STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. HEALDSBURG UNION HIGH SCHOOL DISTRICT and HEALDSBURG UNION SCHOOL DISTRICT, Respondents.	Case No. SF-CE-68 PERB Decision No. 132 June 19, 1980

Appearances: Charles L. Morrone, Attorney for California School Employees Association; W. Craig Biddle, Attorney (Biddle, Walters & Bukey), for Healdsburg Union High School District and Healdsburg Union School District.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION

In the instant case, the Public Employment Relations Board (hereafter PERB or Board) considers the appeal brought by the California School Employees Association (hereafter Association or Charging Party). In brief, the Association alleges that the Healdsburg Union High School District and the Healdsburg Union School District (hereafter Districts) violated sections 3543.5(b) and (c) of the Educational Employment Relations Act[1] by refusing to negotiate regarding contract proposals

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[1]The Educational Employment Relations Act (hereafter EERA

which the Association argues are within the scope of representation as set forth in section 3543.2 of the Act.[2] The findings of fact as set forth in the hearing officer's

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or Act) is codified at Government Code section 3540 et seq.

Unless otherwise noted, all subsequent statutory references are to the Government Code.

Sections 3543.5(b) and (c) provide:

> It shall be unlawful for a public school employer to:
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> . . . . . .
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2]Section 3543.2 of the Act provides:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Section 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certified personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent

proposed decision are free from prejudicial error and are adopted by the Board itself. Each of the items which the parties have stipulated are in dispute are examined and discussed below.

DISCUSSION

In previous decisions, this Board has examined the scope of representation to be afforded under the language of the EERA. (Fullerton Union High School District (7/27/77) EERB Decision No. 20 and (5/30/78) PERB Decision No. 53; Sonoma County Office of Education (11/23/77) EERB Decision No. 40; Palos Verdes/Pleasant Valley (7/16/79) PERB Decision No. 96; San Mateo City School District (5/20/80) PERB Decision No. 129.) While past and present members of this Board have advanced varying tests to measure the scope of representation, there is, nonetheless, substantial agreement that the statutory language as contained in the EERA offers no definitive or conclusive standard. This results from the juxtaposition of language which, on the one hand, suggests that a broad

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> such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

definition be applied and, on the other, that a more narrow interpretation was intended.

The recent case of San Mateo, supra, contains each Board member's view of the appropriate resolution of the tension between the language "relating to" and "limited to", and those views need not be repeated at length here. While differing as to the reasons for and significance of the particular structure of section 3543.2, two members agree that the appropriate means of determining the negotiability of a specific subject or proposal is a balancing test. As stated in San Mateo and as discussed more fully infra, a subject is negotiable if it first logically and reasonably relates to wages, hours or one of the enumerated terms and conditions of employment. If this threshold test is met, the proposal will be analyzed in terms of its degree of concern to the employees and the employer, the suitability of the negotiating process as a means of resolving the dispute and whether the employer's obligation to negotiate would significantly abridge its managerial prerogatives or educational and public policy considerations.[3]

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[3]The basic difference between my view and that of the Chairperson's is that I would specifically factor into the balancing process educational and public policy considerations, as well as managerial prerogatives.

In his opinion in Palos Verdes/Pleasant Valley, supra, Dr. Gonzales proposed a balancing test. However, in San Mateo, he rejects a balancing test because it is a subjective

Turning to the specifics of this case, there are only two issues: is the case moot because the contract year during which these issues arose has passed and, if not, are the specific proposals negotiable or nonnegotiable. Since neither the District or the Association has excepted to any of the hearing officer's findings of fact, there are no factual issues before the Board for consideration.

The Board finds that the issue is not moot. It is well settled law that where the issues persist beyond the specific case, that case is not rendered moot. (See Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74 and cases cited therein.) The issue of negotiability of the subjects contained in the various proposals is of significance in current and future contract negotiations in the Healdsburg Districts and in school districts throughout the state. It is therefore appropriate for PERB to resolve these issues since "In cases clarifying parties' rights and obligations under a new law, the public interest is served by deciding the

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determination and proposes that negotiability be decided on the basis of whether a negotiating proposal is an extension of an enumerated item.

In my view, determining the negotiability of an item based on its being an extension of an enumerated subject similarly involves a subjective analysis. It is still a question of line drawing, and there will still be gray areas. Indeed, it seems unavoidable that a degree of subjectivity be involved in determining whether a subject is negotiable.

underlying issue." (Amador Valley, supra, citing U.S. v. W.T. Grant Co. (1953) 345 U.S. 629.)

The parties have stipulated as to the negotiations proposals which are in dispute. The Districts assert that these proposals are outside of scope and concede that they did not negotiate with regard to any of them. Therefore, the question is solely whether these proposals fall within the scope of representation as defined in section 3543.2 of the Act and are therefore negotiable.

The hearing officer found that several challenged proposals were overbroad and therefore nonnegotiable in their present form, but nonetheless held that it was an unfair practice for the Districts to not respond with more than a flat rejection of the proposal (see for example p. 37 of the H.O. decision). These findings are contrary to his holding that "the refusal to discuss that which is not negotiable is not an unfair practice." (H.O. decision p. 20.) Similarly, the hearing officer states that "failure to respond with more than a summary rejection is itself an unfair practice where the proffered proposal is arguably within scope." (H.O. decision p. 20.)

In sum, the hearing officer's view appears to be that if a proposal is arguably within scope, then it is an unfair practice for the Districts to respond to that proposal with a summary rejection even if PERB later determines that the

proposal is nonnegotiable. In support of his conclusion, the hearing officer referred to Gorman's treatise on private sector labor law which indicates that good faith negotiations require the parties to articulate supporting reasons for their contract proposals and to listen and weigh arguments presented at the bargaining table in an effort to reach a basis for a written agreement.

I do not dispute this characterization of the good faith bargaining process nor its applicability to the requirements of the EERA. However, any review of the parties' conduct for evidence of good or bad faith participation necessarily presupposes that an obligation to bargain exists. With regard to section 8(d) of the National Labor Relations Act (hereafter NLRA) which sets forth the duty to bargain in good faith in the private sector,[4] Professor Gorman states:

> At the heart of the section are the phrases "confer in good faith" and "wages, hours, and other terms and conditions of employment." The latter phrase outlines the so-called mandatory subjects which set the boundaries of the parties' duty to bargain; within those boundaries the duty applies, while outside them either party may decline to bargain and is free to make and implement decisions unilaterally. (p. 399) (Emphasis added.)

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[4]Section 8(d) of the NLRA provides in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the

Based on this fundamental tenet of labor law, I expressly disavow the hearing officer's reasoning and the results. I conclude, to the contrary, that if a party flatly refuses to negotiate a proposal and the proposal is later found by PERB to be out of scope, that party has not committed an unfair practice because no duty to negotiate existed which the employer violated.

The hearing officer's determination that a party must respond to negotiating proposals which are not clearly within or clearly outside of scope no doubt arose in the instant case because numerous proposals were expressed in extremely broad language. Similarly, our determination of negotiability, has been rendered more difficult by the fact that the parties failed to appropriately refine proposals through the negotiations process itself.

In my view, the side offering a proposal has a responsibility to frame it in such a way that it is susceptible to meaningful negotiations. Similarly, the side receiving a proposal has a responsibility to offer a meaningful response

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> representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached is requested by either party to agree to a proposal or require the making of a concession . . .

and not to summarily reject a proposal which may, in some respects, pertain to issues which are appropriately negotiable. However, while some refinement and specificity in drafting is necessary, the form in which proposals are initially presented marks only the beginning of the negotiating process. Indeed, if one side can refuse to negotiate about a proposal until the offering side has so narrowed it that it contains only items the former accepts as unquestionably within scope, then the bilateral process is thwarted rather than served.

Clarification as to what the proposal is meant to encompass is best attained through discussion and submission of counterproposals presented by the negotiating parties. That is clearly missing in this case. Many of the proposals which the Board finds itself ruling on should have been narrowed and refined through negotiations so the issues were crystalized and the focus more apparent. Instead, we have been presented with proposals which may or may not be negotiable depending on their range of application.

With regard to some proposals which contained no limitation in the language, the overbreadth is fatal, and I have found them nonnegotiable. As to other proposals, I have indicated the parameters within which they are negotiable and have left to the parties the task of refinement, a task which they should have performed during the negotiating process. It is intended

that the parties can shape these proposals to more specific concerns in conformity with this decision. Given the passage of time, the Board has determined that the communicative and mediatory nature of the collective negotiations process would not be served by our requiring that these proposals be subject to requirements of re-refinement before our determining whether any obligation to negotiate was established. Rather, we have examined each of the proposals, determined its negotiability and have indicated the bases for our decision offering guidance to the parties' future negotiating efforts.

In response to the hearing officer's decision, the Districts argue that it is beyond PERB's authority to extend the scope of representation. This Board is charged with the authority to implement the provisions of the EERA, including a specific delegation "to determine in disputed cases whether a particular item is within or without the scope of representation." (Sec. 3541.3(b).) An administrative agency like PERB, directed to carry out a particular statute, must adopt a construction of statutory language. (Bodinson Mfg. Co. v. California Employment Commission (1941) 17 C.2d 321; see section 3541.3(n).) Clearly, this Board is authorized to interpret what is encompassed within the statute and, necessarily, to analyze and interpret the "relating to" language set forth in section 3543.2.

The District states in its brief supporting its statement of exceptions that ". . . it is to be preferred that bargaining parties make such determinations as to scope with only guidance from the Board, not intervention." (p. 14) I agree and view the following discussion as appropriate interpretive guidance.

I note that a decision that a proposal is negotiable is not a reflection on the merits of the proposal. In many instances, however, I have given an indication of the appropriate parameters of proposals while leaving to the face-to-face negotiating process the task of refining the proposals.

While objecting to PERB's interpretation, the Districts urge the adoption of their own interpretation. They assert that the Legislature did not use the same scope language that was in the Winton Act and that this fact reflects the Legislature's narrowing of scope under EERA. In the Districts' view, anything which is not enumerated or which does not have a "direct" and "inextricable" relationship to an enumerated term is subject only to consultation with the Districts. In its view, it is the Districts which decide whether or not they wish to consult.

The interpretation proffered by the Districts is clearly a narrowing of scope from the Winton Act. Indeed, it is so narrow that it belies the Districts' assertion that little except what is specifically enumerated is negotiable. While the District concedes in its opening brief that finding only

enumerated subjects within scope would violate the letter and the spirit of EERA (p. 13), it offers little to resolve the question of what else is negotiable. Rather, it hammers at the view that EERA has a narrow scope and ignores the fact that the Legislature just as deliberately included the words "relating to" as it did "limited to."

The hearing officer examines various public sector cases concerning scope of representation which have utilized tests which focus on whether the subject in question is "directly related" or "significantly related" or "fundamentally related" to the statutory standard in that state. (School District of Seward Education Association v. School District of Seward (1972) 199 N.W.2d 752 [80 LRRM 3393]; Clark County School District v. Local Government EMRB (1974) 530 P.2d 114 [80 LRRM 2774]; Aberdeen Education Association v. Aberdeen Board of Education (1974) 215 N.W.2d 837 [85 LRRM 2801]; Unified School District of Racine County v. WERC (1977) 259 N.W.2d 724 [97 LRRM 2489]; City of Beloit v. WERC (1976) 242 N.W.2d 231 [92 LRRM 3318].)

As the majority stated in San Mateo, we have determined that negotiability is more aptly determined by a two step process.[5] First, the disputed subject must bear a logical

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[5]The cases cited above rely on tests which have combined a two step process into one. In effect, they weigh the relative interests of employers and employees to decide on

and reasonable relationship to an enumerated subject. If that relationship is established, the competing interests raised by the proposal are balanced. This test has been applied to each of the proposals set forth infra in determining negotiability. Unlike the hearing officer who divided proposals into two categories, the negotiability of one category being deemed "self-evident," I find that the same analysis must be applied to each proposal. Thus, while this analysis will reveal the necessary relationship and result more immediately in certain cases than in others, I nonetheless conclude that the same analysis is appropriately applied as to each proposal under submission.

As stated above, the District proposes a test that a disputed subject is negotiable only if there is a "direct" and "inextricable" relationship with an enumerated item. (p. 12 of its brief in support of exceptions.) This test is no less subjective than any other. Indeed, it may even lack some of the protections of the majority's test. Reasonable minds can differ as to whether subjects such as promotions bear a direct and inextricable relationship to wages and hours. The District's analysis stops there. We find it is more appropriate, having found such a relationship, to then weigh

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which side of the scale the disputed subjects fall. It is then said to be "directly" related to that side.

the competing interests of employees and employers to determine whether the negotiations process is the suitable forum for resolving these disputes.

Certain aspects of negotiability not specifically addressed in San Mateo, supra are raised by a number of the proposals which seek to incorporate statutory provisions into the agreement or seek some modification of existing statutes. EERA, unlike its two descendants, SEERA and HEERA, does not contain a supersession clause setting forth which statutes may be superseded by a memorandum of understanding in conflict with the specified statutes. Rather EERA, similar to the Winton Act and the Meyers-Milias-Brown Act,[6] provides in section 3540 that nothing in EERA

> shall be deemed to supersede the other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate ternure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

I interpret this language to mean that where a proposal pertains to a subject which is covered by the Education Code,

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[6]The Winton Act was codified at former section 13080 et seq. of the Education Code. Former section 13080 contained analogous supersession language. The Meyers-Milias-Brown Act is codified at Government Code section 3500 et seq. Section 3500 contains analogous supersession language.

the negotiability of that proposal is not precluded so long as it does not directly conflict with the code. For example, the Association proposal in Article 10.1 seeks to negotiate a provision requiring the Districts to pay for the cleaning and maintenance of uniforms. This is an addition to Ed. Code section 45138[7] but is negotiable because that section does not provide that the District shall pay for only that which is listed and nothing else.

At the time when this case arose, some of the enumerated subjects set forth in section 3543.2 were also covered by statute (leave, for example, is discussed at Education Code sections 45190 et seq.). If PERB were to adopt the view that the mere existence of a statutory provision precluded negotiability, many issues of central employee concern would be excluded from negotiations. For example, Member Gonzales notes

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[7]Section 45138 of the Education Code states:

> Uniforms; costs
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> The governing board of any school district may require the wearing of a distinctive uniform by classified personnel. The cost of the purchase, lease or rental of uniforms, equipment, identification badges, emblems, and cards required by the district shall be borne by the district.
>
> This section shall apply to districts that have adopted the merit system in the same manner and effect as if it were a part of Article 6 (commencing with Section 45240) of this chapter.

in San Mateo at p. 43 that overtime compensation is not listed in the enumeration of terms and conditions because it is essentially an extension of wages and is therefore negotiable. Section 45128 of the Education Code, however, pertains to overtime. Thus, by adopting a view that any contract proposal which is also covered by statute is nonnegotiable, any proposal regarding overtime would be excluded from negotiations because of EERA's supersession language even though it is an integral part of the wage scheme.

The Pennsylvania Supreme Court similarly rejected such a conclusion in PLRB v. State College Area School District (1975) 6 PPER 92 [90 LRRM 2081]. In that case, the Court considered section 703 of the Pennsylvania Public Employees Relations Act which prohibited parties from negotiating provisions in their agreements if the implementation of those provisions "would be in violation of, or inconsistent with, or in conflict with" any Pennsylvania statute or municipal charter provision. In reconciling this language with the directive of section 701 permitting negotiations over wages, hours and terms and conditions of employment, the Court noted that, prior to the enactment of the state Act, collective bargaining by public employers was not required and that the report issued by the Governor's Commission suggested the need for collective bargaining to restore harmony to the public sector, to eliminate strikes and widespread labor unrest, and to promote

orderly and constructive relationships between public employers and employees. In this light, the Court commented, the supersession provision must be narrowly interpreted because it would be absurd to suggest that the Pennsylvania Legislature deliberately intended to provide merely an "illusory right of collective bargaining." (PLRB at p. 94.)

The Court further stated:

> The mere fact that a particular subject matter may be covered by legislation does not remove it from collective bargaining under section 701 if it bears on the question of wages, hours and conditions of employment. We believe that section 703 only prevents the agreement to and implementation of any term which would be in violation of or inconsistent with any statutory directive.
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> . . . . . .
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> Section 703 merely prevents a term of a collective bargaining agreement from being in violation of existing law. Cf. Board of Education, City of Englewood v. Englewood Teachers Ass'n., 64 N.J. 1, 311 A.2d 729, 85 LRRM 2137 (1973); Board of Education of Union Free School District #3 v. Associated Teachers of Huntington, Inc., 30 N.Y.2d 122, 282 N.E.2d 109, 79 LRRM 2881 (1972); Joint School District #8 v. Wisconsin Employment Relations Board, 37 Wis.2d 483, 155 N.W.2d 78 (1967). If however the General Assembly mandates a particular responsibility to be discharged by the board and the board alone, then the matter is removed from bargaining under section 701 even if it has direct impact upon "wages, hours and other terms or conditions of employment."
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> . . . . . .

> We therefore conclude that items bargainable under section 701 are only excluded under section 703 where other applicable statutory provisions explicitly and definitively prohibit the public employer from making an agreement as to that specific term or condition of employment.[8]

In my view, the supersession language of section 3540 should similarly be read to preclude negotiability only where the Education Code provisions in conflict would be replaced, set aside or annulled by the language of the proposed contract clause. Unless the statutory language clearly evidences an intent to set an inflexible standard or insure immutable provisions, the negotiability of a proposal should not be precluded. As the Pennsylvania Court similarly noted, an interpretation which would remove subjects from the scope of representation because certain portions of the Education Code pertain to that subject would have the anomalous result of severely restricting the purpose of the EERA. By requiring direct conflict, the words of section 3540 are interpreted in a manner which promotes rather than defeats the general purpose of EERA, furthers construction with reference to the whole system of law of which it is a part, and renders a result in accordance with the intention of the lawmakers. (In re Lynwood Herald American (1957) 152 Cal.App.2d 901 [313 P.2d 584]; Select Base Materials v. Board of Equalization (1959) 51 Cal.2d

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[8]PLRB, supra, p. 95.

640 [335 P.2d 672]; Bush v. Bright (1968) 264 Cal.App.2d 788 [71 Cal.Rptr. 123].)

Thus, where a provision of the Education Code impels certain action, the parties are prohibited by section 3540 of the EERA from negotiating a provision which directly conflicts with the imperative portion of the Code.[9]

The District concedes that it refused to meet and negotiate as to all the proposals. Therefore, as to those items the Board finds negotiable, the District has violated section 3543.5(c). Moreover, as we found in San Francisco Community College District (10/12/79) PERB Decision No. 105, by refusing to meet and negotiate, the employer necessarily denies an employee organization the right to represent its members in the negotiations process and concurrently violates section 3543.5(b). Therefore we overrule the hearing officer's dismissal of this charge.

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[9]In Union Free School District, Town of Cheektowaga v. Nyquist (1975) 8 PERB 7516, the New York Court of Appeals concluded that, under the Taylor Law, provisions of collective bargaining agreements cannot operate to supersede imperative provisions of the Education Law. It limited the scope of bargaining when in conflict with "plain and clear prohibitions found in statute or decisional law" and stated:

> The heart of our present holding is that where, as with the issue now before us, there is an imperative provision of the Education Law, to the extent that such provision is imperative, it is beyond the power of the parties to alter or modify the statutory provision by collective bargaining, agreement to arbitrate or otherwise. (Emphasis added.)

Article II. No Discrimination

In Article II, CSEA seeks to negotiate concerning three proposals which relate to discrimination. The proposals are as follows:

> Article II. No Discrimination
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> 2.1 Discrimination Prohibited: No employee in the bargaining unit shall be appointed, reduced, removed, or in any way favored or discriminated against because of his/her political opinions or affiliations, or because of race, national origin, religion, or marital status and, to the extent prohibited by law, no person shall be discriminated against because of age, sex, or physical handicap.
>
> 2.2 No Discrimination on Account of CSEA Activity: Neither the District nor CSEA shall interfere with, intimidate, restrain, coerce, or discriminate against employees because of the exercise of rights to engage or not to engage in CSEA activity.
>
> 2.3 Affirmative Action: The District and CSEA agree that an effective affirmative action program is beneficial to the District, employees, and the community. The parties agree and understand that the responsibility for an affirmative action plan rests with the employer. The District shall consult with CSEA in preparing the affirmative action plan and further agrees that no provision shall be adopted in the affirmative action plan that violates employee rights as set out in this agreement.

As to subarticles 2.1 and 2.2, I find that the discrimination prohibitions are negotiable to the extent that they relate to enumerated subjects as set forth in the Act or matters relating to enumerated subjects. In other words, the Districts must

negotiate with CSEA as to discriminatory conduct involved in such matters as setting wages, establishing hours of work or in implementing leave and transfer policies. Clearly, there is a strong employee interest in insuring nondiscriminatory treatment in such matters of significant employee concerns. Conversely, there is no overriding employer interest which persuades me that it would be inappropriate to compel the District to engage in negotiations concerning these discrimination proposals. In so deciding, I specifically reject the hearing officer's conclusion that, as limited above, either provision significantly impairs a District's legitimate policy objectives or impinges on reserved management prerogatives.

With regard to subarticle 2.3, however, I find that preparation of an affirmative action plan does involve the District's prerogative to establish such a policy. In Rutgers, The State University (1976) 2 NJPER 13, the New Jersey Public Employment Relations Commission considered the negotiability of a proposal requiring the employee organization's approval of an affirmative action plan prior to submission to federal and state agencies.[10] The Commission stated:

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[10]The New Jersey Employer-Employee Relations Act requires parties to meet and negotiate "with respect to grievances and terms and conditions of employment." (NJSA 34:13A-5.3)

> Therefore, we conclude that the University cannot be compelled to negotiate regarding AAUP approval prior to the submission of affirmative action plans--negotiations in no event require approval by either party to a position taken by the other--but the University is required to negotiate regarding terms and conditions of employment which are affected by such plans as well as regarding the impact of management decisions on terms and conditions of employment of unit members.

I am in agreement with this conclusion. Establishment of an affirmative action plan itself may involve expenditures of funds for recruitment, adapting job functions to provide opportunities for persons with nontraditional employment histories, and changes in hiring or promotion policies to meet affirmative action goals. Thus, while the impact that any such affirmative action plan may have on enumerated subjects or matters relating to enumerated subjects is negotiable, CSEA may not compel the Districts to negotiate a provision which grants a consultation right regarding the preparation of the plan itself.

Article V. Organizational Rights

The proposals presented by CSEA in Article V concern organizational rights. Subarticle 5.1.1 provides:

> 5.1.1 The right of access at reasonable times to areas in which employees work.

I find that this proposal bears a direct relationship to the processing of grievances, an enumerated item under EERA. Thus, in order to insure that CSEA will be provided the needed access

to grievants, witnesses, and materials necessary to process grievances, the Districts are required to negotiate as to this proposal because the management interest in controlling and regulating an organization's access to employees in the work place does not outweigh the significant interests of employees. Although EERA provides employee organizations a right of access, I do not believe this fact removes an otherwise negotiable subject from scope. Finally, access is precisely the type of subject which would best be dealt with through the give and take of the bilateral process of meeting and negotiating.

Subarticle 5.1.2 provides:

> The right to use without charge institutional bulletin boards, mailboxes, and the use of the school mail system and other District means of communication for the posting or transmission of information or notices concerning CSEA matters.

In my view, this provision is negotiable because it is related to the entire process of administering the agreement reached by the exclusive representative and the public school employer. Clearly, the central result contemplated by the passage of the EERA was to permit parties to negotiate a binding agreement covering matters within the scope of representation.[11] The

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[11]Section 3540.1(h) states in pertinent part:

(h) "Meeting and negotiating" means

proposal profferred by CSEA seeks to insure that it will have various communication channels available to transmit information to the employees it represents. This proposal is negotiable because it relates to all subjects within scope contained in the negotiated agreement and because it relates to the collective negotiation process and the administration of the entire agreement. While the District also has an interest in the access to and use of these means of communication, it is not so strong as to preclude negotiability. As with access and other issues, I do not view the existence of similar or exact statutory provisions as precluding negotiability.

CSEA proposes the following provision in subarticle 5.1.3:

> 5.1.3 The right to use without charge institutional equipment, facilities, and buildings at reasonable times.

> meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

In assessing the negotiability of this proposal, the hearing officer considered section 3543.5(d) of EERA,[12] which prohibits the employer from making financial contributions in support of any particular employee organization. This provision of the EERA is derived from section 8(a)(2) of the NLRA which similarly forbids employers to give financial assistance to a labor organization. A proviso contained in section 8(a)(2) states:

> . . .an employer shall not be prohibited from permitting employees to confer with him during work hours without loss of time or pay.

Application of this provision by the federal courts and the NLRB has required that the totality of the circumstances be considered in order to distinguish unlawful support, which involves some degree of control and influence, from employer cooperation, which is a principal purpose of labor relations statute. (NLRB v. Magic Slacks, Inc. (1963) 314 F.2d 844 [52 LRRM 2641].) The right to use the employer's premises is

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[12]Section 3543.5(d) states:

> It shall be unlawful for a public school employer to:
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> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

viewed as permissible cooperation and, as this Board stated in Azusa Unified School District (11/23/77) EERB Decision No. 38, is not per se unlawful. (Coamo Knitting Mills, Inc. (1964) 150 NLRB 579 [58 LRRM 1116]; Chicago Rawhide Mfg. Co. v. NLRB (7th Cir 1955) 221 F.2d 165 [35 LRRM 2665]; Hotpoint Co. v. NLRB (7th Cir. 1961) 289 F.2d 683 [48 LRRM 2101].) Thus, while certain proposals as discussed infra concerning employer financial support may be nonnegotiable if they seek such support for the purpose of obtaining special preferential treatment, the purpose of the instant proposal encompasses a legitimate request for the use of equipment and facilities necessary for CSEA to fulfill its role as exclusive representative. Therefore, to the extent that this proposal seeks to negotiate matters such as entitlement to a meeting room to be used when discussing and preparing grievances, that use, without charge, is not the type of financial intrusion prohibited by section 3543.5(d). Rather, subarticle 5.1.3 is within the union's legitimate concerns.

Although EERA requires the District to provide access to institutional bulletin boards, mailboxes, other means of communication and institutional facilities, such requirement does not mean, of course, that because this proposal is negotiable that the District is compelled to agree to it as written. I find no reason for concluding that, on its face,

this subarticle is nonnegotiable because it improperly invades the area of management's rights.

Subarticle 5.1.4 presented by CSEA states as follows:

> 5.1.4 The right to review employees' personnel files and any other records dealing with employees when accompanied by the employee or on presentation of a written authorization signed by the employee.

I am in agreement with the hearing officer's conclusion that this proposal relates to the processing of grievances and is therefore negotiable. Access to written material concerning a specific employee, when accompanied by the employee's approval, is critical to effective enforcement of the negotiated agreement. This proposal evidences legitimate employee concerns as to the administration of the contract because enforcement of the negotiated agreement through the negotiated grievance procedure depends on the availability of evidence needed to reveal departures from agreed-upon employment policies. I am also in agreement with the Chairperson's conclusion that this proposal bears a logical relationship to employee evaluations. Because this proposal incorporates employee authorization and presents no intrusion into managerial prerogatives or matters of public policy reserved to employer control, it is negotiable.

Proposal 5.1.5 states as follows:

> 5.1.5 The right to be supplied with a complete "hire date" seniority roster of all bargaining unit employees on the effective

> date of this agreement and every three (3) months thereafter. The roster shall indicate the employee's present classification and primary job site.

This proposal requesting that CSEA be provided the seniority roster is, as the hearing officer concluded, negotiable because it bears a close relationship to wages, hours, transfer and leave, matters that are frequently affected by the individual employee's seniority. Committing this proposal to the negotiating process does not intrude on central management rights, prerogatives or policy considerations.

CSEA also proposed other subarticles concerning the distribution of information. Subarticle 5.1.6, 5.1.7, 5.1.8 and 5.1.9 provide as follows:

> 5.1.6 The right to receive upon request two (2) copies of any and all written reports submitted to any other governmental agency.
>
> 5.1.7 The right to receive two (2) copies of all applications to any other governmental agency for any grant, funding, or approval of any kind when such grant, funding, or approval can reasonably be expected to have an impact, direct or indirect, on the classified service; and said copies shall be forwarded to CSEA in the same manner and at the same time as the subject matter is submitted for consideration to the public school employer. No action on such matters shall be taken by the employer until CSEA has been provided the opportunity to review and comment.
>
> 5.1.8 The right to receive two (2) copies of any budget or financial material submitted at any time to the governing board.

> 5.1.9 The right to review at all reasonable times any other material in the possession of or produced by the District necessary for CSEA to fulfill its role as the exclusive bargaining representative.

Subarticle 5.1.6, in its present form, would permit CSEA to receive, upon request, copies of written reports that the District submits to other governmental agencies. Were this proposal limited to materials related to enumerated subjects and thus necessary for CSEA to fulfill its roll as bargaining representative, this proposal would be negotiable. However, as it is written, subarticle 5.1.6 is overly broad since it would require the employer to furnish reports totally unrelated to the employment relationship. CSEA's right to receive information and materials must be confined to its role as exclusive representative. This proposal contains no such limitation and is therefore nonnegotiable.

Subarticle 5.1.9 proposes a right to review other materials produced by or in the possession of the District which are "necessary for CSEA to fulfill its role as the exclusive bargaining representative." While the language of this proposal more clearly limits the purpose for the information sought, it too may be additionally refined during the negotiating process. However, to the extent that it concerns the right to review information necessary to administer the agreement or otherwise assist CSEA in its role as

representative, this proposal is negotiable.[13] No overriding interest of the District to keep all of such information from the CSEA representative overcomes the Association's legitimate purpose aimed at performing its role as the exclusive representative.

Subarticles 5.1.7 and 5.1.8 pertain to the right to review grant and funding requests and budgetary and financial material submitted to the governing board, respectively. While it is apparent that both proposals have a discernible relationship to wages and other enumerated subjects which are affected by financial considerations, the breadth of these items as written

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[13]Although the hearing officer determines that subarticle 5.1.9 is negotiable, he cites NLRB v. Milgo Industrial, Inc. (2d Cir. 1977) 567 F.2d 540 [97 LRRM 2079], enf. (1977) 229 NLRB No. 13 [96 LRRM 1347], for the proposition that the employer is not required to supply information when it is readily available elsewhere. In Milgo, the Court held that the employer had not refused to bargain when it failed to supply the union with a copy of the employer's health plan which was available to the union. The Court noted, however, that the failure to provide information regarding pension costs, relevant to the union's efforts to bargain as to pensions, was unlawful. (NLRB v. Truit Mfg. Co. (1956) 351 U.S. 149 [38 LRRM 2042]; NLRB v. Acme Industrial Co. (1967) 385 U.S. 432 [64 LRRM 2069].) The Court also noted that where the union had unknowingly been provided the information requested, the employer was required to so advise. In any event, the negotiability of CSEA's proposal does not depend on whether an employee organization may be able to obtain necessary information from other sources in certain instances. It is the continuing need for the information relevant to bargaining efforts that is critical and CSEA may demand that the negotiated agreement include an affirmative promise that information related to wages, hours and other enumerated subjects be provided.

goes beyond CSEA's interests and intrudes on the employer's central managerial responsibilities. Both items concern submissions which may potentially impact on the budget but which are, at the time requested, likely to be a part of the employer's planning process. The proposal does not limit the requests for information to documents which are set for action by the Districts or advanced in the form of budgetary proposals. Therefore, while both subarticles may ultimately bear a close relationship to negotiable topics, as submitted, they impinge on management's right to flexibly and internally explore budgetary considerations prior to formulating final proposals for action.

In subarticle 5.1.10, CSEA made the following proposal:

> 5.1.10 The right of release time for employees who are CSEA state officers to conduct necessary CSEA business.

By its terms, this proposal relates to both wages and hours because released time necessarily means release from work during work hours without loss of pay. While the employer clearly has an interest in the amount of time its employees are being paid but not performing their regular job functions, that interest does not outweigh the employees' interest in having released time to process grievances or to conduct other appropriate CSEA business relative to fulfilling its obligations as exclusive representative so as to preclude

negotiability of this item.[14] The necessary refinement of this proposal should be accomplished by the negotiating process. Therefore, this proposal, which seeks released time to conduct necessary CSEA business, is negotiable since its relationship to wages and hours is not offset by considerations involving management prerogatives or educational or public policy concerns such that it should be excluded from scope.

CSEA's proposal set forth in subarticle 5.1.11 provides:

> 5.1.11 The right of release time for CSEA chapter delegates to attend the CSEA Annual Conference, with the District to provide $250 in conference expenses for each delegate.

Unlike subarticle 5.1.3 which the Board concludes is negotiable because it seeks use of district facilities, without charge, necessary for CSEA to effectively perform its role as exclusive representative, the instant proposal seeks a commitment from the District to finance the expenses of CSEA conference delegates.

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[14]I am in essential agreement with the Chairperson's assertion that the financial impact of this and other proposals is a matter most appropriately raised at the negotiating table. Inability to pay for a proposal is a negotiating position and not a reason for refusing to negotiate. However, the fiscal ramifications of a proposal may also be pertinent to the employer's legitimate concerns with matters of educational and public policy. I therefore feel that it is appropriate to address the issue of financial burdens when balancing the competing interests of the parties because, in some instances, the economic impact may be so severe as to compel the conclusion that resolution of the dispute is ill-suited to the negotiating process.

The NLRB has considered the propriety of various types of financial assistance provided by an employer to an employee organization. Direct cash payments are illegal (Meyer and Welch (1950) 91 NLRB 1102 [26 LRRM 1625]) as are payments of union legal fees (Bev Cal Optical Company (1966) 157 NLRB 1287 [157 LRRM 1559]) and financial assistance derived from vending machines and flower funds (Connor Foundry Company (1952) 100 NLRB 146 [30 LRRM 1250]). Other forms of financial assistance, however, are viewed as permissible friendly cooperation (Post Publishing (1962) 136 NLRB 272 [49 LRRM 1768], enf. denied (7th Cir.) 311 F.2d 565 [52 LRRM 106]) or excused because the amount of assistance is deemed minimal. (Coppus Engineering Corporation (1956) 115 NLRB 1387 [38 LRRM 1079], enf. denied (1st Cir. 1957) 240 F.2d 564 [39 LRRM 2315]).

Cases involving financial assistance to subsidize attendance at union functions are most pertinent to the proposal in question. In general, financial assistance to employees for time spent at union meetings is permitted provided these meetings are strictly confined to conferences with the employer. (Essex Wire (1954) 107 NLRB 1153 [33 LRRM 1338], enf. denied another grounds sub nom NLRB v. Associated Machines, Inc. (6th Cir. 1955) 219 F.2d 433 [35 LRRM 2431].) However, if meetings involve such things as discussions of internal union affairs, then payment for worker attendance is considered to be illegal financial support to the employee

organization. (Farmbest, Inc. (1965) 154 NLRB 1421 [60 LRRM 1159] enf. granted in part and denied in part (8th Cir. 1967) 370 F.2d 1015 [64 LRRM 2203].)

While the distinction between meetings involving employer communication and internal union business is maintained because of the express language of the proviso contained in the NLRA, I am persuaded that financial support is impermissible when its primary purpose is to subsidize internal union business. The comment in Dairylea Cooperative Inc. (1975) 219 NLRB 656 [89 LRRM 1737] with regard to the employer's payment to union stewards is similarly appropriate:

> . . .it nevertheless remains the union's task to build and maintain its own organization...

The CSEA Annual Conference is an organizational endeavor at which, it can reasonably be presumed, discussions and workshops will pertain at least in part to internal union affairs. I, therefore, conclude that this demand goes beyond the legitimate financial support essential to CSEA's role as exclusive representative. (Seaway Food Town, Inc. (1978) 235 NLRB 1554 [98 LRRM 1233]. Rather, as the hearing officer found, this proposal seeks the financial support which a district is prohibited from granting by section 3543.5(d) of the Act. I therefore conclude that this subarticle is nonnegotiable to the extent that it proposes the grant of $250 to each conference delegate. CSEA may, however, seek to include in its released

time proposals specific release for attendance at CSEA conferences and meetings which might qualify as necessary CSEA business.

Subarticle 5.1.12 concerns orientation sessions and provides:

> 5.1.12 The right to conduct orientation sessions on this agreement for bargaining unit employees during regular working hours.

This proposal seeks released time for orientation sessions and therefore relates to hours and wages. The provision is directed at acquainting unit members with provisions of the agreement and, therefore, also bears a relationship to the grievance procedure because its goal is employee awareness of and acquaintance with the terms of the agreement which are subject to the grievance procedure. Management also has significant concerns in that the District's right to direct employees is affected by this proposal. The orientation sessions will take employees away from their normal job duties. In balance, however, the hearing officer's conclusion that this proposal is negotiable is sound.

In subarticle 5.2, CSEA seeks to negotiate a provision prohibiting the District's formation of advisory committees. It provides:

> 5.2 Prohibition Against Advisory Committees: The District shall not form or cause to be formed any advisory committee on any matter

> concerning bargaining unit employees without the consent of CSEA.

In its present form, this proposal is nonnegotiable. It fails to limit the prohibition on advisory committees to actual advice or proposals which would, if adopted, impact on wages, hours, or other enumerated items. Rather, it precludes the formation of any committee relating to any matter of employee concern. By its terms, this item fails to demonstrate the requisite connection to a negotiable subject and, more importantly, by its breadth, impermissibly intrudes into the area of management's prerogatives including public policy considerations. Such committees might well be citizen committees concerned with broad issues of the school district's operation and goals which would no doubt concern negotiating unit members but which are nonnegotiable as within management's legitimate sphere.

In subarticle 5.3, CSEA seeks to restrict District negotiations and agreements with other organizations. It provides:

> 5.3 Restriction on District Negotiations and Agreements: The District shall conduct no negotiations nor enter into any agreement with any other organization on matters concerning the rights of bargaining unit employees and/or CSEA without prior notice to and approval by CSEA of the negotiations and the agreement.

The hearing officer found that this item bore a tangential relationship to enumerated items and, further, was

nonnegotiable because the substance of the proposal was adequately covered by the unfair practice provisions of the Act.

In my view, this proposal is nonnegotiable because it is overly broad. By its terms, it prohibits the employer from conducting negotiations as to any agreement with any other organization on "matters concerning the rights of bargaining unit employees." This proposal is not limited to matters relating to wages, hours or enumerated subjects nor is it limited to negotiations with other employee organizations.[15] It is not negotiable.

CSEA's proposal in subarticle 5.4 provides:

> 5.4 Distribution of Contract: Within thirty (30) days after the execution of this contract, the District shall print or duplicate and provide without charge a copy of this contract to every employee in the bargaining unit. Any employee who becomes a member of the bargaining unit after the execution of this agreement shall be provided with a copy of this agreement by the District without charge at the time of employment. Each employee in the bargaining unit shall be provided by the District without charge with a copy of any written changes agreed to by the parties to this agreement during the life of this agreement.

This proposal would require that the public school employer finance the cost of duplicating the parties' negotiated

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[15]The fact that CSEA seeks to incorporate this prohibition into their agreement thereby providing resolution and remedy through the grievance procedure in addition to unfair practice procedures is irrelevant to the question of negotiability.

agreement. I find that this type of financial support is similar to that sought in subarticle 5.1.11. Contrary to the hearing officer's conclusion, this proposal intrudes into the area of conduct prohibited by section 3543.5(d). CSEA urges that this provision relates to the grievance process because the availability of the contract will effectuate that process. The asserted relationship, however, is insufficient to support a negotiability finding because it ignores the major thrust of the proposal which plainly seeks financial support rather than the right to distribute. The right to conduct orientation sessions during working time proposed in subarticle 5.1.12 has a financial impact but is focused on the right to conduct orientation. Subarticle 5.4 does not seek the right to distribute the contract but rather the placement of fiscal responsibility on the employer. I conclude, therefore, that subarticle 5.4 is, in its present form, nonnegotiable.

Subarticle 5.5 of CSEA's proposals states:

> 5.5 Management Orientation: District Management shall conduct orientation sessions on this agreement for Management, Supervisory and Confidential employees.

CSEA asserts that this proposal, sought in order to insure that nonunit members are familiar with the terms of the agreement and to facilitate grievance settlement, is negotiable because it bears a sufficient relationship to grievance procedures. The thrust of this provision, however, seeks to compel

management to conduct orientation sessions and therefore fatally invades management's prerogative to direct its management team and to determine if and when it will provide them with such orientation sessions. Thus, the proposal is outside of the scope of negotiations contemplated by the EERA.

Article VI. Job Representatives

The totality of Article VI of CSEA's contract proposals concerns union job representatives. The article provides as follows:

> 6.1 Purpose: The District recognizes the need and affirms the right of CSEA to designate Job Representatives from among employees in the unit. It is agreed that CSEA in appointing such representatives does so for the purpose of promoting an effective relationship between the District and employees by helping to settle problems at the lowest level of supervision.
>
> 6.2 Selection of Job Representatives: CSEA reserves the right to designate the number and the method of selection of Job Representatives. CSEA shall notify the District in writing of the names of the Job Representatives and the group they represent. If a change is made, the District shall be advised in writing of such change.
>
> Duties and Responsibilites of Job Representatives: The following shall be understood to constitute the duties and responsibilities of Job Representatives:
>
> 6.3.1 After notifying his/her immediate superior, a Job Representative shall be permitted to leave his/her normal work area during reasonable times in order to assist in investigation, preparation, writing, and presentation of grievances. The Job

Representative is permitted to discuss any problem with all employees immediately concerned, and, if appropriate, to attempt to achieve settlement in accordance with the grievance procedure.

6.3.2 If, due to an emergency, an adequate level of service cannot be maintained in the absence of a Job Representative at the time of the notification mentioned in 6.3.1, the Job Representative shall be permitted to leave his/her normal work area no later than two hours after the Job Representative provides notification.

6.3.3 A Job Representative shall be granted release time with pay to accompany a CAL-OSHA representative conducting an on-site walk-around safety inspection of any area, department, division, or other subdivision for which the Job Representative has responsibilities as a Job Representative.

6.4 Authority: Job Representatives shall have the authority to file notice and take action on behalf of bargaining unit employees relative to rights afforded under this agreement.

6.5 CSEA Staff Assistance: Job Representatives shall at any time be entitled to seek and obtain assistance from CSEA Staff Personnel.

CSEA argues, and I agree, that the provisions set forth in Article VI relate to wages, hours and the grievance procedures. The selection and authority of job representatives relates directly to the administration of the provisions of the agreement.

Typically, job representatives or union stewards, as they are frequently called, perform functions critical to the entire grievance procedure. As set out in subarticle 6.3.1,

representatives investigate and prepare grievances and present the merits of the grievance to the individual designated to hear the issues at the various steps of the process.

Subarticles 6.3.1, 6.3.2 and 6.3.3 additionally bear a relationship to hours and wages because the proposals seek released time for employees serving as CSEA job representatives. Section 3543.1(c) of EERA, which specifically grants employee organization representatives the right to receive reasonable periods of released time for grievance processing, does not preclude the finding that these proposals are negotiable. To the contrary, the Legislature's intent to insure that organization representatives shall be granted reasonable amounts of released time for grievance processing without loss of compensation supports the conclusion that the relationship to enumerated subjects is not offset by a managerial interest in precluding or regulating released time.

In finding that Article VI, in its entirety, is a negotiable subject, I specifically reject the hearing officer's finding that subarticle 6.5 is overly broad and therefore outside of scope. It is related to the grievance procedure as well as to hours and wages to the extent that it contemplates released time for the job representatives to obtain assistance from CSEA staff personnel. Since the District does not regulate the entitlement to assistance, the thrust of the

proposal is clearly the provision of time for obtaining such assistance. In sum, Article VI is negotiable.

Article X. Employee Expenses and Materials

Article X concerns several proposals which relate to employee expenses and materials. Subarticle 10.1 provides:

> 10.1 Uniforms: The District shall pay the full cost of the purchase, lease, rental, cleaning and maintenance of uniforms, equipment, identification badges, emblems and cards required by the District to be worn or used by bargaining unit employees.

This provision, as the hearing officer found, relates to wages because it releases the individual employee from assuming the cost of uniforms, equipment, badges, emblems and cards. By its terms, this item accommodates any right that management has in determining if certain of its classified employees will be required to wear uniforms or carry identification badges, emblems or cards. In this regard, subarticle 10.1 in no way contravenes or supersedes section 45138 of the Education Code.[16] It seeks to incorporate into the provisions of the negotiated agreement this statutory right and to provide that

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[16]In pertinent part, section 45138 of the Education Code provides:

> The governing board of any school district may require the wearing of a distinctive uniform by classified personnel. The cost of the purchase, lease or rental of uniforms, equipment, identification badges, emblems, and cards required by the district shall be borne by the district.

any failure to assume the financial burden and thereby eliminate incursions into the employees' wages will be subject to remedy through the grievance procedure. Although it also seeks to have the Districts pay for cleaning and maintenance, such a provision does not conflict with section 45138, supra, since the statute does not provide that the specified items are the only costs the Districts may bear. I therefore conclude that subarticle 10.1 is negotiable.

Subarticles 10.2.1 and 10.2.2 provide:

> 10.2.1 Tools: The District agrees to provide all tools, equipment, and supplies reasonably necessary to bargaining unit employees for performance of employment duties.
>
> 10.2.2 Notwithstanding Section 10.2.1, if an employee in the bargaining unit provides tools or equipment belonging to the employee for use in the course of employment, the District agrees to provide a safe place to store the tools and equipment and agrees to pay for any loss or damage or for the replacement cost of the tools resulting from normal wear and tear.

Taken together, these provisions logically and reasonably relate to wages. They require the Districts to bear the cost of furnishing most tools, etc., and require that when tools and equipment which belong to employees are used on the job, the Districts will be required to assume the responsibility of providing a safe storage place and to pay for loss, damage or replacement costs if necessitated by wear and tear. These subarticles seek to prevent such employees from being required

to use their own wages to generally finance the cost of tools, equipment and supplies and, in the event of use of their personal tools, etc., the cost for loss or damage attendant to the use of such equipment. In agreement with the hearing officer's conclusion, I find these two proposals to be negotiable.

In its proposal set forth in subarticle 10.3, CSEA seeks to negotiate the following:

> 10.3 Replacing or Repairing Employee's Property: The District shall fully compensate all bargaining unit employees for loss or damage to personal property in the course of employment.

This provision, like subarticles 10.2.1 and 10.2.2 discussed above, is related to employees' wages because it proposes that the Districts bear financial responsibility for loss or damage to personal property. It is, by its terms, limited to such loss or damage which is occasioned in the course of employment and involves no impermissible intrusion into the sphere of managerial control or public policy. It is therefore fully negotiable.

The Proposal set forth in subarticle 10.5 provides:

> 10.5 Non-owned Automobile Insurance: The District agrees to provide the primary personal injury and property damage insurance to protect employees in the event that employees are required to use their personal vehicles on employer business.

The hearing officer concluded that this item is negotiable because it relates to wages and because, with regard to expenses incurred following personal injury, it additionally relates to health and welfare benefits. I am in agreement with this assessment.

CSEA's proposal seeks to obtain agreement that the Districts provide this insurance coverage so that individual employees need not deduct such expenses from their wages. Health and welfare benefits, as an enumerated term and condition of employment, encompasses the benefit of financial responsibility assumed by the employer for insurance coverage for an employee's personal injury. The employer must negotiate about this provision.

In subarticle 10.7, CSEA proposes the following item:

> 10.7 Employee Achievement Awards: The District agrees to provide a regular program of monetary awards for valuable suggestions, services, or accomplishments to bargaining unit employees under the provisions of Education Code Sections (sic) 12917 or its successor. The District agrees to develop the program through consultation with CSEA.

The provision in the Education Code, which is expressly incorporated into this proposal, permits the public school employer to grant achievement awards.[17] Through the

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[17]Section 12917 has been recodified without change as section 44015 of the revised (1977) Education Code. It reads as follows:

negotiating process, CSEA seeks to participate in the development of a regular program of awards consistent with the

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> The governing board of a school district may make awards to employees who:
>
> (a) Propose procedures or ideas which thereafter are adopted and effectuated, and which result in eliminating or reducing district expenditures or improving operations; or
>
> (b) Perform special acts or special services in the public interest; or
>
> (c) By their superior accomplishments, make exceptional contributions to the efficiency, economy or other improvement in operations of the school district.
>
> Before any such awards are made, the governing board shall adopt rules and regulations. The board may appoint one or more merit award committees made up of district officers, district employees, or private citizens to consider employee proposals, special acts, special services, or superior accomplishments and to act affirmatively or negatively thereon or to provide appropriate recommendations thereon to the board.
>
> Any award granted under the provisions of this section which may be made by an awards committee under appropriate district rules, shall not exceed two hundred dollars ($200), unless a larger award is expressly approved by the governing board.
>
> When an awards program is established in a school district under the provisions of this section, the governing board shall budget funds for this purpose but may authorize awards from funds under its control whether or not budgeted funds have been provided or the funds budgeted are exhausted.

Education Code rather than to rely on discretionary and sporadic grants initiated solely at the will of the employer. I find, therefore, that the proposal set forth in subarticle 10.7 is compatible with applicable Education Code provisions and is a subject about which the parties must negotiate in compliance with the EERA. I find that the subject of achievement awards relates to wages as well as to evaluation procedures.

In reviewing this proposal, the hearing officer examined numerous cases which distinguish merit or incentive pay from gifts or bonuses. (NLRB v. Wonder State Mfg. Co. (8th Cir. 1965) 344 F.2d 210 [59 LRRM 2065]; NLRB v. Niles-Bement-Pond Co. (2d Cir. 1952) 199 F.2d 713 [31 LRRM 2057].) The hearing officer also considered federal precedent relating to incentive or wage enhancement plans which are found to be negotiable subjects notwithstanding the employer's argument that encouragement of productivity is a management prerogative. (NLRB v. Century Cement Mfg. Co. (2d Cir. 1953) 208 F.2d 84 [33 LRRM 2061]; NLRB v. Katz (1962) 369 U.S. 736 [82 S.Ct. 1107, 50 LRRM 2177].) He concluded that CSEA's proposal seeks to compel negotiations regarding gifts and that CSEA cannot require the employer to negotiate such a discretionary award. I disagree.

The monetary grants delineated in the Education Code include employees' suggestions and proposals resulting in the

elimination or reduction of expenditures, operation improvements, performance of special acts or services in the public interest, superior accomplishments and exceptional contributions. I perceive these bases for awards as analogous to productivity encouragement in the private sector in that they are an inducement to work and are remuneration for work accomplished. The proposal is an effort to reduce the completely discretionary nature of award grants and to standardize the process.

The Iowa Public Employment Relations Board determined that monetary recognition of employees' work performance as measured by employees' attitudes, efficiency and production is merit pay and, viewing such as increased compensation, held that the procedures for distribution of merit pay relate to wages and are negotiable. (In re Area IV Community College Education Association (PERB 1976) Case Nos. 663 and 674.)

I similarly conclude that this proposal relates to the procedures for merit pay and bears a logical and reasonable relationship to employee wages. I also perceive a logical and reasonable relationship to evaluative procedures. No management prerogative exists which vitiates this conclusion of negotiability. To the contrary, I find that significant public policy considerations relevant to improved efficiency of operations are served by subjecting this proposal to the negotiating process.

Subarticle 10.8 as proposed by CSEA provides:

> 10.8 Hold Harmless Clause: Whenever any civil or criminal action is brought against an employee for any action or omission arising out of, or in the course of, the duties of that employee, the District agrees to pay the costs of defending such action, including costs of counsel and of appeals, if any, and shall hold harmless from and protect such employee from any financial loss resulting therefrom.

Similar to other subarticles discussed above, this provision, as the hearing officer concluded, bears ample relationship to wages. While management clearly has a financial interest, that concern is present in numerous negotiable proposals and does not render a proposal nonnegotiable. This proposal is negotiable because it seeks to avoid financial loss arising out of civil or criminal actions initiated against an employee and it therefore relates to employees' salary or remuneration. (See Bittendorf Community School District and Dubuque Community School District (Iowa PERB 1976) Case Nos. 598 and 602.)

Article XI. Rights of Bargaining Unit Upon Change in School Districts

Article XI of CSEA's proposals seeks to protect the rights of the bargaining unit employees and their exclusive representative in the event of changes in the school district. It reads as follows:

> Rights of Bargaining Unit: Any division, uniting, unification, unionization, annexation, or merger or deunification, or change of District boundaries or

> organization shall not affect the rights of individual bargaining unit employees under this Agreement, nor alter the exclusive representation standing of CSEA. This Agreement shall be binding upon any new governing board resulting therefrom, which employs employees currently a part of the bargaining unit during the term of this Agreement.

CSEA urges that this item relates to every mandatory subject under EERA because it seeks to preserve and protect the contract rights of unit employees. The subject of employees' rights and changes in school districts is addressed in section 45118 of the Education Code which provides:

> Any division, uniting, unionization, annexation, merger, or change of school district boundaries shall not affect the rights of persons employed in positions not requiring certification qualifications to continue in employment for not less than two years and to retain the salary, leaves and other benefits which they would have had had the reorganization not occurred, and in the manner provided in this article:
>
> (a) All employees of every school district which is included in any other district, or all districts included in a new district, shall become employees of the new district.
>
> (b) When a portion of the territory of any district becomes a part of another district employees regulary assigned to perform their duties in the territory affected shall become employees of the acquiring district. Employees whose assignments pertained to the affected territory, but whose employment situs was not in such territory, may elect to remain with the original district or become employees of the acquiring district.

> (c) When the territory of any district is divided between or among two or more districts and the original district ceases to exist, employees of the original district regularly assigned to perform their duties in any specific territory of such district shall become employees of the district acquiring the territory. Employees not assigned to specific territory within the original district shall become employees of any acquiring district at their election.
>
> (d) Employees regularly assigned by the original district to any school in said district shall be an employee of the district in which said school is located. Except as herein provided, nothing herein shall deprive the governing board of the acquiring district from making reasonable reassignments of duties.

Assuming that the proposal relates to the enumerated subjects as CSEA asserts, the breadth of the article renders it nonnegotiable because it precludes the Districts from making any division, uniting, unification, annexation, merger, or change of boundaries or organization which would affect employees or alter CSEA's status as exclusive representative. Without doubt, this proposal intrudes into essential and central areas of management prerogative as well as educational and public policy concerns. CSEA is permitted to negotiate a proposal which addresses the impact and implementation of such decisions. However, by the terms of this article, CSEA seeks to prohibit the District's decision to deunify the school district, for example, if it affects the rights of unit employees or CSEA's status as the exclusive representative.

Such prohibitions intrude on essential managerial prerogatives and, thus, I conclude that, in this respect, the present proposal is nonnegotiable.

Article XVII. Hiring

In Article XVII, CSEA seeks to define various categories of employees and, it argues, to protect the wage and hour interests of unit employees. Subarticle 17.1 deals with short-term employees and provides:

> 17.1 Short-Term Employees:
>
> 17.1.1 Persons hired for a specific temporary project of limited duration which when completed shall no longer be required shall be classed as short-term employees.
>
> 17.1.2 The District shall notify CSEA in writing of any proposed hiring of short-term employees and shall indicate the project for which hired and the probable duration of employment at least ten (10) days prior to the employment. CSEA shall be notified in writing immediately of any change in employment status, nature of project, or duration of project affecting such employees.
>
> 17.1.3 No employee shall fill a short-term position or positions for more than 126 working days in any twelve (12) consecutive months.
>
> 17.1.4 No employee serving in a short-term position for 126 days in any twelve (12) consecutive months shall be employed in any capacity by the district for a period of six (6) months after the completion of the 126-day period.
>
> 17.1.5 If a short-term position is utilized for more than 126 days, the position shall become a bargaining unit position.

In assessing these items, the hearing officer concluded that, while related to wages and hours, the proposals concerned employees outside of the negotiating unit and were therefore nonnegotiable.

In pertinent part, section 45103 of the Education Code defines short-term employees as being nonclassified employees. Since CSEA is the exclusive representative of the unit of classified employees, these proposals do in fact relate to positions over which CSEA is not authorized to speak. Subarticles 17.1.1 through 17.1.5 are thus nonnegotiable.

Subarticle 17.2 concerns restricted employees and provides:

> 17.2 Restricted Employees: A restricted employee shall become a regular employee after completing 126 working days service and fulfilling any requirements imposed on other persons serving in the same class as regular employees. The District shall provide restricted employees with an opportunity to meet any requirements imposed on other persons serving in the same class as regular employees. On becoming a regular employee the restricted employee shall be considered as a regular employee as of the initial date of employment for the purpose of all benefits of employment except bargaining unit seniority. The bargaining unit seniority rights of such employee shall commence as of the 127th work day in the position, and the employee shall be immediately subject to the organizational security provisions in this agreement.

In part, this provision concerns the classification of a restricted employee and the requirements for classification as a regular employee. Unlike short-term employees, restricted

employees are not expressly excluded from the classified service. However, section 45105 of the Education Code provides in pertinent part:

> (b) Notwithstanding the provisions of subdivision (a), if specially funded positions are restricted to employment of persons in low-income groups, from designated impoverished areas and other criteria which restricts the privilege of all citizens to compete for employment in such positions, all such positions shall, in addition to the regular class title, be classified as "restricted." Their selection and retention shall be made on the same basis as that of persons selected and retained in positions that are a part of the regular school program, . . .
>
> . . . . . .
>
> (2) Persons employed in positions properly classified as "restricted" shall be classified employees for all purposes except:
>
> (A) They shall not be accorded employment permanency under Section 45113 or Section 45301 of this code, whichever is applicable.
>
> (B) They shall not acquire seniority credits for the purposes of Sections 45298 and 45308 of this code or, in a district not having the merit (civil service) system, for the purposes of layoff for lack of work or lack of funds as may be established by rule of the governing board.
>
> (C) The provisions of Sections 45287 and 45289 shall not apply to "restricted" employees.
>
> (D) They shall not be eligible for promotion into the regular classified service or, in districts that have adopted the merit system, shall not be subject to

> the provisions of Section 45241, until they have complied with the provisions of subdivision (c).

Based on this language, restricted employees are officially considered to be part of the classified service although they are not so considered for certain delineated purposes. Thus, for those aspects of restricted employees' employment relationship for which they are deemed classified employees, an exclusive representative could submit proposals and negotiate with the employer as to restricted employees. As to the instant proposal, however, CSEA seeks to negotiate the procedure by which persons occupying restricted positions acquire permanent status and the impact of this on regular classified employees.

In this regard, section 45105 states as follows:

> (c) At any time, after completion of six months of satisfactory service, a person serving in a "restricted" position shall be given the opportunity to take such qualifying examinations as are required for all other persons serving in the same class in the regular classified service. If such person satisfactorily completes the qualifying examination, regardless of final numerical listing on an eligibility list, he shall be accorded full rights, benefits and burdens of any other classified employee serving in the regular classified service. His service in the regular classified service shall be counted from the original date of employment in the "restricted" position and shall continue even though he continues to serve in a "restricted" position.

Based on this language, the transition of a restricted employee to regular classified service is codified by the statutory provision and, in pertinent part, it conflicts with CSEA's proposal. Therefore, the proposal is nonnegotiable.

CSEA's assertion that this proposal is negotiable because of its impact on regular classified personnel is likewise without merit. Section 45105(e) provides:

> (e) It is the intent of the Legislature in enacting this section to clearly set forth that positions normally a part of the classified service are included therein regardless of the source of income to sustain such positions and to effectively implement specially funded programs intended to provide job opportunities for untrained and impoverished persons but to do so in a manner that will not be disruptive nor detrimental to the normal employment procedures relating to classified school service.

The manner set forth above by which restricted employees are to gain entrance into the regular classified service is specifically delineated by statute. Section 45105(e) further evidences the Legislature's intent that those procedures prevail. Therefore, subarticle 17.2 is nonnegotiable.

Subarticle 17.3 concerns substitute employees and provides:

> 17.3 Substitute Employees: An employee employed as a substitute for more than 100 working days in any six (6) month period shall be deemed a regular employee on the first working day following the completion of the 100th day of service and such employee shall be immediately subject to the organizational security provisions in this agreement.

As to this item, I am in agreement with the hearing officer that it refers to a group of employees statutorily defined as nonclassified personnel and therefore outside of the negotiating unit and beyond CSEA's area of legitimate concern. Section 45103 of the Education Code states that

> "Substitute and short-term employees, employed and paid for less than 75 percent of a school year, shall not be a part of the classified service.
>
> . . . . . .
>
> "Seventy-five percent of a school year" means 195 working days . . . .

The provisions of subarticle 17.3 attempt to define substitute employees in a manner which conflicts with this definition. This proposal is therefore not negotiable.

CSEA's proposal set forth in subarticle 17.4 concerns student employees and provides:

> 17.4 Student Employees: The District shall not employ any students under any secondary school or college work-study program, or in any state- or federally-funded work experience program in any position that would directly or indirectly affect the rights of CSEA or of any employee in the bargaining unit.

While student employees are beyond the bounds of CSEA's unit, this proposal focuses on the impact that the reliance on student employees may have on unit employees. It clearly seeks to preserve the work of unit employees and relates thereby to wages, hours, and enumerated terms and conditions of

employment. The Districts have legitimate interests in the employment of students since, for example, such work may provide students with the financial ability to remain in school. Nonetheless, central employee concerns are also involved. The negotiating process is an appropriate forum for resolving these competing interests. The proposal is negotiable as to the impact of employment of students on the wages, hours and enumerated terms and conditions of employment of unit members. It is noted that section 45103 states in pertinent part:

> Employment of either full-time or part-time students . . . shall not result in the displacement of classified personnel or impair existing contracts for services.

CSEA's proposal does not conflict with this statutory language.

Subarticle 17.5 concerns the distribution of job information and provides:

> 17.5 Distribution of Job Information: Upon initial employment and each change in classification each affected employee in the bargaining unit shall receive a copy of the applicable job description, a specification of the monthly and hourly rates applicable to his or her position, a statement of the duties of the position, a statement of the employee's regular work site, regularly assigned work shift, the hours per day, days per week, and months per year.

On its face, this provision relates to wages and hours of unit employees. Access to this information may also relate to the grievance procedure because, in the event of a dispute, it will

permit each classified employee to review the employer's designation with regard to her/his job description, wages, duties, work site, assigned shift and hours. There is no employer prerogative which overrides the employees' need to be provided with this information. In agreement with the hearing officer, I find this proposal to be negotiable.

Article XIX. Promotion

Article XIX concerns promotions and provides as follows:

> 19.1 First Consideration: Employees in the bargaining unit shall be given first consideration in filling any job vacancy which can be considered a promotion after the annoucement of the position vacancy.
>
> 19.2 Posting of Notice:
>
> 19.2.1 Notice of all job vacancies shall be posted on bulletin boards in prominent locations at each District job site.
>
> 19.2.2 The job vacancy notice shall remain posted for a period of six (6) full working days, during which time employees may file for the vacancy. Any employee who will be on leave or layoff during the period of the posting shall be mailed a copy of the notice by First Class Mail on the date the position is posted.
>
> 19.3 Notice Contents: The job vacancy notice shall include: The job title, a brief description of the position and duties, the minimum qualifications required for the position, the assigned job site, the number of hours per day, regular assigned work shift times, days per week, and months per year assigned to the position, the salary range, and the deadline for filing to fill the vacancy.

19.4 Filing: Any employee in the bargaining unit may file for the vacancy by submitting written notice to the personnel department within the filing period. Any employee on leave or vacation may authorize his/her Job Representative to file on the employee's behalf.

19.5 Certification of Applicants: Within five (5) days following completion of the filing period, the personnel office shall certify in writing the qualifications of applicants and notify each applicant of his/her standing.

19.6 Promotional Order: Any employee in the bargaining unit who files for the vacancy during the posting period and meets the minimum qualifications shall be promoted into the vacant position. If two (2) or more employees who file meet the minimum qualifications, the employee with the greatest bargaining unit seniority shall be the one promoted. In the event that two (2) or more employees have identical seniority, the employee to fill the position shall be selected by lot.

Provisions set forth in this article seek to provide employees with substantive as well as procedural rights pertaining to promotions. Typically, persons granted promotions are subject to the employer's review through the evaluation procedure in order to insure that the best qualified candidate is selected. The substantive provisions of this article set forth the need for evaluations, and therefore I conclude that this article bears a logical and reasonable relationship to evaluation procedures.

In addition, promotions also typically impact on the wages received by employees. Therefore, the promotion article is also related to wages.

The employer's interest extends to concerns that only qualified employees occupy positions that require greater responsibility or skill. Subarticles 19.2 through 19.5 concern procedural rights of employees and do not substantially intrude on the employer's managerial concerns. Subarticle 19.1 would require first consideration be given to unit employees but, by its terms, would not compel selection of any individual employee and certainly not an unqualified candidate. Subarticle 19.6 similarly poses no threat to the employer's legitimate concern for qualified employees because it contemplates that any employee selected will first meet the minimum qualifications required by the vacant position.

While the employer has a valid interest in choosing not only qualified persons but employees it desires to select, employees have a strong interest in receiving priority promotional consideration. No central managerial prerogative is usurped by requiring these conflicting interests to be subjected to the meeting and negotiating process. Therefore, to the extent that this article relates to an employee's promotion into negotiating unit positions, it is

negotiable.[18] As the hearing officer notes, the proposals are negotiable here only as to employees CSEA represents as part of this unit.

Article XX. Classification, Reclassification, and Abolition of Positions

Article XX relates to classification, reclassification and abolition of positions. Subarticle 20.1 provides:

> 20.1 Placement in Class: Every bargaining unit position shall be placed in a class.

The individual employee's position classification directly impacts on her/his wages and hours of employment as well as on transfer policies, safety conditions and evaluation procedures. CSEA's attempt to require that each position be classified invades no managerial prerogative since applicable provisions of the Education Code impose a similar requirement. (See Ed. Code sec. 45103.) This proposal merely seeks to include this obligation in the negotiated agreement thereby

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[18]I am in agreement with the hearing officer's comment that the defeat of Senate Bill No. 288, which sought to amend section 3543.2 of EERA to include promotions as an enumerated item, is not determinative of the question of negotiability. It is speculative to decide whether the bill was intended to add a subject which was previously excluded or to specify what was the previous intent of section 3543.2. Defeat may have meant there was legislative opposition to providing that promotions were negotiable. Or it may have meant that legislation was unnecessary since promotions were already assumed to be covered in 3543.2. In sum, it is not possible to reach any clear interpretation from the defeat of such a legislative proposal.

subjecting the employer's failure to comply to the grievance procedure. The proposal is negotiable.

Subarticle 20.2 provides:

> 20.2 Classification and Reclassification Requirement: Position classification and reclassification shall be subject to mutual written agreement between the District and CSEA, and any dispute shall be subject to the grievance procedure. Either party may propose a reclassification at any time during the life of this agreement for any position.

This provision pertains to position classifications and is related to wages, hours and other enumerated items as discussed above in reference to subarticle 20.1. This item, however, would additionally permit CSEA to take an active role in the classification or reclassification decision itself.

As defined by Education Code section 45101(a), the classification of positions involves a myriad of critical management concerns including questions central to the employer's mission such as the direction and organization of the work force. In my view, because decisions of this nature bear heavily on the employer's right to manage its work force and may impact on public policy concerns, I view classification and reclassification decisions as ill-suited to the bilateral negotiation process. Although employees have a strong interest in the effect of decisions regarding classification and reclassification on their wages, hours and enumerated terms and conditions, in this instance the managerial concerns are

sufficiently strong to render this proposal nonnegotiable. CSEA may vary its proposal and seek to gain avenues of relief through the grievance procedure for those employees who contest the appropriateness of their placement in a specific category. Similarly, the inaccuracy of an existing classification may be addressed in a proposal which would permit resolution of such disputes through the grievance procedure. However, the breadth of subarticle 20.2 extends beyond remedial procedures. As the Chairperson states, to the extent that this proposal seeks to impose an absolute prohibition on management's decision to reclassify or create new classifications, it is beyond the scope of negotiating. Thus, in its current form, this subarticle is nonnegotiable.

CSEA's proposal in item 20.3 concerns new positions or classes of positions and provides:

> 20.3 New Positions or Classes of Positions: All newly created position or classes of positions, unless specifically exempted by law, shall be assigned to the bargaining unit if the job descriptions describe duties performed by employees in the bargaining unit or which by the nature of the duties should reasonably be assigned to the bargaining unit.

Contrary to the hearing officer's conclusion, this proposal is nonnegotiable because it seeks to ensure that all newly created positions or classes of positions shall be assigned to the negotiating unit which CSEA currently represents. While it is likely that positions which describe duties performed by unit

employees or which involve duties similar in nature to those performed by unit employees may be included in the existing unit, the rules and regulations of this agency, as well as EERA itself, establish specific criteria and procedures by which unit modification as a result of the creation of positions shall be handled. CSEA cannot negotiate a proposal which has the potential of circumventing the dictates of the EERA or PERB. Subarticle 20.3, therefore, is nonnegotiable.

Subarticle 20.4 refers to the salary placement of reclassified positions and reads as follows:

> 20.4 Salary Placement of Reclassified Positions: When a position or class of positions is reclassified, the position or positions shall be placed on the salary schedule in a range which will result in at least one (1) range increase above the salary of the existing position or positions, but in no event will the reclassification result in an increase of less than five and one-half (5 1/2) percent.

On its face, this proposal bears a direct relationship to wages. It does not intrude on management's rights to reclassify positions or classes of positions but concerns the impact of that decision on employee's salaries. The subject addressed in subarticle 20.4 is therefore negotiable.

Subarticle 20.5 provides as follows:

> Incumbent Rights: When an entire class of positions is reclassified, the incumbents in the positions shall be entitled to serve in the new positions. When a position or positions less than the total class is or are reclassified, incumbents in the

> positions who have been in the positions for one (1) year or more shall be reallocated to the higher class. If an incumbent in such a position has not served in that position for one (1) year or more, then the new position shall be considered a vacant position subject to the lateral transfer and promotion provisions of this agreement.

As suggested above, the impact of reclassified positions may directly affect an employees's wages, hours, transfer, health and safety, and evaluation procedures. Since it is limited to the impact on incumbents of the reclassified position, it is negotiable.

Subarticle 20.6 concerns the downward adjustment of a position or class of positions:

> 20.6 Downward Adjustment: Any downward adjustment of any position or class of positions shall be considered a demotion and shall take place only as a result of following the layoff or disciplinary procedures of this agreement.

This provision seeks to confirm a contractual definition of any downward adjustment. It mandates that downward adjustments be considered as demotions and be effectuated pursuant to layoff of disciplinary procedures at set forth in the parties' negotiated agreement.

As set out more fully infra in connection with layoff and disciplinary proposals, this item directly and logically relates to hours and wages. This relationship is not offset by any managerial prerogative because it does not interfere with the employer's right to downgrade any position or class of

positions provided it is a result of layoff or disciplinary action. Thus, the limitation imposed merely proscribes downgrades not administered pursuant to the negotiated layoff or grievance procedures. This limitation is permissible and subarticle 20.6 is therefore negotiable.

The final provision in Article XX concerns the abolition of positions or classes of positions. It reads:

> 20.7 Abolition of a Position or Class of Positions: If the District proposes to abolish a position or class of positions, it shall notify CSEA in writing and the parties shall meet and negotiate. No position or class of positions shall be abolished unless agreement has been reached with CSEA.

The decision to abolish a position is similar to the decision to create a classification or downgrade a position. Both involve a matter related to wages and hours as well as a determination involving managerial concerns. To permit CSEA to negotiate as to abolition of positions intrudes heavily into the employer's right to manage its workforce. It may also relate to financial limitations which invoke public policy concerns. Therefore, this subarticle is only negotiable to the extent that it seeks to provide notice of management's proposals to abolish positions and to the extent that CSEA seeks to negotiate as to the impact that such decisions will have on negotiating unit employees.

Article XXI. Layoff and Reemployment

In Article XXI, CSEA proffers various proposals which refer to layoffs and reemployment. Subarticle 21.1 provides as follows:

> 21.1 Reason for Layoff: Layoff shall occur only for lack of work or lack of funds. Lack of funds means that the district cannot sustain a positive financial dollar balance with the payment of one further month's anticipated payroll.

In addition to establishing the conditions under which a layoff is permitted, this proposal contains a definition of the term layoff. CSEA asserts that subarticle 21.1 bears a clear relationship to wages, hours, and benefits. The hearing officer found a sufficient relationship and concluded that because the term "lack of work" is not defined by this proposal, the relationship to enumerated items is not offset by managerial rights of the public school employer.

The Districts assert, however, that the layoff and reemployment proposals are nonnegotiable because they are statutorily provided for in the Education Code, because they interfere with rights essential to the operation of the school districts and because the legislature's amendment in 1977, which included layoff of certain certificated probationary employees among the negotiable enumerated terms, evidences a clear legislative intent to generally remove the subject of layoffs from the negotiating process.

I have no doubt that the subject of layoffs bears a clear relationship to wages, hours, and benefits and that it is a matter of critical employee concern. However, the employer's ability and obligation to adjust and accommodate the classified work force to budgetary constraints and needs is likewise of critical concern.

Section 45308 of the Education Code provides in pertinent part:

> Classified employees shall be subject to layoff for lack of work or lack of funds.

This provision differs from CSEA's proposal in two respects; subarticle 21.2 limits the ability to layoff to the lack of work or funds and it defines the term "lack of funds".

In CSEA v. Pasadena Unified School District (1977) 71 Cal.App.3d 318 [139 Cal.Rptr. 633], the Court considered the employee organization's allegation that, inter alia, the school employer unlawfully laid off various employees because the existence of an undistributed amount of reserve funds evidenced that no "lack of funds" existed upon which a layoff could be based.

The court rejected this argument noting that other provisions of the Education Code contemplated the need for reserve accounts and that the determination of the amount needed for reserves was a matter of employer discretion absent evidence that the employer's judgment was fraudulent or so

palpably unreasonable or arbitrary as to indicate an abuse of discretion.

In my view, the crucial question is whether CSEA's proposal interferes with the school employer's discretion to determine that funds are lacking which necessitate layoffs. While the court in Pasadena finds that this is a discretionary determination which rests with the employer, it also warns that districts are not free to abuse their discretion by defining the phrase "lack of funds" in a manner which would circumvent the apparent statutory protection granted to classified employees. CSEA's proposal seeks to reach agreement on the definition of the term "lack of funds" in order to provide a more objective standard by which the employer's discretion can be examined.

In the private sector, layoff is clearly recognized as a mandatory subject of bargaining. (See generally, Morris, Developing Labor Law, p.404.) An employer demonstrates bad faith bargaining when it insists that it retain unrestricted power over and unilateral control of layoffs and the selection of employees to be laid off. (U.S. Gypsum Co. (1951) 94 NLRB 112 [28 LRRM 1015]; Valley Iron & Steel Co. (1976) 224 NLRB No. 118 [93 LRRM 1379]; Master Slack Corp. (1977) 230 NLRB No. 138 [96 LRRM 1309].) An employer is permitted, however to unilaterally determine the existence of an economic necessity which would prompt its decision to layoff. (United Nuclear v.

NLRB (10th Cir 1967) 381 F.2d 972 [66 LRRM 2101]. But it must provide notice of the planned layoff and permit meaningful input from affected employees (W.R. Grace & Co. (1977) 230 NLRB No. 76 [95 LRRM 1459] aff'd (5th Cir. 1978) 571 F.2d 279 [98 LRRM 2001].) Therefore, even where the layoff decision itself is deemed to be strictly a managerial prerogative, a union must be afforded the opportunity to discuss when a layoff will occur, the number and identity of employees affected, the method of recall and any alternatives to layoff. (United Nuclear, supra; Caravelle Boat Co. (1977) 227 NLRB No. 162 [95 LRRM 1003].)

In the public sector, the question of employee layoffs has been considered. In the District of Columbia, a reduction in force or layoff is deemed a managerial prerogative, but an employer is required to provide notice of a layoff and to negotiate as to the impact and effect of the layoff. (DC Bd. of Ed. (1978) NPER 9-10004.) The Wisconsin Supreme Court has held, similarly, that the economically motivated layoff is primarily related to managerial powers, but an employer must bargain as to the impact. (City of Brookfield (WI 02/27/79) 1 NPER 51-10002.) In City of Green Bay (WI 05/04/79) 1 NPER 51-10046, the state court held that the city was not required to bargain about the decision to initiate a layoff plan based on economic considerations.

In San Mateo County Community College District (6/8/79) PERB Decision No. 94, this Board considered an employer's assertion of financial necessity as a justification for its unilateral action and commented:

> Although an employer may be free to exercise its management prerogative to close all or part of its business for financial reasons, the employer must still give the employee organization notice and opportunity to negotiate over the effects of the decision; for example, the order and timing of employee layoffs, serverance payments, relocation, retraining, re-employment rights, and so on. (citations omitted) As a basis for these negotiations the employer must be willing to provide an employee organization with information supporting the employer's claim of financial inability.
>
> . . . . . .
>
> In sum, under federal law, inability to pay is a negotiating position rather than an excuse to avoid the negotiating obligation entirely. (p.13)

In this case, CSEA's proposal seeks to place limitations on the employer's ability to initiate layoffs. It is nonnegotiable to the extent that it interferes with and effectively limits the employer's ability to determine when layoffs are required. The Districts are permitted by the Education Code to initiate layoffs for lack of funds or lack of work. CSEA, however, seeks to define the lack of funds provision in a manner which would allow the union to analyze the employer's claim of financial justification and become a participant in the decision to initiate layoffs. The bilateral

negotiating process is not suited to resolution of disputes concerning the need for layoffs. Thus, while an employer must negotiate as to the effects and implementation of layoffs, the proposal as presented seriously impinges on and effectively interferes with the employer's ability to effectuate operational policy. It is nonnegotiable.

Subarticle 21.2 concerns the notice for layoffs. It states:

> 21.2 Notice of Layoff: Any layoffs under Section 21.1 shall only take place effective as of the end of a academic year. The District shall notify both CSEA and the affected employees in writing no later than April 15th of any planned layoffs. The District and CSEA shall meet no later than May 1st following the receipt of any notices of layoff to review the proposed layoffs and determine the order of layoff within the provisions of this agreement. Any notice of layoffs shall specify the reason for layoff and identify by name and classification the employees designated for layoff. Failure to give written notice under the provisions of this section shall invalidate the layoff.

In general, CSEA is permitted to seek agreement as to a proposal concerning layoff notices. Advanced notice of the employer's plans to implement a layoff will permit the effective exchange of ideas and possible alternatives to the layoff. The sole question concerning the negotiability of this subarticle pertains to its potential for conflict with provisions of the Education Code. Those provisions refer to procedures for layoff including notice thereof and do not impose the restrictions which CSEA's proposal seeks to attain.

Section 45117(a) requires notice of layoffs due to lack of a specially funded program "on or before May 29" and as to termination effective other than on June 30, "notice shall be given not less than 30 days prior to the effecive date of their layoff."

Notices of layoffs as a result of reduction or elimination of service is likewise required "not less than 30 days prior to the effective date of layoff." Finally, section 45117(c) provides that when lack of funds creates an actual inability to pay salaries or when unforeseen or unpreventable lack of work requires layoff, the 30 day notice provisions are not required.

If CSEA's proposal regarding notice of layoffs permitted exceptions under emergency circumstances consistent with section 457117(c), I would not view the proposal's specific deadlines for those layoffs which do occur at the end of the academic year as superseding the Education Code provisions. However, as to the aspect of subarticle 21.2 which restricts the district's authority to effectuate layoffs only at the end of the academic year, it conflicts with the general mandate of the Education Code which permits layoffs for lack of funds or lack of work. In that respect, subarticle 21.2 is nonnegotiable.

Subarticle 21.3 defines reduction in hours. It states:

> 21.3 Reduction in Hours: Any reduction in regularly assigned time shall be considered a layoff under the provisions of this Article.

This proposal obviously relates to hours and, because it merely defines the term for purposes of the parties' contract, it is negotiable. Unlike Article 21.1, this proposal does not unduly limit the employer's ability to manage the work force by deciding to reduce employees' hours when warranted. This proposal seeks to determine the method by which such reduction is effectuated and to protect the employees' legitimate concerns with lost work.

Subarticle 21.4 concerns the order of layoff and provides:

> 21.4 Order of Layoff: Any layoff shall be effected within a class. The order of layoff shall be based on seniority within that class and higher classes throughout the District. An employee with the least seniority within the class plus higher classes shall be laid off first. Seniority shall be based on the number of hours an employee has been in a paid status in the class plus higher classes or seniority acquired under Section 21.7.

This provision concerns the implementation of layoffs and is related to employees' wages and hours. It is consistent with provisions of the Education Code (See section 45308). While any ordering of persons affected by a layoff necessarily impinges on management's ability to freely select particular employees for layoff, the employees' concerns for use of seniority as a procedure for selection clearly outweighs any employer concern in not negotiating the subject. This proposal is negotiable.

Bumping rights are covered in subarticle 21.5 and states:

> 21.5 Bumping Rights: An employee laid off from his or her present class may bump into the next lowest class in which the employee has greatest seniority considering his/her seniority in the lower class and any higher classes. The employee may continue to bump into lower classes to avoid layoff.

Subarticle 21.6 refers to layoff in lieu of bumping and provides:

> 21.6 Layoff in Lieu of Bumping: An employee who elects a layoff in lieu of bumping maintains his/her reemployment rights under this agreement.

Both subarticles 21.5 and 21.6 are negotiable because they concern the effects of any layoff scheme on individual employees and neither proposal supersedes provisions of the Education Code. (See sec. 45298.)

Subarticle 21.7 concerns equal seniority. It provides:

> 21.7 Equal Seniority: If two (2) or more employees subject to layoff have equal class seniority, the determination as to who shall be laid off will be made on the basis of the greater bargaining unit seniority or, if that be equal, the greater hire date seniority, and if that be equal, then the determination shall be made by lot.

Like subarticles 21.4 through 21.6, it is negotiable.

Reemployment rights are discussed in subarticle 21.8 and it provides:

> 21.8 Reemployment Rights: Laid off persons are eligible for reemployment in the class from which laid off for a thirty-nine (39) month period and shall be reemployed in the reverse order of layoff.

> Their reemployment shall take precedence over any other type of employment, defined or undefined in this agreement.
>
> In addition, they shall have the right to apply for promotional positions within the filing period specified in the Promotion Article of this agreement and use their bargaining unit seniority therein for a period of thirty-nine (39) months following layoff. An employee on a reemployment list shall be notified of promotional opportunities in accordance with the provisions of 19.2.1.

It is negotiable because it relates to the hours and wages of employees and because it does not supersede applicable Education Code provisions. (See sec. 45298.)

Voluntary demotion or voluntary reduction in hours is covered in CSEA's proposal at subarticle 21.9. It states:

> 21.9 Voluntary Demotion or Voluntary Reduction in Hours: Employees who take voluntary demotions or voluntary reductions in assigned time in lieu of layoff shall be, at the employee's option, returned to a position with increased assigned time as vacancies become available, and with no time limit, except that they shall be ranked in accordance with their seniority on any valid reemployment list.

This proposal allows employees affected by a layoff decision to voluntarily select a demotion or reduction in hours. It is inextricably bound to their wages and hours. Like the decision to select employees for layoff, this provision affects the employer's determination regarding who will return to work. However, because of the critical employee interests involved, it is not offset by any management right and is not precluded

by any provision of the Education Code which pertains to either option. (See sec. 45298.)

Retirement in lieu of layoff is proposed in subarticle 21.10. It states:

> 21.10 Retirement in Lieu of Layoff:
>
> 21.10.1 Any employee in the bargaining unit may elect to accept a service retirement in lieu of layoff, voluntary demotion, or reduction in assigned time. Such employee shall within ten (10) workdays prior to the effective date of the proposed layoff complete and submit a form provided by the District for this purpose.
>
> 21.10.2 The employee shall then be placed on a thirty-nine (39) month reemployment list in accordance with Section 21.8 of this Article; however, the employee shall not be eligible for reemployment during such other period of time as may be specified by pertinent Government Code Sections.
>
> 21.10.3 The District agrees that when an offer of reemployment is made to an eligible person retired under this Article, and the District receives within ten (10) working days a written acceptance of the offer, the position shall not be filled by any other person, and the retired person shall be allowed sufficient time to terminate his/her retired status.
>
> 21.10.4 An employee subject to this Section who retires and is eligible for reemployment and who declines an offer of reemployment equal to that from which laid off shall be deemed to be permanently retired.
>
> 21.10.5 Any election to retire after being placed on a reemployment list shall be retirement in lieu of layoff within the meaning of this section.

As is the case with the proposals concerning other options in lieu of layoff, these provisions are negotiable.

Subarticle 21.11 refers to a seniority roster. It states:

> 21.11 Seniority Roster: The District shall maintain an updated seniority roster indicating employees' class seniority, bargaining unit seniority, and hire date seniority. In addition to the requirements of Section 5.1.5 such rosters shall be available to CSEA at any time upon demand.

This proposal concerns a request for information necessary to implement provisions of the proposed contract which are operative based on seniority. It is negotiable.

Subarticle 21.12 states:

> 21.12 Notification of Reemployment Opening: Any employee who is laid off and is subsequently eligible for reemployment shall be notified in writing by the District of an opening. Such notice shall be sent by certified mail to the last address given the District by the employee, and a copy shall be sent to CSEA by the District, which shall acquit the District of its notification responsibility.

Subarticle 21.13 states:

> 21.13 Employee Notification to District: An employee shall notify the District of his or her intent to accept or refuse reemployment within ten (10) working days following receipt of the reemployment notice. If the employee accepts reemployment, the employee must report to work within thirty (30) working days following receipt of the reemployment notice. An employee given notice of reemployment need not accept the reemployment to maintain the employee's

> eligibility on the reemployment list, provided the employee notifies the District of refusal of reemployment within ten (10) working days from receipt of the reemployment notice.

Subarticle 21.14 states:

> 21.14 Reemployment in Highest Class: Employees shall be reemployed in the highest rated job classification available in accordance with their class seniority. Employees who accept a position lower than their highest former class shall retain their original thirty-nine (39) month rights to the higher paid position.

Since I have determined that subarticle 21.8, which concerns reemployment rights, is negotiable, these subarticles are also deemed negotiable.

Subarticle 21.15 refers to improper layoff and states:

> 21.15 Improper Lay Off: Any employee who is improperly laid off shall be reemployed immediately upon discovery of the error and shall be reimbursed for all loss of salary and benefits.

This proposal merely asserts that the foregoing proposals covering employee layoff will be enforceable through the contract grievance procedures. As the Chairperson concludes, it is also related to wages, hours and benefits. This is negotiable.

Finally, subarticle 21.16 refers to seniority during involuntary unpaid status and provides:

> 21.16 Seniority During Involuntary Unpaid Status: Upon return to work, all time

> during which an individual is in involuntary unpaid status shall be counted for seniority purposes not to exceed thirty-nine (39) months, except that during such time the individual will not accrue vacation, sick leave, holidays or other leave benefits.

This proposal is negotiable because it clearly relates to wages. It is not in conflict with any provision of the Education Code. While this proposal affects both managerial interests and employee interests, the employer interest in employees' accumulation of seniority is not so strong as to preclude negotiation of this proposal. Rather, the mutuality of the negotiation process is the appropriate forum for resolving the conflicting interests.

Article XXII. Disciplinary Action

Article XXII of CSEA's proposals concerns disciplinary actions. It defines disciplinary action and sets forth an exclusive procedure for imposing any such discipline. Because subarticle 22.2.1 defines disciplinary action as dismissal, demotion, suspension, reduction in hours, class, or involuntary transfer or reassignment, this proposal bears a reasonable and logical relationship to wages and hours. In addition, because this proposal contemplates that the grievance procedure will be utilized as a resolution of disciplinary action disputes, the article is related to the enumerated grievance procedure as well.

Without doubt, disciplinary action is of critical concern to employees since it potentially threatens their livelihood and financial security. The public school employer, however, likewise shares a legitimate concern over disciplinary actions since the ability to insure competent and reliable job performance is a fundamental component of the employment relationship. In this case, it is necessary to consider whether the article is rendered nonnegotiable because it supersedes any applicable provisions of the Education Code. Section 45113 directs the governing board of a school district to prescribe written rules and regulations governing personnel management. That section also states that permanent employees who satisfactorily complete a prescribed probationary period

> shall be subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board, but the governing board's determination of sufficiency of cause for disciplinary action shall be conclusive."

To the extent that CSEA's proposal incorporates the "just cause" basis for disciplinary action, it does not supersede the Education Code nor does it impermissibly impinge on the employer's right to regulate its workforce. A more difficult question, however, concerns the propriety of that part of CSEA's proposal which delegates the school board's conclusive authority to determine the sufficiency of cause to the negotiated grievance process culminating in binding arbitration.

In the private sector, an employer's decision to impose discipline is commonly and unquestionably subjected to review and challenge through the arbitration process. Indeed, in United Food and Commercial Workers International v. Gold Star Sausage Co. (D.C. Col. 1980) _____ Fed. Supp. _____ [88 DLR D-1], the Court upheld an arbitrator's decision overturning the employer's discharge in which the arbitrator had ruled that a just cause provision must be implied as part of the collective bargaining agreement. The Court determined, inter alia, that because the notion of job security is a fundamental aspect of collective bargaining agreements, it could therefore be considered in interpreting each agreement and the arbitrator could reasonably infer that a just cause restriction was enmeshed in the fabric of the agreement.

In the public sector, however, final review of an employer's decision to discipline is viewed more critically and has been addressed in public sector jurisdictions with mixed results. (AFSCME, Local 1226, Rhinelander City Employees v. City of Rhinelander (1967) 35 Wis.2d 209 [151 N.W.2d 30, 65 LRRM 2793], where the Wisconsin Supreme Court held that arbitration of a discharge dispute did not infringe on the power of the city; Kaleva-Norman-Dickson School District v. Teachers Association (1975) 227 N.W.2d 500 [89 LRRM 2078], where the Michigan Supreme Court held that nonrenewal of a probationary teacher's contract was subject to arbitration

notwithstanding a clause in the parties' negotiated agreement which specifically reserved the employer's statutory power to dismiss employees; Philadelphia Board of Education v. Teachers Local 3 (1975) 346 A.2d 35 [90 LRRM 2879]; Board of Education Union Free School District v. Associated Teachers of Huntington, Inc. (1972) 282 N.E.2d 109 [79 LRRM 2881], where the New York Court of Appeals held that the school board was permitted to negotiate binding arbitration of disciplinary actions even though the state Education Code established a specific procedure for reviewing school board disciplinary decisions. Compare Moravek v. Davenport Community School District (1978) 262 N.W.2d 797 [98 LRRM 2923]; Chassie v. School District (1976) 356 A.2d 708 [92 LRRM 3359], where it was determined that decisions regarding retention and nonrenewal of nontenured teachers are not subject to grievance arbitration because of the school board's exclusive competence and public policy considerations; Wibaux Education Association v. Wibaux High School (1978) 573 P.2d 1162 [97 LRRM 2592], where the Montana Supreme Court held that decisions regarding the continuation of probationary teachers was not arbitrable but contractually specified procedures were; School Committee of Danvers v. Tyman (1977) 360 N.E.2d 877 [94 LRRM 3182], where the Massachusettes court held that nontenured teachers' contract renewal disputes could not be delegated to an arbitrator but adherence to the negotiated procedures could be;

Newman v. Board of Education of the Mount Pleasant School District (1975) 350 A.2d 339 [91 LRRM 2750], where it was determined that, because of a provision of the Delaware collective bargaining act that specifies that no contract can be executed which directly or indirectly specifies binding arbitration or decision making by a third party, no duty is imposed on the employer to justify or discuss a decision not to renew a contract of a nontenured teacher.)

The thrust of Article XXII is to provide that the employer's determination of good cause for discipline be reviewed by an independent individual. In this respect, the proposal does not infringe on the employer's legitimate interest in availing itself of appropriate disciplinary proceedings when an employee's conduct so warrants. The potential conflict lies with the fact that the Education Code vests the school board with conclusive authority to determine sufficiency of cause for discipline and EERA prohibits supercession. A related question was addressed in an opinion of the Attorney General (60 Ops.Atty.Gen. 370 11/29/77) in which a negotiated agreement required the school district to enforce the organizational service fee requirement. The opinion noted that section 45101(h) of the Education Code defined "cause" relating to disciplinary actions and restricted such action to the enumerated grounds or those included by provisions of the employer's written rules. The attorney

general reviewed the district's rules regarding cause for discipline and noted that failure to pay service fees was not included. The opinion focuses, however, on the enumeration of insubordination as cause for discipline and concludes:

> The agreement, which places upon the district the duty to enforce payment as a condition of continued employment, requires the district, at minimum, to order the employee to pay the fee. Persistent refusal to comply with the order would constitute insubordination. To whatever extent this approach might prove inadequate, the district's obligation to enforce the organizational security provision would further require it to define expressly in its rules nonpayment as cause for discipline. (p. 373, emphasis added.)

This opinion, while not binding on PERB or determinative of the negotiability question at hand, permits collective agreements negotiated under EERA to compel a public school employer to define nonpayment of service fees as an additional cause for discipline. Since the Education Code permits the school district to enact rules governing cause, the requirement to promulgate a rule by which the employer can effectuate the agreement is read not to supersede the code and thus is consistent with EERA.

In the instant case, CSEA's proposal does not seek to add an additional cause for discipline; it is consistent with the requirements as set forth in the code. However, while the employer may possibly be required to affirmatively add to its disciplinary causes, it nonetheless retains the power to

determine that sufficiency of cause exists. Therefore, in light of the specific statutory requirement which is not present in the public sector cases cited above, the employer cannot relinquish its conclusive decision on sufficiency of articulated causes to an arbitrator. CSEA's proposal is not compatible with the plain dictates of the Education Code even though it does not disturb the limited reasons for which discipline may be imposed. The Legislature has decided that the conclusive determination of cause for discipline must remain with the employer. Any review by an independent arbitrator would undermine the district's authority to insure compliance with the Education Code and is therefore impermissible. Thus, those portions of Article 22 which would cause the employer to waive its exclusive authority over discipline and delegate review to an arbitrator are nonnegotiable.

Subarticle 22.2 concerns disciplinary procedure. Subarticle 22.2.1 provides.

> Discipline shall be imposed on permanent employees of the bargaining unit only for just cause. Disciplinary action is deemed to be any action which deprives any employee in the bargaining unit of any classification or incident of employment or classification in which the employee has permanence and includes but is not limited to dismissal, demotion, suspension, reduction in hours or class or transfer or reassignment without the employee's voluntary written consent.

As indicated above, disciplinary action is a matter of critical concern to employees. It results in loss of wages and hours and is undeniably related to these enumerated subjects. The employer's interest in preserving a responsible work force is likewise at issue. This proposal limits disciplinary action to situations where just cause exists and does not supersede Education Code sections 45101(h)[19] and 45113. Subarticle 22.2.1 also defines disciplinary action for purposes of the negotiated agreement and conforms to the statutory definition set forth in section 45101(e). Subarticle 22.2.1 is negotiable.

Subarticle 22.2.3 provides:

> Discipline less than discharge will be undertaken for corrective purposes only.

While the intent of this subarticle is unclear, it appears to incorporate a requirement that the punishment for discipline be suited to the improper behavior. Good cause for discipline, as defined by the arbitration process, uniformly incorporates a requirement that "the punishment fit the crime." This proposal is negotiable because the concern to employees is not

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[19]Section 45101(h) states:

> "Cause" relating to disciplinary actions against classified employees means those grounds for discipline, or offenses, enumerated in the law or the written rules of a public school employer. No disciplinary action may be maintained for any "cause" other than as defined herein.

outweighed by any managerial interest in disciplining employees for other than corrective purposes. Reserving the ultimate discipline of discharge for serious violations for which corrective action would be futile or ineffective preserves the employer's control over the work force and insures productive operation.

Subarticle 22.2.4 states:

> The District shall not initiate any disciplinary action for any cause alleged to have arisen prior to the employee becoming permanent nor for any cause alleged to have arisen more than one year preceding the date that the District files the notice of disciplinary action.

This proposal attempts to limit the period for which an employee's past acts may be cause for disipline. In general, this proposal rests on the idea that discipline is ineffective as a means of remedying improper behavior when it is levied for acts committed in the past. Since discipline affects wages and other enumerated subjects, this proposal is of obvious concern to employees. However, the employer's interest in commanding a reliable workforce also requires that, within certain time limits, some acts arising in the past may be the subject of disciplinary action because of the severity of the offense or the likelihood of repetition. As defined by Education Code section 45113, the sufficiency of just cause for disciplinary action includes events which arose not more than two years from the date of notice. CSEA's proposal in subarticle 22.2.4

thus supersedes the Education Code and is nonnegotiable to the extent that it specifically prohibits events arising more than one year hence to form the basis for disciplinary action.

CSEA also proposed several other subarticles which relate to procedural aspects of disciplinary actions, subarticles 22.2.2 (written advance warning prior to discipline), 22.2.5 (notice of discipline including specified facts supporting the charge), 22.2.6 (exhaustion of grievance procedure prior to implementing penalty), 22.2.7 (District's option to relieve employee of duties), 22.3.1 and 22.3.2 (emergency suspension), 22.4.1 and 22.4.2 (grievance procedure), and 22.5 (disciplinary settlements). These provisions do not impinge on the employer's decision to impose disciplinary action but concern the procedural aspects of those decisions. Proposals dealing with disciplinary procedure are related to wages, hours, grievance procedure and, potentially, transfer and are clearly negotiable.

Article XXIV. Working Conditions

Article XXIV of CSEA's proposals is entitled Working Conditions. Subarticle 24.1 provides:

> Past Practices: The rules, regulations, policies and practices of the District which are in effect at the time of this Agreement and which neither conflict with terms of this Agreement nor abridge the rights of employees under this agreement shall remain in full force and effect unless changed by mutual agreement of CSEA and the District.

By the provisions of this item, CSEA seeks to reach contractual agreement and to prevent the District from making any unilateral changes as to the existing employment environment. The hearing officer, relying on NLRB v. Katz, supra, erroneously concludes that this proposal would, in effect, create an alternative remedy to the unfair practice vehicle set forth in section 3543.5(c). Even if I were to conclude that the availability of an alternative remedy through unfair practice channels were relevant to a negotiability determination, the CSEA past practice proposal goes well beyond the doctrine established by Katz as to impermissible unilateral changes.

Subarticle 24.1, by its terms, would require bilateral negotiations over all subjects regardless of any relationship to the subjects defined as negotiable by section 3543.2. I cannot conclude that any rule, regulation, policy, or practice, because it is in existence at the time of the agreement, is negotiable. Because of the rule promulgated in Katz which has been adopted by this Board in prior decisions, the school employer may not unilaterally alter the terms and conditions of employment about which it is required to negotiate. (San Francisco Community College District (10/12/79) PERB Decision No. 105; San Mateo Community College District (6/8/79) PERB Decision No. 94.) CSEA may seek to include, as a contract term, such a prohibition provided the proposal is limited to

rules, regulations, policies and practices which relate to wages, hours and the enumerated terms and condition. In its present form, however, this proposal is overly broad and is nonnegotiable.

Subarticle 24.4 reads:

> Special Trip assignment shall be distributed and rotated as equally as possible among bus drivers in the bargaining unit.

It is clear from the record that this proposal relates to the wages and hours of bus drivers. The employer has no legitimate concern in maintaining the existing policy of using seniority to allocate special trip assignments so as to render this proposal nonnegotiable. While the employer retains the right to direct that special trip assignments be made, the allocation of these assignments to specific unit drivers is not a matter of reserved managerial control and thus, subarticle 24.4 is negotiable.

Subarticles 24.5.1 and 24.5.2 relate to standby time. They provide:

> 24.5.1 Bus drivers on special trips including but not limited to athletic events, field trips, and curricular trips who are required to remain on standby for the duration of the event for which the special trip is made, shall be paid for all standby hours at their regular rate of pay.
>
> Whenever any combination of driving and standby hours in a day exceeds the established workday as defined in Section 8.1, all excess hours shall be compensated at the appropriate overtime rate based on the employee's regular pay rate.

> 24.5.2 Notwithstanding any other provisions of this Agreement, if a special trip requires an overnight stay, the District shall be relieved of the obligation of payment for any hours between the time a bus driver is relieved of duties for the evening and the time duties resume the following morning.

Subarticle 24.6 relates to vehicle availability and states:

> Vehicle Unavailability: Whenever as the result of the unavailability of appropriate District vehicles due to mechanical or other malfunctions a bus driver regularly scheduled to work is unable to work, he/she shall receive pay at the rate he/she would have received for working that day.

Each of these proposals relates to wages and hours. The request for standby time involves compensation for periods spent "on call." Similarly, when an employee is unable to carry out an assignment due to vehicle problems, the employee would be entitled to her/his regular rate of pay for that time. Neither the standby time proposal nor the vehicle unavailability proposal is rendered nonnegotiable by any managerial interest. Bus drivers' work will continue to be assigned to unit employees and to be directed by the Districts; these proposals simply relate to payment and thus are negotiable since they relate to wages and hours.

Article XXVI. Training

In Article XXVI, CSEA submitted proposals dealing with employee training. Subarticle 26.1 provides:

> In-service Training Program: The District shall provide a program of in-service

> training for employees in the bargaining unit designed to maintain a high standard of performance and to increase the skills of employees in the bargaining unit.

The language of this proposal seeks to require that the Districts provide training. However, since the subject of training itself is not an enumerated term and condition of employment and does not relate to wages or hours, the Districts argue that it is nonnegotiable.

In my view, the subject of employee training is logically and reasonably related to certain specified subjects. Training that is necessary to insure employee safety is negotiable since it relates to safety, an enumerated subject. Also, to the extent that evaluations of employees are affected by the availabiiity or lack of training, training is negotiable. Therefore, while the decision to offer a specific training program is a managerial prerogative, the subject of training is negotiable to the extent that it relates to safety, evaluative procedures, or other enumerated subjects.

Subarticle 26.2 states:

> Training Advisory Committee: A training advisory committee composed of six (6) employees in the bargaining unit to be selected by CSEA from the following classifications: Cafeteria, Clerical, Custodial, Instructional Aides, Maintenance, Transportation and two (2) members appointed by the District shall be formed. The purpose of the advisory committee will be to plan in-service training programs, to monitor the programs, and to provide recommendations concerning improvement of

> programs. Bargaining unit employees shall be granted reasonable release time to carry out the committee obligations.

This provision, like subarticle 26.1, is negotiable to the extent that it relates to safety-related training and evaluation-related training. The proposal establishes an "advisory committeee" and, on its face, does not disturb the employer's authority to render the final decision with regard to training programs offered.

Subarticles 26.3 and 26.4 provide:

> 26.3 In-Service Training Time: In-Service training shall take place during regular working hours at no loss of pay or benefits to employees.
>
> 26.4 Reimbursement for Tuition: The District shall reimburse employees for the tuition costs of any and all training programs approved by the training advisory committee.

These two proposals regarding training are negotiable because, by their terms, they relate to wages and hours of employees. Training during work hours without loss of pay and reimbursement for approved program costs are focused on the employees' legitimate concerns of wages and hours and do not compel the Districts to grant such sessions.

Article XXVII. Contracting and Bargaining Unit Work

Article XXVII concerns contracting and bargaining unit work Subarticle 27.1 provides:

> Restriction on Contracting Out: During the life of this agreement, the District agrees

> that it will not contract out work which has been customarily and routinely performed or is performable by employees in the bargaining unit covered by this agreement unless CSEA specifically agrees to same or contracting is specifically required by the Education Code.

The decision to subcontract work is logically and reasonably related to wages, and, as stated in Township of Little Egg Harbor (1976) 2 NJPER 5, has a "cataclysmic effect on wages, hours and working conditions." An employee whose job is terminated because the employer has decided to subcontract her/his work to other employees is undeniably confronted with a loss of hours and wages. Management considerations, however, are also raised by subcontracting decisions. The public school employer may determine that an outside custodial firm may be able to perform a particular task for less cost than that required by the currently employed classified personnel. While sound fiscal management is a significant concern, it does not follow that submission of a subcontracting proposal to the bilateral negotiating process would undermine the school employer's legitimate interests.

The hearing officer concluded that the subject of subcontracting relates to both managerial prerogatives and enumerated subjects. He reviewed the private section decisions in (Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609]; Westinghouse Electric Corp. (1965) 150 NLRB 1574 [58 LRRM 1257]; District 50, UMW v. NLRB (4th Cir. 1966)

358 F.2d 234 [61 LRRM 2632]) and concluded that subcontracting is a negotiable subject but only "under certain circumstances."

In the public sector, the negotiability of subcontracting decisions has been repeatedly examined. In City of Kennewick (WA 10/05/79) 1 NPER 49-10052, the Washington board, relying on Westinghouse Electric, supra, held that the city was required to bargain about the decision to subcontract its custodial work previously performed by unit employees. In City of Waterbury (CT 12/07/79) 2 NPER 07-11010, the Connecticut board similarly held that the City acted improperly when it unilaterally decided to subcontract its computer operations. That board noted that since the work contracted out had been formerly performed by unit employees, the City was required to bargain even though the function had been performed inefficiently, only 11 of the 50 unit employees were affected by the subcontracting and the employer had guaranteed comparable jobs to those affected.

In Massachusetts, the labor board has held that public employers must bargain about subcontracting decisions where the decision affects duties traditionally performed by unit members. (Town of Burlington (MA 01/24/80) 6 MLC 1795 [2 NPER 22-11015]; Franklin School Committee (MA 02/22/79) 5 MLC 1659 [1 NPER 22-10033].)

New Jersey has likewise considered the negotiability of subcontracting decisions and has concluded that the right to

subcontract is not a management prerogative but is subject to the salutory influence of collective negotiations. (Township of Little Egg Harbor, supra; State of New Jersey (NJ 01/04/80) 6 NJPER 11017 [2 NPER 31-11017].)

In New York, a public employer is not permitted to unilaterally implement a subcontracting decision. (Saratoga Springs City School District (NY 05/17/79) 12 PERB 7008 [1 NPER 33-17008].) The obligation to negotiate subcontracting, however, pertains only to those decisions where the private employees would be performing the same services in the same manner as the public employees were performing them (Town of Rochester (NY 01/04/79) 12 PERB 4501 [1 NPER 33-14501].)

Likewise, in Pennsylvania an employer is prohibited from subcontracting unit work, even if based on purely economic reasons, because of the inherent connection between subcontracting and curtailment of employees' work. (Erie Municipal Airport Authority (PA 01/12/79) 10 PPER 10028 [1 NPER 40-10028]; Phoenixville Area School District (PA 07/03/79) 10 PPER 15178 [1 NPER 40-10178].)

Thus, based on the foregoing discussion, I conclude that CSEA's subcontracting proposal in subarticle 27.1 is negotiable to the extent that it requires negotiations for decisions for the subcontracting of unit work.[20]

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[20]In excepting to the hearing officer's conclusion, CSEA argues that the decision in CSEA v. Willits Unified School

Subarticle 27.2 concerns notice of subcontracting decisions and states:

> Notice to CSEA: No contract for services which might affect employees in the bargaining unit shall be let until CSEA has been provided 10 days advance notice of the award.

This proposal is negotiable because ample notice of subcontracting plans is essential to meaningful negoiations.

Finally, subarticle 27.3 states:

> Bargaining Unit Work: No Supervisory or Management employee may perform any work within the job description of a bargaining unit employee.

In analyzing this proposal, the hearing officer concludes that employees have a legitimate concern with protecting bargaining unit work and that protection of unit work necessarily relates to wages, hours and benefits. He also concludes, however, that because assignment of work is a managerial prerogative, the instant proposal, because it is over broad, is an incursion

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District (1965) 243 243 Cal.App.2d 776 2d 776 [52 Cal. Rptr. 765] substantiates its view that subarticle 27.1 is negotiable. In Willits, the Court held that the District was not permitted to subcontract the work of janitorial employees and, generally, that school districts have the power only to subcontract as established by statute. The Court did not specifically adopt CSEA's argument that subcontracting is prohibited if the work is customarily and routinely performed. Willits did not interpret the scope of bargaining under EERA, and it is not controlling here. However, the language of subarticle 27.1 which incorporates the "customarily and routinely performed" standard is in accord with the public sector cases cited herein.

into management rights and thus nonnegotiable. He finds that this proposal would permit CSEA to negotiate regarding the duties of supervisory personnel who are not within the classified unit.

The language of subarticle 27.3 is admittedly vague and could be read to be an attempt to negotiate the impact that nonunit employee job performance may have on the work responsibilities of unit employees. However, as written subarticle 27.3 is plainly directed at prohibiting the employer from assigning and directing its nonunit work force. Thus, while such decisions may well impact on unit employees, the proposal is not so limited and it therefore impermissibly intrudes into management's right to control work assignments.

CSEA may submit proposals which focus on such assignments and the rights of unit employees which it represents. However, in its current form, while the proposal is related to the employee's wages and hours, it is nonnegotiable because it is outweighed by the employer's legitimate interests and primarily concerns the work assignments of nonunit employees.

By: _____
Barbara D. Moore, Member

Concurring and dissenting opinion of Chairperson Gluck begins at page 101.

The Remedy and Order in this case begin on page 150.

Harry Gluck, Chairperson, concurring and dissenting:

DISCUSSION

The District's objections to the hearing officer's proposed decision may be summarized as follows:

(a) The legislative intent was to provide a narrow or limited scope of negotiability.

(b) The test of relationship to an enumerated item should be that the subject is inextricably or directly related.

(c) Any matter covered by existing state law is thereby preempted and should be excluded from mandatory scope. The employer should not be forced to negotiate on rights already guaranteed and which are remediable by other means.

(d) The District should not be required to consider possible relationships between proposals and enumerated items which are out of scope.

(e) The issues are moot because they arose out of negotiations for a contract proposed to expire on June 30, 1977.

In San Mateo City School District (5/20/80) PERB Decision No. 129, the Board was concerned with the meaning of the term "matters relating to . . . ." There, the question arose as an aspect of the general task of determining negotiability. It was my conclusion that in deciding whether a subject is one on which the employer is required to negotiate, the threshold question is whether the disputed subject logically and reasonably relates to hours, wages, or an enumerated term and

condition of employment. Supra, p. 13. The San Mateo test does not stop, however, with establishing this threshold question. It was recognized that the determination of a logical and reasonable relationship is not always facially evident. To cope with proposals that are arguably included or excluded, a further yardstick was developed against which disputed issues could be measured:

> (a) whether the subject is of such concern to both management and employees that conflict is likely to occur and whether the mediatory influence of collective bargaining is the appropriate means of resolving the conflict; and,
>
> (b) whether the employer's obligation to negotiate would significantly abridge his freedom to exercise those managerial prerogatives essential to achievement of the District's mission. Supra, p. 14.

That test is applied here.

The Intent to Narrow Scope

In my judgment, the weakness in the District's proposed test is its attempt to limit scope, even for those items specifically enumerated, by curtailing the definition of the term "matters relating to." Granted, there seems to be a conflict between the apparent expansiveness of this phrase and the limitations imposed by the Legislature through its specific enumeration of negotiable items covered by the phrase "terms and conditions of employment." Reading the words "matters relating to" in connection with wages and hours, EERA seems to

make possible a broader spectrum of negotiable subjects than does the National Labor Relations Act which does not use the quoted phrase. It appears that the limitation intended by the Legislature is accomplished not by giving to that phrase an unnaturally limited meaning but by the listing of specific subjects which are meant to be within scope and the specific listing of subjects on which negotiations is precluded. Thus, a subject which is excluded cannot be transformed by applying to it the phrase "matters relating to." On the other hand, a subject which may logically and reasonably be related to an included subject should not be cast out by altering the plain and common meaning of the words constituting that phrase.

The District's further argument that the mere existence of any statutory provision precludes incorporating that provision in the agreement was similarly rejected in Jefferson School District (6-19-80) PERB Decision No. 133, pp. 7-11.

The Employer's Duty to Interpret the Proposal

As I interpret the hearing officer's admonition here, as I did in Jefferson, he would hold the employer responsible for evaluating any proposal to determine the extent of the employer's duty to negotiate. I find nothing wrong in this position as I found none in Jefferson,[1] (supra, pp. 11-12 for a full discussion of the matter).

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[1]Because the District refused to discuss those matters which it declared to be outside the scope of representation,

The Issues are Moot

For the reasons set forth at length in Amador Valley Unified School District (10-2-78) PERB Decision No. 74, and in the absence of clear evidence here that the Association relinquished its right to negotiate the disputed items, the District's argument is rejected.

With the foregoing in mind, it is appropriate to turn to the specific proposals in dispute.

Article II No Discrimination

I am in substantial agreement with Member Moore's conclusion that 2.1 and 2.2 of this proposal are within the scope of representation.

These sections logically touch on virtually all aspects of the employment relationship. The prohibition of discrimination assures that wages will be paid on an equal basis; that hours will be distributed without regard to sex, race, union activism, etc.; that transfers and reassignments will be accomplished in an even-handed fashion; that evaluations will not reflect non job-related biases.

A work place free from discrimination is of fundamental interest to employees, as it may surely be assumed to be to employers alike. Indeed, statutory obligations imposed on

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those Association proposals were not clarified; consequently, it has not been possible to be more specific in determining the precise limits of their negotiability.

employers in this regard emphasized the point. (See Education Code sections 44100-44105, 44830; 42 U.S. 2000 et seq., 42 U.S. 1981, 1983). The negotiating process is well suited to the airing and resolution of the parties' concerns on this subject. A collective agreement may well provide, through its administration processes, a convenient and inexpensive means of resolving future related disputes.

Requiring negotiations on a proposal such as this is not seen as abridging the District's "freedom to exercise those managerial prerogatives essential to the achievement of the District's mission," San Mateo, supra p. 14. This proposal requires the employer to do nothing it is not already obligated to do under applicable law. The District's argument that the proposal is nonnegotiable because other remedies exist is rejected. We, therefore, find the proposal within the scope of representation.

The District argues that 2.3 Affirmative Action is nonnegotiable because it intrudes into managerial prerogatives in the operation of the District. I disagree. Unlike a decision which is strictly within the ambit of managerial prerogatives but requires impact bargaining, an affirmative action plan itself may establish policy on wages, hours, and the enumerated conditions of employment. Such a plan could accelerate promotions of certain workers, thereby increasing their pay. It may equalize hours of work, affect leave and

transfer rights, or equalize rates among workers; the possibilities touch on all aspects of the employment relationship. I would, therefore, find an affirmative action plan a negotiable item to the extent it concerns the subjects listed in section 3542.2.[2]

The Association here is seeking only to consult on an affirmative action plan, a request which I find permissible.

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[2]Section 3543.2 states:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certified personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

There is nothing in EERA which prohibits an employee organization from waiving its right to negotiate in favor of an assurance of consultation rights on a subject matter which is within the scope of representation.

Article V Organizational Rights

The District objects to 5.1.1 and 5.1.2 on the grounds that the subject matter is not closely enough related to grievance procedures or any other enumerated item to warrant bargaining. It also claims that these proposals need not be negotiated, as they reiterate rights and provide for remedies already set forth in EERA section 3543.1(b).

I concur with Member Moore's findings with regard to both sections. In giving Association representatives access to all school buildings, this paragraph bears a logical relationship to grievance procedures. Furthermore, the right of access bears direct relation to the administration of the collective bargaining argument itself, as organization representatives may require access to school premises to observe whether various terms of the agreement are being complied with. It is well settled that administration of a contract is an essential part of the collective bargaining process.[3] As the Supreme Court noted in Conley v. Gibson (1957) 355 U.S. 41, 46 [41 LRRM 2089]:

> Collective bargaining is a continuing process. Among other things, it involves

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[3]Morris, The Developing Labor Law, Ch. 11, p. 340.

> day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. (emphasis added).

The interest that employees have in this proposal is identical to their interest in collective bargaining itself. Negotiating the subject of this paragraph does not interfere with the exercise of basic managerial prerogatives. The District's concern that "unlimited access" may interfere with operations should be expressed through its bargaining position; the fact that it may find the proposal objectionable, does not excuse it from an obligation to bargain over the subject matter.

For the same reasons, I find the proposed free access to bulletin boards, mailboxes, and the mail system to be within scope. The Legislature does not consider such access as interfering with the District's mission as evidenced by the embodiment of the requirement in section 3543.1(b).[4]

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[4]Section 3543.1(b) states:

> Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.

See also Long Beach Unified School District (5-28-80), PERB Decision No. 130.

With regard to 5.1.3, I substantially agree with Member Moore's discussion.

The District contends that 5.1.4 which would grant employees the right to review their personnel files need not be negotiated since it is not inextricably related to a grievance procedure or any other enumerated item. It also claims that Education Code. section 44031 provides an alternative remedy for employees denied access to their personnel files.

Like Member Moore, I find this proposal related to grievance procedures; the personnel file may contain any manner of material related to the enforcement of the contract. I also find 5.1.4 related to evaluations. The contents of the personnel file may be used to evaluate employees. Allowing individuals to inspect the file is a way of assuring that objectionable material does not find its way into an evaluation or otherwise influence the evaluator.

The fact that the Education Code section 44031 allows employees to inspect their personnel files does not remove this proposal from the ambit of negotiable subjects. As stated earlier in this concurrence, the presence of a proposed item in the Education Code precludes negotiability only if the proposal conflicts with the Code. I find no such conflict.

In addition to claiming that seniority rosters have no discernible relationship to enumerated items, the District asserts that 5.1.5 is beyond the scope of bargaining because an

alternative remedy exists in some unspecified portion of EERA. As there is nothing in that statute or any other to which the District has directed our attention that conflicts with the proposal, I find the employer's claim groundless.

I believe that the seniority roster is a negotiable subject because it logically relates to the enforcement and administration of the contract itself. Through the information contained on the roster, employers and the Association will be alerted to possible contract violations where seniority is a factor in determining negotiated wages, hours, and terms and conditions of employment.

I am in substantial agreement with Member Moore's analysis of proposals 5.1.6 through 5.1.9 which concern access to information.

5.10 provides for released time to conduct "necessary CSEA business." While it is unclear what is included in the term "necessary CSEA business," I assume that it encompasses negotiating on behalf of unit members, preparing and presenting grievances, and otherwise administering the collective bargaining agreement. To this extent, I find it negotiable. A demand for released time without loss of pay more than "relates" to wages and hours. It deals directly with those enumerated matters.

I would note that the employer's concern with costs or

possible illegal expenditures could be advanced at the negotiating table.

5.1.11 demands released time for attendance at CSEA's Annual Conference and requires the District to pay $250 for conference expenses. I agree with Member Moore that a demand for released time for attending the conference is negotiable because such a demand, in itself, seeks a reduction in working hours. However, the demand for conference expenses bears no logical or reasonable relationship to an enumerated item and falls outside mandatory scope.

The District maintains that it need not bargain over 5.1.12 because that proposal seeks to dictate the activities of the workday, the sole prerogative of management. It is unclear what the Association meant by "workday"--whether that encompasses the regular hours during which employees are at work, including lunch and breaks, or whether it refers only to those periods employees are actually performing duties for the employer. In either event, 5.1.12 is a demand for reduction of work hours in that it calls for time set aside during the work day for the purpose of contract administration. I would find it related to hours and wages and, thus, negotiable.[25]

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[25]Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7-16-79), PERB Decision No. 96, holding that the length of the working day is a matter within scope. See also San Mateo City School District (5-20-80), PERB Decision No. 129.

As with every other proposal, the District should not confuse its obligation to bargain with a nonexistent duty to acquiesce. Its concerns and interests can be adequately expressed and protected at the bargaining table.

The District's argument that 5.2 intrudes impermissibly into managerial prerogatives is well-taken. As it stands, this proposal would prevent management from forming committees made up of its own ranks for the purpose of giving administrators and other managers advice concerning labor relations. The formation of such a committee is clearly within the legitimate purview of the employer's internal functioning and cannot be precluded or interfered with by the demands of the employee organization.

However, the ambiguity of this proposal raises the possibility that it may include matters within scope. I would find it acceptable to the extent that it would prohibit the employer from unlawfully bypassing the exclusive representative on matters related to wages, hours, and the enumerated working conditions.

5.4 Distribution of Contract

By its proposed 5.4., CSEA seeks to pass on to the employer the cost of informing the employees of the terms of the collective bargaining agreement. The District claims that this proposal is not related directly enough to an enumerated item to warrant negotiation. I agree. The proposal deals with the

assumption of organizational costs, neither an enumerated item nor related to an enumerated item.

5.5 Management Orientation

I am in substantial agreement with Member Moore's discussion of this proposal.

Article VI Job Representatives

I join in Member Moore's opinion regarding this article.

Article 10.1 Uniform; Article 10.2.1 and 10.2.2 Tools; Article 10.3 Replacing or Repairing Employee's Property; Article 10.5 Nonowned Automobile Insurance

I am in substantial agreement with Member Moore's discussion of the above items.

10.7 Employee Achievement Awards

The District claims this proposal is not related to wages. It argues that because the Education Code section 12917, incorporated by reference in 10.7, allegedly establishes a system of "irregularly paid, discretionary bonus[es], [the proposal] is not related to economic benefits paid for services rendered during the employment relationship." [District's Brief in Support of Exceptions, p. 25].

In analyzing this proposal, I find the question of whether the Education Code section 12917 establishes a system of bonuses, gifts, or merit increases irrelevant to the issue of negotiability. The proposal will be within the scope of bargaining as a result of its relation to wages, if it, in its

totality, contemplates a regular system of bonus payments or merit pay rather than gifts.

There has been much litigation over the distinction between nonnegotiable "gifts" and merit increases or bonuses, which are mandatory subjects of bargaining. Courts have generally agreed that a payment will be considered a gift if (1) it is awarded on an irregular and inconsistent basis, (2) it varies in amount, and (3) payment is dependent on the financial condition of the employer.[26] The distinction has also been articulated in NLRB v. Niles-Bemont-Panel Co. (1952) 199 F.2d 713, 714 [31 LRRM 2065]:

> ...if these gifts were so tied to the renumeration which employees received for their work that they were in fact a part of it, they were in reality wages and so within the statute...Where,...the so-called gifts have been made over a substantial period of time and in amounts that have been based on the respective wages earned by the recipients, the Board was free to treat them as bonuses not economically different from other special kinds of renumeration like pensions, retirement plans, or group insurance...which have been held with the scope of statutory bargaining requirements.

Merit increases, which may include payments to individual employees as a reward for loyalty or efficiency, have also been

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[26]NLRB v. Wonder State Mfg. Co. (1965) 344 F.2d [54 LRRM 2065].

consistently held to be a mandatory subject of bargaining.[27] The rationale for this conclusion was succinctly stated by the court in NLRB v. Berkeley Machine Works, supra:

> Merit pay where there are a number of employees means more than a gratuity or bonus paid to an occasional employee whom the company wishes to favor on account of his loyalty or efficiency. It means necessarily the formulation and application of standards; and such standards are proper subjects of collective bargaining. Collective bargaining with respect to wages might well be disrupted or become a mere empty form if the control over the wages of individual employees were thus removed from the bargaining area.

I see this proposal as comparable to a merit pay concept. The intention of 10.7 is to establish a "regular program of monetary awards for valuable suggestions, services, or accomplishments..." (emphasis added). Thus, payment is for work performed which is valuable to the employer. Whether in the past, awards made pursuant to that section of the Education Code could have been legitimately characterized as "gifts" is unimportant because the Association, through this proposal, seeks to negotiate and regularize an award system based on standards, thereby bringing it under the umbrella of wages.

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[27] J.H. Allison & Co., (1946) 70 NLRB 377 [18 LRRM 1369]; NLRB v. Berkeley Machine Works, (1951) 189 F.2d 904 [28 LRRM 2176]; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].

10.8 Hold Harmless Clause

I agree with Member Moore's discussion of this proposal but find that the employer's financial interest is not a factor to be considered in determining negotiability. Financial concerns--ability to pay--is a bargaining position, not a criterion of negotiability.

Article XI Rights of Bargaining Unit

I do not interpret this article as an attempt by CSEA to circumscribe or prohibit the District's decision to deunify the school district. Rather, it seeks to bind a successor district to the terms of this collective bargaining agreement, if there is a successor.[28]

I would find this proposal negotiable to the extent that it attempts to include in the collective bargaining agreement Education Code section 45118 (quoted at p. 26). That statute guarantees employment for not less than two years at the same rate of pay and with retained leaves and other benefits. It also bestows certain transfer rights on employees affected by the reorganization. As such, it clearly relates to wages, health and welfare benefits, leaves, and transfer policies.

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[28]The implications of this proposal in deciding the ability of one public agency to bind another (its successor) to an existing collective bargaining agreement, the obligation of a successor agency to honor existing contracts where the workforce is assimilated and the rights of employees whose employment survives a change in the identity of their employer must be left to such time this Board considers the matter.

17.1 Short-Term Employees

It is possible that the parties, have used the term "classified employee" without reference to the Education Code definitions but simply as a general term to distinguish noninstructional personnel from certificated employees. But since the District raises the question of whether short-term employees are in the unit, and in the absence of any evidence in the record as to what the parties meant by the term "classified employees," I assume that the Education Code definition prevails. Thus, short-term personnel are not in the unit as they are not "classified employees," and CSEA is precluded from submitting proposals concerning this group.

17.2 Restricted Employees

The District argues that restricted employees are not in the unit because, it claims, they are not in the classified service. As Member Moore points out, the restricted employees, unlike the short termers, are not specifically excluded from classified service. We cannot, therefore, declare them outside the unit of all classified employees, absent evidence that the parties intended to exclude them.

I do not find the instant proposal to fatally conflict with the relevant Education Code sections, though certain portions may conflict. For example, CSEA may not seek to require that a restricted employee automatically become a regular after 126 working days, "fulfilling any requirements imposed on other

persons serving in the same class as regular employees," if those requirements do not include the qualifying examination prescribed by Education Code section 45105(c). Neither does it appear that the restricted employees can be given retroactive seniority for layoff purposes or provisional employment (See Education Code sections 45287 and 45289), but this proposal seeks to secure other benefits retroactively for restricted employees who become regular. Such benefits may include wage raises, health and welfare benefits, and other contracted values not precluded by the Code. To this extent, I find it within scope.

17.3 Substitute Employees and 17.4 Student Employees

I substantially agree with the discussion and conclusion reached concerning these proposals.

17.5 Distribution of Job Information

I concur in the finding that this proposal is related to wages and hours. I also find it negotiable in accordance with my previous discussion on contract administration.

Article XIX Promotions

I concur with Member Moore's finding and conclusions.

Article XX Classification

20.1 Placement in Class

This section is essentially prefatory language to the entire article, its purpose being to define eligibility for

contract entitlements. It is, therefore, within scope to the extent the following related proposals are.

20.2 Classification and Reclassification Requirement

The District strenuously objects to the negotiability of this proposal, claiming that classification decisions go to the very heart of management's ability to direct the workforce. It also claims that the Association cannot interject itself into the statutorily mandated prerogative of the District to establish classifications. Education Code section 45109 requires the District to establish job classifications. The fact that the District is so obligated does not automatically preclude it from bargaining with the employee organizations prior to so doing. As with every other proposal, the negotiability of 20.2 turns on its relation to an enumerated item.

This proposal accomplishes two things by its terms: it subjects the classification process to the requirement of mutual agreement between CSEA and the District, and it provides that "any dispute shall be subject to the grievance procedure." Precisely what is intended by this last phrase is unclear. CSEA might be seeking a procedure for contesting the placement of an employee in an established classification. A different reading might be that CSEA seeks arbitration of a disagreement concerning establishment of the classification. If the former is the intent of this proposal, I find it in

scope. If the latter is the purpose of this portion of 20.2, I would find the provision outside the required scope of bargaining. Interest arbitration, which is the essence of such a proposal, is a method of resolving negotiation disputes and is not, itself, a subject on which negotiation is required.

The question of negotiating classifications is, however, more complex. In the private sector, a classification system has been defined as "a series of job levels or grades determined arbitrarily with each job classified into its proper relative grade."[29]

Education Code section 45101(a) provides:

> (a) "Classification" means that each position in the classified service shall have a designated title, a regular minimum number of assigned hours per day, days per week, and months per year, a specific statement of the duties required to be performed by the employees in each such position, and the regular monthly salary ranges for each such position (emphasis added).

Implicit in a classification scheme is the prerogative of determining which functions are necessary for the District to accomplish its mission. To determine that the District requires custodians, clericals, cafeteria workers, etc. is a patent managerial task which cannot be abrogated by a duty to negotiate over such decisions. To the extent that this

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[29]Latin Watch Case Co. Inc. (1965) 156 NLRB 203, 206 [61 LRRM 1021].

proposal seeks to impose an absolute prohibition on management's decision to reclassify or create new classifications, it is beyond the scope of bargaining.

However, the general nature of the proposal makes it difficult to determine those aspects of a classification decision CSEA seeks to bargain over. To the extent that it requires bargaining over resulting changes in the employees' current wages, hours, and negotiable conditions of employment such as transfers and promotions of present employees, it is negotiable.[30] I also find the aspect of classification which concerns job descriptions to be negotiable.[31] The job description may determine pay rates, promotion and transfer opportunity, hours, and other enumerated items.

20.3 New Positions or Classes of Positions

I concur in Member Moore's discussion of this proposal.

20.4 Reclassification

This constitutes a wage demand and is a matter on which the employer must negotiate.

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[30]Latin Watch Case Co., supra; Limpco Mfg. Co. ( ) 225 NLRB 927 [93 LRRM 1464]; Sewerage Commission of the City of Milwaukee, 1 NPER 51-10005 (Wisconsin Employment Relations Commission 5/18/79); Contra, New York State Court Employees Association v. Bartlett (1979) 12 PERB Decisions of New York 3075.

[31]Handen Community Child Care, (1979) 1 NPER U7-10038 Comm. SBLR; Milwaukee Police Assoc. v. Breier (1979) WERC Decision No. 16602-A.

20.5 Incumbent Rights

"Reclassification" is defined as "the upgrading of a position to a higher classification as a result of the gradual increase of the duties being performed by the incumbent in such a position.[32]" I presume that any upgrading involves an increase in pay for employees serving in those positions. The proposal seeks to assure that incumbents will receive that higher wage by guaranteeing their placement in the higher classification.

This proposal also relates to transfers in that it establishes a classification of positions which will be subject to the negotiated transfer procedures.

Because the terms of this proposal do not seek to prevent the employer from reclassifying any job, negotiating the rights of incumbents or of other employees eligible for transfer will not intrude on the District's ability to fulfill its mission.

20.6 Downward Adjustment

Member Moore concludes that this proposal "does not interfere with the employer's right to downgrade any position...provided it is a result of layoff or disciplinary action." (Moore opinion, p. 66, emphasis added). As I interpret the proposal, it requires that downward adjustments

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[32]Education Code section 45101(f).

be considered demotions and accomplished by a negotiated procedure used in layoffs or disciplinary actions.

To the extent that the layoff and disciplinary procedures are within scope, I find this proposal is negotiable.

20.7 Abolition of Position

This proposal differs significantly from 20.6, a difference which is fatal to 20.7's negotiability. Here, CSEA attempts to control the management decision to abolish positions by requiring its approval before that event. This contrasts with 20.6, which simply mandates that a particular procedure be followed before downward adjustments take place.

21.1 Reason for Layoff

As Member Moore points out, the flaw in this proposal is the attempt to define "lack of funds" and in so doing, to restrict the reasons for which the employer may institute a layoff. The effort to tie managerial decision making to a specific definition interferes with the employer's ability to freely manage the enterprise.[13] While the school employer is obligated not to abuse its discretion in determining its financial condition, it is also vested with the flexibility to decide what circumstances necessitate a layoff.[14] By

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[13]NLRB v. United Nuclear Corp. (1967) 381 F.2d 972 [66 LRRM 2101].

[14]CSEA v. Pasadena Unified School District (1977) 71 Cal. App. 3d 318.

attempting to impose an arbitrary standard before the fact, this proposal would impermissively interfere with lawful management discretion.

21.2 Notice of Layoff

I am in basic agreement with Member Moore's discussion and conclusion with respect to this proposal.

21.3 Reduction in Hours

I concur in Member Moore's findings and conclusion.

21.4 Order of Layoff

This proposal is consistent with the Education Code. Its negotiability is also supported by private sector law.[15]

Procedures to be utilized in effectuating layoffs bear an obvious relation to the wages and hours of those who are laid off as well as to those employees to be retained. The employer's control over the decision to layoff is not removed by a requirement that order of layoff and pertinent procedures be mutually established. I find 21.4 within the scope of representation.

21.5 through 21.14

I am in substantial agreement with Member Moore's findings and conclusions on these articles.

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[15]Firefighters' Union v. City of Vallejo (1974) 12 Cal. 3d 608; United States Gypsum Co. (1952) 94 NLRB 114, enfd. 206 F.2d 410; Hilton Mobile Homes 155 NLRB 873 [60 LRRM 1411].

21.15 Improper Layoff

I do not see the relationship between this proposal and the contract grievance procedure. However, this article is an attempt to protect the wages of employees who are improperly laid off. Because it provides for immediate reinstatement of such employees, it affects the hours worked by them and may have an effect on their entitlement to health and welfare benefits. I therefore find 21.25 related to wages, hours, and health and welfare benefits.

21.16 Seniority During Involuntary Unpaid Status

This proposal not only relates to wages but to all enumerated items contained in the proposed contract which are dependent on seniority. On its face, it relates to leaves as well, since it provides for a nonaccrual of leave benefits during the unpaid status. As this proposal, like the majority of the other in Article XXI, is procedural, it does not impinge on any relevant managerial interest in such a manner to preclude negotiability.

Article XXII--Discipline

The District objects to this proposal on the grounds that it interferes with management prerogatives and supersedes the Education Code. The proposal reads:

> 22.1 Exclusive Procedure: Discipline shall be imposed upon bargaining unit employees only pursuant to this Article.
>
> 22.2 Disciplinary Procedure.

22.2.1 Discipline shall be imposed on permanent employees of the bargaining unit only for just cause. Disciplinary action is deemed to be any action which deprives any employee in the bargaining unit of any classification or incident of employment or classification in which the employee has permanence and includes but is not limited to dismissal, demotion, suspension, reduction in hours or class or transfer or reassignment without the employee's voluntary written consent.

22.2.2 Except in those situations where an immediate suspension is justified under the provisions of this Agreement, an employee whose work or conduct is of such character as to incur discipline shall first be specifically warned in writing by the Supervisor. Such warning shall state the reasons underlying any intention the Supervisor may have of recommending any disciplinary action and a copy of the warning shall be sent to the Job Representative. The Supervisor shall give a reasonable period of advanced warning to permit the employee to correct the deficiency without incurring disciplinary action. An employee who has received such a warning may appeal the warning notice through the grievance procedure, and in addition, shall have the option of requesting a lateral transfer under the provisions of this agreement.

22.2.2 Discipline less than discharge will be undertaken for corrective purposes only.

22.2.4 The District shall not initiate any disciplinary action for any cause alleged to have arisen prior to the employee becoming permanent nor for any cause alleged to have arisen more than one year preceding the date that the District files the notice of disciplinary action.

22.2.5 When the District seeks the imposition of any disciplinary punishment, notice of such discipline shall be made in

writing and served in person or by registered or certified mail upon the employee. The notice shall indicate (1) the specific charges against the employee which shall include times, dates, and location of chargeable actions or omissions, (2) the penalty proposed, and (3) a statement of the employee's right to make use of the grievance procedure to dispute the charges or the proposed penalty. A copy of any notice of discipline shall be delivered to the Job Representative within twenty-four (24) hours after service on the employee.

22.2.6 The penalty proposed shall not be implemented until the employee has exhausted his/her rights under the grievance article.

22.2.7 An employee may be relieved of duties without loss of pay at the option of the District.

2.3 Emergency Suspension:

22.3.1 CSEA and the District recognize that emergency situations can occur involving the health and welfare of students or employees. If the employee's presence would lead to the clear and present danger to the lives, safety, or health of students or fellow employees the District may immediately suspend with pay the employee for three (3) working days. No suspension without pay after service of a notice of suspension.

22.3.2 During the three (3) days, the District shall serve notice and the statement of facts upon the employee, who shall be entitled to respond to the factual contentions supporting the emergency at Step 4 of the grievance procedure.

Disciplinary Grievance:

22.4.1 Any proposed discipline and any emergency suspension shall be subject to the grievance procedure of this Agreement and the employee, at his/her option, may commence review either at Step 1, 2 or 3.

22.4.2 An employee upon whom a notice of discipline has been served, may grieve any emergency suspension without pay at Step 3 of the grievance procedure. The grievance meeting shall be held and a response made within three (3) days of the submission of the grievance. Notwithstanding any separate grievance meeting held in accordance with the preceding sentence, the employee may also grieve the emergency suspension along with the notice of discipline.

22.5 Disciplinary Settlements: A disciplinary grievance may be settled at any time following the service of notice of discipline. The terms of the settlement shall be reduced to writing. An employee offered such a settlement shall be granted a reasonable opportunity to have his/her Job Representative review the proposed settlement before approving the settlement in writing.

Initially, I find the entire subject of discipline to be a negotiable item. It is related to wages, health and welfare benefits, evaluations and other enumerated terms and conditions in that employees' entitlement to those enumerated items can be affected by disciplinary actions taken against them. Additionally, the terms of this proposal do not prevent the employer from taking disciplinary action but rather, establish procedures which the District must follow when it decides to discipline.

I dissent from that portion of Member Moore's opinion which holds that Education Code section 45113 is superseded by CSEA's attempt to submit to a third party the disputes over disciplinary actions. Section 45113 requires that the

District's "determination of sufficiency of cause for disciplinary action shall be conclusive." I find nothing in the proposal which conflicts with this basic authority. The arbitrator would not have the power to determine whether the employee's alleged transgression is a legitimate cause for discipline. His authority would be limited to deciding whether the evidence was sufficient to support a finding that the employee was in fact culpable. CSEA seeks merely to give a neutral the authority to decide whether the employer followed its own rules in effectuating the discipline. To this extent, I find no attempted supersession of the Education Code.

Subarticle 22.2.3 requires that discipline less than discharge be taken for corrective purposes only. The intent of this proposal is to require that lesser forms of discipline be remedial rather than punitive in nature.

I find this proposal within scope. By its underlying thrust toward performance improvement, it inherently seeks to protect the employees' current and future wages, benefits, and hours of employment.

I am in substantial agreement with Member Moore concerning the remaining subarticles of Article XXII.

Subarticle 24.1 Past Practice

CSEA merely wishes to incorporate by reference existing rules and regulations which it does not seek to alter through negotiations. Unquestionably, CSEA could propose individual

personnel policies or practices which, coincidentally, would conform to those already in effect. Such a procedure would be the longhand method of including in its negotiated agreement those personnel rules and policies which are within scope. Rather than going this protracted route, CSEA has chosen the short-cut method of incorporating, by reference, those matters which already exist and which it otherwise could have itself proposed. To the extent the proposal covers rules and regulations which deal with matters within the mandatory scope of section 3543.2, it is negotiable.[16] Beyond that, the District need not submit to negotiations. Since the proposal clearly incorporates legitimate areas of negotiability, the refinement of the proposal is more properly accommodated through the bargaining process by the District's raising legitimate objections to those particular policies, practices, or rules which it deems out of scope.

Subarticle 24.4 (Special Trip Assignments)

To the extent that this proposal deals with the wages and hours of bus drivers, it is negotiable.

Subarticle 24.5.1 and 24.5.2 (Standby Time)

I concur in the finding that these proposals relate to wages and hours and are within scope.

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[16]For this reason, the "past practice" justification found by the hearing officer is irrelevent.

Article XXVI, Subarticle 26.1 (In-service Training Program)

I perceive this proposal as sufficiently related to the enumerated subjects of wages, evaluations, and grievance procedures to merit a finding that it is within scope. It is not uncommon to find evaluation procedures which require a remedial program including training for employees whose performance is rated below standard. An employee's successful completion of a probationary period or his/her opportunity to proceed through the promotional ladder is inevitably based on that employee's job performance. Defense against disciplinary action based on alleged unsatisfactory job performance which might include termination or demotion may well raise questions of prior availability and adequacy of job training. These vital employee concerns, enumerated in section 3543.2, have a relationship to in-service training which, in my view, brings the latter subject well within the scope of negotiations.

Subarticle 26.2 (Training Advisory Committee)

I find this proposal inextricably connected with subarticle 26.1 discussed above and, therefore, within the scope of negotiations.

Subarticles 26.3 and 26.4 (In-service Training Time; Reimbursement for Tuition)

I concur in the finding that these proposals directly relate to wages and hours of the employees and are within scope.

Article XXVII, Subarticle 27.1 (Restriction on Contracting-Out)

I concur in the reasoning and conclusions reached by Member Moore, and find this proposal within scope of negotiations.

Subarticle 27.2 (Notice to CSEA)

I find this proposal also within scope as directly connected with the previous proposal.

Subarticle 27.3 (Bargaining Unit Work)

In Crown Coach Corp. (1965) 155 NLRB 625, [60 LRRM 1366], it was stated:

> "The obvious propose of the clause in question is to preserve non-supervisory production and maintenance work for employees in the unit, and, plainly, contrary to [employer's] position, the mere fact that the proposed terms would affect supervisors does not relieve the company of any obligation to bargain with respect thereto. On the contrary, the clause is a mandatory subject of bargaining, as its provisions, dealing as they do with employment opportunities for employees in the unit, pertain to their 'wages, hours, and other terms and conditions of employment,' within the meaning of [the Act] which defines the bargaining obligations of employers and labor organizations,. . . ."

To the extent that CSEA's proposal relates to the work of employees within the CSEA negotiating unit, the proposal clearly relates to the wages, hours, and possibly other enumerated working conditions of the employees in the unit in question, and the principle set forth in Crown Coach Corp. is clearly applicable here. I do not view the phrase "a bargaining unit employee" as sufficiently ambiguous to raise the possibility that CSEA is seeking to negotiate working

conditions for employees outside of its unit. Nevertheless, the appropriate forum for determining the precise meaning of CSEA's proposal is the bargaining table. The mere possibility that CSEA seeks to extend lawful negotiations into prohibited areas should not invalidate a proposal which inherently contains matters within scope. The resolution of ambiguities should be a matter addressed by the employer's questions or objections to the proposal as provided rather than by its refusal to discuss the matter at all.

Harry Glick, Chairperson

The Remedy and Order in this case begin on page 150.

Raymond J. Gonzales, Member, concurring and dissenting:

Upon reaching the end of the majority's decisions, one is left with a nagging question: Why did the Legislature bother to enact the unique scope language in section 3543.2 if its intent, as found by the majority, was to provide a scope of representation virtually identical to that found in the private sector? The Legislature must have had some reason for enacting language that differs so markedly from the scope language of

the NLRA[1] and almost every other public employee collective bargaining statute.[2] Yet the majority's analyses of that language give those differences little significance, resulting in tests for determining whether a proposal is negotiable that sound remarkably like interpretations of the NLRA scope language and similar language in other state collective bargaining statutes.

Chairperson Gluck's test, as set forth in San Mateo City School District (5/20/80) PERB Decision No. 129, is based on the United States Supreme Court's interpretation of NLRA scope language in Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609]. Member Moore's test is essentially the same with the addition of explicit recognition that public policy considerations may limit management's obligation to negotiate. I simply cannot believe that the legislative intent in enacting unique scope language is served by adopting tests commonly used to interpret the more usual scope of bargaining statutory language.

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[1]NLRA section 8(d) (29 U.S.C. section 158(d)) defines collective bargaining as the mutual obligation of the parties to meet and confer in good faith "with respect to wages, hours, and other terms and conditions of employment. . . ."

[2]See Najita, Guide to Statutory Provisions in Public Sector Collective Bargaining: Scope of Negotiations (2d issue, 1978)

I recognize that both tests provide that a negotiating proposal must bear some relationship to an enumerated item in section 3543.2. But this limitation does not appreciably narrow the range of subjects to which my colleagues can apply their respective balancing tests; as this case demonstrates, some sort of logical and, in the majority's opinion, reasonable, connection can be made between almost any proposal that would be considered an employment condition in the private sector and one of the items enumerated in section 3543.2.

It might be argued that the majority's requirement that a proposal be reasonably as well as logically related to an enumerated item will safeguard against a flood of minimally related matters inundating collective negotiations, since matters which are "unreasonably related" will presumably fail the majority's threshhold test. However, under the majority's test, the term "reasonable" reduces to whatever appears reasonable to the individual making a judgment of whether a particular item is "reasonably related." While "reasonableness" is a longstanding and widely used legal concept, judicial application of reasonableness normally includes some standard by which it may be applied. Development and articulation of such a standard establishes a basis for objectivity, permits application by others and allows a clear basis for judicial review. Absent such a standard, "reasonableness" becomes highly subjective: the person

evaluating a negotiations proposal may decide whether she/he feels the matter should be negotiated and then label the subject as either "reasonably related" or "not reasonably related" depending on that decision. The majority's threshhold test regretably provides no standard or guidance and so, does nothing to substantively narrow the scope of representation.

Thus, I do not believe that the majority's tests reflect the legislative intent to enact a narrow scope of representation. My position on this issue is set forth in full in my dissent in San Mateo, supra, PERB Decision No. 129, and I will not repeat it here. Suffice it to say that the phrase "matters relating to" should be interpreted within the context of all of the language of section 3543.2. Read as a whole, that language indicates an intent that only a limited number of subjects be subject to negotiations. Therefore, "matters relating to" should be construed narrowly, applying only to subjects that are so closely related as to be essentially extensions of specifically enumerated items.

This case presents an issue that was not raised in San Mateo: the relationship between the scope of representation and Education Code provisions regulating various employment conditions. The potential conflict between collective bargaining agreements and statutory provisions is common in the public sector because public employment conditions were often regulated by statute before the advent of

collective negotiations for public employees. Statutorily regulated employment conditions pose certain problems when subject to the collective bargaining process. Negotiations should be a bilateral process with both parties having the flexibility to give and take on any issue on the bargaining table. However, a regulating statute naturally runs counter to such flexibility: if the statute sets a mandatory standard, then no agreement between the parties can change that statute, rendering negotiations meaningless; if the statute sets certain minimum benefits which can be exceeded, then employees negotiate upward from a statutorily-granted floor which employers cannot attempt to decrease. Negotiations thus become a one-way street to increased employee benefits.

The Legislature did not clearly resolve the relationship between Education Code provisions covering employment conditions and section 3543.2. Section 3540 provides in part:

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

Since several Education Code sections cover employment

conditions that are specifically listed in section 3543.2,[3] section 3540 obviously does not mean that any employment condition covered in the Education Code is not negotiable; given the clear legislative intent that specified subjects be negotiable, such an interpretation would cause a conflict between these two sections of the EERA. Instead, the more reasonable explanation is that the language in section 3540 reflects an intent that subjects which are neither specifically enumerated nor direct extensions of enumerated items remain regulated by statute rather than by agreement. In other words, where the Legislature has already provided for an employment condition through the legislative process, absent a clear legislative direction, the EERA should not be read as a mandate to now provide for such matters through the collective negotiation process. Perhaps the clearest example is tenure: the parties involved in creating the EERA deliberately chose not to submit the issue of tenure to be determined through collective negotiations, and thus did not list tenure as an enumerated term and condition of employment. I think the same is true for areas such as layoffs and discipline. Each of these major subject areas is extensively regulated through the Education Code and, despite its importance to employees, was

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[3]See, e.g., Education Code section 45127, which sets the maximum working hours for classified employees.

not enumerated in section 3543.2. This, to me, is a strong indication that these subjects were intended to be determined through the legislative process, as expressed in statute, rather than through the bilateral negotiations process.

* * *

Based on my position that section 3543.2 should be construed narrowly and that "matters relating to" enumerated items refers only to matters which are so closely related as to be essentially extensions of enumerated items, I dissent from the majority's determination that the following proposals are negotiable:

Articles 2.1 - 2.2. Discrimination is only tangentially related to enumerated terms and conditions of employment. While discrimination may have an impact on enumerated items, it is not an extension of any of them. I do not believe that impact on a specifically listed subject alone is a sufficient relationship to bring a proposal within scope.

Article 5. The organizational rights proposed by CSEA do not have any direct relationship to the items listed in section 3543.2. Furthermore, organizations are given rights under EERA section 3543.1; I believe this indicates a legislative intent that PERB interpret the statutory language to determine employee organizations' rights under the statute.

The majority here decides that released time is negotiable. I disagree for two reasons. First, "hours" as used in section 3543.2 refers to how many hours employees work and when those hours occur. It does not encompass what work is performed during those hours. Released time is not nonworking time; rather it is time that has been freed from other work assignments to be utilized for some other specific activity. Thus, it is only tenuously related to hours of work. Second, the statutory provision for released time under section 3543.1(c) indicates to me that the Legislature intended PERB to determine what is "reasonable" under the EERA.

Article 10. Most of these proposals seek district reimbursement for employee expenses. The majority finds such proposals related to wages because they would release employees from having to assume certain costs. This is a prime example of how far the "relating to" language can be stretched. "Wages" commonly refers to rate of pay. To relate expenses to wages requires first that wages be related to the total economic benefit an employee receives for working; one can then perhaps see a connection between expenses and this expansive notion of wages. Needless to say, I do not agree with this use of the term "matters relating to" and find the expense items in Article 10 to be nonnegotiable. If the Legislature had intended "matters relating to wages" to be construed this broadly, it would have found it unnecessary to specifically

enumerate such items as "health and welfare benefits" which are clearly part of an employee's total economic benefit.

Article 10.7 proposes a program for employee achievement awards. Again, relating this to wages involves first relating wages to overall economic benefits. Unlike overtime compensation or incentive pay, achievement awards do not provide a standardized rate of compensation for a standardized amount of work and are thus not direct extensions of the concept of wages.

Article 17.4. This proposal, which seeks to limit the District's hiring of student employees is only tangentially related to enumerated terms and conditions of employment.

Article 19. I do not find promotions to be sufficiently related to wages or evaluation procedures. As I stated in San Mateo, supra, PERB Decision No. 129,

> [A] promotional policy may be considered logically related to wages in that a promotion generally leads to a salary increase. But it is not an extension of wages since it includes considerations, such as proficiency, which go beyond questions of what salary should be paid for what work, and thus should not be negotiable under section 3543.2.

Furthermore, a need for evaluations in making promotional decisions does not, in my opinion, create a close relationship between promotions and the procedures for evaluating employees.

Finally, I find it difficult to believe that an item of such concern to employees would not have been specifically

enumerated if the Legislature had intended it to be in scope. In fact, a bill which would have amended section 3543.2 to include such matters as promotions, classifications and reclassifications, layoff procedures, reemployment, disciplinary action procedures, contracting for services, and workload was defeated by the Legislature in 1977. (Senate Bill 288, 1977 Sess.) While this may not be conclusive evidence of legislative intent at the time the EERA was enacted, it seems significant to me that one year later the Legislature had an opportunity to add important employee relations issues and refused to do so. The argument that the legislation may have been defeated because the issues were assumed to be covered by section 3543.2 is specious. Under the majority's interpretation of that section, several of the enumerated terms and conditions of employment are covered by "wages" or "hours;" yet these were specifically listed despite potential redundancy. It seems clear to me that the Legislature has consistently listed major employment related items that it intended to make subject to negotiations. This is made even more obvious by the 1977 amendments to section 3543.2 which added reassignment and layoffs for certain probationary certificated employees to the list of enumerated terms and conditions of employment.[4] The defeat of SB 288 indicates

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[4]Stats. 1977, ch. 961, sec. 2

that the Legislature did not want those items specifically enumerated as within the scope of representation, and therefore did not intend them to be within scope.

Article 20. These proposals concern classification. As the Board has strenuously argued in defending the State Employer-Employee Relations Act (Gov. Code sec. 3512 et seq.), classification and salary setting are not intrinsically related.[5] While classification may have an impact on several enumerated items, it is not an extension of any of them and thus is not negotiable. Furthermore, if the Legislature had intended classification to be in scope, it would have specifically listed it rather than depending on its being found to be a matter relating to an enumerated item.

Article 21. Layoff is not an extension of wages or hours, despite the impact it has on employees' working conditions. Also, it is extensively regulated in the Education Code. (See Ed. Code secs. 45308, 45114, 45298.) This, combined with the fact that it was not specifically enumerated despite its importance to employees, indicates to me that the Legislature intended the subject of layoffs to remain exclusively subject to statutory regulation. It should be noted that the Legislature did amend section 3543.2 in 1977, adding "the layoff of probationary certificated school district employees,

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[5]See PERB's Petition for a Hearing by the Supreme Court in Pacific Legal Foundation v. Brown, S.F. No. 24168.

pursuant to Section 44959.5 of the Education Code" to the scope of representation. (Section 44959.5 applies only to school districts with an average daily attendance of more than 500,000.) It indicates that layoffs were not considered negotiable under section 3543.2 as originally enacted by either the parties proposing the amendment or the Legislature; otherwise, the legislation would have been unnecessary. Its significance is emphasized by the fact that other legislation, which would have added the general subject of layoffs to the specifically enumerated items in section 3543.2, was defeated in 1977. The Legislature was apparently willing to expand the scope of representation to cover a particular situation in a specific school district, but was unwilling to make layoffs negotiable for all educational employees.

Article 22. Disciplinary action is another subject that is covered by the Education Code (see Educ. Code secs. 45113, 45116) and is not directly related to enumerated items. I believe that the Legislature intended this area to be left to the districts' discretion subject to statutory regulation.

Article 24.4. Assigning special trips to bus drivers may have an impact on wages and hours, but it is not an extension of those concepts. Rather, it is part of the employer's right to make work assignments.

Article 26.4. This proposal is similar to Article 10 in that it seeks reimbursement for an employee expense. As noted above, I do not consider expenses to be related to wages.

Article 27.1 - 27.2. Contracting out is not an extension of any enumerated item. Additionally, it is a major, controversial issue which has been the subject of many cases in both the private and public sectors. I cannot help but believe that the Legislature would have indicated its intent to include it in scope by specifically listing it. The failure to do so is a significant indication that contracting out was not intended to be negotiable.

* * *

I concur with Member Moore's decision that the following proposed articles are out of scope:

Article 2.3. While affirmative action proposals may have some impact on employee wages, the subject is not an extension of wages.

Articles 5.1.6 - 5.1.8. These proposals have only a tenuous connection to any enumerated item.

Article 5.1.11. I agree with Chairperson Gluck that providing $250 conference expenses is unrelated to any enumerated term and condition of employment. Furthermore, released time to attend the conference should not be in scope.

As discussed more fully above, the legislative provision for released time for certain organizational activities indicates an intent that this issue not be subject to collective negotiations.

Article 5.2 - 5.5. These proposals are, at best, only tangentially related to any enumerated items.

Article 11. This proposal does not specifically relate to an enumerated subject. Furthermore, the employment rights of classified employees in the event of a change in the configuration of a district are covered in Education Code section 45118.

Articles 17.1.1 - 17.3. An exclusive representative may not negotiate over the employment conditions of positions outside the unit. The rights and transition to regular statutes of restricted employees are covered in Education Code section 45105.

Articles 20.2 - 20.3, 20.7. As discussed above, I find that the general subject of classification is not within the scope of representation.

Articles 21.1 - 21.2. I also find that the overall subject of layoffs is not negotiable.

Article 22. Since I find that discipline in general is not subject to negotiations under section 3543.2, I concur with Member Moore's determination that those portions of Article 22 which cause the employer to waive its exclusive authority over

discipline and delegate review to an arbitrator are nonnegotiable.

Article 22.2.4. I also concur in Member Moore's finding that this proposal is nonnegotiable, on the grounds that discipline is not within the scope of representation.

Article 24.1. I agree that this proposal is overbroad and therefore nonnegotiable.

Article 26.1 - 26.2. I am in partial agreement with Member Moore on these proposals. I do not believe that training is an extension of an enumerated item; its relationship to safety conditions or evaluation procedures is tangential at best. The employer need not negotiate over whether training programs will be offered, and thus need not negotiate over the decision to offer a specific training program.

Article 27.3. I concur in the finding that the work assignments of nonunit employees are not negotiable.

I agree with the majority that the following proposals are within the scope of representation under section 3543.2:

Articles 6.1 - 6.5. While I do not agree that these proposals relate to wages and hours, I would find them to be in scope based on their close relationship to grievance procedures.

Article 17.5. This proposal is closely enough related to wages and hours to be included in the scope of representation.

Article 26.3. Whether in-service training takes place during working hours is directly related to the number of hours worked and thus is negotiable.

* * *

I agree with Member Moore that this case is not moot. I also agree with her disavowal of the hearing officer's view that if a proposal is arguably within scope, the district commits an unfair practice by responding with a summary rejection even if PERB later determines that the proposal is nonnegotiable and with her conclusion that there is no duty to negotiate a proposal that PERB finds to be out of scope. It is absurd to find a party guilty of an unfair practice for doing what it had a perfect right to do--refusing to negotiate a nonnegotiable subject.

However, I would note that both parties, pursuant to their duty to negotiate in good faith, must come to the negotiating table with a sincere desire to reach agreement on matters within scope. At the very least, this encompasses a willingness to seek clarification if one does not at first perceive a relationship between a proposal and an enumerated employment condition. Unless a proposal is patently unrelated, a party should be willing to discuss negotiability and to offer the other party an opportunity for explanation or

clarification. This does not mean that one questioning the negotiability of a particular proposal must respond with a substantive counterproposal. But a rigid refusal to respond at all is certainly inconsistent with making an earnest effort to reach agreement.

* * *

In conclusion, it is interesting to compare the proposals that my colleagues have found to be negotiable under section 3543.2 with what would have been negotiable if the Legislature had merely provided for negotiations with respect to wages, hours, and other terms and conditions of employment. I submit that there would be very few differences.

The fact that the EERA includes a specific listing of negotiable subjects has become almost irrelevant; in the present case, the majority rarely found a proposal nonnegotiable on the grounds that it did not relate to an enumerated item. Clearly, the limiting language of section 3543.2 has had little, if any, impact on this Board's negotiability determinations. Despite the Legislature's efforts, the bottom line of the majority's decision is that a broad range of issues may be subject to the bilateral process of negotiations. While this may be desirable in the private sector, I believe that there are additional considerations in

the public sector, such as the public's right to be involved in important policy determinations, which should act to limit the number of negotiable issues. Also, there are differences between the public and private sectors in their respective missions and sources of funding: public agencies perform governmental functions using tax revenues. I have discussed these differences at greater length in previous decisions, including San Mateo, supra, PERB Decision No. 129, and Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7/16/79) PERB Decision No. 96. Once again, however, I express my great concern over my colleagues' seeming insensitivity to the differences between the public and private sectors and their willingness to incorporate private sector standards even in the face of completely different statutory language.

/Raymond/J. Gonzales, Member

REMEDY

Based on the foregoing discussion, we conclude that the Districts unlawfully refused to negotiate with CSEA in violation of section 3543.5(c) as to those negotiating proposals which the majority opines are within the scope of representation as set forth in the EERA.

Specifically, to the extent noted in this decision in the discussion of each Article and the portions thereof, the Districts are required to negotiate as to the following subjects:

Article II.	No Discrimination
Article V.	Organizational Rights
Article VI.	Job Representation
Article X.	Employee Expenses and Materials
Article XVII.	Hiring
Article XIX.	Promotions
Article XX.	Classification, Reclassification, Abolition of Positions
Article XXI.	Layoff and Reemployment
Article XXII.	Disciplinary Action
Article XXIV.	Working Conditions
Article XXVI.	Training
Article XXVII.	Contracting and Bargaining Unit Work

The District's refusal to negotiate violated section 3543.5(b) of the Act by interfering with the exclusive representative's right to negotiate an agreement on behalf of the unit members. As a remedy for these violations, the Districts are Ordered to cease and desist from these unfair practices and to return to the negotiating table and fully participate in the process in good faith.

The Districts shall also be required to sign and post the Notice to Employees as is attached as an appendix to this Decision and Order.

In conformity with the majority view,the unfair practice allegations levied against the Districts with regard to Article XI, Rights of Bargaining Unit upon Change in School Districts, are hereby DISMISSED.

ORDER

Pursuant to section 3541.5(c) and based upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the Public Employment Relations Board hereby ORDERS that the Healdsburg Union High School District and the Healdsburg Union School District shall:

A. CEASE AND DESIST from failing or refusing to meet and negotiate in good faith with the California School Employees Association, the exclusive representative of the classified employees, with regard to: discrimination, organizational rights, job representatives, employee expenses and materials, hiring, promotions, classification, reclassification, abolition of positions, layoff and reemployment, disciplinary action, working conditions, training and contracting and bargaining unit work to the extent this decision has determined them to be within the scope of representation;

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

(1) Meet and negotiate upon request with CSEA with respect to those subjects enumerated above to the extent that we have determined them to be within the scope of representation and as to any other negotiating proposals which CSEA may choose to submit which are within the scope of representation;

(2) Immediately upon receipt of this decision post copies of the attached notice marked "Appendix" in conspicuous places where notices to employees are customarily placed for a period of thirty (30) working days;

(3) Take reasonable steps to insure that said notices are not altered, defaced or covered by any other material; and

(4) Notify the San Francisco regional director of the Public Employment Relations Board in writing within twenty (20) calendar days from the receipt of this decision, of what steps the Districts have taken to comply herewith.

This order shall become effective immediately upon service of a true copy thereof on the Districts.

Per Curiam

Appendix: Notice

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-68 in which all parties had the right to participate, it has been found that the Healdsburg Union High School District and the Healdsburg Union School District violated the Educational Employment Relations Act by failing and refusing to meet and negotiate with the California School Employees Association with respect to negotiating proposals which are within the scope of representation. As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

WE WILL NOT fail or refuse to negotiate in good faith with the California School Employees Association.

By: _____
Superintendent
Healdsburg Union High School District
Dated: _____

By: _____
Superintendent
Healdsburg Union School District
Dated: _____

This is an official notice. It must remain posted for thirty (30) working days and must not be defaced, altered or covered by any material.