* * * OVERRULED IN PART by *The Accelerated Schools* (2023) PERB Decision No. 2855 * * *

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and its SOLANO COLLEGE CHAPTER #211, Charging Party, v. SOLANO COUNTY COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. SF-CE-337 PERB Decision No. 219 June 30, 1982

Appearances: Madalyn J. Frazzini, Attorney, for California School Employees Association and its Solano College Chapter #211.

Before Gluck, Chairperson; Jaeger and Morgenstern, Members.

DECISION

This case is before the Public Employment Relations Board (PERB) on exceptions filed by the California School Employees Association and its Solano College Chapter No. 211 (Association). The hearing officer found that the Solano County Community College District (District) violated subsections 3543.5(b) and (c) of the Educational Employment Relations Act (Act or EERA)[1] by unilaterally transferring work from the classified negotiating unit to the certificated unit. We affirm his decision in part and reverse it in part.

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[1]The Educational Employment Relations Act is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise noted.

FACTS

The dispute between the parties arose in the weeks following the passage of Proposition 13 in June of 1978. The parties had negotiated a collective bargaining agreement that covered, among others in classified service, the positions of Off-Campus Representative and Student Services Specialist/Tutoring Center. This agreement was in effect from July 1, 1977 through June 30, 1980. In June 1978, the parties agreed to a contract reopener and on July 15, 1978, they reached certain additional agreements that resulted in modifications to the layoff procedures.

Prior to the summer of 1978, the District employed two individuals, Robert Harris and Tom Cirimele, as Off-Campus Representatives at Travis Air Force Base and Mare Island. Their primary job responsibilities were to assist in the enrollment of students and to organize off-campus classroom facilities. The District also employed Karen Rampone in the classification of Student Services Specialist/Tutoring Center at the main campus. Her primary job responsibility was to administer the tutoring program. Rampone went on a maternity leave in November 1977, followed by extended sick leave. Joyce Laird assumed Rampone's duties during this period. All three of these positions were included in the Association's classified bargaining unit.

On July 20, 1978, Harris, Cirimele and Rampone were laid off effective August 4, 1978. This layoff was the result of the District's post-Proposition 13 decision to eliminate these services. The District received an immediate request from community representatives to continue providing the terminated services.

The Off-Campus Facilities

In early August, the District made a decision to reinstitute the off-campus services and assigned Carolyn Tilley, a certificated employee and the District's Director of Counseling, to Travis Air Force Base in the morning and to Mare Island in the afternoon. She was directed to report to these facilities only on a temporary basis. Her job duties[2] were substantially the same as the previous Off-Campus Representatives, Harris and Cirimele, and consisted mainly of registering students.

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[2]These duties included: assisting new and returning students in class registration; publicizing the available course offerings; providing a liaison between the college faculty at the military base and the main campus; advising and disseminating information to students and prospective students about the college, including entrance requirements, graduation requirements and transferability of courses; collecting tuition; assisting students in applying for veterans benefits; scheduling courses and arranging for classroom space; transporting information and materials to and from the main campus; and receiving input from students about course offerings they wanted scheduled.

Within two weeks, on about August 14, 1978, Charles McDonald and Leslie Rota, two certificated employees, relieved Tilley of her temporary duties and were assigned to Mare Island and Travis respectively. They were the District's only employees at these two locations. They performed substantially the same job functions as the laid-off classified Off-Campus Representatives.

The Tutoring Center

On July 19, 1978, the District closed the tutoring center because of funding problems. This also resulted in classified employee Karen Rampone being laid off from her position as Student Services Specialist.

On September 6, 1978, again in response to community requests, the District restored the tutoring center services. The center reopened on October 8, 1978 with Leslie Rota, a certificated employee assigned to work at the center. She worked there in the afternoon and retained her Travis position in the morning. She performed essentially the same job functions[3] as the laid-off classified employee, Karen Rampone.

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[3]These duties included: recruiting tutors; accepting applications; interviewing tutors; matching tutors with tutees; assisting in the practicum; compiling reports regarding the functions of the tutoring center; and keeping the tutors' hours.

During the months following the passage of Proposition 13, the Association expressed serious concern over the layoffs that were occurring. On August 1, 1978, after engaging in informal discussions with the District, the Association wrote to the District complaining about certificated employees performing classified work as Off-Campus Representatives at Mare Island and Travis. Informal meetings regarding the layoff were held in conjunction with negotiating sessions over the contract reopeners. The District maintained that the classified positions were vacant and that the certificated employees were actually performing different work than the laid off classified employees.

On December 12, 1978, the District refused to engage in further discussion concerning the Off-Campus Representatives or the Student Services Specialist. The District informed the Association that the Student Services Specialist was a certificated position and asserted it had no obligation to bargain with CSEA.[4] The District also refused to participate

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[4]In support of its position, the District principally relies on an August 29, 1978, Fiscal Management Audits Management Letter CCCol-37, to Dr. William Craig, Chancellor, Board of Governors of the California Community Colleges. The subject of the communication is the State School Fund Apportionment, Solano Community College District. That document states, in relevant part:

> Average daily attendance was reported for hours not supervised by certificated employees for Tutoring Practicum and Office Machines Laboratory.

in further discussion concerning the Off-Campus Representative position.[5]

On January 10, 1979, the Association filed this unfair practice charge alleging that the District violated subsections 3543.5(b) and (c) by unilaterally removing positions from the classified unit and thereby eliminating the wages and hours of classified employees.

On October 23, 1979, the hearing officer issued his proposed decision finding that the District violated subsections 3543.5(b) and (c) of the Act by unilaterally transferring work from the classified to the certificated unit without negotiating the effects thereof.

Exceptions

The Association excepts to: the conclusion of the hearing officer that the decision to transfer work from the unit was a managerial prerogative that can be unilaterally made; the conclusion that the District's decision not to reemploy the classified employees was lawful; the hearing officer's failure to order reinstatement of the classified employees.

DISCUSSION

The Association bases its exceptions on a contention that the decision to lay off the classified employees in the

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[5]The record is unclear as to whether the District's response was that no certificated employees were working in the Off-Campus Representative positions, or whether certificated employees were working in these positions but were not performing the duties previously done by classified employees. In any event, the District refused to negotiate.

Off-Campus Representative and Student Services Specialist positions was one and the same with the District's decision to transfer the work from the unit. The hearing officer concluded, and we find ample factual support in the record to agree, that the layoff decision was made on or about July 19, 1978, prior to the District's decision to transfer the work. The layoff was carried out in accord with the relevant provisions of the collective bargaining agreement which the parties had negotiated and was therefore lawful under the Act. The Board determined in Healdsburg Union High School District (6/19/80) PERB Decision No. 132, that the decision to initiate a layoff is within the managerial prerogative of a District and that bilateral negotiations are required as to the effects and implementation of the District's operational decision.

The evidence discloses that the District and the Association did meet and negotiate concerning the effects and implementation of the layoff decision. They did reach agreement through bilateral negotiations concerning the procedure for layoffs. In fact, on June 15, 1978, they modified Article XIX of their agreement to reflect the results of their contract reopener discussion concerning these additional layoff procedures. The decision to institute layoff was within the District's managerial rights. Their legal obligation to discuss the effects and implementation of that decision was the subject of these reopener discussions

between the parties. We find no error in the conclusion of the hearing officer and we affirm his findings of fact and conclusions of law that the layoff decision was lawful under the Act.

The Association contends that the District's decision to transfer work out of its bargaining unit to the certificated unit, is a mandatory subject of negotiations under the Act. The hearing officer concluded, without benefit of our decisions in Healdsburg Union High School District (6/19/80) PERB Decision No. 132 and Rialto Unified School District (4/30/82) PERB Decision No. 209, that only the effects of a decision to transfer work from one bargaining unit to another was negotiable. In Healdsburg, supra, we found that a District's decision to subcontract work out of a bargaining unit is negotiable so long as the subcontracting impacts upon a subject within scope. In Rialto, supra, we held that a decision to transfer work from one bargaining unit to another was negotiable so long as it impacts upon a subject within the scope of representation.

In the instant case, the District has removed positions from the unit and terminated any possible recall from layoff for these classified employees. In so doing it has denied these employees actual or potential work opportunities. The possibility of wages and hours associated with the transferred-out work are similarly withdrawn. In addition to

these effects, the diminution of unit work by transferring functions weakens the collective strength of employees in the unit. We therefore conclude that the District violated subsections 3543.5(b) and (c) when it unilaterally transferred the unit work of classified employees who occupied the positions of Off-Campus Representatives and Student Services Specialist/Tutoring Center to the certificated unit employees. The same conduct that denied to the employee organization rights provided in the EERA also constituted a concurrent deprivation of the right to representation, concerning matters within the scope of representation, thereby violating subsection 3543.5(a). San Francisco Community College District (10/12/79) PERB Decision No. 105; Oakland Unified School District (4/23/80) PERB Decision No. 126.

The District asserted two additional defenses for its unilateral action. Since we have concluded that the District has a statutory obligation to meet and negotiate over the decision to transfer unit work, we therefore find it appropriate to address the defenses invoked by the District.

First, the District offers that the "management rights" clause of the contract reserved the decision to the District.[6]

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[6]Article XXIV, Management Rights, states:

> 24.1 The District, on its own behalf and on behalf of the residents thereof, hereby retains and reserves unto itself, without

The hearing officer concluded that the District did not meet its burden of proving a waiver of the right to negotiate as a

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> limitation, all powers, rights, authority, duties, and responsibilities conferred upon and vested in it by the laws and the Constitution of the State of California, and of the United States, including, but without limiting the generality of the foregoing, the right:
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> To the District management, administrative control of the District and its properties and facilities, and to direct the work of its employees; except as otherwise modified by the agreement.
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> To hire all employees, and, subject to the provisions of the law, to determine their qualifications and the conditions for their continued employment, discipline, dismissal, or demotion; and to promote, assign, and transfer all such employees: except as otherwise modified by this agreement. To establish educational policies, goals, and objectives; to insure rights and educational opportunities of students; to determine staffing patterns; to determine the number and kinds of personnel required in order to maintain the efficiency of District operation, except as modified by this agreement; and
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> To build, move, or modify facilities; establish budget procedures and determine budgetary allocation; determine the methods of raising revenue.
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> 24.2 The exercise of the foregoing powers, rights, authority, duties, and responsibilities of the District, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgement and discretion in connection therewith shall be limited only by the specific and express terms of this

result of this provision. In order for a waiver of a statutory right to be found, the District must prove the waiver by either clear and unmistakable language or demonstrable behavior amounting to a waiver of the right to meet and negotiate. Sutter Union High School District (10/7/81) PERB Decision No. 175; Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74; San Mateo County Community College District (6/8/79) PERB Decision No. 94. Even though the Association has conceded certain rights to the District by way of this provision, we find no specific language covering the transfer of work from the unit, nor do we find evidence to indicate any demonstrable behavior by the Association evincing a waiver. We affirm the findings and conclusion of the hearing officer that there was no waiver.

The second defense offered is an amalgam of component arguments that have at their core an assertion by the District that it was under a statutory compulsion to transfer this work. This argument includes allegations that the Education Code compelled the District to take this action, because of a provision that arguably requires certificated employees to perform some professional type duties associated with these

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> agreement and then only to the extent such specific and express terms hereof are in conformance with the Constitution and laws of the State of California and the laws of the United States.

positions. The District also asserts that the Association is attempting to usurp, in a surreptitious manner, a management right and attempt to negotiate job descriptions. Finally, the District contends the Association was also trying to negotiate for certificated positions that were not in its unit instead of following the available procedure to petition for unit modification. The District, however, did not meet its burden of proving any of these defenses.

The District first asserts that it was under a statutory compulsion to fill these positions with certificated employees. It bases this argument on certain Education Code provisions that the District interprets as compelling it to use certificated personnel in the disputed job classifications.[7]

In Jefferson School District (6/19/80) PERB Decision No. 133, the District claimed that, pursuant to the

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[7]In support of this defense the District cites Education Code sections 87002, 87400, 88004 and the Average Daily Attendance letter referred to in footnote 2. None of these provisions expressly mandate that the District take this action. Education Code section 72620 does require that individuals who perform, as part of a counseling program, counseling services must be assigned specific times to perform those services and must possess a valid credential with specialization in student personnel services. Nothing in the record demonstrates that these positions are within the parameters of this Education Code provision and are part of a counseling program. We therefore must conclude that the District failed to meet its burden of proof.

"supersession" provision of section 3540 of the Act,[8] a proposal otherwise within the scope of representation is not negotiable where the subject matter is also covered by an Education Code provision.

Section 3540 is derived from and is substantially identical to the supersession clause in the Winton Act, former Education Code section 13080.[9] This provision has received clear judicial interpretation. In Certificated Employees Council v. Monterey Peninsula Unified School District (1974) 42 Cal.App.3d 328, the court rejected the District's position that the supersession clause precluded consultations regarding subjects that were also covered by the provisions of the Education

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[8]Section 3540 of the EERA provides in relevant part:

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

[9]The Winton Act provided:

> Nothing contained herein shall be deemed to supersede other provisions of this code and the rules and regulation of public school employers which establish a regular tenure or a merit or civil service system, or which provide for other methods of administering employer-employee relations.

Code. The Monterey School District argued that its unilateral promulgation of tenure guidelines was exempt from the meet and confer requirements of the Winton Act because the subject of tenure guidelines was addressed in other portions of the Education Code. The court held that other Education Code provisions were to be "harmonized" whenever possible with the Winton Act's meet and confer requirement. The court stated that it treated the Education Code provisions regarding tenure as "a mandatory minimum" that could exist not in exclusion of but in addition to the meet and confer process. The court concluded that the meet and confer provision would not be set aside unless "the language of the two statutory enactments cannot be harmonized." 42 Cal.App.3d, at 333.

Accordingly, the Legislature, in readopting the supersession clause of the Winton Act as section 3540 of the EERA, is presumed to have knowledge of and acquiesced in the judicial construction given to the provision. Kaplan's Fruit and Produce Co. v. Superior Court (1979) 26 Cal.3d 60, 75.

Here the District urges us to find that negotiations concerning the transfer of these classified positions are not required. It argues that, because provisions of the Education Code require personnel who perform counseling as part of a counseling program to possess a credential, they are precluded from negotiating over their decision to transfer the Off-Campus Representative and Student Services Specialist work.

Heeding the Court's admonition to harmonize wherever possible, we find that the District was not compelled to transfer this work nor was it relieved by the Education Code from the obligation to negotiate over the decision to transfer work out of the bargaining unit. The District failed to meet its burden of establishing that these positions had to be occupied by certificated personnel because the services were in fact part of a counseling program within the meaning of the Education Code. We additionally note that, because the Association and District could have harmonized any Education Code concerns with the statutory duty to negotiate, they may well have developed some alternative for the performance of the duties associated with these jobs. We do not specify these alternatives; rather, we leave resolution to the parties by requiring them only to meet and negotiate over a possible solution to the transfer of the classified unit work to the certificated unit.

The last defense offered is the District's assertion that the Association is seeking to negotiate over three certificated counselor positions when another employee organization is the exclusive representative. The District argues that the Association does not represent employees in these certificated positions and, if the Association wants representation rights, it should file a unit certification/modification petition. We

affirm the hearing officer's conclusions and holding rejecting this defense.

THE REMEDY

The Association excepts to the failure of the hearing officer to order the reinstatement of the three classified employees to their former positions with full back pay. They argue that the status quo ante requires reinstatement of bargaining unit employees to the work they had been performing and an award of back pay.

The hearing officer concluded that: the original decision to lay off these employees, as well as the procedure the District followed, was not improper. He found that there was no basis to recommend their reinstatement. While we agree that these employees were on a lawful layoff status at the time of the District's illegal act, which was its failure to negotiate the transfer of the unit work, they still possessed certain legal rights which provide for their possible recall from the layoff. We will therefore order that those recall rights be reinstated.

We conclude that the District transferred the work of the two Off-Campus Representatives and the one Student Services Specialist/Tutoring Center out of the classified unit without first meeting its duty to negotiate with the Association. We find this is an infringement of employee rights, as it denies the exclusive representative the opportunity to present and

negotiate possible alternatives to the District's action, and to negotiate the effect of the transfer of work.

We note that new employees have been working in these positions since 1978. If the District were required to transfer work back to the classified unit, it might be required to lay off these employees in midterm, causing considerable disruption of the services rendered.

Under the circumstances of this case, including the lapse of time and the placement of new employees in these positions, it is impossible to reestablish a situation equivalent to that which would have prevailed had the District more timely fulfilled its statutory bargaining obligation. We deem it necessary, in order to effectuate the purposes of the Act, to require the District to bargain with the Association concerning the decision to transfer this work to the certificated unit. Under the present circumstances, however, a bargaining order alone cannot serve as an adequate remedy.[10]

Therefore, in order to assure meaningful bargaining and to effectuate the purposes of the Act, we shall accompany our order to bargain with a limited back pay requirement designed to both make whole the employees for losses suffered by this

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[10]See Transmarine Navigation Corporation (1968) 17 NLRB 389; Royal Plating and Polishing Co. (1967) 160 NLRB 990.

violation, and to recreate in some practicable manner a situation in which the parties' bargaining position is closely akin to what it would have been absent this violation.

Accordingly, we order the District to bargain with the Association, upon request, over the decision to transfer this work as well as the effects thereof and to pay to the three affected classified employees an amount, at the rate of their normal wages when last in the respondent's employ, which equals pay from 5 days of service of this Decision until the occurrence of the earliest of the following conditions: (1) the date the District bargains to agreement with the Association over the decision to transfer the unit's work; (2) a bona fide impasse is declared; (3) the failure of the Association to request bargaining within 5 days of service of this Decision or to commence negotiations within 4 days of the District's notice of its desire to negotiate with the Association; or (4) the subsequent failure of the Association to negotiate in good faith; but in no event shall the sum paid to any of these employees exceed the amount they would have earned as wages from August 4, 1978, the date on which the District terminated these positions, to the time they secured or refused equivalent employment elsewhere, provided, however, that in no event shall this sum be less than these employees would have earned for a two-week period at the rate of their normal wages when last in respondent's employ.

ORDER

Pursuant to subsections 3541.5(a), (b), and (c), and based upon the foregoing findings of fact, conclusions of law, and the entire record in the case, the Public Employment Relations Board hereby ORDERS that the Solano County Community College District shall:

A. CEASE AND DESIST FROM VIOLATING SUBSECTIONS 3543.5(a), (b), AND (c) BY:

1. Making unilateral changes in the terms and conditions of employment in the classified unit without prior notice to the Association and without providing an opportunity to negotiate, with particular reference to transferring unit work.

2. Failing and refusing to meet and negotiate regarding the transfer of Association work, thus denying the Association its right to represent unit members.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer concerning the unilateral transfer of unit work, when such action affects matters within the scope of representation, without offering to the exclusive representative the opportunity for meeting and negotiating.

B. THE BOARD FURTHER ORDERS THE DISTRICT TO TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Upon request of the Association, meet and negotiate with the Association over the decision and effects thereof of

transferring the Off-Campus Representative and Student Services Specialist/Tutoring Center from the classified unit.

2. Pay the affected classified employees their normal wages for the period set forth in this Decision.

3. Within five days of service of this Decision post at all school sites, and all other work locations where notices to employees customarily are placed, immediately upon receipt thereof, copies of the Notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that said notices are not reduced in size, altered, defaced or covered by any other material.

4. Notify the San Francisco regional director of the Public Employment Relations Board, in writing, within 20 calendar days of service of this decision, of the steps the District has taken to comply herewith.

This ORDER shall become effective immediately upon service of a true copy thereof on the Solano County Community College District.

By: John Jaeger, Member

Marty Morgenstern, Member

Chairperson Gluck's dissent begins on page 21.

Harry Gluck, Chairperson, dissenting:

The District contends that certain Education Code provisions mandate that the contested work be performed by certificated employees. The majority here finds that the District has failed to offer proof that the work involves a counseling program within the contemplation of the Code. Indeed, the District's case in this regard lacks substance, possibly because it expected this Board to make the determination based on the evidence of the job content. Nevertheless, it would be regrettable if the Board were to require that the District choose between violating our Order or the Education Code. I believe it is appropriate therefore that this single issue be remanded to permit evidence and argument on the applicability of the Education Code provisions in question.

I am further influenced by the fallacy I perceive in the majority's view that the Code and EERA can be "harmonized" through the process of negotiations. If the transfer of this work is mandated by an adamantine Code provision, then the employer is under no obligation to negotiate.[1] Ordering

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[1]Where the Education Code "mandates a specific and unalterable policy," that policy is not subject to the obligation of good-faith negotiations. Jefferson Unified School District, supra, p. 8.

the employer to do something which EERA exempts him from doing is not a harmonizing directive.

Harry Gluck, Chairperson

APPENDIX

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

After a hearing in Case No. SF-CE-337 in which all parties had the right to participate, it has been found that the Solano County Community College District violated the Educational Employment Relations Act (Government Code subsections 3543.5(a), (b) and (c)) by taking unilateral action with respect to the transfer of work of the classified unit to the certificated unit without meeting and negotiating in good faith on the issue with the exlcusive representative, the California School Employees Association and its Solano College Chapter #211, and by denying the California School Employees Association and its Solano College Chapter #211 the right to represent unit employees by failing and refusing to meet and negotiate about matters within the scope of representation. As a result of this conduct, we have been ordered to post this notice, and to abide by the following:

WE WILL CEASE AND DESIST FROM:

1. Failing and refusing, upon request, to meet and negotiate in good faith with the California School Employees Association and its Solano College Chapter 211, with respect to matters within the scope of representation as defined in Government Code section 3543.2, and specifically with respect to the transfer of work previously performed by members of the bargaining unit represented on an exclusive basis by the CSEA to employees in another bargaining unit.

2. Denying the California School Employees Association and its Solano College Chapter 211 the right to represent unit employees by failing and refusing to meet and negotiate about matters within the scope of representation as defined in Government Code section 3543.2; and, specifically, with respect to the transfer of work performed by members of the bargaining unit represented on an exclusive basis by the California School Employees Association to employees in another bargaining unit, in violation of Government Code subsection 3543.5(b).

3. Failing and refusing to pay any classified employee for the loss of compensation they suffered as a result of the District's transfer of work for the period required by the Decision of the Public Employment Relations Board.

4. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate; specifically, with respect to the transfer of work performed by members of the bargaining unit represented by the Association.

Dated: _____

SOLANO COUNTY COMMUNITY COLLEGE DISTRICT

By: _____

Authorized Representative

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