LA-CE-4724-E along with its Chapters 759 and 724 and an unfair practice charge in Case No. LA-CE-4725-E along with its Chapter 788, alleging that the San Diego Unified School District (District) unilaterally changed its policy regarding sick leave and vacation accrual by refusing to implement the terms of the parties' agreement. On June 9, 2004, the office of General Counsel of the Public Employment Relations Board (PERB

or Board) issued complaints in both cases alleging that by this conduct, the District violated the Educational Employment Relations Act (EERA) section 3543.5(c), and by the same conduct violated section 3543.5(a) and (b).[1] In its answers, the District denied any wrongdoing.

An informal settlement conference on both cases was held at the Los Angeles offices of PERB on July 12, 2004, but the matters were not resolved. Formal hearing on both cases was held before the undersigned on November 8 and 9, 2004. At the hearing, the District moved to dismiss Case No. LA-CE-4724; the motion was denied.

After the submission of post-hearing briefs, the matter was submitted for decision on January 28, 2005.

FINDINGS OF FACT

The District is a public school employer within the meaning of EERA section 3540. l(k), and CSEA is a recognized employee organization within the meaning of section 3540.1(1). CSEA represents approximately 9000 classified District employees in three bargaining units: Chapter 724 represents the Operations-Support Services unit (OSS) consisting of laborers, mechanics, groundskeepers, maintenance and custodial workers, food service workers, and bus drivers; Chapter 759 represents the Paraeducators unit (PARA) consisting of special education assistants and technicians, health, library and campus security employees; and Chapter 788 represents the Office-Technical and Business Services unit (OTBS).

The most recent collective bargaining agreements for the OSS and OTBS units expired on June 30, 2002. In mid-2002, the parties reached a new agreement for the PARA unit

[1] EERA is codified at Government Code section 3540 et seq. Section 3543.5 makes it unlawful for a public school employer to (c) "(R)efuse or fail to meet and negotiate in good faith with an exclusive representative;" (a) "...interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter;" and (b) "(D)eny to employee organizations rights guaranteed to them by this chapter."

effective April 28, 2002 through June 30, 2004. Article 12 of all three agreements provided that those employees who work part-time would accrue sick leave and vacation benefits on a pro-rata basis, i.e., based on the number of hours worked. And Article 22 of all three agreements provided that any changes thereto must be approved by the school board prior to implementation.

At around this same period of time the District was engaged in a search for new computer software, and in November 2002 it purchased a program, or "module," from PeopleSoft entitled Human Capital Management for its various payroll and human resources functions, including the accrual of sick leave and vacation benefits.[2] The District also engaged the services of Empower Solutions (Empower), a computer consulting firm, to help modify the PeopleSoft module to meet the District's specific needs. Empower advised the District that it would be far less costly to use the PeopleSoft program "off-shelf," as it was designed for a single sick leave and vacation schedule, and to create a two-tier schedule where part-time employees would accrue benefits according to whether they worked more or less than four hours per day, rather than to substantially modify the program to accommodate the contractual pro-rata basis. Thus, on April 15, 2003,[3] Deberie Gomez (Gomez), then deputy administrative officer for human resources and chief personnel officer as well as the District's chief negotiator,[4] issued a memo which was distributed, inter alia, to the three CSEA unit representatives, reading in part:

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[2] Other software companies' products were purchased for other District functions.

[3] All dates hereafter refer to the year 2003 unless otherwise specified.

[4] Final decisions regarding the District's computer programs were made by the Executive Sponsor Committee composed of Gomez, Rick Reynolds, chief executive officer, and Mike Casey, chief of technical services.

> Approximately 18 months ago, I introduced the notion that it might be necessary to discuss some of the collective negotiations contract language around pay and payroll as we entered into the process of converting from our legacy computer system environment to an off-the-shelf product. It was impossible to anticipate what these issues would be or demand until we actually purchased the product and until we went through a complete fit gap analysis. [5]
>
> The District has purchased PeopleSoft's Human Capital Management software to manage HR and payroll functions. It is not our goal to create major modifications to this system because such modifications are expensive to program at the outset [and] then create ongoing costs as they must be separately upgraded...
>
> Now the time has come for us to solve some of these problems as we move forward into a less complex future... .It is paramount that we focus on these tasks and that we resolve these things quickly so that the implementers can structure the system accordingly.
>
> [Emphasis added.]

Representatives of the three CSEA units met with the District on April 26 and May 29.[6] Gomez explained that the PeopleSoft module must be adapted to the District's purposes, but the District would incur "astronomical costs" if it had to modify for a pro-rata accrual basis and far less cost to merely alter it from a one-tier to a two-tier schedule. Gomez noted that a two-tier schedule would benefit employees as their accrual rates would be rounded up. On May 29, Gomez presented the units with Memoranda of Understanding (MOUs) providing for a two-tier accrual schedule, which she urged must be signed no later than June 1 in order to be

[5] A fit gap analysis is the process of determining how a computer program will serve the District's needs.

[6] The meetings were held in the context of the Contract Administration Committee (CAC), an ongoing committee composed of CSEA and District representatives to work out mid-contract issues and develop MOUs where appropriate.

taken to the July meeting of the District's school board for approval and be operational by early 2004. The virtually identical MOUs read:

> **For Implementation of District-Wide Applications of Payroll and Financial Software**
>
> The purpose of this Memorandum of Understanding is to set forth the terms and conditions for implementation of new contract language regarding sick leave accrual and vacation leave accrual.
>
> The parties acknowledge that implementation of the Payroll and Financial Software requires changes in negotiated contract language in the subject areas specified in the preceding paragraph. Therefore, the parties agree to negotiate new language to be included in a successor contract to the 1999-2002 Agreement. [7] This new language will be effective (actually implemented) when the new software system is fully operational; however, prior to that event, the language of the 1999-2002 contract shall remain in full force and effect.
>
> The parties acknowledge that the implementation of the Payroll and Financial Software is a scheduled event that is subject to delays as a result of testing of the software in the new system. Testing is expected to begin on or about November 1, 2003 and implementation is targeted for February 1, 2004. Until the new Payroll and Financial Software is fully operational (i.e., in a manner that fully implements newly negotiated language in the successor agreement) relevant contract language in the 1999-2002 Agreement shall remain in full force and effect.
>
> If the Payroll and Financial Software ultimately is not implemented, relevant contract language in the 1999-2002 Agreement shall remain in full force and effect.

The phrase "Payroll and Financial Software" was not discussed at these meetings, nor was the default language, i.e., under what circumstances the software might "ultimately" not be implemented. According to CSEA, the only system or program mentioned was PeopleSoft and the implicit understanding was that the new system would be considered not implemented and the default language triggered only if no PeopleSoft program were utilized. William Surbrook

[7] The MOU for the PARA unit cites a 2002-2004 agreement instead of a 1999-2002 agreement.

(Surbrook), then a labor relations representative and author of the MOUs, testified that "fully operational" meant if a computer program were used with virtually no modifications then the accrual schedule would be changed, but if the computer program were modified then the old accrual schedule would continue. However, Surbrook did not contend that he made this clear to CSEA at the April or May meetings. Gomez claimed she told CSEA at the CAC meetings that an off-shelf program was the best alternative but cautioned that the final decision was out of her control.

CSEA asked about the cost of the new accrual schedule, but the District had no answer. It was understood that CSEA was referring to the cost of setting up the computer program, not the labor cost. It is uncontested that labor cost for a new two-tier schedule was not discussed and that the District at that time had made no calculations as to what the labor cost might be. It is also uncontested that District negotiators said the MOUs would be taken to the District's attorney and would "go through the process," i.e., would be taken to the school board for approval.

The parties signed the MOUs on May 29 and 30 and the various CSEA chapters ratified them on June 3.[8] However, Kay McElrath (McElrath), the District's then budget supervisor,[9] who did not attend the April or May CAC meetings and was not involved with the MOUs, was "shocked" when, at a fit-gap session in mid-June, she learned about the decision to convert to a

[8] Gomez contends that these agreements are mid-term MOUs to be approved by the District's board and later incorporated into successor collective bargaining agreements where appropriate. Surbrook testified that they are not MOUs but rather tentative agreements (TAs). In that regard, Article 22, section 5 of the three collective bargaining agreements provides that when the parties "reach tentative agreement on all matters being negotiated" they be taken to both CSEA and the school board for ratification prior to implementation. This section appears to refer to a TA on an entire successor agreement and is inapplicable herein. However, article 22, section 4 provides that any changes to the agreements must be ratified by the school board prior to implementation.

[9] McElrath was promoted to payroll and benefits manager on July 1, effective July 15.

two-tier accrual schedule, believing it would have a huge impact on the District's labor cost. She shared her concerns with Gomez,[10] who directed her to Stephen Carr (Carr), internal auditor. Carr then prepared a cost analysis estimating that a two-tier schedule would cost the District an additional $1.2 million in vacation benefits and $800,000 in sick leave benefits.[11] The District, in consultation with Empower, then decided to modify the PeopleSoft program for the pro-rata accrual schedule, which would have an initial modification cost of $30,000-40,000 and an annual maintenance fee of $40,000. It is uncontested that the District's decision was made unilaterally without any input or discussion with CSEA. Thus, in spite of Gomez' stated urgency at the parties' May 29 meeting, the MOUs were not taken to the school board for approval.

In the meantime, on June 6 the parties reached a TA for a successor collective bargaining agreement for the OTBS unit effective July 1, 2003 through June 20, 2006. Surbrook presented it to the District's board on July 8 and it was approved. New language in Article 12 section 2.B reads:

> 1) Any unit member whose full-time equivalent (FTE) is greater than one-half (.5) FTE shall accrue eight (8) hours per month.
>
> 2) Any unit member whose FTE is one-half (.5) or less shall accrue four (4) hours per month.

Article 12 does not contain any of the MOU default language and makes no reference to the MOU.

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[10] Gomez retired from the District on June 30 and was succeeded as chief negotiator by Surbrook. Surbrook was later promoted to director of labor relations in mid-2004, retroactive to July 1,2003.

[11] Part of the cost, for loss of employee services during an absence, represents a liability rather than a budget item and part of the cost represents the out-of-pocket expense for hiring substitutes for those classifications requiring them, e.g., bus drivers and special education assistants.

Surbrook testified that he was unaware at that time of the labor cost of a two-tier schedule; he first became aware of the cost in conversations with Carr in late July. On August 11, Surbrook sent memos to each of the CSEA unit representatives regarding the District's decision not to go forward with the two-tier accrual schedule, stating in part:

> These changes in accrual rates [referring to the MOUs] were negotiated because the new Payroll and Financial Software system that the District purchased and will be installing, in its standard form, cannot track sick leave and vacation on a pro rata basis. In order to so track these benefits, the new software will have to be modified. It was the belief of the District when the MOU was negotiated that the cost of the modification would have exceeded the additional cost to the District for benefits under the new accrual rate. At that time the District believed that the additional cost of these benefits would be minimal. It is for this reason, and to avoid any adverse impact to employees from implementation of the new software system, that the new benefit accrual rate was negotiated.
>
> It has now been determined by District staff that the cost of modifying and maintaining the new software system to track benefits on a pro rata basis is relatively modest, and that the cost to the District for benefits under the new accrual method will be significant. Consequently, the District will modify the new Payroll and Financial software to track these benefits on a pro rata basis, as provided under existing contract language. Since the originally proposed standard Payroll and Financial software will not be implemented, and as required by the MOU, the existing contract language that accrues sick leave and vacation on a pro rata basis will remain in full force and effect.
>
> Please feel free to contact me at your earliest opportunity if you wish to schedule a time to meet on these issues.

A similar memo was sent by the District superintendent to the school board containing the following additional language, in part:

> District staff believes, and the office of General Counsel concurs, that continuation of the existing sick leave and vacation practices will not violate the recently board-approved amendments to the CSEA/OTBS...collective bargaining agreement....

> ....Since the original standard software relating to sick leave and vacation accrual will not be ultimately implemented, because the modified software will be implemented, the current contract language on sick leave and vacation accrual remains in effect.

CSEA sent letters of protest in late September. Surbrook testified that because of Gomez' retirement and changes to his position and responsibilities, he did not realize until then that the MOUs had not yet been taken to the school board and that the new OTBS contract did not contain the default language of the MOUs. Thus, he presented the MOU for the OTBS unit to the school board at its November 18 meeting and it was approved. Surbrook testified that MOU was not subsumed by the OTBS contract, notwithstanding his contention that it was not an MOU but rather a TA pending a final contract, and that it could not be withdrawn until it had gone before the board. The District contends that once having been approved by the board, the MOU, with its default language, took precedence over the OTBS contract language.

When asked at the hearing why he did not take the MOUs for the OSS and PARA unit to the board's November 18 meeting along with the MOU for the OTBS unit, Surbrook testified that he believed he was obligated to try to work something out with CSEA based on "the new facts", i.e., labor cost, before presenting anything to the board. When asked why he had not discussed this issue with CSEA between August and November, Surbrook testified that he had taken on the labor relations responsibilities without any additional support and that he was "involved in a lot of tables and a lot of meetings" during that time.

The PeopleSoft program, modified for accrual on a pro-rata basis, became fully operational on January 1, 2004.[12] Unfair practice charges were filed on February 10.

At this point in time, the OSS unit was still in negotiations for a successor agreement and the accrual language in Article 12 of the expired agreement was at issue. On May 5, the

[12] All dates hereafter refer to the year 2004 unless otherwise specified.

parties reached a TA on changes to the contract for a successor collective bargaining agreement effective July 1, 2003 through June 30, 2006. No agreement, however, was reached on accrual language, and the pro-rata language of Article 12 remained unchanged. The District proposed a new MOU regarding accrual:

> The parties disagree as to the parties' obligations, if any, under the May 29, 2003 [MOU]. Relevant contract language in the 1999-2002 Agreement has remained in full force and effect.
>
> On or about January 26, 2004, the Association filed an unfair practice charge with [PERB] related to the referenced memorandum of understanding.
>
> The parties have elected to forego further discussions and negotiations relative to issues related to the memorandum of understanding and to maintain status quo (1999-2002 Contract language) as to Article 12, Section 2 and 6. The parties recognize that the outcome of the unfair practice charge, now pending with [PERB], could alter the status quo and/or require further negotiations between the parties.

CSEA signed the MOU, claiming it signed under duress. The OSS successor agreement, including the new MOU, was adopted by the school board in September.

On September 28, Surbrook presented the OSS and PARA unit MOUs to the District's board for the first time, 16 months after were signed by the parties on May 29, 2003. The board rejected both of them.[13] Surbrook testified that he had not presented them to the board earlier because he did not have "complete authority" until after his appointment as chief negotiator in July, and he was not aware that they had not previously been presented.

On October 21, Surbrook sent a memo to the OSS and PARA unit representatives stating in part:

[13] I take notice that, if the OSS and PARA unit MOUs had been taken to the board in September 2003 along with the OTBS unit MOU, it would have been unlikely, if not impossible, for the board to reject them while at the same time approving the OTBS unit MOU.

> On September 28, 2004, the Board of Education rejected the Tentative Agreements agreed to regarding implementation of District-Wide Applications of Payroll and Financial Software as it related to Article 12.. .for.. .bargaining unit members.
>
> As a result, we are willing to return to the bargaining table and are prepared to discuss the increased vacation schedule as outlined in the MOU dated May 29, 2003.
>
> We appreciate your prompt attention to this matter and believe that a mutually agreeable result can be reached.
>
> Please feel free to contact me if you have further questions.

The parties have not met since then and have not arrived at any further agreements regarding accrual. The District has continued to provide sick leave and vacation benefits on a pro-rata basis for all three units.

In summary, the District contends that it has no obligation to provide a two-tier accrual system to any of the three units. As to the OTBS unit, in July 2003 the school board ratified the new collective-bargaining agreement containing a two-tier system. In November 2003, the board ratified the MOU, claimed that it supercedes the agreement, and further claimed that its default language is operative. However, the OSS and PARA unit MOUs were not presented to the board at that time. Unlike the OTBS contract, both OSS and PARA have collective bargaining agreements providing for a pro-rata system. In August 2003 the District notified CSEA that it would not implement a two-tier system because the software program was not fully implemented as anticipated, thus the MOU default language was applicable. However, when the MOUs were finally presented to the school board in September 2004, they were rejected altogether, thereby eliminating the necessity of continuing the default argument, hi both situations, the District contends that the pro-rata system is still in effect for all three units.

ISSUE

Did the District unlawfully change its policy regarding sick leave and vacation accrual benefits by refusing to implement an agreed-upon two-tier accrual system?

CONCLUSIONS OF LAW

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.) Further, a change in policy must be of generalized application and continued effect. (San Mateo Community College District (1979) PERB Decision No. 94.)

There is no dispute that sick leave and vacation benefits are subjects within the scope of representation.[14] (San Bernardino City Unified School District (1998) PERB Decision No. 1270; Los Rios Community College District (1988) PERB Decision No. 684.) There is also no dispute that the District made its decisions not to implement the two-tier accrual system without giving CSEA prior notice or opportunity to bargain.

The District defends its actions on the following grounds: (1) there was no unilateral action taken by the District as to the OSS and PARA units because their MOUs were not

[14] Section 3543.2 defines the scope of representation as "matters relating to wages, hours of employment, and other terms and conditions of employment," and expressly includes leave policies.

approved by the school board; (2) there was no change in policy because the PeopleSoft program was not fully implemented as intended by the MOUs; (3) no two-tier system could be implemented because the MOUs were not "sunshined" as required by EERA section 3547.5;[15] and (4) the District mistakenly believed that creating a two-tier system would be far less costly than the modifications necessary for a pro-rata system, thus to enforce a two-tier system would be unconscionable. The latter two grounds were presented for the first time in the District's post-hearing brief.

OSS and PARA Units

The District did not present the OSS and PARA unit MOUs to the school board until September, 2004, 16 months after the parties signed them, long after the parties' disagreement as to the District's obligations under the MOUs and long after the instant charges were filed. Surbrook claimed that he was unaware they had not been presented previously and he had insufficient authority to deal with them. However, he negotiated the OTBS contract on behalf of the District and presented it to the school board in July 2003, sent memos to both CSEA and the school board in August 2003 regarding the import of the MOUs, presented the OTBS unit MOU to the school board in November, 2003, was the District's chief negotiator for the successor OSS contract reached in May 2004, which he presented to the school board in September, 2004, and drafted the new OSS MOU of May 5, 2004. I therefore find that the District, by Surbrook's conduct, acted in bad faith by failing for 16 months to present the OSS

[15] Section 3547.5 states in part:

> Before a public school employer enters into a written agreement with an exclusive representative covering matters within the scope of representation, the major provisions of the agreement, including, but not limited to, the costs that would be incurred by the public school employer under the agreement for the current and subsequent fiscal years, shall be disclosed at a public meeting of the public school employer...

and PARA unit MOUs to the school board, especially by failing to present them along with the OTBS unit MOU in September 2003. As this was not alleged in the charge or complaint, however, I shall not find an independent violation nor order a remedy thereupon.

Notwithstanding the District's conduct in making a late presentation to its school board, I must nevertheless address the fact that the board ultimately rejected the MOUs. PERB has held that EERA section 3540.1(h), which defines the bargaining obligation, does not require that a public school governing board ratify an agreement in order for it to be binding. (San Francisco Unified School District (1984) PERB Decision No. 476.) However, as noted above, Article 22 of both the OSS and PARA collective bargaining agreements require school board approval prior to the implementation of any changes thereto. The District's board did not approve the MOUs. I cannot therefore find that the District unlawfully refused to implement the OSS or PARA unit MOUs.

However, even if the District were obligated to honor the MOUs, it was not required to implement the two tier system. Although it is clear that the development of a two-tier software program was the purpose for the MOUs, nowhere in the MOUs is there a specific reference to a two-tier system. Rather, the parties were to negotiate "new language" in their collective bargaining agreements. The 2002-2004 PARA contract provided for a pro-rata system; it expired in June 2004 and the record does not reveal whether the parties bargained for any changes in a successor contract. A new OSS contract was reached in May 2004, with the parties reserving accrual language to a PERB decision in the instant case. In that regard, therefore, I find, in agreement with the District, that the two-tier system envisioned by the MOUs was not developed and did not become fully operational. What became operational was the PeopleSoft module modified for a pro-rata system. To hold that the "software system" referred to in the MOUs became fully operational merely because it was the same PeopleSoft

module which was ultimately used for the pro-rata system would be an unreasonable reading of the MOU and a total disregard of its default language. If CSEA's interpretation were to be credited, then the only way the default language would arise would be if the District disposed of the PeopleSoft module entirely and purchased another module from another company, even if that module had to be modified. I do not find CSEA's interpretation to be logical or reasonable. Rather, I find that the terms of the MOU are clear, that a new accrual system would be implemented only if and when the District adapted its software for a new system and the parties included it in their collective bargaining agreements. This was not done. I find therefore that, even if the MOU's were honored, the default language therein would be applicable and would allow the District to continue providing accrual benefits under the old pro-rata system.

OTBS Unit

The OTBS situation is quite different. Its collective bargaining agreement was executed and ratified by the parties after the MOU was signed. The agreement provides for a two-tier accrual system and makes no reference to the MOU. Some months later the school board adopted the MOU, which it contends supercedes the agreement. Surbrook testified at the hearing that once the MOU was signed, the District was obligated to present it to the board, notwithstanding that the collective bargaining agreement had already been ratified.

In Morgan Hill Unified School District (1999) PERB Decision No. 1362, the union alleged that the employer had unlawfully refused to pay a negotiated wage increase to a certain classification of bargaining unit members, and argued that the parties' tentative agreement was meant to cover the entire unit. However, the final collective bargaining agreement provided that the wage increase applied to the salary schedule, and the classification at issue was not listed on the salary schedule. The Board stated that it would not take parole evidence

regarding the tentative agreement where the contract was clear and unambiguous, thus the employer had not violated its bargaining obligation. What is implicit in PERB's decision is that, once a final collective bargaining decision is reached, it takes precedence over and subsumes prior tentative agreements, which are then no longer in effect. (See also, Fountain Valley Elementary School District (1987) PERB Decision No. 625: ".. .our responsibility in administering EERA is to make it possible for the parties to negotiate collective bargaining agreements in good faith and, once they have done so, to protect their right to rely on their agreements.")

I therefore do not find that the OTBS unit MOU supercedes the collective bargaining agreement, but rather find to the contrary, i.e., that the collective bargaining agreement supercedes the MOU. The District's continued accrual on a pro-rata basis is a change in policy from the terms of that collective bargaining agreement, which requires the District to provide accrual benefits on a two-tier basis. The District implemented the change without first notifying CSEA or giving it an opportunity to request bargaining. I further find that this change in policy has a generalized application and continued effect on the unit employees, as it affects all part-time employees in the unit. (Jamestown Elementary School District (1990) PERB Decision No. 795 (employer unlawfully changed policy of vacation pay formula affecting only two part-time employees.)

Accordingly, I conclude that the District has bargained in bad faith in violation of EERA section 3543.5(c) and, by the same conduct, violated section 3543.5(a) and (b).

The Sunshine Requirement

In post-hearing brief, the District argues that the accrual provisions of the new OTBS contract cannot be implemented because it was not subject to public disclosure in accordance

with EERA section 3547.5.[16] Documentary evidence introduced at the hearing by the District shows that at the school board meeting of July 8, the date the board approved the OTBS contract, public disclosure under section 3547.5 was an approved agenda item. Attached to the agenda was a cost analysis of various items negotiated with CSEA, citing the cost of Article 12 of the contract as "Unknown - Minimal Cost." The District argues that the public was therefore not informed of the substantial cost of the two-tier system, which violates the intent of section 3547.5.

It is the school district's obligation to fulfill the "sunshine" requirement and its failure to do so is itself an indicia of bad faith bargaining (Oakland Unified School District (1983) PERB Decision No. 326.) However, PERB has held that when the actual cost of a proposal is not subject to calculation in advance, section 3547.5 is satisfied when the public is notified of the issue to be negotiated. (AFT College Guild. Local 1521 (1989) PERB Decision No. 740; Palo Alto Unified School District (1981) PERB Decision No. 184.) Here, the actual cost of a two-tier accrual system was not calculated in advance, but the July 8 agenda minute clearly notified the public that it was a negotiation proposal along with the other items in the OTBS contract.

Accordingly, I find that section 3547.5 was satisfied and is not a bar to implementation of the two-tier accrual system.

Unconscionability

In post-hearing brief, the District argues that the OTBS contract language is invalid because of Gomez' erroneous belief that adapting the new software for a two-tier system would be less costly to the District than substantially modifying it for a pro-rata system, thus to

[16] The District also applies the sunshine argument to the OSS and PARA unit MOUs. However, as I have found the default language of those MOUs is operative and the District did not unlawfully refuse to implement a two-tier system, the sunshine argument is moot.

enforce the contract would be unconscionable.[17] The District cites Witkin, Summary of California Law, Ninth Ed. (1987) Vol. 1, Contracts (Witkin). In Witkin, sections 369, 370, pp. 334-338, the author explains that a contract may be rescinded where one party has made a mistake of fact, unless the other party has relied to his detriment on the promise. This is a common occurrence in the construction industry, where a contractor or subcontractor mistakenly but innocently submits too low a bid and later discovers he cannot perform for the price agreed upon. The contract can usually be rescinded if the bidder discovers his mistake quickly before the other party has an opportunity to rely on it. In Witkin, sections 31-33, pp. 66-71, the author discusses unconscionability under provisions of California's Civil Code and Restatement 2d, Contracts, both of which take into consideration public policy, weakness in the contracting process, gross disparity in the values exchanged, and gross disparity in the bargaining power of the parties with terms unreasonably favorable to the stronger party. However, where the mistake was caused by the neglect of a legal duty or by an error in judgment on the part of the person making the mistake, rescission will generally not be granted. (Witkin, section 374-376, p. 341-344.)

In the field of labor law, research has not revealed a case dealing with unconscionability. There are, however, federal cases regarding contract rescission. In Apache Powder Co. (1976) 223 NLRB 191 [92 LRRM 1102], the National Labor Relations Board (NLRB) stated its guidelines for granting rescission:[18]

> ...we agree that rescission for unilateral mistake is, for obvious reasons, a carefully guarded remedy reserved for those instances

[17] See footnote 16.

[18] PERB and the California courts have long held that NLRB decisions may be cited for guidance when interpreting similar issues. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal. 3d 608 [116 Cal.Rptr. 507].)

> where the mistake is so obvious as to put the other party on notice of an error.

The NLRB quoted the above passage in Local 1199, Drug, Hospital and Health Care Employees Union (Lenox Hill Hospital) (1989), 296 NLRB 322 [132 LRRM 1351]. There, the parties reached a mid-term agreement for a wage increase which expressly omitted the position of handyman. The union refused to execute the agreement and defended on the basis that the agreement should be rescinded because the union mistakenly believed the handyman position was included. The NLRB rejected the union's defense, finding as follows:

> [The employer] cannot be blamed for not knowing that [the union] was making a mistake. [The union's] mistake resulted from [its] lack of preparation and not from any obvious cause that should have alerted [the employer.]...[The union's] mistake did not arise from any confusion as to the actual offer.. ..The Union should be held to the representations made by its negotiator that the employees agreed to the contract and [the employer] should be able to rely on the bargain it made."

Here, it cannot be said that CSEA relied to its detriment on the District's proposal for a two-tier accrual system. However, the District's mistake was not due to an inadvertent clerical error or any confusion as to the actual offer, but rather to its own negligence and lack of adequate preparations for negotiations. Its failure to take into account the possible additional labor cost of a two-tier system was not an obvious mistake which should have alerted CSEA, and CSEA should be able to rely on the bargain it made while the District should be held to its ratification of the OTBS contract.

I find therefore that the accrual terms of the OTBS contract may not be excused on the basis of unconscionability and that the District's mistake does not relieve it of its contractual responsibility.

REMEDY

EERA section 3541.5(c) gives PERB:

> .. .the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action... as will effectuate the policies of this chapter.

It has been found that the District unilaterally changed its policy regarding sick leave and vacation accrual benefits for employees in the OTBS bargaining unit. By this conduct the District breached its duty to negotiate in good faith with CSEA, in violation of EERA section 3543.5(c). By the same conduct, the District interfered with employee rights to be represented by CSEA, in violation of section 3543.5(a) and denied CSEA its right to represent employees, in violation of section 3543.5(b). It is appropriate therefore that the District be ordered to cease and desist from such activity. It is also appropriate that the District be ordered to implement the two-tier accrual system provided in the OTBS collective bargaining agreement, and to credit the OTBS unit employees with these benefits retroactive to the effective date of the OTBS agreement, i.e., July 1 2003.

It is also appropriate that the District be required to post a notice incorporating the terms of this order at all locations where notices to employees are customarily posted. Posting of such a notice, signed by an authorized agent of the District, will inform employees that the District has acted in an unlawful manner, is being required to cease and desist from such activity, and will comply with the terms of the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and of the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record in this matter, the unfair practice charge and complaint in Case No. LA-CE-4724-E, California School Employees Association & Its Chapters 759 and 724 v. San Diego Unified School

District, are hereby DISMISSED. The complaint in Case No. LA-CE-4725-E, California School Employees Association & Its Chapter 788 v. San Diego Unified School District, is hereby upheld, it having been found that the San Diego Unified School District (District) violated the Educational Employment Relations Act (EERA) Government Code section 3543.5(a), (b), and (c). The District violated EERA section 3543.5(c) by unilaterally changing its policy regarding sick leave and vacation accrual benefits, i.e., failing to implement the agreed-upon two-tier accrual system, without first providing California School Employees Association (CSEA) notice and an opportunity to bargain regarding the change. Because the District's conduct would tend to interfere with employee rights to be represented by CSEA, the District also violated EERA section 3543.5(a). And because the District's conduct would tend to deny CSEA the right to represent its members, the District also violated EERA section 3543.5(b).

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to bargain in good faith with CSEA and its Chapter 788 by unilaterally changing its policy regarding sick leave and vacation accrual benefits;

2. Continuing to provide sick leave and vacation accrual benefits for employees in the Office-Technical and Business Services unit (OTBS) on a pro-rata basis rather than on the contractual two-tier basis;

3. Interfering with the rights of OTBS employees to be represented by CSEA;

4. Denying to CSEA the right to represent its OTBS members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE PURPOSES OF THE EERA:

1. Effective immediately upon service of a final decision in this matter, develop a software program for a two-tier system of sick leave and vacation accrual benefits for the OTBS employees;

2. Immediately upon completion of the software program, discontinue the pro-rata accrual system and implement the two-tier accrual system.

3. Immediately upon completion of the software program, credit the OTBS employees with sick leave and vacation accrual benefits on a two-tier system retroactive to July 1, 2003 and pay them back pay for any financial losses suffered by implementation of the pro-rata system since July 1, 2003;

4. Within ten (10) workdays of service of a final decision, post at all work locations where notices to employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material;

5. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the General Counsel of the Public Employment Relations Board in accord with the General Counsel's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board

Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ann L. Weinman
Administrative Law Judge