STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

NEWARK TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. NEWARK UNIFIED SCHOOL DISTRICT, Respondent.	Case Nos. SF-CE-2377-E SF-CE-2380-E PERB Decision No. 1895 March 27, 2007
NEWARK UNIFIED SCHOOL DISTRICT, Charging Party, v. NEWARK TEACHERS ASSOCIATION, CTA/NEA, Respondent.	Case No. SF-CO-640-E

Appearances: California Teachers Association by Ramon E. Romero, Staff Attorney, for Newark Teachers Association, CTA/NEA; Miller, Brown & Dannis by John R. Yeh, Attorney, for Newark Unified School District.

Before Duncan, Chairman; McKeag and Neuwald, Members.

DECISION

DUNCAN, Chairman: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Newark Unified School District (District) to an administrative law judge's (ALJ) proposed decision (attached). This decision involves three consolidated cases. The unfair practice charge in Case No. SF-CE-2377-E alleged that the District negotiated in bad faith when it would not bargain the selection of a health insurance carrier with the Newark Teachers Association, CTA/NEA (Association). The second

charge on behalf of the Association, in Case No. SF-CE-2380-E alleged that the District unilaterally established a pre-paid legal services program for bargaining unit employees. Case No. SF-CO-640-E resulted from allegations by the District that the Association engaged in surface bargaining and insisted to impasse on negotiating non-negotiable subjects. All three cases include allegations that would violate the Educational Employment Relations Act (EERA)[1] section 3543.5(a), (b) and (c).

The Board has reviewed the entire record in each of these cases including, but not limited to, the unfair practice charges, the complaints, correspondence from and between the parties, the hearing transcript and exhibits, the briefs filed by the parties, the ALJ's proposed decision, the exceptions filed by the District and the response filed by the Association. We adopt the ALJ's proposed decision as the decision of the Board itself except as discussed below.

BACKGROUND

The proposed decision has an extensive and thorough discussion of the facts relevant to these cases. We find the factual discussion to be free of prejudicial error and adopt the findings of fact, in their entirety, as the findings of the Board itself. The following is a summary of some of the background facts relevant to the discussion in this decision.

The District's unfair practice charge against the Association alleged that the Association bargained in bad faith using the totality of conduct standard. Specifically, the District alleged that the Association unlawfully attempted to bargain to impasse the reporting

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

of STAR[2] test data (which the District believed to be outside the scope of representation) and other items which the District asserts that the Association waived the right to negotiate (health insurance carrier). The District alleged that the Association scheduled agenda items (presentation of the California Public Employees Retirement System representative) without notice to the District. Further, the District charged that the Association refused to submit proposals, refused to discuss proposals, maintained a take it or leave it position, canceled bargaining sessions without prior explanation and conditioned settlement of the 2003-2004 contract on negotiation of the 2004-2005 contract.

The Association alleged that the District unilaterally implemented a pre-paid legal services program and that the District bargained in bad faith by refusing to bargain the health care carrier offered to District employees. It was the Association's position that the health care carrier was in scope and was re-opened under the re-opener clause on compensation in the contract.

ALJ'S PROPOSED DECISION

On a motion by the Association, the ALJ consolidated the three cases over the objection of the District.

In Case No. SF-CE-2377-E, the ALJ found that the District violated its obligation to meet and confer in good faith by refusing to negotiate concerning the selection of a health insurance carrier during the 2003-2004 re-opener negotiations. The ALJ concluded that although the Association waived its right to negotiate the health insurance carrier under the collective bargaining agreement, the District was obligated to bargain the Association's

[2]STAR refers to Standardized Testing and Reporting and is the student achievement assessment device administered by the California Department of Education (CDE). (ALJ's proposed dec. at p. 5, fn. 6, citing the CDE website.)

proposal when the parties re-opened the article in the agreement containing the health insurance carrier waiver.

In Case No. SF-CE-2380-E, the complaint and underlying unfair practice charge alleged that the District unilaterally implemented a pre-paid legal program.[3] The ALJ determined that the Association did not set forth a prima facie case because implementation of the program did not have a generalized and continued impact on the bargaining unit. The ALJ dismissed the complaint and unfair practice charge.

In Case No. SF-CO-640-E, the District alleged both bad faith bargaining and bad faith participation in the impasse procedures. To support its allegations of bad faith bargaining, the District cited the Association's insistence on negotiating the manner in which the District received its STAR test results, canceling two bargaining sessions, failing to present written proposals, attempting to bypass District negotiators and presenting a non-negotiable class size proposal. Of those claims, the ALJ found only that the Association violated its obligation to meet and negotiate in good faith when it insisted to impasse on its proposal related to the STAR test results. He also found the Association violated its obligation to meet and negotiate in good faith when it attempted to bypass the District's labor relations representatives and proposed a preparation time schedule to elementary school principals in an attempt to resolve pending grievances.

In determining whether a party has violated 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)

[3] While the District argued that the charge should have been dismissed based on timeliness, the ALJ found the District did not show that the Association had knowledge of the implementation of the pre-paid legal program in 2002 and therefore found it was not time-barred. We agree with that finding.

PERB Decision No. 143 (Stockton).) Applying the totality of conduct test, the ALJ found that notwithstanding these two instances of per se bad faith bargaining, "the Association's overall conduct does not demonstrate a lack of subjective intent to reach an agreement" and dismissed the allegation of bad faith bargaining.

The District also claimed that the Association engaged in bad faith conduct during the impasse procedures by engaging in conditional bargaining (a per se violation when it has the practical effect of preventing negotiations altogether according to Stockton). The District's conditional bargaining allegation centered on the Association's expressed concerns about the next year's negotiations, an argument rejected by the ALJ.

The ALJ also considered and rejected the District's argument that the Association engaged in surface bargaining when it reneged on a tentative agreement. Surface bargaining is found when a party goes through the motions of negotiations, but takes action to delay or prevent agreement. (Muroc Unified School District (1978) PERB Decision No. 80.) Where there is an accusation of surface bargaining, PERB will resolve the question of good faith by analyzing the totality of the accused party's conduct. The Board weighs the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (Oakland Unified School District (1982) PERB Decision No. 275.)

In this case the parties reached a tentative agreement, but the Association's representative council did not ratify the tentative agreement. Even though the Association took a neutral position when presenting the proposal to the representative council, the ALJ did not find that this failure to endorse the agreement constituted reneging on the agreement. According to the ALJ's analysis, the parties have no obligation to endorse a tentative

agreement absent agreement to do so. The District did not present and we have found no authority to the contrary.

DISCUSSION

The following discussion includes the exceptions filed by the District,[4] the Association's response and the findings of the Board.

Case No. SF-CE-2377-E (alleges bad faith bargaining by the District)

The District excepted to the ALJ's conclusion that it bargained in bad faith over selection of the health insurance carrier. The District also excepted to the ALJ's reliance on an Association witness' testimony that the Association's proposal naming a carrier, was intended to replace the consult language in the parties' collective bargaining agreement. Citing PERB precedent, the District's exceptions state that "an exclusive representative can waive the right to negotiate an otherwise negotiable subject by clear and unmistakable contract language." (Amador Valley Joint Union High School District (1978) PERB Decision No. 74; Solano County Community College District (1982) PERB Decision No. 219.) The District argues that because the collective bargaining agreement included a waiver of the Association's right to bargain the insurance carrier, the Association first had to present a proposal to abandon the waiver language before the District would be required to negotiate a proposed health insurance carrier. The Association's position is that the ALJ determined correctly that the District engaged in bad faith bargaining by its flat refusal to negotiate the selection of a health insurance carrier.

It is not disputed that the contract language (Section 13.14 of the collective bargaining agreement) waives the right to negotiate the health carrier, with the parties agreeing instead to

[4]The Association filed no exceptions to the proposed decision.

consult. However, it is also incontrovertible that the Compensation Article (Article 13) was subject to negotiation during the 2003-2004 school year negotiations.[5] Furthermore, the health care carrier language in dispute is part of the Compensation Article that was re-opened. This fact alone, that the health care carrier language was contained in the Compensation Article, required the District to negotiate the Association's proposal related to that article. Therefore, the District should have negotiated the proposal submitted by the Association, notwithstanding the fact that the proposal did not include a proposed repudiation of the waiver.

We disagree with the portion of the ALJ's proposed decision that speculates about the intent of the Association's proposal, however. The proposed decision at page 36 states that "[t]he proposal identifying CalPERS as the health carrier was intended by the Association to supplant the meet-and-consult language." While we find that the ALJ was correct in his conclusion that the health carrier language was negotiable as part of the Compensation Article, we need not speculate about the intent or nature of the Association's proposal in reaching that conclusion. The ALJ's proposed decision should have concluded only that the subject of the District's health care carrier was subject to negotiations by virtue of that topic's inclusion in the Compensation Article of the collective bargaining agreement and we adopt the analysis in the proposed decision to the extent that it makes that finding. We decline to adopt any additional analysis of the ALJ on the subject of the negotiability of the health care carrier language beyond that conclusion.

[5]The District and the Association were parties to a collective bargaining agreement for the period of July 1, 2001 through June 30, 2004. Article 22 (Term and Renegotiation) at section 22.1 of that agreement provides, in part, that for the 2003-2004 school year, "there shall be re-openers in compensation and two other articles per party."

We therefore uphold the ALJ's conclusion that the District did not act in good faith in advancing its positions related to the negotiability of the health care carrier and waiver language.

Case No. SF-CE-2380-E (alleges unilateral implementation of a pre-paid legal services program)

The District excepted to the ALJ's conclusion that pre-paid legal services are a form of insurance providing future economic security that benefits the employee directly and is within the scope of representation. The District's position is that the program is not insurance, offers no future economic benefit, and does not relate to wages or another enumerated subject and is a de minimus amount and therefore is not negotiable.

The ALJ determined that "the benefit is not actually the [pre-paid legal] plan itself, but the payroll deduction" which the District allowed for employees to participate in the voluntary plan. (ALJ's proposed dec, p. 38). The Association did not except to the ALJ's determination. However, in its response to the District's exceptions, the Association argued that the pre-paid legal service itself was a legal expense benefit and therefore a "term and condition of employment" under EERA. EERA section 3543.2(a) defines "terms and conditions of employment" as health and welfare benefits within the meaning of Government Code Section 53200. Section 53200(d) includes within its definition of "health and welfare" benefits "legal expense or related benefits ... whether provided on an insurance or a service basis."

We agree with the ALJ's determination that the District "provided nothing other than the service of its payroll department in processing deductions to pay for the employees' participation in the plan." As such, the issue is whether or not the payroll deduction is negotiable based on the facts before us. As cited by the ALJ's proposed decision, the Board

has determined that not all payroll deductions are negotiable. (Jefferson School District (1980) PERB Decision No. 133.) Rather, "the relationship of the deduction to an enumerated subject in section 3543.2 must be demonstrated." (Ibid.) In this case, that relationship has been demonstrated, because the payroll deduction is for a legal expense program which falls squarely within the definition set forth in EERA.[6]

The ALJ found that the pre-paid legal services plan was akin to insurance and afforded unit employees a future economic benefit and was therefore negotiable. Because we find that the plan relates to an enumerated subject under Section 3543.2, we see no need to analyze whether pre-paid legal services are akin to insurance.

To prevail on a complaint of unilateral change, the exclusive representative must establish by a preponderance of the evidence that (1) the employer breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196.)

Although finding that the pre-paid service was negotiable, the ALJ concluded that the District did not unilaterally implement the program, because the program did not have a generalized and continued impact on the bargaining unit. The ALJ analyzed the District's decision to disallow further enrollments pending the outcome of this case, the de minimus involvement of the District in continuing the program and the small number of employees

[6]As discussed above, Section 53200(d) includes within its definition of "health and welfare" benefits "legal expense or related benefits . . . whether provided on an insurance or a service basis."

involved in reaching that conclusion. We agree. Therefore, the Board upholds the ALJ's ultimate conclusion in this case, with the clarification that the Board does not affirm the ALJ's reasoning that pre-paid legal services are a form of insurance providing future economic security.

Case No. SF-CO-640-E (alleges bad faith bargaining by the Association)

The bad faith bargaining allegation filed by the District charged the following: (1) the Association insisted to impasse on negotiating non-negotiable subjects (the selection of health insurance provider and the format of STAR results); (2) the Association cancelled bargaining sessions; (3) the Association failed to present written proposals; (4) the Association attempted to bypass District negotiators and presented a non-negotiable class size proposal. The complaint also alleged that the District engaged in bad faith conduct during the mediation phase of the impasse procedures.

The District excepted to the ALJ's rejection of the testimony of District witness Bill Stephens (Stephens), the District's assistant superintendent of business, that he informed the Association that funds were available to go to the unit. The exception is based on the District's position that the ALJ misconstrued the testimony of Stephens and then based the conclusion on something other than what Stephens actually said. If accepted, Stephens' testimony may have supported the District's argument that the Association refused to discuss proposals and maintained a "take it or leave it" position during negotiations. The Association asserts that the ALJ's proposed decision was based on more than Stephens' testimony.

We find that the ALJ's determination was based largely on the credibility of Stephens and other witnesses. The Board accords great deference to the ALJ's credibility findings because the ALJ is in a better position to make those findings. (Long Beach Community College District (1998) PERB Decision No. 1278, p. 10, citing Duarte Unified Education Association

(Fox) (1997) PERB Decision No. 1220 and Los Rios College Federation of Teachers (Deglow) (1996) PERB Decision No. 1133.) We do not find evidence in the record to support the District's credibility exceptions here. We also do not find grounds to change the ALJ's conclusion that the Association did not engage in surface bargaining.

The District also excepted to the ALJ's finding that STAR test results are in any way within the scope of bargaining. The District takes the position that the Association never articulated that their proposal was intended to fall under the Evaluation Article of the collective bargaining agreement that the District had re-opened.

The Association argues that the ALJ properly determined that the STAR test results could be a negotiable subject of bargaining, conceding that the specific issue that the Association proposed (the manner in which the results would be received and the proposal that school principals not have access to them) impinged upon managerial rights.

A subject is negotiable, even though not enumerated in EERA, (1) if it is logically and reasonably related to hours, wages, or an enumerated term and condition of employment; (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives, including matters of fundamental policy, essential to the achievement of the school district's mission. (Anaheim Union High School District (1981) PERB Decision No. 177.)

The Board need only determine the negotiability of the specific proposals in the case at hand and the ALJ's proposed decision goes further. Therefore, the Board upholds the ALJ's conclusion that the Association's proposal regarding the make up and dissemination of the

STAR results was not negotiable and impinged upon managerial rights, without further analysis. There was no basis for speculation about how the subject of STAR test results "could" fall within the evaluation article.

ORDER

Case No. SF-CE-2377-E

Based upon the foregoing discussion and the entire record in this matter, the Public Employment Relations Board (PERB or Board) finds that the Newark Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), when it failed to meet and negotiate in good faith by refusing, during the 2003-2004 re-opener negotiations, to negotiate concerning the selection of a health insurance carrier.

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 and refusing to meet and negotiate in good faith with the Newark Teachers Association, CTA/NEA (Association) as the exclusive representative of its certificated employees by refusing during the 2003-2004 reopener negotiations to negotiate concerning the selection of a health insurance carrier.

2. By the same conduct, interfering with bargaining unit employees' right to participate in the activities of an employee organization of their choosing.

3. By the same conduct, denying to the Association rights guaranteed by EERA, including the right to represent its members.

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

1. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations in the District where notices to employees customarily are 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.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

Case No. SF-CE-2380-E

The Board finds that the District did not fail to meet and negotiate in good faith with regard to the pre-paid legal services plan. Therefore, the complaint and underlying unfair practice charge in Case No. SF-CE-2380-E are hereby DISMISSED.

Case No. SF-CO-640-E

Based upon the foregoing discussion and the entire record in this matter, the Board finds that the Association violated EERA, Government Code section 3543.6(c), when it failed to meet and negotiate in good faith by (1) insisting to impasse on a proposal to have the District elect to receive the Standardized Testing and Reporting (STAR) test results without the data being disaggregated by teacher, and (2) by attempting to bypass the District's labor

relations representatives when proposing a preparation time schedule to the District's elementary school principals for the purpose of resolving pending grievances.

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

A. CEASE AND DESIST FROM:

1. Insisting to impasse on bargaining a proposal to have the District elect to receive the STAR test results without the data disaggregated by teacher.

2. Bypassing or attempting to bypass District bargaining representatives by directly communicating with District management staff for the purpose of settling grievances or disputes over negotiable matters.

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

1. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations in the District where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Association, indicating that the Association 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.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The Association

shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the District.

All other allegations in Case No. SF-CO-640-E are hereby dismissed.

Members McKeag and 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. SF-CE-2377-E, Newark Teachers Association, CTA/NEA v. Newark Unified School District, in which all parties had the right to participate, it has been found that the Newark Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), when it failed to meet and negotiate in good faith by refusing, during the 2003-2004 re-opener negotiations, to negotiate concerning the selection of a health insurance carrier.

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

CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Newark Teachers Association, CTA/NEA (Association), as the exclusive representative of its certificated employees by refusing during the 2003-2004 reopener negotiations to negotiate concerning the selection of a health insurance carrier.

2. By the same conduct, interfering with bargaining unit employees' right to participate in the activities of an employee organization of their choosing.

3. By the same conduct, denying to the Association rights guaranteed by EERA, including the right to represent its members.

Dated: _____ NEWARK 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.

APPENDIX

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PUBLIC EMPLOYMENT RELATIONS BOARD
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After a hearing in Unfair Practice Case No. SF-CO-640-E, Newark Unified School District v. Newark Teachers Association. CTA/NEA, in which all parties had the right to participate, it has been found that the Newark Teachers Association, CTA/NEA, violated the Educational Employment Relations Act, Government Code section 3543.6(c), when it failed to meet and negotiate in good faith by (1) insisting to impasse on a proposal to have the Newark Unified School District (District) elect to receive the Standardized Testing and Reporting (STAR) test results without the data being disaggregated by teacher, and (2) by attempting to bypass the District's labor relations representatives when proposing a preparation time schedule to the District's elementary school principals for the purpose of resolving pending grievances.

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

CEASE AND DESIST FROM:

1. Insisting to impasse on bargaining a proposal to have the District elect to receive the STAR test results without the data disaggregated by teacher.

2. Bypassing or attempting to bypass District bargaining representatives by directly communicating with District management staff for the purpose of settling grievances or disputes over negotiable matters.

Dated:_____ NEWARK TEACHERS ASSOCIATION, CTA/NEA

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

NEWARK TEACHERS ASSOCIATION, Charging Party, v. NEWARK UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NOS. SF-CE-2377-E SF-CE-2380-E
NEWARK UNIFIED SCHOOL DISTRICT, Charging Party, v. NEWARK TEACHERS ASSOCIATION, Respondent.	UNFAIR PRACTICE CASE NO. SF-CO-640-E PROPOSED DECISION (4/18/05)

Appearances: California Teachers Association, by Ramon E. Romero, Staff Attorney, for Newark Teachers Association; Miller, Brown & Dannis, by John R. Yeh and Lori K. Schnall, Attorneys, for Newark Unified School District.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

In three unfair practice charge matters consolidated for hearing and decision, a teachers union and a public school employer charge each other with bad faith bargaining during reopener negotiations for the 2003-2004 school year.

On January 29, 2004, the Newark Teachers Association (Association) filed its first unfair practice charge (case no. SF-CE-2377-E) alleging that the Newark Unified School District (District), during the negotiations, maintained that the selection of a health insurance provider was a non-negotiable subject. On February 13, 2004, the Association filed its second unfair practice charge (case no. SF-CE-2380-E) alleging that the District implemented a

unilateral change by establishing a pre-paid legal services program for bargaining unit employees.

On February 20, 2004, the District filed its unfair practice charge (case no. SF-CO-640-E) alleging that the Association engaged in surface bargaining and insisted to impasse on negotiating non-negotiable subjects (selection of a health insurance provider and format of state-reported student test results).

On March 8, 2004, the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint in case number SF-CE-2377-E alleging that the District unilaterally repudiated its policy of consulting on the selection of health insurance providers. On April 1, 2004, a complaint issued in case number SF-CE-2380-E alleging that the District unilaterally implemented a pre-paid legal services plan for the benefit of bargaining unit members. The conduct specified in each of these complaints is alleged to violate Educational Employment Relations Act (EERA or Act) section 3543.5(a), (b) and (c).[1]

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[1] Unless otherwise indicated all statutory references are to the Government Code. The EERA is codified at section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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. Knowingly providing an exclusive representative within accurate information, whether or not in response to a request for information, regarding the financial

On April 22, 2004, a complaint issued in case number SF-CO-640-E alleging that the Association engaged in surface bargaining, insisted to impasse on non-negotiable subjects, and attempted to bypass the District's negotiators. This conduct is alleged to violate section 3543.6(c).[2]

On March 29, and April 21, 2004, the District answered the complaints in case numbers SF-CE-2377-E and SF-CE-2380-E, respectively, denying all material allegations and asserting a number of affirmative defenses.

On May 3, 2004, the Association answered the complaint in case number SF-CO-640-E, denying all material allegations and asserting a number of affirmative defenses.

On May 25, 2004, the District moved to amend its complaint, seeking to add allegations that (1) the Association's insistence on bargaining over the format in which the state-reported student test results were received constituted indicia of bad faith (as well as the already alleged per se bad faith bargaining violation), and (2) the Association participated in the impasse procedures in bad faith by reneging on a tentative agreement brokered by the mediator and engaging in conditional bargaining.

On August 27, 2004, the undersigned granted a motion by the Association to consolidate the three cases for formal hearing.

On October 18, 2004, the Association moved to amend the complaint in case number

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> resources of the public school employer constitutes a refusal or failure to meet and negotiate in good faith.

[2] Section 3543.6(c) provides that it shall be unlawful for an employee organization to:

> Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

SF-CE-2377-E to allege that the District engaged in bad faith bargaining by refusing to negotiate concerning health insurance provider options (rather than by unilaterally repudiating the policy of consulting as to that subject).

The undersigned conducted a formal hearing in Oakland on October 20, 21, and November 8, 2004. At the outset of the hearing, the undersigned granted the District's motion to amend its complaint. The undersigned reserved ruling on the Association's motion to amend its complaint, and later in the course of the hearing granted that motion as well.

With the receipt of post-hearing briefs on January 31, 2005, the matter was submitted for decision.

FINDINGS OF FACT

The District is a public school employer within the meaning of section 3540.l(k) of the Act. The Association is an employee organization within the meaning of section 3540.l(d) and an exclusive representative within the meaning of section 3540.l(e). PERB has jurisdiction in this matter.

Commencement of the Negotiations

The District and the Association were parties to a collective agreement for the period of July 1, 2001, through June 30, 2004. Article 22 ("Term and Renegotiation"), section 22.1, of that agreement provides, in pertinent part, that "[f]or the 2003-2004 school year, there shall be re-openers in compensation and two other articles per party."

Pursuant to this provision, the parties reopened the agreement in the spring of 2003. The Association chose to reopen the contract's articles on class size and workday. The District chose to reopen only the article on evaluations. By the terms of the agreement, the compensation article was opened without need for election by either party. The parties sunshined their proposals, but, at least as to the Association's February 27, 2003, proposal (the

only one entered into evidence), the proposals state nothing more than the intention to reopen the cited contract articles.

Around this time, the District also announced plans to lay off 120 bargaining unit members. The Association responded with a proposal to bargain the effects of the layoffs. By mutual consent the parties agreed to combine the effects-bargaining and the reopener negotiations. In the initial sessions the parties prioritized the bargaining subjects and agreed to deal with the layoff effects first. Several sessions were devoted to this subject until two side letters were executed in June 2003.

On June 4, 2003, Association President Phyllis Grenier submitted a demand to bargain the effects of a change in the reporting procedure for STAR/CAT6 student test results. In the past, STAR[3] results had been released to the school districts listing scores of students, for each grade level of testing. Grenier learned from the California Teachers Association (CTA) during the summer of 2003 that the Department of Education would for the first time be releasing test scores disaggregated by teacher. Thus, a list of test scores for students in each grade level class would be grouped and reported according to teacher. The reports were presumably intended for use by the teachers themselves, because teachers were the ones to receive the results.[4]

[3] STAR (Standardized Testing and Reporting) is the student achievement assessment device administered by the California Department of Education in cooperation with school districts. The department's website states that the "[t]est results are used for student and school accountability purposes." (California Department of Education Web site <http://www.cde.ca.gov/ta/tg/sr>.)

[4] While previously the information in this form could have been obtained manually by pulling the test scores for each student and then grouping them by teacher, this report constituted a new state format.

Resumption of Negotiations in the Fall of 2003

It was known in the spring of 2003 that District Superintendent Ken Sherer would be retiring at the end of that school year. The District chose John Bernard to succeed him. Bernard commenced his new position effective July 1, 2003. The departure of Sherer also marked a wholesale change in the District's top administrative positions, including the positions of director of personnel and chief business officer.

Going into the new school year, the District also chose a new bargaining team, headed by Sandra Woliver, a labor relations attorney. Woliver was the team's chief spokesperson. Also on the District's team were Interim Director of Personnel John Casey and Chief Business Officer William Stephens. The Association's team was newly constituted as well, headed by Diane Lisi, a California Teachers Association staffperson. Also included were Jacob Goldsmith, a high school mathematics teacher, and two others.

The first reopener negotiation session for the new teams took place on September 22, 2003. This one was followed by sessions on October 7, October 23, November 6, and December 15, 2003. Both parties acknowledge that neither party came to the negotiations with written proposals. For at least three of the sessions (October 7, October 23, and November 6), it was the Association presenting an agenda for the meetings.

At the September 22, October 7, and October 23 sessions, the Association raised concerns about the distribution of the STAR test reports with listings by teacher because of its potential for use by administrators in evaluations, as well for establishing individual reputations of teachers that might generate unwanted scrutiny by parents and the community. At the time, Woliver was aware that some discussions concerning the STAR test results were taking place away from the table. Woliver resisted the subject, claiming it was a non-negotiable matter. Woliver interpreted the Association's position on each occasion as seeking

a change in the manner in which the District "received" the reports from the state and "how they were or were not disseminated." Bernard testified that the state had reported that the teacher reports (which followed the student reported results by several months) would be sent to the District separated by school, but that all the teachers' results would be in one envelope for each school.

At the October 7 session, Woliver probed the negotiability of the subject but found the Association's explanation to be unpersuasive and "circular." Woliver asserted that at the October 23 session the Association again demanded that the results not be disaggregated by teacher and that she responded that there would be no change in the manner in which the results were received from the state. Woliver asserted that "confidentiality" was not an issue raised initially by the Association, but acknowledged that the Association eventually communicated that concern. Stephens and Casey, at least over time, had no difficulty appreciating the core concern of the Association, namely, the need for confidentiality of the results.[5] Nevertheless, Woliver believed the Association never presented a proposal on this matter that was within scope.

While acknowledging that the District had reopened the evaluation article (art. 9), Woliver denied that the Association's proposal fell within the subject matter of that article. The contract's evaluation article does not specifically address use of STAR test results in evaluations. However, section 9.7 ("Assessment Methods"), subsection 9.7.1, provides:

> Methods to be utilized in the assessment of student progress shall be consistent with stated objectives. Such methods of assessment may include use of state, District, and/or department test norms [but not publishers' norms established by standardized tests (See Ed. Code section 44662)] utilizing pre- and post-testing methods;

[5] Lisi also testified that despite Sherer having some difficulty initially understanding the Association's proposal in June 2003 to negotiate the effects of the new STAR results format, he never asserted that the subject was not negotiable.

product output measuring quality and/or quantity; performing output; observation and records; and other techniques.

In addition, the bracketed language in the quote above is essentially restated in subsection 9.2.8. Nowhere does the article specifically define "student progress." Subsection 9.5.3, under the section entitled "Proposed Objectives," states that the teacher's individually selected objectives for the evaluation process must be consistent with "educational goals, objectives and standards of student progress established by the state, the District, the School and/or the department program." The District has never had a policy of allowing STAR results to be a factor in teacher evaluations, and its bargaining team tried to assure the Association that that would not occur going forward.[6]

Woliver referred the Association to the evaluation article and invited the Association to present a proposal that was related to evaluations and within scope. Ultimately, at the November 6 session, the Association presented a written proposal on dissemination of the STAR results, which is discussed below.

At the October 7 session, the parties also discussed the subject of class size. The Association presented its concern with "special day class" students being mainstreamed into classes without an aide for each student. The Association also expressed a concern about unusually large high school classes. The existing contract language only contained a limit of 150 student contacts for each teacher in grades 7 through 12 for specified subjects, with a $30-per-student stipend to be paid after November 1 for each student exceeding the cap. The

[6] The District's original idea in reopening the evaluation article was to standardize the evaluation form to more closely parallel the teaching standards identified by the Department of Education. Specifically, the District wanted to ensure that the instrument contained all of the state teaching standards. The District made an oral proposal on this, but after the Association explained that the current instrument covered all the standards, the District abandoned it.

Association verbally proposed a cap of 30 students per class. The parties ended the October 7 session without movement.

Article 13 of the contract addresses compensation. The contract does not specify what health and welfare benefits are provided. Instead, the amount that might typically be allocated to various benefits is simply added on top of the salary assigned to each employee by the salary schedule. The contract only requires the District to maintain an Internal Revenue Code section 125 plan so as to ensure that the portion that the employee allocates to such premiums is treated as pre-tax income. Section 13.14 of the article stipulates:

> As long as the District maintains an Internal Revenue Code section 125 plan, subject to the terms of the plan and applicable law, the Association and the District shall consult concerning the health carrier options, which will be selected by the Association, subject to administrative feasibility and Board approval.

Under the current contractual language the District payroll deducts from employee paychecks and allocates those monies to a health carrier it has chosen, in consultation with the Association. As noted below, this language is also a waiver of the Association's right to negotiate the choice of the health carrier. The District made no initial proposal regarding compensation.

At the October 23 session, the Association proposed a change to designate the California Public Employees Retirement System (CalPERS) as the health carrier for the unit. According to the testimony of Woliver, the District understood that the Association was seeking to identify a specific health carrier. The District responded that the contract's language constituted a waiver of the right to negotiate over this subject (i.e., the subject was limited to a meet-and-consult item). Woliver testified that because the Association also failed to make a written proposal that first eliminated the waiver language, the District had no obligation to entertain the proposal, other than as a meet-and-consult item.

Goldsmith, testifying for the Association, acknowledged that no such proposal to first eliminate the waiver language was proposed, but countered that because the Association's proposal was mutually exclusive with the language of section 13.14, such a proposal was, at the very least, clearly implied. Moreover, Goldsmith testified that he explained this exclusivity to the District. Further, although conceding there initially might have been a lack of clarity regarding this point, Goldsmith recalled that he eventually advised the District that the intent of the proposal was to supplant the meet-and-consult language of the article.

> Q: And was the Association also proposing to change the language in Section 13.14 to eliminate just the right to consult about health carriers?
>
> A: Yes. And at the time there seemed to be a little miscommunication here. The District seemed to have the point of view that we were working within that contract language trying to change the healthcare provider. And that was mistaken. I clearly explained, and I spoke to this personally, I clearly explained that what we were seeking was to replace, we were actually negotiating that language itself and what we were seeking to replace that consult language with the proposal in [the written proposal[7]], CalPERS shall be the health insurance provider to Newark Teachers Association members.

The District provided no direct rebuttal to this testimony and I credit Goldsmith's testimony in this regard. Woliver testified that at some point - probably at this juncture - she complained about the Association raising "extraneous issues" and asked that the parties "get down to business."

The November 6 session was scheduled to be an all-day meeting. The Association spent most of the first hour caucusing.[8] Then, without having provided prior notice to the District or obtained its consent, the Association introduced a representative from CalPERS to

[7] The written proposal was provided at the November 6 session, discussed below.

[8] Woliver cited the fact that around this time the Association's caucusing began to be a problem by slowing the pace of negotiations.

provide an explanation of the CalPERS medical benefit plan. The District team allowed the representative to speak to avoid any awkwardness and as a courtesy to her. The presentation took up the entire morning session. The Association team announced that following lunch, it would present written proposals.

After the break, the Association presented a package of three proposals, its first proposals that were in writing. The Association's health care proposal states:

> Health Care and Compensation
>
> Proposal: CalPERS shall be the health insurance provider to Newark Teachers Association members.
>
> Proposal: The $6324 that has been placed on the salary schedule to cover health care costs shall be increased to the actual annual cost of family health care coverage under the current plan. In the future, this portion of the salary schedule shall automatically increase to match any increase in the annual cost of family health care coverage under the current plan but shall not be affected by negotiated changes to the salary schedule.
>
> Proposal: The district contribution to health care for employees and retirees shall be the minimum amount required by law.

The Association's class size proposal included changes to various sections of article 8. One of the language changes would have required that the instructional aide obligation to special-day-class students attach to each student individually rather than the class as a whole, thus increasing the number of aides required. Another proposed a 31-student cap for high school and junior high school classes. Various other proposals addressed the ramifications of changing to a fixed class-size cap as it related to the stipend for overages.

The Association submitted a proposal entitled "Test Results Reporting." The proposal read as follows:

> The State of California will be sending confidential test data to each school district. The test data shall be handled in the following manner:

1. The district shall distribute the sealed data to each school site.

2. Envelopes shall remain sealed until the teacher unseals them.

3. No one but the teacher should see the sealed test data.

4. The teacher is under no obligation to share this information, nor should administrators request this information from teachers.

5. Envelopes shall be distributed at staff meetings, not individually.

6. Administrators shall not tamper with the envelopes.

7. The district will elect to receive from the state only grade level information (not teacher specific information).

The District responded to these proposals. The District rejected the STAR testing proposal as being outside of scope.[9] It rejected the health care proposal's escalator clause as being too costly, stating the District had no money, and the CalPERS proposal on grounds that selection of the health carrier was only a meet-and-consult item. Woliver stated the District would certainly agree to consult on the matter. The District also rejected the class size proposals as too costly.

[9] Incoming Superintendent Bernard testified that Grenier contacted him in October 2003 concerning the dissemination of the test scores by teacher. An away-from-the-table exchange then ensued. Beginning with an October 20, 2003, memorandum, Grenier and Bernard exchanged correspondence, in which Grenier conveyed her concern about the test scores being delivered in sealed envelopes which would not be opened by the principals. Bernard agreed to address this concern. He ultimately proposed that a joint communiqué issue from the two of them containing instructions for distribution of the results which memorialized their agreement. Grenier was provided a draft of this communiqué but she never responded to it, until Bernard was compelled by time factors to act. With no contact from Grenier, Bernard informed Grenier he could delay the distribution no longer and would send out the cover memorandum with his signature alone and a notation that Grenier was a copy recipient. A few hours later the same day, Grenier responded to Bernard, conveying her understanding that the District was insisting at the bargaining table that the subject of dissemination of the STAR results was outside the scope of representation. Her e-mail ended with an objection to the District bargaining team's position at the table.

Casey testified that the District never had any interest in making movement on the high school cap proposal. Goldsmith testified that each of the class size proposals involved cost and that the Association stated it was not interested in any counterproposal that did not add money. The Association viewed the District's response as rejecting any proposal that involved additional costs to the District. The District team did not disabuse the Association of that notion, in response to which the Association indicated there was really nothing further to discuss. The District then asked if that statement was intended to mean that the Association's proposal was a "take-it-or-leave-it" proposal, to which the Association responded affirmatively.

Stephens had concluded, based on a review of District finances, that there were funds in reserve which could be moved to the general fund and be made available for bargaining with the Association. He testified that he informed both bargaining teams of this. However, he also testified that Woliver never stated there was money available. Casey appeared to contradict Stephen's point as well, testifying that Woliver never informed the Association, if, or how much, money was available for bargaining. Woliver testified:

> We were offering no money. There was discussion in terms of class size, but we were not offering or making a proposal or counterproposal that would have had attendant costs.

Goldsmith also recalled the District refusing to consider any proposal that would be a cost item, and Stephens stating that "there is no money." Lisi testified that she counted three occasions on which the District stated that it was not offering any money. I reject Stephens's testimony that he informed the Association that there were funds available to go to the unit.[10]

[10] Stephens was shown a local editorial article that noted the District had reserves remaining from a capital projects local tax measure. He did not dispute its claim that the District had approximately $6.1 million in reserves. The District does not currently have a parcel tax revenue stream. Lisi acknowledged there were "leaks" about the financial reserves, but the District never came forward with an offer.

The next two scheduled sessions were cancelled at the request of the Association. Lisi had temporarily removed herself from the reopener negotiations in the fall of 2003 to head up bargaining in another district. A CTA intern took her place. Lisi returned to these negotiations on November 6, 2003. She was the one who requested the cancellations because the sessions scheduled in advance were not on her calendar. The District never complained to the Association about the cancellations.

The final negotiating session occurred on December 15. The District indicated its willingness to discuss class size, workday, and compensation. It remained unwilling to negotiate the CalPERS proposal. According to Goldsmith, the District stated that it was proposing a zero-percent change to the salary schedule; it would only entertain class changes that did not involve added cost; and there would be no movement on its part. The Association then declared that the parties were at impasse. The District responded that the Association was bargaining in bad faith. The Association leveled the same charge at the District's bargaining team. The Association left the session at noon.

The District's witnesses testified that they opposed the impasse because negotiations on compensation had not been exhausted and the parties had not reached the point where the District could make a financial offer.[11] Goldsmith testified that the Association believed the parties had reached impasse, notwithstanding the District's apparent willingness to continue discussing cost-neutral proposals on class size:

> Possibly we would have considered such proposals as part of an entire package. But with the tone of the [negotiations] when the District had said that no money was available for anything, we understood that we wouldn't be able to make any significant progress toward a settlement just moving in the field of cost neutral class size adjustments.

[11] Woliver asserted that the District never offered "$0" and that it was denied an opportunity to counter-propose some financial movement.

As to the subject of the workday, though the matter appeared on the agenda twice, neither side made a proposal. The Association initially expressed interest in limiting the adjunct duties of high school teachers, but eventually abandoned that issue. The Association also declined to discuss the matter because it had several pending grievances on the subject which were proceeding to arbitration. Casey suggested that the District was interested in negotiating this subject. However, the District never offered a proposal on the subject.

Casey noted there had been "side discussion" about the reinstatement of preparation periods at the elementary schools. On December 19, the last day before the winter break, Lisi sent a proposed daily schedule for elementary schools to the elementary school principals designed to show how the preparation period could be restored at each school. The District had no advance notice of this direct communication. Casey instructed the principals to ignore it.

Lisi had been informed by an Association member that meetings were being held by the principals to obtain teachers' input regarding the reconfiguration of the preparation time schedule. The input of the science teachers whose scheduling tied in directly to the preparation time schedule was allegedly being ignored. Lisi solicited the input of the science teachers.[12] Lisi testified that she wanted to present a proposal that included the input of the science teachers. Subsequently, on the day of the arbitration scheduled as to the pending grievances, the parties agreed to a settlement that included the reinstatement of the preparation time.

In February 2004, a flyer was posted at Graham Elementary School announcing there would be a presentation by a pre-paid legal services vendor at a staff meeting. Grenier was a part-time teacher at Graham. She did not attend the meeting, but saw the flyer. Unbeknownst

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[12] Moving the preparation period to the beginning of the school satisfied the regular teachers, but the science teachers were inconvenienced.

to the Association, Sherer had arranged or contracted with the vendor in February 2002 to allow employees to participate in the plan through District payroll deductions. The District made no monetary contribution of its own on behalf of the participating employees. Approximately 15 to 20 employees signed up for the plan. Approximately five to six of these were bargaining unit members.

When Grenier protested this ostensible unilateral change to Casey, Casey investigated. Being new to the District, Casey had no prior knowledge of the plan and discovered the facts described above. He learned that Sherer had a written agreement with the agency to allow solicitation of employees. After his investigation Casey ordered the presentations to cease. He did allow the existing enrolled employees to maintain their payroll deductions. Despite Casey's assertion that he ordered the solicitations to cease, Goldsmith discovered a flyer from the vendor in the high school faculty lounge in October 2004.

Bernard's principal concern was that the presentations had occurred on staff time. Although he acknowledged Sherer's prior agreement allowing access to the company, he told the representatives that it was not an agreement he signed and

> therefore this was something that was not going to continue. As was it to the point of saying that they were no[] longer allowed to do business, I don't remember saying those words but I think the impact of that is probably pretty true.

Bernard did not believe that even voluntary meetings occurred after the directives. Appearing to contradict Casey, Bernard testified that if an employee did want to join, he or she could authorize District payroll deductions.

Impasse Procedures

Following an Association request to PERB, a determination issued that the parties were at impasse. PERB appointed a mediator. Two mediation sessions were held. No progress was made at the first. At the second, the mediator brokered a proposal for a settlement that

included a one-time, off-the-salary-schedule payment of $1620 per employee. The agreement contained other less significant provisions, such as the Association's withdrawal of pending unfair practice charges. Goldsmith believed the mediator suggested or intimated to both parties that the proposal was generated by the other party. He denied that it was an Association proposal.

During the time that mediation was occurring, the Association had constituted a separate bargaining team to commence negotiations for a successor agreement to the 2001-2004 agreement (also referred to as the 2004-2005 negotiations). Members of both teams were present at a meeting in early May 2004, when the 2003-2004 bargaining team presented the proposed tentative agreement to the Association's leadership group, known as the Rep Council, comprising approximately 20 individuals. Goldsmith testified that he laid out the terms of the proposal:

> I felt it appropriate to present the information, to present the settlement and then to some degree stand back from deliberations.

The bargaining team took a neutral position on the proposal; it did not argue that the Rep Council should either accept or reject the proposal. There followed a discussion of the pros and cons of the settlement. A vote was taken and the settlement was rejected. Although Goldsmith took no poll of individual members as to why they voted to reject, he concluded that the chief reason stemmed from the District's refusal to increase the salary schedule and approve its selection of CalPERS. Goldsmith denied that the 2004-2005 bargaining team specifically expressed "anger" toward the District for the 2003-2004 settlement proposal. At the same time, he acknowledged the interrelatedness of the bargaining strategies of the separate teams due to the cause-and-effect relationship of any settlement in the 2003-2004 negotiations.

The District's governing board voted to accept the settlement proposal. New Director of Personnel Keith Rogenski had occasion to discuss the Association's rejection of the settlement on May 10 with Lisi prior to a 2004-2005 bargaining session. Both expressed disappointment at the Association's rejection. Lisi, who was not present at the Rep Council meeting, speculated that the rejection might have been related to the successor agreement bargaining based on her knowledge that that topic was also an agenda item at the same meeting. Woliver learned from someone that the Association had presented the 2004-2005 proposals at the same meeting as the tentative agreement, that this angered the membership, and led to rejection of the tentative agreement. She could not pinpoint who the source of the information was, but she suggested it might have been Rogenski. Rogenski could not recall providing such information to Woliver. Woliver testified that the District was "astonished" that the Association had rejected the tentative agreement because it was "their proposal."

In the successor agreement bargaining, the Association proposed both the elimination of the waiver language and the selection of CalPERS. The District maintained that these subjects were not negotiable. According to Rogenski, the District maintained that position to the point of impasse.

In October 2004, Rogenski notified the Association that it was adopting CalPERS as the health insurance carrier for unit members under the meet-and-consult provisions of the contract.

ISSUES

1. Did the Association bargain in bad faith by insisting on negotiating, to the point of impasse, the subjects of STAR testing results and the health insurance carrier?

2. Did the Association bargain in bad faith by bypassing or attempting to bypass District negotiators as to restoration of elementary school preparation time?

3. Did the Association engage in bad faith, surface bargaining under the "totality of the conduct" test?

4. Did the Association participate in the impasse proceedings in bad faith by reneging on a tentative agreement, by conditioning agreement on matters in the 2004-2005 negotiations, or by the totality of its conduct?

5. Did the District bargain in bad faith by refusing to negotiate elimination of the waiver language limiting the selection of a health insurance provider to a meet-and-consult item?

6. Did the District unilaterally implement a pre-paid legal services plan for the benefit of unit members without providing the Association an opportunity to bargain over the new policy?

CONCLUSIONS OF LAW

Association Bad Faith Bargaining

The complaint issued against the Association alleges that it violated the EERA by engaging in bad faith conduct during the 2003-2004 negotiations, and (by way of the pre-hearing amendment to the complaint) bad faith conduct during the mediation phase of the impasse procedures as well. As to the bargaining phase, the underlying conduct specifically alleged in the complaint consists of the Association's insisting on negotiating the manner in which the District received its STAR results, canceling two bargaining sessions, failing to present written proposals, attempting to bypass District negotiators, and presenting a non-negotiable class size proposal.

In determining whether a party has violated 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.) The complaint, by alleging that the bad faith conduct "includ[es], but [is] not limited to," the specific acts alleged, sets out a theory of "surface bargaining" as to the negotiations and the impasse procedures. In such cases, the ultimate issue is whether the respondent lacked a "genuine desire to reach agreement" based on the totality of its conduct. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; Oakland Unified School District (1982) PERB Decision No. 275.) In Muroc Unified School District (1978) PERB Decision No. 80, PERB stated:

> Specific conduct of the charged party, which when viewed in isolation may be wholly proper, may, when placed in the narrative history of the negotiations, support a conclusion that the charged party was not negotiating with the requisite subjective intent to reach agreement.

The case law has identified a number of indicia which may serve to demonstrate bad faith: (1) entering into negotiations with a "take-it-or-leave-it" attitude (General Electric Co. (1964) 150 NLRB 192, 194 [57 LRRM 1491]); (2) recalcitrance in the scheduling of meetings (Oakland Unified School District (1983) PERB Decision No. 326); dilatory and evasive tactics, such as canceling meetings or coming unprepared (id); conditioning agreement as to mandatory subjects of bargaining on agreement as to non-mandatory subjects (State of California (Department of Personnel Administration) (1998) PERB Decision No. 1249-S); employing negotiators lacking in adequate authority (Stockton Unified School District, supra, PERB Decision No. 143); refusing to provide information (id); reneging on tentative agreements (Charter Oak Unified School District (1991) PERB Decision No. 873); failure to act on the other side's proposals or to offer counterproposals (Jefferson School District (1980) PERB Decision No. 133). Other conduct which constitute per se violations of the duty to bargain in good faith, such as unilateral changes, are also considered within the totality of the conduct. (See Stationary Engineers v. San Juan Suburban Water Dist. (1979) 90 Cal.App.3d

796, 802 [153 Cal.Rptr. 666].) The complaint further alleges that the Association's attempted bypassing constitutes an independent per se violation of the duty to bargain in good faith. Although not so alleged specifically as to the impasse procedures, I will analyze whether the Association engaged in conditional bargaining so as to constitute a per se violation and whether the Association failed to participate in the impasse procedures in good faith under the totality of the conduct test. (Stockton Unified School District supra, PERB Decision No. 143 [conditional bargaining])

The cases recognize that in surface bargaining cases the conduct alleged to constitute the surface bargaining may nevertheless be lawful "hard bargaining" (i.e., standing firm on a position that the party reasonably believes is fair and proper or that it has sufficient bargaining strength through which to force agreement by the other party). (See Atlanta Hilton & Tower (1984) 271 NLRB 1600, 1603 [117 LRRM 1224]; Oakland Unified School District, supra, PERB Decision No. 275.) Analysis of surface bargaining typically requires a determination of whether the bargaining conduct is lawful or unlawful in these terms.

A. Insisting to Impasse on Non-negotiable Subjects

1. STAR Test Results Proposal

The District contends the Association insisted to impasse on negotiating about how the District "receives" its STAR test results. It also contends that as to the entire subject of STAR results the matter relates to the District's establishment of educational objectives, a managerial prerogative. And the District disputes that the Association was ever able to make proposal that was within scope legally, or within the scope of the evaluation article reopener.

The Association contends that its proposals were negotiable because they dealt with how confidentiality of the results would be maintained at school sites, so as to prevent anyone

but teachers from seeing their own classroom results. The Association also asserts that the matter fell within the scope of the evaluation article.

Section 3543.2 enumerates "procedures to be used for the evaluation of employees" as a subject within the scope of representation. To the extent that the distribution of STAR test score results falls outside the meaning of this phrase, I must apply PERB's test for the negotiability of subjects not specifically enumerated in the statute. That test requires that (1) the subject be logically and reasonably related to wages, hours, or an enumerated term or condition of employment, (2) the subject be of such concern to management and employees that conflict is likely to occur and the mediatory influence of the negotiations is appropriate for resolving such conflict, and (3) obligating the employer to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of its mission. (Anaheim Union High School District (1981) PERB Decision No. 177.)

First, I reject Woliver's claim that the Association was unable to articulate any proposal that was within scope. I find that the proposals for procedures to ensure the confidentiality of the results disaggregated by teachers, such as having the teacher results be transmitted under seal and that the envelopes be distributed at staff meetings, comprise negotiable matters, under the Association's rationale that the results could affect performance evaluations. (Jefferson School District, supra, PERB Decision No. 133 [limiting contents of personnel files to only those evaluations done in accordance with the contractual procedures]; Walnut Valley Unified School District (1983) PERB Decision No 289 [procedures and criteria, including teacher's effectiveness as a teacher, classroom management and control, and planning and preparation, negotiable under the Anaheim test].) These proposals relate to the teachers' concerns about unnecessary and potentially harmful dissemination of the information and their potential

impact on evaluations, and do not abridge the District's freedom to exercise managerial prerogatives essential to the achievement of its mission.[13] District witnesses Stephens and Casey did not have difficulty appreciating the Association's core concern around confidentiality. Nor did Bernard, who responded to Grenier's concerns. Submitting such proposals to collective bargaining is the appropriate means of resolving conflicts over the subject.

In its zeal to ensure that the results not be used by administrators for evaluation purposes, however, I believe the Association did make a proposal that intruded on the District's managerial prerogatives: by demanding that administrators not view the results. Therefore, I agree with the District that some portions of the proposal were outside the scope of representation. Student test results are the product of a number of circumstances beyond the teacher's control. But teacher methods, skills, and effort are not unrelated to aggregate student performance as measured by standards-based testing. There is nothing that per se disqualifies such results from being used in evaluations; it is a proper negotiating goal for both sides as to which opposite views may be maintained. That said, a school district should not be precluded from allowing principals and other administrators to view such test results for educational

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[13] Although not specifically argued by the District, I note that use of test results in teacher evaluations presents an arguable issue as to an overriding managerial prerogative, particularly in light of legislative action not extant at the time of the cited precedent. This is evident in the recent state and federal mandates for year-to-year improvement by school districts in standards-based test scores, with severe sanctions for non-performance. (See Public School Performance Accountability Program, Ed. Code, sec. 52051 et seq.; No Child Left Behind Act, 20 U.S.C, sec. 6301 et seq.) However, I do not believe such an argument provides a clear ground for departing from the current PERB precedent. I would add that there is also a textual argument surrounding the statute's definition of "procedures to be used for the evaluation of employees." This can be cited as grounds for distinguishing the subject from evaluation "criteria," but also as evidence of intent that the Legislature knew how to exclude evaluation "criteria" when it so desired and failed to do so in this instance. (See sec. 3562(r)(l)(D) [Higher Education Employee-Employer Relations Act specifically exempts criteria for evaluation of academic employees from the scope of representation].)

purposes unrelated to teacher evaluations, such as whether the school's curriculum and teachers' varied strategies for implementing that curriculum are successful in improving test scores.[14]

Furthermore, Woliver testified without contradiction that as late as October 23, the Association was demanding that the test scores not be disaggregated by teacher. This is confirmed by the fact that when the Association presented its November 7 written proposal on STAR results the last item of its seven-point proposal demanded that the District "elect to receive[] from the state only grade level information (not teacher specific information)." I find this proposal to be outside the scope of representation as well. There is no evidence that the District has discretion as to how it receives the test results reported by the Department of Education, since there is no evidence that this is a matter within its control. (See Ed. Code, sec. 52052.) Moreover, the Association's proposal would have deprived the District of information that it was entitled to receive and consider for purposes unrelated to teacher evaluations, for the reasons explained above.

Woliver also claimed that the Association failed to make a proposal that was properly within the scope of the evaluation article. It should be noted that a refusal to bargain charge arises in a somewhat different context in reopener negotiations, where the duty to bargain is in part a creature of the contract. A "reopening clause" has been defined as:

> A provision in a collective bargaining agreement which permits either side to reopen the contract during its term, generally under specified circumstances or at specified periods of time prior to the actual expiration of the agreement. . . . (Harold S. Roberts, Roberts' Dictionary of Industrial Relations (3d ed. 1986) p. 616.)

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[14] At the same time, there are staff members, such as other teachers, classroom aides and secretarial staff, for whom the managerial prerogative does not apply. Confidentiality as to these individuals was a concern implicated by the Association's proposal. Obviously, the Association could have, but apparently chose not to simply propose language barring use of the test results in evaluations in favor of a broader type of protection.

Thus, negotiability depends in part upon the "specified circumstances" prescribed by the contract. Although a number of concerns were articulated by the Association, one of its main ones was that the test results not be seen by administrators due to its potential for use in a teacher's performance evaluation. The evaluation article currently makes reference to "test norms" and assessment of student progress. I find no other article of the contract that would constitute a more appropriate place for the Association's proposal to be placed. Since the Association's proposal was logically and reasonably related to evaluations, I further find that it was properly within the scope of the reopener on that article.

Despite the fact that I deem substantial portions of the Association's written proposal to be outside the scope of representation, I do not find the Association's conduct in presenting the proposal to be unlawful as to all aspects that were non-negotiable. PERB has held that when presented with a non-mandatory subject of bargaining, the party resisting the proposal must articulate its objection to negotiability. (San Mateo County Community College District (1993) PERB Decision No. 1030, pp. 19-20 [objecting party must inform the other of its refusal to entertain the proposal and its grounds therefor].) The rule makes logical sense because, as illustrated here, a proposal containing both negotiable and non-negotiable subjects, often presents close questions of law. A party making such a proposal may present such a proposal with a good faith belief in its negotiability. The negotiations process, rather than PERB, should be the first place where differing views as to negotiability are debated and non-negotiable subjects removed at the insistence of the resisting party. (See State of California (Department of Consumer Affairs') (2004) PERB Decision No. 1711-S, pp. 24-25 [no violation for refusing to provide information, where the information does not appear to concern mandatory subjects of bargaining and the union fails to renew its request with an explanation of the relevance].) There is, after all, nothing illegal per se about a party making a proposal as

to a non-negotiable subject and the responding party agreeing to such a proposal. (See Lake Elsinore School District (1986) PERB Decision No. 603.) Here the District failed to articulate a justification as to those aspects of the proposal that prevented administrators from viewing the results by teacher. Woliver admitted she could not recall there being any specific discussion about access by administrators to the results, despite that point being included in the written proposal. The District only specifically objected to the manner in which the District received the results.

Because the Association, over the articulated objection of the District, insisted to impasse on negotiating the proposal regarding how the District received the STAR results, I find that the Association committed a per se violation of its duty to meet and negotiate in good faith, in violation of section 3543.6(c).

2. Health Insurance Carrier Proposal

The District contends that it was never obligated to bargain over the proposal to allow the Association to select the health insurance carrier for unit members because the language of section 13.14 constituted a waiver of the right to bargain. The Association counters that because the compensation article was reopened, any language in the article was fair game, including the waiver language. I agree with the Association.

The non-negotiability of the health carrier selection is not a claim based on a statutory or case law prohibition. (Sec. 3543.2(a) ["health and welfare benefits as defined by Section 53200"]; Palo Verde Unified School District (1983) PERB Decision No. 321 [health carrier change from Blue Cross to Blue Shield negotiable; not de minimus in impact][15]; Oakland

[15] In Palo Verde Unified School District, the bargaining history shows the parties changing from a fixed dollar contribution with the district retaining the right to select the carrier to a dollar level contribution with a specific carrier identified. PERB explained that as a result "the District no longer retained the right to unilaterally select the health insurance carrier." (Id. at p. 3.)

Unified School District (1980) PERB Decision No. 126, affd. Oakland Unified School District v. Public Employment Relations Bd. (1981) 120 Cal.App.3d 1007 [175 Cal.Rptr. 105] [change in health plan carriers which affects level of benefits is negotiable].) Here the only impediment to negotiability was the contractual waiver conceded by the Association in its earlier negotiations with the District.

Yet the waiver was not insulated from attack through the reopener negotiation process. Again, as noted above, the scope of a reopening clause is defined by the language of the contract. Article 22, section 22.1, provides that "there shall be re-openers in compensation and two other articles per party." And article 21 ("Completion of Meet and Negotiation"), section 21.3, provides:

> The parties may by mutual agreement reopen this agreement for the purpose of modifying any Article or portion thereof.

Since the scope of the right to reopen is defined and limited only by the parties' contractual language, the language employed here clearly contemplates that what is reopened are articles, or portions thereof, by the parties. Since the compensation article was reopened and there is no language limiting the negotiations to only specific portions thereof, the entire article was subject to new proposals.

The District presents a fallback position in terms of the argument that the Association failed to make any explicit proposal to remove the waiver language. The Association contends that the proposal of a specific health insurance carrier was mutually exclusive with the waiver language and that this explanation of its proposal was expressly noted by Goldsmith. I do recognize that bargaining is often about technicalities; that making a proposal to eliminate the waiver language and making one to identify a particular health insurance carrier are two separate matters, which should logically extract more in return than simply for one of the proposals alone. On this basis the District's argument is not mere semantics. Nevertheless,

allowing the District to maintain its position on negotiability under these circumstances exalts form over substance.

The District contends that because the Association made a separate proposal in the subsequent successor agreement negotiations, it knew the difference. Yet when the Association conceded the District's dichotomy and specifically made the proposal to eliminate the waiver language in the subsequent successor negotiations, the District responded by again refusing to accept the negotiability of the health carrier proposal and maintaining that position to impasse. This shows that the District's position was not advanced in good faith from the outset.

Thus, I find that the allegation of a per se violation based on this matter must be dismissed.

B. Attempted Bypassing with Respect to Restoration of Preparation Time

An exclusive representative must deal with the employer's chosen representative for negotiations on matters within scope and must refrain from direct negotiations with the employer entity. (California State University (1987) PERB Decision No. 621-H [union president communicating an offer to the employer's governing board that had not been offered to the employer's negotiators].)

Lisi communicated with the elementary school principals on a matter that was the subject of settlement negotiations during grievance processing. The principals were individual decisionmakers at the District's various school sites, and part of the management team. The appropriate person to have received a settlement proposal was Woliver, the attorney handling the grievance arbitration, or her designee. Lisi gave no prior notice to the District of her intentions, nor did she receive authorization or a waiver from the District for her endeavor. This constituted an attempt to obtain support for the Association's position through a direct

appeal to the principals. That Lisi may have believed her conduct was innocent or excused because she was simply responding to what she perceived as improper direct dealing between the principals and the elementary school teachers does not constitute a defense. Therefore, the Association bypassed or attempted to bypass the District's authorized representative, in violation of section 3543.6(c).

C. Totality of the Conduct

Analysis of the totality of the conduct requires an assessment of any independent per se violations of the duty to bargain in good faith, as well as other indicia of bad faith. I have found two per se violations, one based on the STAR test results proposal and one based on the attempted bypassing.

The District contends there are a number of other indicia of bad faith arising from the Association's refusal to submit proposals, refusal to discuss proposals, scheduling of an agenda item without notice to the District (i.e., the CalPERS representative), cancellation of two bargaining sessions, maintaining a "take-it-or-leave-it" position, and conditioning settlement of the 2003-2004 contract on negotiations over the 2004-2005 contract.

I find the record generally lacking in circumstantial evidence of the Association's intent to simply "go through the motions" in the negotiations. The Association's proposal on STAR results was advanced in good faith, in response to a legitimately perceived concern about the confidentiality of the test results. Thus, the proposal to have the District change the way it received its results must be viewed in context. It was the last point in the seven-point proposal, and, as more encompassing in scope, was logically an alternative to the detailed prescription. The attempted bypassing violation was conduct that was "away from the table." It related to separate grievances then pending. Although the workday article had been reopened by the Association and the grievances related to that matter, the Association had effectively

abandoned the subject in the negotiations. I see little impact that such conduct would have had in terms of frustrating progress at the table.[16]

The other alleged indicia of bad faith are not substantiated. As soon as the layoff-effects portion of the negotiations had been completed, the Association came to the table prepared to offer ideas, explore those ideas, and formulate proposals out of those discussions. It submitted the agendas. After exploring ideas through the initial three bargaining sessions - while the District simultaneously parried with its overbroad protestations of non-negotiability - the Association formulated a set of written proposals. The District never presented a formal written proposal on the evaluation article and ultimately wished for no change in that article.[17] The District maintained a closed stance throughout the negotiations, particularly as it related to any proposals that would impose additional costs, hi short, after a thorough explanation of the parties' positions, the District demanded maintenance of the status quo.

The District now claims that because the Association, after presenting its proposals but hearing from the District that it had no financial leverage for settlement, should have been willing to continue negotiating solutions that did not involve additional cost, and that the impasse declaration was premature because the District had some reserves that could have been the source of a financial offer. Little or no purpose would have been served by such continued effort. The District asserted on three occasions that it had no money to put on the

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[16] The NLRB is "reluctant to find bad-faith bargaining exclusively on the basis of a party's misconduct away from the bargaining table. (Litton Systems (1990) 300 NLRB 324, 330 [136 LRRM 1163], enfd. Litton Systems v. NLRB (8th Cir. 1991) 949 F.2d 249 [138 LRRM 2761].)

[17] Lisi prepared a summary of the negotiations, in which she acknowledged that the District requested written proposals before discussing them. Her notes indicate that the Association wanted to discuss the issues before "putting anything in writing."

table. The District makes a claim that its hard bargaining position was needed to protect its fiscal health, but this is beside the point. The District rejected all proposals that added costs.

I reject the suggestion that the Association adopted a "take-it-or-leave-it" posture in these negotiations. Typically, such conduct is probative when it occurs at the outset of negotiations arid is maintained throughout. (Cf. General Electric Co., supra, 150 NLRB 192 [employer's strategy of researching the basis for a "fair, firm" initial offer prior to bargaining followed by resistance to consider any offer unless it refutes the parameters of the research].) The parties here took several sessions to explore each other's concerns. Once the Association felt comfortable advancing a package written proposal and presented it, it was fairly clear that with the reduced number of subjects available for consideration, the options for compromise were limited as well. As to those limited subjects still on the table, neither side ever indicated a willingness to propose solutions that deviated from their positions on economics. I find unconvincing the District's protest that if negotiations had continued progress could have been made and that it was prevented from advancing a financial offer. The District had several opportunities to demonstrate financial movement but declined to counterpropose anything that involved money, one-time or otherwise. It certainly had that opportunity once the Association declared impasse. I reject the District's implied suggestion that in order to bargain in good faith the Association had to capitulate to its zero-percent financial proposal and continue bargaining in the field of cost neutral class size adjustments before a legitimate impasse could be reached.

As to the scheduling issues, I find that the two cancellations were inconsequential in context of what was happening, or not happening, at the bargaining table, and that the Association has presented a plausible explanation for why the requests were based on Lisi's calendaring issues. (County of Riverside (2004) PERB Decision No. 1715-M.) The District

contends that the Association wasted valuable bargaining time by presenting the CalPERS representative during the morning of the November 6 session. The sequence of events indicates the purpose of the presentation was to lay the foundation for the presentation of the written CalPERS proposal later that afternoon. There is no basis for finding employment of dilatory or evasive tactics.

Thus, I find the record contains insufficient evidence to demonstrate that the Association lacked a genuine desire to reach agreement. (See Muroc Unified School District, supra, PERB Decision No. 80.) Accordingly, the two instances of per se bad faith bargaining notwithstanding, I conclude that the Association's overall conduct does not demonstrate a lack of subjective intent to reach an agreement. Therefore this allegation of bad faith bargaining must be dismissed.

Association Bad Faith Participation in the Impasse Procedures

A. Conditional Bargaining

PERB has held that conditioning an agreement on agreement as to non-mandatory subjects, insisting on identifying who may be on the opposing negotiating team, and conditioning agreement on the waiver of statutory rights or withdrawal of grievances and unfair practice charges are examples of unlawful conditional bargaining. (Fremont Unified School District (1980) PERB Decision No. 136; Gilroy Unified School District (1984) PERB Decision No. 471; Lake Elsinore School District, supra, PERB Decision No. 603.) Conditional bargaining may amount to a per se violation when it has the practical effect of preventing negotiations altogether. (Stockton Unified School District, supra, PERB Decision No. 143.)

The District's argument is that the Association's rejection of the 2003-2004 tentative agreement based on concerns in the 2004-2005 negotiations amounts to conditional bargaining. I reject this claim. The fact that the membership of the Association may have taken into

consideration what the District was offering in no way demonstrates that the reopener bargaining team foisted on the District a condition that there would be no settlement unless matters outside of those negotiations were also settled. Finding anything "coercive" about a bargaining representative taking into consideration the effects of prior negotiations on subsequent negotiations is contrary to the common sense reality of collective negotiations. Even subsequent negotiations completely separated in time are premised on what the parties accomplished or failed to accomplish in previous negotiations. I find the Association's conduct to be neither a per se violation nor evidence of bad faith. This per se allegation must be dismissed.

B. Reneging on a Tentative Agreement

Reneging on a tentative agreement is evidence of surface bargaining. (Charter Oak Unified School District, supra, PERB Decision No. 873.) PERB has held that a single instance of repudiation, or more precisely, a repudiation on a single subject, is insufficient to demonstrate a prima facie case under a per se or totality of the conduct test. (Fresno County Office of Education (1993) PERB Decision No. 975; cf. Charter Oak Unified School District, supra, PERB Decision No. 873 [no prima facie violation where a package proposal contained some provisions less beneficial than prior ones but some more beneficial].)

In this case I reject the claim that the Association reneged on a tentative agreement, albeit one that was a package designed to settle the entire negotiations. The Association and District teams met in mediation and, through the auspices of the mediator, arrived at a proposed settlement of all the outstanding issues. It was of course contemplated by both parties that the settlement would be taken to the respective principals for ratification. The District's governing board agreed to adopt the settlement; the Association's Rep Council did not. This does not constitute reneging.

PERB did hold, in somewhat unusual circumstances, that a public school employer was guilty of bad faith bargaining when it ratified only a portion of a tentative settlement agreement, severed a provision (organizational security) not to its liking, and ratified the remainder of the agreement. (Placerville Union School District (1978) PERB Decision No. 69.) Pertinent here, PERB in finding bad faith in that case also relied on the fact that the employer's negotiator breached a previously agreed-upon written ground rule that he would "endorse and support" the total tentative agreement. In response to the employer's defense that the ground rules also established that the principal retained ultimate authority to accept or reject the settlement, PERB responded that such an argument avoided the "real issue presented," namely whether it was proper for the employer to sever the objectionable provision and ratify the remainder. (Id.) I do not believe this case should be interpreted, as the District does, to mean that a negotiator necessarily has a duty in every negotiations to "endorse and support" the tentative agreement when presenting it to his principal. On the other hand, it would appear fairly indisputable that some bad faith would be evidenced by a negotiator consciously sabotaging a package agreement he had negotiated when presenting it to his principal.

Thus, I will examine the facts and circumstances of the Rep Council meeting to determine whether the Association's bargaining team demonstrated bad faith in this regard. The bargaining team explained the terms of the package settlement to the Rep Council and then took a neutral position on the proposal. The Rep Council discussed the advantages and disadvantages of the settlement. Goldsmith gathered from the discussion that the chief reason for the vote was the District's refusal to increase the salary schedule and approve its selection of CalPERS in the 2003-2004 reopener negotiations. Woliver testified on the basis of uncorroborated hearsay that the Rep Council was angered by the District's 2004-2005 initial

offer. These are the only facts presented. On this scant evidence, I cannot conclude that the Association team attempted to undermine the proposal, and therefore I do not find its conduct evidence of bad faith.

C. Totality of the Conduct

The District cites no other conduct other than the alleged reneging and unlawful conditioning in support of its claim of bad faith participation in the impasse procedures. Since I have rejected these instances as evidencing bad faith, I have no basis to find bad faith participation under the "totality of the conduct" test. Thus, this allegation must be dismissed as well.

In sum, the Association is found to have violated section 3543.6(c) by (1) insisting to impasse on a proposal to have the District elect to receive the STAR test results without the data disaggregated by teacher and (2) attempting to bypass the District's labor relations representatives as a result of proposing a preparation time schedule to the elementary school principals for the purpose of resolving the pending grievances. All other allegations in case number SF-CO-640-E must be dismissed.

District Bad Faith Bargaining

A. Refusal To Bargain Concerning the Selection of a Health Insurance Carrier

The complaint in case number SF-CE-2377-E alleges a flat refusal to negotiate with the Association. Such conduct, if proven, would constitute a violation of the duty to bargain in good faith. (Sierra Joint Community College District (1981) PERB Decision No. 179.) An absolute refusal occurs when a bargaining representative denies, without reasonable attempts to obtain clarification, that a given proposal is within the scope of representation. (Compton Community College District (1990) PERB Decision No. 790.)

The Association contends that the District consistently maintained that selection of a health insurance carrier was subject to meet-and-consult rights only by the waiver language in section 13.14. The Association also acknowledges that the District agreed that if the Association had first proposed to eliminate the waiver language the proposal to change health carriers would have been appropriate. But the Association also contends that the District understood the nature of its proposal and that elimination of the waiver language was clearly contemplated. The District contends that it was constrained only to negotiate matters within scope and that the Association never presented such a proposal.

For the reasons explained above, I find that the District's contention that the waiver applies because the Association made no proposal to first eliminate the waiver language is unpersuasive. The entire compensation article was automatically reopened by the terms of the reopener language. The proposal identifying CalPERS as the health carrier was intended by the Association to supplant the meet-and-consult language. The District offers no argument as to why the waiver language itself was immutable.

Moreover, the District's argument that the Association failed to make a proposal within the scope of representation is clearly erroneous. Choice of health carriers is within the express language of section 3543.2 ("health and welfare benefits"). The Association's proposal was only "outside the scope of representation" because of the purported contractual waiver. A waiver of negotiating rights is itself a matter as to which the parties may mutually agree; however, insistence on a waiver, or in this case, continued maintenance of a waiver as to an otherwise negotiable matter is an infringement on the statutory right to bargain. (Travis Unified School District (1992) PERB Decision No. 917 [employer's unlawful insistence on status quo, where prior contract constituted a limitation on the union's statutory right to

represent employees].) On this basis, I find that the District flatly refused to negotiate a negotiable subject.[18]

Accordingly, I find that the District violated section 3543.5(c) by refusing to negotiate over the selection of a health carrier. This conduct also denied the Association its right to represent bargaining unit members in violation of section 3543.5(b). It further interfered with the right of the bargaining unit members to participate in the activities of an employee organization of their own choosing, in violation of section 3543.5(a).

B. Unilateral Implementation of Pre-paid Legal Services Payroll Deductions

The complaint in case number SF-CE-2380-E alleges a unilateral change in health and welfare benefits offered bargaining unit members. 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.)

The Association contends that the District unilaterally implemented the pre-paid legal services program. The District contends that because the plan was originally offered in 2002, the claim is barred by the statute of limitations under the theory of constructive notice. Alternatively, the District argues the allowance for payroll deductions to an outside commercial entity not sponsored by the District is not a material change in terms and conditions of employment, nor a change as to a matter within the scope of representation.

[18] The District also contends that the claim is moot because the District adopted CalPERS as the health carrier in October 2004, under the meet-and-consult provision of the contract. The District's prior unlawful refusal to bargain is not rendered moot by such action, particularly since it maintains that it has done so under privilege of the waiver provision being challenged by the Association in these proceedings.

The claim is not time-barred. The District asserts that the Association knew or should have known of the alleged unilateral change in 2002, when payroll deductions were first authorized. Knowledge of an unfair practice is only imputed to a party when persons with authority to act on behalf of the charging with respect to the alleged violation have received clear notice of a unilateral change. (Victor Valley Union High School District (1986) PERB Decision No. 565; see also State of California (Board of Equalization) (1997) PERB Decision No. 1235-S.) The District cites evidence from a District principal who testified that a presentation was made in 2002 at an elementary school that included unit members, and that "in all likelihood" one of the Association's site representatives at that school would have been at that meeting, because "traditionally at least one of them attended every meeting." This evidence fails to establish by a preponderance of the evidence that an official of the Association with authority to deal with matters of collective negotiations had constructive notice of the alleged unilateral change.[19]

As to the merits, a preliminary issue is how the benefit is defined, and whether, as so defined, it is within the scope of representation. The evidence establishes that the District provided nothing other than the services of its payroll department in processing deductions to pay for the employees' participation in the plan. Therefore, the benefit is not actually the plan itself, but the payroll deduction. In Jefferson School District, supra, PERB Decision No. 133, PERB held that payroll deductions are a means by which employees enhance their present or future economic status and such a benefit has a direct impact on negotiable matters, and thus

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[19] The Association cites the testimony of Grenier (who would have had authority to demand bargaining of a proposed unilateral change) that she received an advertisement in her paycheck envelope in the winter of the 2002-2003 year, contacted Sherer, and was told by the District that the service would only be provide to management in light of the Association's opposition to it. On these facts, Grenier was entitled to assume there was no problem as it related to the Association's unit.

presents a matter within scope. In the Jefferson case, PERB distinguished between deductions for annuities, credit unions, and savings bonds - finding those to be negotiable - and charitable donations - finding those not to be negotiable. (Ibid.) I conclude the matter is within scope. Pre-paid legal services are a form of insurance providing future economic security that benefits the employee directly.

The evidence further establishes that the District's former superintendent entered into some contractual agreement to allow a specific vendor to make presentations and solicit members on staff time. This arrangement led to the subscription by bargaining unit members and the attendant payroll deductions. The Association was never provided notice of this, constructive or actual, or of the fact that bargaining unit members were signing up for the plan. Thus, there was a change in policy without notice or opportunity to bargain.

The final question is whether the change in policy has a "generalized effect or continuing impact" on the bargaining unit. (Grant Joint Union High School District, supra, PERB Decision No. 196.) As to this issue, the evidence is weak. When Grenier saw the announcement at her school and protested, Casey immediately investigated and ordered all presentations to cease. There were a small number of employees who had already signed up (five to six bargaining unit members), and Casey determined that these employees should be allowed to continue their payroll deductions. Although Bernard testified he did not believe it actually necessary to prevent new enrollees, there was no evidence establishing that new enrollees followed the filing of the unfair practice charge. Bernard also testified that he told the company that the prior arrangement with Sherer was rescinded.[20]

[20] As noted in footnote 19 above, the Association cites Grenier's 2002-2003 complaint to Sherer as evidence suggesting that the District cannot be trusted at its word. However, I find that the District did take sufficient action to cease enrollment of new members.

As to those five or six employees who were allowed to continue, it could be argued that the policy has a continuing impact. However, I believe that would be stretching the Grant rule to embrace a violation for which a bargaining remedy would do nothing to effectuate the purposes of the EERA. Hence, I decline to find a violation under these limited circumstances. The District has ceased sponsorship of the benefit plan and it continues to allow past enrollees to maintain the payroll deduction solely out of convenience to the employees or to avoid disruption and/or hardship to them. Thus, the District's continuing involvement in the plan is de minimus. (Anaheim City School District (1983) PERB Decision No 364 [one-time mistake made in good faith which employer attempted to rectify does not satisfy Grant test]; see also Muroc School District, supra, PERB Decision No. 80 [technical violation without discernible impact and immediately retracted not violative of the duty to bargain].)[21] PERB has also held that when a unilateral change has been unlawfully implemented to the benefit of a few unit employees it may be unnecessary and inappropriate to deprive those employees of the new benefit as part of the restoration-of-the-status-quo remedy. (Nevada Joint Union High School District (1985) PERB Decision No. 557; Marin Community College District (1995) PERB Decision No. 1092.)

Accordingly, the District did not fail to meet and negotiate in good faith with regard to the pre-paid legal services plan. The complaint and underlying charge in case number SF-CE-2380-E must be dismissed.

REMEDY

Section 3541.5(c) grants PERB

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[21]I acknowledge that a solicitation flyer appeared in the high school faculty lounge as late as October 2003. However, it does not announce any meeting for solicitation on District time or property. It appears that the flyer was produced by the broker and not the District. Its mere posting does not establish knowledge or ratification by the District.

> 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, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Case Number SF-CO-640-E

In case number SF-CO-640-E, it has been determined that the Association violated its obligation to meet and negotiate in good faith by (1) insisting to impasse on a proposal to have the District elect to receive the STAR test results without the data disaggregated by teacher and (2) attempting to bypass the District's labor relations representatives as a result of proposing a preparation time schedule to the elementary school principals for the purpose of resolving the pending grievances. This conduct violates section 3543.6(c). The Association will be ordered to cease and desist from such unlawful conduct. (Modesto City Schools (1983) PERB Decision No. 291, p. 71; see also Rio Hondo Community College District (1983) PERB Decision No. 279a, p. 6; San Mateo City School District (1984) PERB Decision No. 375a, p. 4.)

The Association will also be ordered to post a notice incorporating the terms of this order. (See Redwoods Community College District (1987) PERB Decision No. 650.) The Notice should be signed by an authorized agent of the Association indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting of such notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. (Davis Unified School District (1980) PERB Decision No. 116; see also Placerville Union School District, supra, PERB Decision No. 69.)

Case Number SF-CE-2377-E

In case number SF-CE-2377-E, it has been determined that the District violated its obligation to meet and negotiate in good faith by refusing during the 2003-2004 reopener negotiations to negotiate concerning the selection of a health insurance carrier, in violation of section 3543.5(c). The District will be ordered to cease and desist from such unlawful conduct. (Modesto City Schools, supra, PERB Decision No. 291; see also Rio Hondo Community College District, supra, PERB Decision No. 279a; San Mateo City School District, supra, PERB Decision No. 375a.)

The District will also be ordered to post a notice incorporating the terms of this order. The Notice should be signed by an authorized agent of the Association indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting of such notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. (Davis Unified School District, supra, PERB Decision No. 116; see also Placerville Union School District, supra, PERB Decision No. 69.)

PROPOSED ORDER

Case Number SF-CO-640-E

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(b), it is hereby ordered that the Newark Teachers Association (Association) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Insisting to impasse on bargaining a proposal to have the Newark Unified School District (District) elect to receive the STAR test results without the data disaggregated by teacher.

2. Bypassing or attempting to bypass District bargaining representatives by directly communicating with District management staff for the purpose of settling grievances or disputes over negotiable matters.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Within seven (7) workdays of service of a final decision in this matter, post at all 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 for 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 calendar days. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by any other material.

2. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of the Public Employment Relations Board, or his designee, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

All other allegations are hereby dismissed.

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(b), it is hereby ordered that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Association as the exclusive representative of its certificated employees by refusing during the 2003-2004 reopener negotiations to negotiate concerning the selection of a health insurance carrier.

2. By the same conduct, interfering with bargaining unit employees' right to participate in the activities of an employee organization of their choosing.

3. By the same conduct, denying to the Association rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Within seven (7) workdays of service of a final decision in this matter, post at all 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 for 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 calendar days. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by any other material.

2. Within thirty (30) workdays of service of a final decision in this matter, notify the General Counsel of the Public Employment Relations Board, or his designee, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue

to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

Case Number SF-CE-2380-E

The complaint and underlying unfair practice charge in case number SF-CE-2280-E are hereby dismissed.

Pursuant to PERB Regulation 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the PERB 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. (PERB Reg. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (PERB Regs. 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 PERB Regulation 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. (PERB Reg. 32135(b), (c) and (d); see also PERB Regs. 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 PERB Regs. 32300, 32305, 32140, and 32135(c).)

Donn Ginoza
Administrative Law Judge