STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, CHAPTER 32, Charging Party, v. BELLFLOWER UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5955-E PERB Decision No. 2544 December 15, 2017

Appearance: Law Offices of Eric Bathen by Eric Bathen, Attorney, for Bellflower Unified School District.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Bellflower Unified School District (District) to the proposed decision (attached) of a PERB administrative law judge (ALJ). The proposed decision concluded that the District had acted in derogation of its duty to meet and negotiate in good faith with the California School Employees Association, Chapter 32 (CSEA), which is the exclusive representative of the District's classified employees and to have committed various other unfair practices in violation of the Educational Employment Relations Act (EERA).[1] Specifically, the District was found to have violated EERA section 3543.5, subdivision (c), by: (1) failing and refusing to respond to CSEA's requests for necessary and relevant information regarding the District's plans to contract out work historically performed by the

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

District's bus drivers; (2) laying off all District bus drivers and unilaterally contracting out bargaining unit work historically performed by the District's bus drivers for the regular school year, starting in 2014-2015; and (3) laying off all District bus drivers and unilaterally contracting out bargaining unit work historically performed by the District's bus drivers for the extended school year (i.e., summer school), beginning in 2014. Each of these violations was also found to constitute a violation of EERA section 3543, subdivisions (a) and (b), by interfering with public school employees' right to be represented by their chosen employee organization, and by interfering with CSEA's right to represent employees, respectively.

As a proposed remedy, the ALJ ordered the District to cease and desist from refusing to respond to CSEA's requests for necessary and relevant information, from unilaterally changing policies within the scope of representation, and from interfering with the rights of CSEA to represent employees and the rights of employees to be represented by their chosen representative. The proposed remedy also directed the District to take certain affirmative actions designed to restore the prior status quo. These measures included ordering the District to rescind its contracts for bus services for the regular school year and the extended school year and to cease offering parents $25 to transport students to and from school; to reinstate the District's prior bidding process for assigning bus services; to reinstate and make affected employees whole for any financial losses, until such employees are either reinstated or refuse an offer of reinstatement; and to remit to CSEA the sums equivalent to all dues and agency fees that CSEA would have received, but for the District's unilateral changes in policy. As is customary, the ALJ also ordered that monetary awards be augmented by interest at a rate of 7 percent per annum, and directed the District to post physical and electronic notices advising employees of their rights and of the District's readiness to comply with PERB's order.

The District has filed with the Board itself four exceptions and a supporting brief, which focus primarily on the ALJ's rejection of the District's contract waiver defense. According to the District, if the ALJ had interpreted the collective bargaining agreement (CBA) according to its express terms, he would have concluded that CSEA had waived any right to negotiate over the District's decisions to contract out transportation services and layoff of the District's bus drivers. The District also excepts to the ALJ's conclusion that its decision to pay parents a $25 stipend to transport their special education students in lieu of transportation on District buses constituted a negotiable decision to contract out bargaining unit work, and to the ALJ's proposed remedy. The District argues that, in this regard, the ALJ's reasoning and remedy were contrary to special education law and to the District's asserted rights, under the parties' CBA, to contract for services. In addition to issues raised in its statement of exceptions, the District's supporting brief also excepts to any finding of liability for failure to provide information. The District argues that the information requested by CSEA was either not relevant to negotiations and/or that the District had no obligation to furnish, as it was already publicly available to CSEA.

The Board has reviewed the entire record, the proposed decision, and the District's exceptions and supporting brief in light of applicable law.[2] Based on this review, we find that the ALJ's findings of fact are adequately supported by the record and his conclusions of law are well reasoned and in accordance with applicable law. We hereby adopt the proposed decision as the decision of the Board itself, subject to the following discussion of issues raised in the District's exceptions and supporting brief.

[2] As determined by the Board in *Bellflower Unified School District* (2017) PERB Order No. Ad-447, CSEA's response to the District's exceptions was untimely filed without good cause and was therefore not considered as part of the Board's deliberations for this decision.

DISCUSSION

The District's Waiver-by-Contract Defense

According to the District's exceptions and supporting brief, the District's waiver by contract defense is "the major and dispositive issue in this case." At issue is the meaning of Article XVI of the parties' expired CBA, which provided that the agreement "shall … remain in full force and effect to and including June 30, 2007[3] *or until a successor Agreement is approved by the Board of Education.*" (Emphasis added.) The District reiterates its argument made before the ALJ that, because its governing board never approved a successor agreement, the CBA's management rights clause remained in effect after July 1, 2010. Consequently, according to the District, it was still authorized to act unilaterally in Summer 2014, when it decided to subcontract bus operator services.

The ALJ considered but rejected this argument as inconsistent with the testimony of three members of CSEA's bargaining team and that of Delgado, who had served as the District's chief negotiator for 28 years. In varying degrees of detail, each of these witnesses testified that the CBA had expired in 2010. The ALJ also rejected the District's interpretation of Article XVI as contrary to EERA section 3540.1, subdivision (h), which states that a collective bargaining agreement between a public school employer and the representative of its employees "may be for a period of not to exceed three years." If the CBA remained in effect after 2010, the ALJ reasoned that its duration would have extended beyond the three-year maximum set by EERA. Rather than declare the CBA void as contrary to public policy, the ALJ preferred to

[3] Associate Superintendent of Business and Personnel Services Marcy Delgado (Delgado) explained that the dates in Article XVI were typographical errors and had not been updated from the previous CBA.

interpret Article XVI in a manner consistent with EERA and thereby preserve the agreement to the extent possible.

The District's central argument is that the ALJ erred in finding that the CBA expired in 2010. According to the District, if the ALJ had interpreted the CBA according to its express terms, he would have found that CSEA had waived its right to negotiate over the District's subcontracting decisions and, accordingly, dismissed both the unilateral change allegations and the failure to provide information allegations on relevance grounds. The District also argues that the ALJ's interpretation of Article XVI leads to the absurd conclusion that the parties operated without an agreement for four years between 2010 and 2014. We disagree. As explained in the proposed decision, the record evidence in this case, including the admission of the District's chief negotiator, supports the ALJ's finding that the CBA expired in 2010, and the District has pointed to no persuasive evidence to the contrary. Because uncontradicted, unimpeached testimony is "certainly sufficient to carry the burden of proof in an unfair practice case," we deny the District's exception. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 32, citing *Mt. Diablo Unified School District* (1984) PERB Decision No, 373c, p. 4.)

Alongside its waiver defense, the District also argues that, because the ALJ never advised the parties at the hearing that he considered the language of Article XVI dealing with successor language ambiguous, it was reasonable for the District to assume that this language was valid and enforceable. The District contends that it therefore had no opportunity to offer evidence or argument on this issue. Again, we disagree.

A PERB hearing officer has the power and the duty to "[i]nquire fully into all issues and obtain a complete record upon which the decision can be rendered" and to "[r]ender and serve the proposed decision on each party." (PERB Reg. 32170, subds. (a), (l); *City of Santa Clara*

(2016) PERB Decision No. 2476-M, p. 10.) A hearing officer is not required to advise the parties of which factual disputes or legal issues may determine the outcome of the case, nor to make preliminary factual findings at the hearing itself so that the parties may object or offer additional evidence or argument on the issue.

Regardless of whether the District realized that the ALJ in the present matter considered the language of Article XVI ambiguous, before submitting its brief, it had notice that the Board itself had addressed this issue and, indeed, had resolved it in a manner that was inconsistent with the District's interpretation. In *Bellflower Unified School District* (2015) PERB Decision No. 2455 (*Bellflower*), an unfair practice case involving the same parties and the same agreement, an ALJ found that the parties' CBA had expired on June 30, 2010. Neither party excepted to that finding, and it was adopted by the Board. (*Id*. at p. 3.)[4] *Bellflower* issued on September 30, 2015, one day after the hearing in the present case, but before post-hearing briefs were due and before this matter was submitted for decision by the ALJ. Despite notice of the Board's determination that the parties' CBA had expired on June 30, 2010, the District's briefing before the ALJ and now before the Board make no attempt to explain how the same agreement at issue in *Bellflower* could have expired in 2010 but nonetheless remain in effect in the present case.

The interpretation of a collective bargaining agreement is not simply a factual finding of the sort which the Board or its agents are free to disregard in a subsequent case involving the same language. Because of its significance for governing the parties' ongoing relationship, a Board finding as to the meaning of a contract term is more akin to a question of law, particularly

[4] PERB may take official notice of matters within its own files and records. (*Antelope Valley Community College District* (1979) PERB Decision No. 97, p. 23; see also *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 16.)

where, as here, the question is whether the contract itself is illegal or void for public policy, as declared by the three-year limit for collective bargaining agreements set forth in EERA section 3540.1, subdivision (h). (See, e.g., *Kashani v. Tsann Kuen China Enterprise Co., Ltd.* (2004) 118 Cal.App.4th 531, 540.) Moreover, waiver is an affirmative defense as to which the asserting party has the burdens of production and persuasion. (*Regents of the University of California* (1994) PERB Decision No. 1077-H, adopting proposed decision at p. 35; *Long Beach Community College District* (2003) PERB Decision No. 1568, p. 14; Evid. Code, §§ 500, 550.)

Even if the District's waiver defense had merit, which it does not, under the circumstances, granting this exception would effectively require the Board to disturb the unexcepted-to findings and conclusions in *Bellflower, supra*, PERB Decision No. 2455. Despite notice that the Board had already made a contrary determination as to the meaning of the CBA's duration clause, the District has never requested to reopen the record, to submit additional evidence or briefing, nor in any other manner contested the Board's findings and conclusions in *Bellflower* that the CBA "expired on June 30, 2010." Moreover, as indicated above, the testimony presented in this case further supports a finding that the MOU expired in 2010. In the absence of any explanation or briefing from the District on this issue, or a request for reconsideration showing both extraordinary circumstances and that *Bellflower* included prejudicial errors of fact, we have no grounds to consider the District's waiver defense now. (PERB Reg. 32410, subd. (a); *California Nurses Association (Rosa)* (2011) PERB Decision No. 2182a-M, p. 3.)

Additionally, we reject the District's contention that the ALJ erred in finding the language of Article XVI ambiguous. The language relied on by the District identifies two alternative

possibilities as to the status of the CBA after 2010, and, by itself, the language does not answer the fundamental question posed by the ALJ: whether, in fact, the CBA had expired or whether it remained in effect during the period when the present dispute arose. The ALJ was thus faced with two alternative interpretations of Article XVI. One interpretation, the one chosen by the ALJ, would produce an admittedly unusual, but nevertheless lawful, situation in which parties to a collective bargaining relationship had been without an agreement for more than four years. The other interpretation, the one urged by the District, would result in an agreement whose duration in excess of three years was contrary to public policy as expressed in EERA section 3540.1, subdivision (h), and PERB decisional law. (*County of San Luis Obispo* (2015) PERB Decision No. 2427-M, p. 40, citing *City of Torrance* (2008) PERB Decision No. 1971-M, p. 27 ["calcification of working conditions" contrary to principles of collective bargaining].)[5] We agree with the ALJ that collective bargaining agreements should be interpreted in a manner that preserves as much of the parties' intent as is consistent with applicable law and public policy, and we therefore reject the District's exception.

The District's Exception to the Proposed Remedy

Because the District disagrees with the ALJ's conclusion that its decision to pay parents a stipend to transport special education students to school in lieu of using District bus services

[5] Under the circumstances, we find it unnecessary to consider whether a labor agreement whose life exceeds three years is void in its entirety (Civ. Code, §§ 1441, 1608, 1667), or whether, similar to federal law and other PERB-administered statutes, labor contracts of indeterminate duration or ones that do not provide for a manner for termination are terminable at will by either party. (See, e.g., *City of El Cajon v. El Cajon Police Officers' Assn.* (1996) 49 Cal.App.4th 64, 72-73, and state and federal authorities cited therein; see also *Kashani v. Tsann Kuen China Enterprise Co., supra,* 118 Cal.App.4th 531, 541.)

was negotiable, the District likewise excepts to the proposed remedy as excessive.[6] The District asserts that the remedy effectively "require[s] the District to tell the special education parents they cannot transport their own children to school." (District Brief, p. 13.) We reject this assertion because it mischaracterizes the proposed decision, which states: "Nothing in this proposed decision precludes parents from voluntarily transporting their own children to and from school." (Proposed Decision, p. 41, fn. 22.)

The District's contention that the proposed remedy is contrary to special education law, as codified in the federal Individuals with Disabilities Education Act (IDEA),[7] is also without merit. Under PERB's "supersession" line of cases, which enjoys the approval of the California Supreme Court, when otherwise negotiable matters are also regulated by external law, proposals affecting such matters remain negotiable to the extent there is no conflict with any "inflexible standard[s]" or "immutable provisions" set by the external law. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865; *San Mateo City School District* (1984) PERB Decision No. 375, pp. 6-7; *Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 6, 8.) Similarly, the Board and its agents have broad authority to investigate, adjudicate and remedy unfair practice allegations, as the Board deems necessary to effectuate the policies and purposes of the Act. (EERA, § 3541.3, subds. (i), (k), (n); *Local 21, International Federation of Professional and Technical*

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[6] For reasons adequately set forth in the proposed decision, we reject the District's contention that its decision to pay parents a stipend to transport special education students in lieu of transportation on District buses was a non-negotiable managerial prerogative. Parents are certainly entitled to transport their students, but the District's offer of compensation in the form of a stipend brings this case within the ambit of *Fibreboard Corp. v. NLRB* (1964) 379 U.S. 203 and similar PERB subcontracting cases. (See, e.g., *Lucia Mar Unified School District* (2001) PERB Decision No. 1440; *Redwoods Community College District* (1997) PERB Decision No. 1242, proposed decision at p. 22.)

[7] IDEA is codified at 20 U.S.C. section 1400 et seq.

Engineers, AFL-CIO v. Bunch (1995) 40 Cal.App.4th 670, 679; *California State Employees' Assn. v. Public Employment Relations Bd*. (1996) 51 Cal.App.4th 923, 946.) In addition to reinstatement and back pay, the Board has broad discretion to take other actions necessary to reverse the effects of unfair practices and restore the parties to their respective positions before the unlawful conduct occurred (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1310, review den. (Mar. 15, 2017); *City of Pasadena* (2014) PERB Order No. Ad-406-M, pp. 12-13;), and a reviewing court will not disturb a Board-ordered remedy "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." (*Santa Monica Community College Dist. v. Public Employment Relations Bd*. (1980) 112 Cal.App.3d 684; *J.R. Norton Co. v. Agricultural Labor Relations Bd*. (1987) 192 Cal.App.3d 874.) Unless a remedial measure positively conflicts with "inflexible standard[s]" or "immutable provisions" set by external law, the fact that it affects matters normally within the jurisdiction of another tribunal does not, by itself, make PERB's remedy improper. (*United Teachers of Los Angeles v. Los Angeles Unified School Dist.* (2012) 54 Cal.4th 504, 513–514; *McFarland Unified School District v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166, 169-170; *State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, p. 8; see also *San Diego Unified School District* (1980) PERB Decision No. 137, pp. 20-21.)

Here, the District's statement of exceptions and supporting brief include no citation to any provision of IDEA nor to any decisional law interpreting it. Nor does the District explain how the proposed remedy in this case would conflict with IDEA. The District's filing thus fails to comply with the requirements of PERB's Regulation governing exceptions, and we

therefore consider the issue abandoned and warranting no further consideration. (PERB Reg. 32300, subds. (a), (c); *City of Livermore* (2017) PERB Decision No. 2525-M, pp. 11-12.)[8]

Exceptions Concerning the Relevance and Availability of Information Requested by CSEA

In addition to the four issues identified in its statement of exceptions, the District's supporting brief also argues that the ALJ erred in finding that the District unlawfully failed to provide requested information. Reiterating arguments it made before the ALJ, the District contends that the requested information was not relevant and/or that it was equally available to CSEA through public documents, including published agendas and minutes of school board meetings. Although the Board's review of exceptions to a proposed decision is de novo, it need not address arguments that have already been adequately addressed in the same case or that would not affect the result. (*Trustees of the California State University (Culwell)* (2014) PERB Decision No. 2400-H, pp. 2-3; *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, pp. 4-5; *Morgan Hill Unified School District* (1995) PERB Decision No. 1120, p. 3.) Because we adopt the proposed decision, which included no fewer than three reasons addressing both of these contentions (see Proposed Decision, pp. 14-16), they warrant no further discussion here.

The District's Request for Oral Argument

Concurrent with its exceptions and supporting brief, the District has requested oral argument pursuant to PERB Regulation 32315. Historically, the Board has denied requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*United Teachers of Los Angeles (Valadez, et al.)* (2001) PERB Decision No. 1453, p. 5; *City of Modesto* (2008) PERB Decision

[8] PERB Regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

No. 1994-M, pp. 8-9.) Based on our review of the record, all of the above criteria are met in this case and the Board therefore denies the District's request for oral argument.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Bellflower Unified School District (District) is found to have violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c). The District violated EERA by refusing to provide California School Employees Association, Chapter 32 (CSEA), with requested information necessary and relevant to representing its members and by unilaterally contracting out bus driver work and laying off all its bus drivers in Summer 2014. All other claims are hereby dismissed.

Pursuant to EERA section 3541.5, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to properly respond to CSEA's requests for information necessary and relevant to its representational duties.

2. Unilaterally implementing policies within the scope of representation.

3. Interfering with employees' right to be represented by their chosen employee organization.

4. Interfering with the right of CSEA to represent its members.

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

1. As soon as is practical, but not later than the end of the school year in which this decision and order becomes final, rescind its contract for bus driver services to transport students to and from school during the regular school year.

2. Upon completion of (B)(1), offer reinstatement to all bus drivers laid off in or around June 27, 2014.

3. Make whole for any financial losses suffered, including wages, benefit and extra hours wages, all laid off bus drivers until they are either reinstated or refuse an offer of reinstatement. These amounts should be augmented by interest at a rate of 7 percent per annum.

4. Remit to CSEA the sum equivalent of any dues or agency fees that CSEA would have received if the District did not unlawfully layoff its bus drivers until each laid off bus driver is either reinstated or refuses an offer of reinstatement. These amounts should be augmented by interest at a rate of 7 percent per annum.

5. As soon as is practical, rescind the private contract for bus services to transport students to and from District schools during the Extended School Year and cease offering parents $25 to transport their own students to and from school during the Extended School Year.

6. Upon completion of (B)(5), reinstitute the bidding process used to assign Extended School Year work to District bus drivers.

7. Make whole for any financial losses any bus driver who lost Extended School Year bus driving work, during the 2014 Extended School Year and every subsequent Extended School Year, until the bidding assignment process is reinstated. These amounts should be augmented by interest at a rate of 7 percent per annum.

8. Remit to CSEA the sum equivalent of any dues or agency fees that CSEA would have received if the District did not unilaterally assign Extended School Year bus driver work to outside sources, until it reinstitutes the Extended School Year bidding assignment process. These amounts should be augmented by interest at a rate of 7 percent per annum.

9. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in CSEA customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with employees in CSEA's bargaining unit. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

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

Chair Gregersen and Member Winslow joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, & ITS CHAPTER 32, Charging Party, v. BELLFLOWER UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5955-E PROPOSED DECISION (February 29, 2016)

Appearances: Brian Lawler, Labor Relations Representative, for California School Employees Association, and its Chapter 32; Law Offices of Eric Bathen, by Eric Bathen and Marsha P. Brady, Attorneys, for Bellflower Unified School District.

Before Eric J. Cu, Administrative Law Judge.

In this case, an exclusive representative claims that a public school employer violated its duty to negotiate in good faith when contracting out bargaining unit work, laying off unit members, and failing to respond to requests for information. The employer denies any violations.

PROCEDURAL HISTORY

California School Employees Association, and its Chapter 32 (CSEA) filed the instant unfair practice charge with Public Employment Relations Board (PERB or Board) on August 22, 2014. CSEA asserted that the Bellflower Unified School District (District) violated its duty to negotiate in good faith under Educational Employment Relations Act (EERA),[1] by unilaterally contracting out bus driver work to private companies and to District parents.

[1] EERA is codified at Government Code section 3540 et seq.

CSEA further asserted that the District failed to respond to requests for information about the Transportation Department and private transportation contracts.

On November 10, 2014, the PERB Office of the General Counsel issued a complaint alleging violations of EERA section 3543.5, subdivisions (a), (b), and (c). On December 1, 2014, the District filed its answer to the PERB complaint, denying the substantive allegations and asserting multiple affirmative defenses. PERB held an informal settlement conference on February 19, 2015, but the matter did not settle. PERB held the formal hearing on September 28-29, 2015. The parties filed closing briefs on December 11, 2015. At that point, the record was closed and the matter was considered submitted for decision.

FINDINGS OF FACT

The Parties

The District is a "public school employer" within the meaning of EERA section 3540.1, subdivision (k). CSEA is an "exclusive representative" within the meaning of EERA section 3540.1, subdivision (e), and represents the District's classified bargaining unit. Prior to Summer 2014, the bargaining unit included bus drivers.

The Expired Collective Bargaining Agreement

The most recent Collective Bargaining Agreement (CBA) between the parties during the times relevant to this case was negotiated in 2007 remained in effect until June 2010. Article XVI of that CBA contained a "DURATION AND RENEGOTIATION," provision stating in pertinent part "This Agreement shall become effective July 1, 2004 and remain in full force and effect to and including June 30, 2007 or until a successor Agreement is approved by the Board of Education." That language conflicts with the cover page of the CBA which states an effective term of "July 1, 2007 – June 30, 2010." Associate Superintendent of

Business and Personnel Services Marcy Delgado explained that the dates in Article XVI were typographical errors and had not been updated from the prior iteration of the CBA. Delgado has been the District's chief negotiator for 28 years. As to the expiration date of the CBA, three members of CSEA's bargaining team testified that the CBA had expired in 2010. Delgado agreed, testifying as follows:

> [QUESTION]: I think this contract was effective July 1st, 2007, until June 30th, 2010.
>
> [DELGADO]: I believe so, yeah.

Article III, Section A, contains a "RETAINED DISTRICT RIGHTS" clause, listing 13 enumerated items over which the District retained "the exclusive right and power to determine, implement, supplement, change, modify or discontinue, in whole or in part, temporarily or permanently[,]" including "the lawful subcontracting of services to be rendered and functions to be performed, including services, subject to the consultation rights of CSEA under Article XV, Miscellaneous."

Article XV, Section A includes a "Contracting Out" provision, stating:

> In the event that the District contemplates the contracting out of work which has been performed by unit members, and thereby adversely affecting the hours or continued employment of current unit members, it shall give notice to the Association and upon request meet and consult regarding the decision and its effects, and give good faith consideration to the Association's objectives, if any. In the absence of an emergency need, such notice shall be given not less than 45 days prior to the Board action.

The Transportation Department

Prior to Summer 2014, the District's Transportation Department employed both mechanics and bus drivers. The primary job of bus drivers was, naturally, to transport students to and from schools using District buses. Most of the students requiring District transportation

services also use special education services. Accordingly, the location of those students largely determines the Transportation Department's 11 bus routes. At one point, the District employed as many as 17 bus drivers. But more recently, the District had 11 regular drivers and 2 substitutes.

Mechanics' primary job was to maintain the school buses and other District vehicles. This work also included ensuring that the buses were ready for State-required inspections. In addition, mechanics were sometimes called upon to drive buses when drivers were absent and there was insufficient drivers to cover all the routes.

The District's History of Using Outside Transportation Services

The District occasionally used a private bus company, Ryan's Express Transportation, to transport students to events that could not be completed by District drivers. This occurred either when District drivers were unavailable or when the circumstances of the trip required a fuller-featured bus. For example, Delgado said that the District used air-conditioned and well-cushioned buses for a student-athletics trip to Sacramento that would have been less comfortable in a District school bus. There was no evidence that this practice changed at any time relevant to this case.

During the District's Summer school program, called the Extended School Year (ESY), the District historically reimbursed mileage expenses for parents of students using special education services when transporting their own students to school in lieu of District transportation services.[2] According to Assistant Superintendent of Special Education and Support, Tracy McSparren, this practice was advantageous for the District because the District

[2] At the times relevant to this case, the only students requiring special education services used District transportation during the ESY.

could avoid any financial responsibility for ensuring the student arrived on time. She said that if District-provided transportation was late, then the District would be responsible for making up the costs of educational services lost during that time by either by paying a District teacher additional hours for delivering extra instruction to the student or by reimbursing parents to receive special education services from another facility. In recent years, fewer parents were willing to take part in the mileage reimbursement program.

The February 27, 2014 Notice

On February 27, 2014, the parties' bargaining teams met to negotiate a successor to the expired CBA. During that meeting, Delgado, delivered a document stating in its entirety:

NOTICE

Bellflower Unified School District

To

CSEA

Article XV

MISCELLANEOUS
Contracting Out, Transportation

> The District is considering contacting out transportation services for the 2014-2015 school year.
>
> Since the consideration of contracting out transportation services may have an adverse impact on the hours and/or continued employment of current unit members, the District is providing the Association with the required 45-day notice.
>
> If the Association exercises its right to meet and consult, the District proposes that this take place at the next scheduled bargaining session. At that time, the District will give good faith consideration to the Association's objectives if any.

No one from the District informed CSEA that it had finalized any decision to either use contractors for transportation services or to lay off and unit members working in transportation. Indeed, no recommendation had been made to the District's governing board and no official governing board action had been agendized or taken. The parties did not discuss the District's reference to Article XV of the expired CBA and did not discuss what would happen after the referenced 45-day period elapsed. Nor did the parties discuss the District's student transportation plans for the 2014 ESY scheduled to take place between the 2013-2014 and the 2014-2015 school years.

During the discussion, Delgado stated the District was interested in using contractors for bus driving services due to concerns over District drivers' excessive absences and timecard "padding," presumably, artificially inflating the number of hours worked. CSEA's chief negotiator, Donald Lockwood, asserted that driver misconduct should be handled using existing discipline procedures.[3] Delgado responded that the District lacked the resources to "run around checking on people who should be doing their job." CSEA requested proof of any excessive absenteeism or timecard padding. The District responded that it would provide the requested information, but it never did so.

Over the following months, the parties continued discussing transportation issues during ongoing successor CBA negotiations. In around March 2014, Delgado informed CSEA's negotiating team that the District was considering contracting with Hemet Unified School District (Hemet USD) for bus driving services because Hemet USD provided driving services for other school districts and had a good reputation. At hearing, Delgado testified that Lockwood asked for anticipated costs relating to the District's contracting plans. According to

[3] Lockwood did not testify.

Delgado, Lockwood said "how could we give you a proposal unless we know what it [would] cost?" Delgado responded by stating that CSEA's costs requests were premature because the District had not yet finalized its contracting plans.

In around early April 2014, CSEA requested a meeting between the bus drivers and Delgado to suggest alternatives to the District's contemplated contracting plans. Delgado agreed but CSEA cancelled the meeting and it was never rescheduled. Instead, on or around April 10, 2014, CSEA President Diane St. Clair committed to meeting with the bus drivers and providing a proposal during ongoing successor negotiations. Among the suggestions eventually discussed during this period were to redesign the District's driving routes; add new routes; install tracking equipment to monitor employee activity; and to have drivers perform additional job duties, such as washing buses, to reduce the need for the District to pay for those services elsewhere. The District opposed the idea of investing additional resources to, in Delgado's words "protect [bus drivers] from themselves. They ought to be doing their jobs."

The May 1, 2014 Meeting

During a bargaining session on May 1, 2014, Delgado informed CSEA's negotiating team that 45 days had passed and that the District intended on contracting out bus driver work for the 2014-2015 school year. He also said that the District would begin using contractors during the 2014 ESY as a "trial" for the 2014-2015 school year.[4] Finally, Delgado explained that the District would offer parents $25 per day to transport their own children to and from

[4] CSEA disputes that the District discussed contracting for the 2014-2015 school year during the meeting. The District's version of events is credited here. Delgado testified confidently about the what occurred at the May 1, 2014 meeting and was able to recall specific events with clarity. His account was also supported by other witnesses and by the bargaining notes of another District negotiating team member.

school during the ESY. Delgado stated that this decision was non-negotiable. CSEA did not immediately respond to the District's statements. Layoffs were not discussed.

On May 15, 2014, Lockwood sent Delgado a pair of letters with the subject line "Cease and Desist." In one letter, Lockwood demanded that the District cease its unilateral decision to use contractors for transporting students during the 2014 ESY asserting that CSEA had no notice of those plans. In the second letter, Lockwood demanded that the District cease its plans to offer parents $25 for transporting students to and from school during the 2014 ESY. The District did not respond directly to either letter.

On or around May 21, 2014, the District entered into a contract with American Logistics Company, LLC, to transport District students to and from school during the 2014 ESY (American Logistics Contract). Around the same time, the District revised the forms sent to parents about the ESY. The revisions include adding the following:

> **Transportation (Initial One)**
> ***If my student is eligible for transportation**
>
> __ I want to transport my own child to and from school for the Extended School Year session and be paid $25 per child per day of actual attendance. A copy of my current car insurance is attached.
>
> __ I want my child to use District provided transportation to and from school for the Extended School Year session.

Delgado explained that the District did a cost analysis and determined that it cost the District between $35 and $50 per student for transportation. The District determined that offering parents $25 would result in substantial savings. McSparren said that the District paid parents the money owed upon confirmation that the student at issue attended school that day. The District's goal was to eliminate the need for District bus drivers during the ESY.

Around the same time, the District finalized its agreement with Hemet USD for an "AGREEMENT FOR PUPIL TRANSPORTATION SERVICES" (the Hemet Contract). Under the terms of the agreement, the District paid Hemet USD approximately $1 million per year to service 12 regular bus routes and 1 special route and transport District students to and from District schools. The Hemet Contract was effective starting in the 2014-2015 school year. Delgado testified about the Hemet Contract as follows:

> [QUESTION] So, Hemet performed in 2014-'15 the work that bus drivers had performed in previous years.
>
> [DELGADO] Correct.
>
> [QUESTION] And is Hemet still performing those services?
>
> [DELGADO] They are.

In addition, Hemet USD agreed to reimburse the District for approximately $175,000 annually for using District buses for the transportation services in the contract, for maintaining those buses, and for maintaining certain of Hemet USD's own buses. The District's governing board approved the Hemet Contract and the American Logistics Contract at the same meeting on June 12, 2014.

Transportation During the 2014 ESY

The District did use American Logistics Company, LLC, to transport students to and from school during the 2014 ESY. It also began paying parents $25 per day to transport their own children. The District paid parents around $24,000 under that program. No CSEA unit member provided transportation services during the 2014 ESY. Both programs continued in subsequent Summers.

CSEA's June 23, 2014 Proposal

On June 23, 2014, CSEA presented a counterproposal to the District's then-pending offer concerning both successor negotiations and settlement talks for a pending unfair practice charge. As relevant to this case, CSEA's proposal included the following item:

> The District shall not contract out classified work for all classifications within the bargaining unit, including transportation and summer work during the term of the contract.

CSEA's proposal included an effective term of July 1, 2014, until June 30, 2017. The District did not agree to the proposal and the contract negotiations ultimately reached impasse.

The Bus Driver Layoffs

On June 27, 2014, the District notified all of its bus drivers that they were being laid off, effective August 27, 2014. St. Clair learned of the layoff directly from bus drivers. Those layoffs were later officially approved by the District's governing board at a public meeting. St. Clair attended the meeting along with some bus drivers. Several drivers appealed that decision, but the District's Personnel Commission denied those appeals.

The Parties' Subsequent Communications

On July 10, 2014, in an e-mail to Delgado entitled "Transportation," St. Clair demanded negotiations over the District's decision to use "a non bargaining unit group to perform work that has been traditionally performed by members of the bargaining unit." She further stated that "CSEA proposes that the District cease and desist from using the non bargaining group and offer the summer work to the bargaining unit members."

On July 29, 2014, St. Clair e-mailed District counsel Eric Bathen protesting the District's decision to enter into the American Logistics Contract for ESY transportation work. She demanded that the District return that work to District bus drivers for the remainder of the

Summer. Bathen responded that day asserting that the District had the authority to contract out bargaining unit work without negotiations subject only to the notice provisions in Article XV, Section A, of the expired CBA. He then stated that, if CSEA sought to negotiate over the impacts of the District's contracting decision, that St. Clair should identify the asserted impacts and provide the District with a proposal.

On August 5, 2015, Lockwood sent District Superintendent Brian Jacobs a letter demanding that "the District cease and desist from actions taken by the District on June 27, 2014, to layoff all 11 Bus Driver positions and that the District meet and negotiate both the decision and the effects of contracting-out transportation services." The parties stipulated that Jacobs received the letter on or around the time it was sent. That same day Lockwood sent a written request for information to Delgado about whether the District had contracted with any entities for transportation services. CSEA requested that the District identify the companies hired, the bidding process used, if any, any projected savings from the contract(s), the wages and benefits paid by the contractors, the legality of the contracts under the Education Code, the reasoning behind the contracting decision(s), whether unit members were displaced by the contract(s), the qualifications of the contractor(s) employees, and the expected economic benefit of the contract(s). There is no evidence that the District responded to either letter.

On August 8, 2014, CSEA representative Jason Ter Keurst sent the District another information request, largely reiterating the request made three days earlier.[5] Ter Keurst added a request for the American Logistics Contract and the Hemet Contract. On August 12, 2014, Bathen sent CSEA a copy of the Hemet Contract, along with documents indicating that the

[5] Ter Keurst was Lockwood's supervisor at CSEA and became involved in the negotiations with the District in June 2014.

District's governing board approved the Hemet Contract, the American Logistics Contract, and a transportation contract with Ryan's Express. There is no evidence that either party communicated further regarding this information request.

In or around August 2014, Ter Keurst and Delgado had been corresponding via e-mail over the successor negotiations and the layoff of District bus drivers. On August 12, 2014, Delgado stated the District's willingness to bargain over the negotiable impacts of its decision to lay off its bus drivers. Ter Keurst replied the next day, stating that because the layoff decision was made in conjunction with its decision to contract out bus driving services, CSEA believed that both the decision and the impacts of the layoff were negotiable. Ter Keurst inquired as to whether the District was willing to negotiate over both. There is no record of Delgado's response to Ter Keurst's e-mail, but it was generally understood that the District consistently maintained that only the effects of the layoff decision was negotiable.

The Successor Agreement

On October 1, 2014, the parties reached a tentative agreement in both their successor CBA negotiations and their settlement negotiations in PERB case numbers LA-CE-1509-E and LA-CE-5707-E. Relevant to this case is the fact that the tentative agreement did not change the language in either Article III (Retained District Rights) or Article XV, Section A (Contracting Out). The tentative agreement also did not include CSEA's earlier proposal that the District not contract out any bargaining unit work for the duration of the contract. The term of the contract was October 1, 2014, through September 30, 2017, with reopeners limited to health care providers and other items by mutual agreement. It is undisputed that both parties ratified and/or approved the tentative agreement.

ISSUES

1. Did the District violate the duty to negotiate in good faith by failing to respond to CSEA's information requests made on either: (a) February 27, 2014, or (b) August 8, 2014?

2. Did the District violate the duty to negotiate in good faith by unilaterally changing any existing policy either by: (a) laying off all bus drivers and subcontracting all bus driver work for the regular school year, starting in 2014-2015; or (b) subcontracting all bus driver work during the ESY, starting in 2014?

CONCLUSIONS OF LAW

1. The Information Request Allegations

CSEA accuses Bellflower of failing or refusing to respond to two requests for information during the course of negotiations. EERA entitles exclusive representatives to all information "necessary and relevant" to the discharge of their duty of representation. (*Santa Monica Community College District* (2012) PERB Decision No. 2303 (*Santa Monica CCD*), proposed dec., p. 6, citing *Stockton Unified School District* (1980) PERB Decision No. 143 (*Stockton USD*).) Failure to provide such information upon request is a breach of the duty to bargain in good faith and violates EERA sections 3543.5, subdivisions (a), (b), and (c). (*Santa Monica CCD*, p. 3; *Compton Community College District* (1990) PERB Decision No. 790, p. 6.) PERB uses a liberal standard, similar to a discovery-type standard, to determine relevance of requested information. (*Santa Monica CCD*, proposed dec., p. 6, citing *Trustees of the California State University* (1987) PERB Decision No. 613-H.) Requests for information relating to issues within the scope of representation are considered presumptively relevant. (*Saddleback Valley Unified School District* (2013) PERB Decision No. 2333

(*Saddleback Valley USD*), proposed dec., p. 22, citing *Ventura County Community College District* (1999) PERB Decision No. 1340.)

An employer's duty to furnish otherwise "relevant and necessary" may be fully or partially excused under certain circumstances, such as where production will impose burdensome costs on the employer, or the release will compromise employee privacy rights. (*Los Rios Community College District* (1988) PERB Decision No. 670, p. 13 (*Los Rios CCD*); *Modesto City Schools and High School District* (1985) PERB Decision No. 479, p. 11.) However, the employer must explain why it will not comply and has the burden of establishing that production is inappropriate under the circumstances. (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270, pp. 69-70 (*San Bernardino City USD*), citing *Stockton USD*, *supra*, PERB Decision No. 143; *NLRB v. Borden* (1st Cir. 1979) 600 F.2d 313; *The Kroger Co*. (1976) 226 NLRB 512.) If the employer affirmatively asserts its concerns, then both parties must bargain in good faith to ameliorate those concerns. (See, e.g., *Los Rios CCD*, *supra*, PERB Decision No. 670, pp. 10-12 [employer bargained in good faith by offering to delete social security numbers from requested document].) An employer may not simply ignore a union's information request. (*Saddleback Valley USD*, *supra*, PERB Decision No. 2333, proposed dec., 21-22, citing *Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista CSD*); see also *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, partial dismissal, p. 6 (*LA Superior Court*).)

a. The February 27, 2014 Information Request

In this case, the District acknowledges never responding to the February 27, 2014 request but asserts that CSEA failed to prove that the requested information is necessary and relevant to the representation of the bargaining unit. I find this argument unpersuasive for at

least three reasons. First, CSEA's information request for the District's records of excessive bus driver absenteeism, incorrect timekeeping, and other misconduct was made in direct response to the District's own assertions about inefficiency and cost overruns in the transportation department. CSEA only sought those documents to test the veracity of the District's claims regarding the need to subcontract bus driver work. CSEA's request was made contemporaneous to the District's own invitation to meet and consult over the matter. The requested information is plainly relevant to that discussion and, under the circumstances, I find that the District's assertions to the contrary lack sincerity.

Second, CSEA's request touches upon several negotiable subjects. EERA section 3543.2, subdivision (a)(1), expressly includes both hours and leave policies as within the scope of representation. Accordingly, CSEA's request for information relating to alleged misreporting of time and leave abuse involves presumptively relevant matters. Likewise, CSEA's request for employee discipline records concerns matters within the scope of representation. (See *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, pp. 12-13 (*Fairfield-Suisun USD*), citing *San Bernardino City USD*, *supra*, PERB Decision No. 1270, *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, *San Bernardino City Unified School District* (1982) PERB Decision No. 255.) Thus, an employer's duty to furnish information includes the obligation to provide records of disciplined employees where those records have a representational purpose. (*Mt. San Antonio Community College District* (1982) PERB Decision No. 224, pp. 10-11.) Therefore, the District was required to respond to the request for presumptively relevant information.

Third, even if the District had legitimate questions about the relevancy of the information requested, it was still not privileged to simply ignore CSEA's request entirely. In *Chula Vista CSD, supra*, PERB Decision No. 834, the Board held that an employer who disagrees with the relevancy of requested information was obligated to raise those issues to the union in a timely manner. (*Id*. at p. 53.) The District failed to do so in this case. Instead, the District acknowledges receiving the request, stated it would respond, and then failed to do so. This conduct violates EERA section 3543.5, subdivision (c), with derivative violations of subdivision (a) and (b). (*Santa Monica CCD, supra*, PERB Decision No. 2303, p. 3.)

b. The August 8, 2014 Information Request

CSEA also alleges that the District refused to respond to its August 8, 2014 request regarding the District's private transportation contracts. The record shows that the District did respond to this request on August 12, 2014. The question here, therefore, is whether the District's response violated the duty to negotiate in good faith. PERB generally finds no violation where the employer responds, at least partially, to an information request and the union fails to either communicate its dissatisfaction with the response, clarify the information needed, or reassert its request. (*LA Superior Court, supra*, PERB Decision No. 2112-I, partial dismissal, p. 6, citing *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2013-S, *State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Decision No. 1227-S, *Oakland Unified School District* (1983) PERB Decision No. 367; but see *Los Angeles Unified School District* (2015) PERB Decision No. 2438,[6] pp. 16-18 [finding no requirement to reassert an information request where the parties discussed the appropriate response beforehand and the union raised its "unequivocal

[6] Appeal pending, July 24, 2015 B265626.

objection" to the response contemplated by the employer].) In *Trustees of the California State University* (2004) PERB Decision No. 1732-H, a union requested information relating to the representation of a unit member seeking reinstatement to her prior position. (*Id.* at pp. 2-3.) The union's request included seven separate items, but the employer only responded to five of those items. There was no further contact between the parties about the request. The Board dismissed the union's information request claim, reasoning that "the lack of reassertion for information not provided in the response from [the employer] creates a situation where there is no violation." (*Id*. at. pp. 6-7.)

In the present case, the District responded to CSEA's information request within four days, providing a copy of the Hemet Contract as well as other information about other contracts. Although this complied with only a portion of CSEA's lengthy information request, CSEA never expressed its dissatisfaction with the response, reasserted the request, or clarified that it sought additional or different records. Nor is this the case where the parties had already discussed the request and where CSEA clearly objected to the District's planned response beforehand. Based on these facts, this allegations does not demonstrate a violation of the duty to bargain in good faith and it is therefore dismissed.

2. The Unilateral Change Allegations

CSEA maintains that the District's decision to offer or assign transportation work to non-unit members starting in the 2014 ESY and in the 2014-2015 school year were unilateral policy changes. Unilateral changes violate the duty to bargain in good faith where: (i) the employer took action to change existing policy; (ii) the policy change concerned a matter within the scope of representation; (iii) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (iv) the change has a

generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun USD, supra*, PERB Decision No. 2262, p. 9, citing *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5.) The allegations concerning the 2014 ESY and the 2014-2015 school year will each be discussed separately below.

a. Contracting Out Bus Driver Work During the 2014-2015 School Year

CSEA alleges a unilateral change when the District laid off all its bus drivers and concurrently entered into the Hemet Contract for all or most of its bus driving services starting in the 2014-2015 school year.[7]

i. Alleged Policy Change

The record shows that prior to entering into the Hemet Contract, District bus drivers performed the large majority of all work involving transporting students to and from District schools during the regular school year. Starting in the 2014-2015 school year, all District bus drivers were laid off and Hemet USD drivers transported District students to and from school. Delgado unequivocally confirmed these facts during his testimony. This satisfies the first element of the unilateral change analysis.

ii. Scope of Representation

The District is correct that not all subcontracting decisions are subject to negotiations. This is because some contracting decisions "lie at the core of entrepreneurial control or change the nature and direction of an operation [and are therefore] not automatically subject to

[7] To the extent that CSEA also asserts that the District contracted out unit member work through its Ryan's Express Transportation contracts, those claims are rejected as lacking proof. Delgado explained that the District used Ryan's Express mainly for trips that could not be done by District drivers and/or buses. There was no evidence that the District used Ryan's Express to perform work normally done by the bargaining unit.

collective bargaining even though such decisions may well impact employment security." (*Oakland Unified School District* (2005) PERB Decision No. 1770, proposed dec., pp. 25-26 (*Oakland USD*), citing *Fibreboard Corp. v. NLRB* (1964) 379 U.S. 203, p. 223; *Stanislaus County Department of Education* (1985) PERB Decision No. 556.) The Board has identified two instances where an employer's contracting decision is negotiable:

> (1) where the employer simply replaces its employees with those of a contractor to perform the same services under similar circumstances; or (2) where the decision was motivated substantially by potential savings in labor costs.

(*State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S, p. 6 (*Veterans Affairs*), citing *Lucia Mar Unified School District* (2001) PERB Decision No. 1440 (*Lucia Mar USD*); *Oakland USD*, pp. 25-27; *Redwoods Community College District* (1997) PERB Decision No. 1242, proposed dec., p. 22.) In addition, "when layoffs result from a decision to contract out bargaining unit work, 'the decision to subcontract and layoff employees is subject to bargaining.'" (*Id.*, citing *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, p. 621.) Using these definitions, the District's decision to lay off all its bus drivers and then continue providing substantially similar bus services to its students via a private contractor falls under the scope of representation.

The District also acknowledges that cost savings was its primary reason for moving away from using its own bus drivers for transportation work. Delgado explained that "expenses were getting out of control" in the transportation department, and that the District thought that could provide more effective and cost-efficient transportation services through private contractors. McSparren, another member of the District's negotiating team, echoed that sentiment, stating that whenever a District bus was late and students lost special education services, the District was required to pay to recoup those services.

The District maintains that the contracting decisions here were non-negotiable service level changes part of its managerial prerogative because its own bus drivers were ineffective. PERB rejected a nearly identical argument in *Oakland USD, supra*, PERB Decision No. 1770. In that case, the employer argued that it subcontracted police services to the local police force after concluding that its own officers provided insufficient coverage after school and during weekends. PERB concluded that those issues could potentially be addressed through negotiations, such by bargaining over shifts and wages during the times in question. (*Id*. at proposed dec., pp. 29-30.); see also *Long Beach Community College District* (2008) PERB Decision No. 1941, pp. 13-14 (*Long Beach CCD*) [holding that employer's decision to contract with local police department to perform the same basic services was not a "fundamental change" in operations].) I reach the same conclusions here as well. The District's concerns about bus driver efficiency and services levels could have been addressed through negotiations. In fact, CSEA offered solutions to the District at the negotiating table that could have addressed the District's efficiency concerns. Thus, I decline to find that the contracting decisions here were made for a non-negotiable change in service level.[8]

iii. Notice and Opportunity to Request Negotiations

The next issue is whether the District provided CSEA with adequate notice and the chance to request bargaining before subcontracting all of its bus driver work, starting in the 2014-2105 school year. This element is satisfied where the respondent fails to provide

[8] The Hemet Contract was not merely one where the District agreed to compensate Hemet USD in exchange for providing bus driving services. In addition, Hemet USD also compensates the District for bus maintenance. I decline to conclude that this fact renders the District's decision to replace its own drivers with Hemet USD's a non-negotiable service-level change. Both before and after the Hemet Contract, the District still offered a similar level of bus transportation services to approximately the same number of students. The main change in that regard effectuated by the Hemet Contract was the personnel who performed those services.

reasonable advance notice and opportunity for bargaining before reaching a firm decision to enact a negotiable policy change. (*City of Sacramento* (2013) PERB Decision No. 2351-M, p. 28, citing *PERB v. Modesto City Schools* (1982) 136 Cal.App.3d 881, p. 900; *Trustees of the California State University* (2012) PERB Decision No. 2287-H, pp. 10-11.) The District maintains that it informed CSEA of its intent to contract out bus driver work through the February 27, 2014 Notice. That document stated that the District was "considering" contracting out transportation work in a way that could impact CSEA's unit. Pursuant to Article XV, Section A of the expired CBA, the District gave CSEA 45 days from which to "meet and consult" over the matter before the District finalized its contracting out plans. The District now contends that, because CSEA never made a formal demand to bargain, the District was entitled to move forward with its subcontracting plans. It argues, essentially, that CSEA has waived any right to negotiate over the decision to contract out bus driver work by its silence.

An exclusive representative may waive its right to bargain over an issue "where the employer shows that the exclusive representative failed to demand to negotiate, despite having received sufficient notice of the proposed change." (*West Covina Unified School District* (1993) PERB Decision No. 973, pp. 13-14, citing *Cloverdale Unified School District* (1991) PERB Decision No. 911.) However, "[s]ilence, by itself is never clear and unambiguous." (*Rio Hondo Community College District* (2013) PERB Decision No. 2313, p. 7.) Thus, to find a waiver, there must be other indicators that the union intentionally relinquished its right to bargain. (*Ibid*.) Although an unreasonable delay in making a bargaining demand may be evidence of a waiver, the reasonableness of the delay turns on the specific facts of each case. (*Id*., citing *Compton Community College District* (1989) PERB Decision No. 720; *Victor*

Valley Union High School District (1986) PERB Decision No. 565.) Moreover, such a waiver cannot be found absent proper notice, which necessarily includes both advance knowledge and the opportunity to demand bargaining. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 27-29.) In the present case, I decline to find that CSEA waived its bargaining rights because the District never offered a meaningful opportunity to bargain and because the District also ignored CSEA's efforts to engage in negotiations.

(a) Lack of Opportunity to Request Negotiations

The February 27, 2014 Notice did not provide CSEA with any opportunity for meaningful negotiations. An employer does not satisfy the notice requirement by informing a union of a contemplated change that it has no intent of bargaining over. (*City of Sacramento, supra*, PERB Decision No. 2351-M, p. 33, citing *Lost Hills Union Elementary School District* (2004) PERB Decision No. 1652, *Arcohe Union School District* (1983) PERB Decision No. 360 (*Arcohe USD*), *San Francisco Community College District* (1979) PERB Decision No. 105, *Ciba-Geigy Pharmaceuticals* (1982) 264 NLRB 1013, p. 1017, *Mercy Hosp. of Buffalo* (1993) 311 NLRB 869, p. 873, *S&I Trans., Inc*. (1993) 311 NLRB 1388, p. 1390.) In those situations, unions are not required to demand bargaining because doing so, in light of the employer's *fait accompli*, would be futile. (*Arcohe USD*, p. 11; *Fall River Joint Unified School District* (1998) PERB Decision No. 1259, p. 28.) A union does not waive any right to bargain where it only learned of the changes after the employer already finalized its decision. (*Id*. at p. 28.) And it is not required to put forth proposals in light of the employer's refusal to acknowledge any bargaining obligation. (*Gonzales Union High School District* (1984) PERB Decision No. 410, p. 25.)

Here, the District had not yet finalized its contracting-out plans at the time of its February 27 2014 Notice. But I nevertheless find the futility line of cases instructive to the extent that they recognize that it is fruitless to require a union to demand negotiations from an unwilling employer. The February 27, 2014 Notice specifically references the District's perceived authority under CBA Article XV, Section A, to contract out unit work subject only to a "meet and consult" requirement. By citing to that section, the District communicated to CSEA that it did not intend on negotiating over its subcontracting plans and that any discussions between the parties on the subject would not constitute formal bargaining. District counsel Bathen confirmed that position in an e-mail from July 29, 2014, where the he informed CSEA president St. Clair that the Article XV of the expired CBA authorized the District to contract out unit work without negotiations. Bathen reiterated that position in a letter dated August 12, 2014, informing CSEA, that the District was only obligated to "meet and consult" over the subcontracting plans.[9] Because the District consistently took the position that it could contract out bus driver work without negotiations, I conclude that any demand to negotiate

[9] Bathen was the District's counsel on this matter. Delgado explained that he referred communications from CSEA to Bathen for response. As such, Bathen was acting as an agent of the District and the statements made in his e-mails qualify as agency admissions. (*Santa Ana Unified School District* (2013) PERB Decision No. 2332, pp. 9-11; *Gonzales Union High School District* (1993) PERB Decision No. 1006, proposed dec., p. 15.)

over the change would have been a meaningless exercise.[10] Under the circumstances, CSEA was not required to demand negotiations.[11]

(b) Adequacy of CSEA's Statements Concerning Negotiations

I also conclude that CSEA had adequately informed the District that it desired negotiations over any proposed subcontracting of bus driver work. A bargaining demand does not require any specific format or language, so long as the union adequately demonstrates a desire to negotiate a matter within the scope of representation. (*Sylvan Union Elementary School District* (1992) PERB Decision No. 919, pp. 11-12, citing *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223, pp. 7-8.) Mere protests or "heated discussions" about a planned change are insufficient to notify the employer that the union desires bargaining. (*Pasadena Area Community College District* (2011) PERB Decision No. 2218, proposed dec., pp. 5-6, citing *County of Riverside* (2010) PERB Decision No. 2097-M; *Santee Elementary School District* (2006) PERB Decision No. 1822, p. 5, citing *Delano Joint Union High School District* (1983) PERB Decision No. 307.)

[10] The District argues in its closing brief that the "meet and consult" language in the expired CBA "obviously" means that it had an obligation to negotiate over the contracting out decision. I reject that argument as contrary to both the position it took in its communications directly with CSEA and existing interpretations of EERA. (*Allan Hancock Community College District* (1989) PERB Decision No. 768, warning ltr., p. 5; see also *El Centro Elementary School District* (2006) PERB Decision No. 1863, p. 3, citing *Eureka City School District* (1992) PERB Decision No. 955.)

[11] But see *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M, where the Board rejected a union's argument that an employer's statement that it was willing to "meet and discuss" a policy change implied that it was unwilling to *meet and confer* over that change. The Board reasoned that the employer was under no obligation to invite bargaining. Here, by contrast, the District affirmatively communicated its unwillingness to engage in formal negotiations due to the authority it believed it possessed under the expired CBA.

In this case, upon receiving the February 27, 2014 Notice, CSEA requested proof of cost-overruns and employee misconduct in the Transportation Department. Delgado also acknowledged in his testimony that CSEA requested cost information and that CSEA's chief negotiator at the time, Lockwood, said that "how could we give you a proposal unless we know what it [would] cost?" The District admitted to never providing any information in response to either request. Delgado also testified that CSEA's negotiators committed to putting forward a proposal on the contracting issue in or around April 2014. The District argues that CSEA never followed through with an actual proposal. Even if the District were correct, its admission that CSEA expressed interest in submitting a proposal is sufficient to indicate a desire to engage in bargaining over the subcontracting issue.

Furthermore, witnesses from both parties stated that CSEA offered alternatives that could have addressed the District's asserted transportation concerns and possibility eliminated or reduced the need to use a private contractor or layoff bus drivers. Among the alternatives explored were redrawing or increasing the number of bus routes to improve effectiveness, adding job duties for bus drivers to reduce the need to go elsewhere for those services, adding tracking equipment, and changing current disciplinary practices. On June 23, 2014, CSEA gave its clearest indication of its desire to negotiate this matter, proposing in successor CBA bargaining that the District not contract out any bargaining unit work for the life of the new contract.[12] Although the District may not have agreed with CSEA's proposed solutions, the

[12] At hearing the District highlighted the fact that CSEA later withdrew this proposal before the parties reached their tentative agreement in October 2014. The District also notes that, under the tentative agreement, the District retains its authority to contract out under Articles III and XV. It appears to argue that by reaching the tentative agreement, CSEA implicitly acquiesced to the contracting decisions made in this case. I reject that argument for at least two reasons. First, waivers must be express, not implicit, and the tentative agreement made no mention of resolving the instant dispute. Second, the term of the new agreement was

issue at this stage is whether CSEA signaled the intent to negotiate over with the District.[13] CSEA requested information about the District's subcontracting plans, committed to presenting proposals to the District, and then followed through with that commitment. All of these actions are inconsistent with a party who has intentionally relinquished its right to negotiate. To the contrary, CSEA's conduct conclusively shows its desire to negotiate over the subcontracting of bus driver work.

On the whole, I conclude that the District did not provide CSEA with an opportunity for good faith negotiations. In addition, CSEA also demonstrated its interest in negotiating with the District over any subcontracting plans. For all these reasons, CSEA has established this element of its prima facie case.

iv. Generalized Effect

The record shows that the District, through the Hemet Contract, removed work from CSEA's bargaining unit starting in the 2014-2015 school year and continuing up until the present. Nor is there any dispute that the District permanently laid off all of its bus drivers and no longer employs them. This is sufficient to establish the final element of CSEA's prima facie case.

October 1, 2014, through September 2017. Thus, any authority given to the District under the tentative agreement did not apply to June 2014, when the District began subcontracting 2014 ESY bus driver work, or to August 2014, when the District began subcontracting bus driver work for the regular school year.

[13] There is some indication that the District did, in fact, agree with some of CSEA's positions. The District agreed in the Hemet Contract to increase the number of existing bus routes from 11 to 12 regular routes and one special route.

v. The Contract Waiver Defense

The District's principal defense in this case is that it was permitted to contract out based on the language in Articles III and XV of the expired CBA. Evaluating the merit of this argument requires me to interpret the terms of the parties' agreement. PERB may review parties' contracts only to the extent necessary to decide issues within its jurisdiction, such as unfair practice charges. (*County of Sonoma* (2012) PERB Decision No. 2242-M, pp. 15-16.)

An exclusive representative may "waive its right to negotiate a matter within the scope of representation by consciously yielding that right in a management rights clause." (*Berkeley Unified School District* (2004) PERB Decision No. 1729, warning ltr., p. 3.) This sets a high bar. To meet it, the contract language must "specifically reserve for management the right to take certain action or implement changes regarding the issues in dispute." (*Id*., citing *CSEA v. PERB* (1996) 51 Cal.App.4th 923, pp. 938-940.) A generally worded management rights clause will not be construed as a waiver. (*Rocklin Unified School District* (2014) PERB Decision No. 2376, proposed dec., pp. 39-40.) Moreover, any waiver of the right to bargain contained in a contract does not remain in effect after the negotiated term of that agreement. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, pp. 14-15 (*Stanislaus CFPD*), citing *Antelope Valley Union High School District* (1998) PERB Decision No. 1287; see also *Regents of the University of California* (2004) PERB Decision No. 1689-H, proposed dec., p. 25 (*UC Regents I*), citing *Blue Circle Cement Co.* (1995) 319 NLRB 954 ["a contractual reservation of managerial discretion does not extend beyond the expiration of the contract unless the contract provides for it to outlive the contract."].)[14]

[14] The Board in *Antelope Valley Union High School District, supra*, PERB Decision No. 1287, actually found that provision in the parties' CBA granting the employer authority over selection and promotion processes remained in effect even after the agreement expired.

The District in this case relies heavily on *Barstow Unified School District* (1996) PERB Decision No. 1138 (*Barstow USD*). In that case, the parties entered into an agreement retaining for the employer "all powers and authority to direct, manage and control to the full extent of the law. Included but not limited to those duties and powers are the exclusive right to . . . contract out work which may be lawfully contracted for[.]" The contract further specified that the union waived the right to negotiate over any subjects (except for limited reopeners) for the term of the contract. (*Id*. at pp. 6-7.) The Board interpreted that language as follows: "[t]he clear and explicit meaning of this contract language is that the District has the right to make the decision to contract out a specific area of work, transportation services, without engaging in negotiations with [the charging party] over that decision." (*Id*. at p. 14.)[15]

In this case, CSEA appears to concede that the language in CBA Article III, Section A, operated as a waiver of the right to negotiate over contracting out bargaining unit work so long as the District satisfied the notice and meet and consult requirements of Article XV, Section A. CSEA instead argues that the District's authority under the CBA expired along with the

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(*Id*. at pp. 6-7.) In doing so, the Board at the time appears to have drawn some kind of distinction between contract-based waivers of the duty to bargain, which it acknowledged expired with the contract, and contract-based managerial rights clauses. I note that the Board's later decisions, including *Stanislaus CFPD*, *supra*, PERB Decision No. 2231-M and *UC Regents I*, *supra*, PERB Decision No. 1689-H, make no such distinction and unambiguously hold that neither contractual waivers nor reservation of managerial discretion over negotiable subjects survive expiration of the parties' agreement. (See also *Los Angeles Unified School District* (2014) PERB Decision No. 2390, p. 40 [holding that an employer may not unilaterally impose a reservation of rights clause which operates as a waiver of a union's right to negotiate matters within the scope of representation].)

[15] The *Barstow USD*, *supra*, PERB Decision No. 1138 decision was later overruled by the Board in *Long Beach Community College District* (2003) PERB Decision No. 1568, p. 21. That decision was, itself overruled in *Long Beach CCD*, *supra*, PERB Decision No. 1941 in order to reinstate the above-described rule in *Barstow USD*. (*Id*. at p. 21.)

contract in 2010. The District maintains that the CBA remains in effect under the terms of the CBA's duration provision, Article XVI.

Traditional principles of contract determination dictate that PERB first examine the plain meaning of the language in the parties' agreement to ascertain its meaning. (*County of Sonoma, supra*, PERB Decision No. 2242-M, pp. 15-16) Extrinsic evidence is relevant in those cases where the language of the agreement itself is not clear and unambiguous. (*Ibid*.)

I find that CBA Article XVI is ambiguous on its face. It states "This Agreement shall become effective July 1, 2004 and remain in full force and effect to and including June 30, 2007 or until a successor Agreement is approved by the Board of Education." This contradicts the cover page of the CBA, which states its effective term as "July 1, 2007 – June 30, 2010." Moreover, it is undisputed that the contract was negotiated in 2007. I find it highly unlikely that the parties would would negotiate a CBA with a term that started three years before negotiations even commenced. Relying then on extrinsic evidence, the District's chief negotiator, Delgado, testified that the dates in the duration clause were typographical errors and that the contract listed dates should have been 2007 through 2010. Delgado further testified that the CBA expired in 2010. Multiple CSEA witnesses agreed. I find this testimony persuasive.

The District argues that the "until a successor Agreement is approved by the Board of Education," clause in Article XVI, should be interpreted to mean that the CBA remained in effect after July 1, 2010, because the District's governing board did not approve a successor agreement until after October 2014. I decline to adopt that interpretation because doing so conflicts with the undisputed testimony about the contract's expiration date. Furthermore, contracts should be read in a manner "'which gives a reasonable, lawful, and effective meaning

to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect.'" (*Long Beach CCD, supra*, PERB Decision No. 1941, p. 17, quoting *Riverside Community College District* (1992) PERB Order No. Ad-229, pp. 3-4.) Here, the District's proffered interpretation would extend the term of the CBA beyond three years. Such an interpretation is inconsistent with EERA, Section 3540.1, subdivision (h), which defines the parties' meet and confer obligations. That section contemplates entering into a binding written agreement ratified by both parties, and that "[t]he agreement may be for a period of not to exceed three years." The Board has, unsurprisingly, interpreted this language to mean "[t]he language of EERA is clear. A contract's duration cannot exceed three years." (*San Benito Joint Union High School District* (1984) PERB Decision No. 406, p. 5.) The District's interpretation would extend the terms of the parties' CBA several years beyond the three-year maximum duration under EERA, Section 3540.1, subdivision (h). I cannot ascribe such an interpretation to the parties' contract because doing so would conflict directly with EERA. (See *Long Beach CCD* , *supra*, PERB Decision No. 1941, p. 17.) Rather, I find it more likely that the parties intended the term of the CBA to be three years (from July 1, 2007, through June 30, 2010), unless succeeded earlier by a new agreement that is approved by the District's governing board. This interpretation is more consistent with both the requirements of EERA as well as with witnesses' own description of the CBA.[16]

[16] I note that the language of the duration clause in *Barstow USD*, *supra*, PERB Decision No. 1138 contained a duration clause that is similar to Article XVI, Section A, in this case. (*Id*. at p. 2.) That language included both a fixed three-year term and language specifying that the agreement would continue "until such time as a new or modified agreement is reached by the parties." However, the Board did not review the duration clause in that case because the employer made its subcontracting decisions within the three-year term of the agreement. (*Id*. at pp. 3-5.)

Based on the above, I conclude that the CBA had expired in 2010, and the District's authority to unilaterally contract out bargaining unit work expired with it. Thus, the CBA offers no valid defense for the District's unilateral subcontracting decision.

CSEA has satisfied all the elements of its prima facie case for a unilateral change. The District did not persuasively establish any defenses for failing to bargain with CSEA before laying off all its drivers and subcontracting out that work. Therefore, the District's decisions lay off all its drivers and to contract with Hemet USD for bus driver work starting in the 2014-2015 school year violated the duty to negotiate in good faith under EERA, Section 3543.5, subdivision (c). This conduct also derivatively violated EERA, Section 3543.5, subdivisions (a) and (b). (*Lucia Mar USD, supra*, PERB Decision No. 1440, appendix.)

b. Contracting Out Bus Driver Work During the 2014 ESY

The PERB also complaint alleges that the District unilaterally decided to offer parents $25 per day to transport their own children to and from school during the ESY. In addition, CSEA also asserts that the District unilaterally contracted with an outside company, American Logistics for bus driving services during the 2014 ESY. The Board addresses claims not raised in the complaint using its so-called "unalleged violation" doctrine, which states:

> The Board has authority to review unalleged violations where the following criteria are met: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue.

(*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, p. 8, citations omitted; see also *Jurupa Unified School District* (2015) PERB Decision No. 2420, p. 16.) As a

threshold matter, the unalleged allegations must be timely. (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C, pp. 14, 17.)

I conclude that all of the elements from the unalleged violation analysis are satisfied in this case. CSEA first raised its claims about contracting out 2014 ESY bus driver work in its original unfair practice charge. Those claims were timely as of the date the charge was filed. (*Fresno Superior Court*, *supra*, PERB Decision No. 1942-C, pp. 14, 17.) In addition, the District had ample notice that CSEA would be challenging the legality of all the District's contracting out of bus driver work. Before the hearing, CSEA subpoenaed records of the District's Summer 2014 transportation contracts and introduced documents produced from those subpoenas as exhibits at hearing. In addition, CSEA questioned each of its witnesses about either the District's decision to contract out 2014 ESY bus driver work or about work lost as a result of the contracting decisions. The parties submitted as a joint exhibit CSEA's May 15, 2014 written demand for the District to cease and desist from contracting out bus driver work during the 2014 ESY. Both parties addressed the lawfulness of the District's 2014 ESY contracting decisions in their closing briefs. These facts all demonstrate that the District had adequate notice of the previously unalleged claim.

It is also clear from the record that the previously unalleged contracting out claims arise from the same basic cluster of facts as those expressly stated in the PERB complaint. District witnesses claim that the District announced all of its subcontracting decisions at the same time on May 1, 2014. Both the Hemet Contract and the American Logistics Contract were approved by the District's governing board at the same time. The District furthermore asserts that the same document, i.e., the February 27, 2014 Notice, informed CSEA of all its contracting decisions. The District also relies on the same provisions of the expired CBA as its primary

justification for all its subcontracting decisions. These facts satisfy the second element of the unalleged violation test.

The substantial overlap between the alleged and unalleged violations also demonstrates that the previously unalleged matters were fully litigated at hearing. Both sides present nearly identical factual claims and legal positions in support of the alleged and unalleged violations. Both had ample opportunity to establish those positions at hearing and in closing argument. Therefore, I conclude that the previously unalleged claims were fully litigated.

Finally, both parties had and took the opportunity to question witnesses and present other evidence in support of their respective positions about the District's decision to enter into 2014 ESY transportation contracts. Accordingly, I will consider whether the District unilaterally changed existing policy by offering parents money to transport students or by contracting with a private bus company.

i. Alleged Policy Change

The record shows that District bus drivers historically performed most, if not all, of student transportation services during the District's ESY. Multiple drivers credibly testified that this practice had been going on for more than 10 years and that multiple District bus drivers consistently received Summer driving assignments during the ESY through a seniority-based bidding process. Delgado also acknowledged that, prior to 2014, District drivers performed the "majority" of this work. No District bus driver was offered an ESY assignment during 2014.[17] These facts are sufficient to establish the first element of CSEA's prima facie case for a unilateral change violation. In its brief, the District argues that no evidence

[17] At that point, all District bus drivers had been notified had been notified of their layoff but that layoff was not effective until August 27, 2014, which is after the 2014 ESY concluded.

established that District drivers performed the Summer transportation work, but this assertion misstates the undisputed evidence presented by both parties. For that reason, the argument is rejected.

ii. Scope of Representation

As explained above, the decision to contract out work is negotiable when: (1) the employer merely replaces its own employees for contractors performing similar services; or (2) where the contracting decision was based substantially on potential labor cost savings. (*Veterans Affairs, supra*, PERB Decision No. 2110-S, p. 6.)

Similarly to above, the District's decision to use contractors for the 2014 ESY also satisfies both of the above alternatives that make subcontracting decisions negotiable. It is clear that the District completely ceased assigning any transportation work to bus drivers during the 2014 ESY and instead offered that work to either parents or to American Logistics.[18] In cases where the employer fully replaces its own employees with contractors who perform the same services under similar conditions, the Board has found that decision is

[18] For this reason, the District's argument that the decision to use contractors in this instance was non-negotiable because it had an existing past practice of using contractors for transportation is rejected. The record showed that the District had historically used private companies for transporting students that drivers could not cover or where District busses would have been inadequate to the task. Furthermore, the District previously offered to reimburse District parents for mileage costs associated with transporting their own students to school, but that practice waned over the years because, in Delgado's words "[m]any parents were not doing it anymore for the mileage." There was no dispute that District drivers performed most of the transportation work during prior ESYs. In contrast with these practices, the District supplanted its own drivers in total, and reassigned all 2014 ESY driving work to outsiders. An employer's "significant increase in subcontracting constituted an unlawful 'change in quantity and kind,' even where the same type of duties had been contracted out in the past." (*Beverly Hills Unified School District* (1990) PERB Decision No. 789, pp. 15-16, citing *Oakland Unified School District, supra*, PERB Decision No. 367; see also *California State University (San Diego)* (2008) PERB Decision No. 1955-H, proposed dec., pp. 7-8.)

subject to negotiations without any further consideration as to whether the decision was based on labor costs. (*Lucia Mar USD, supra*, PERB Decision No. 1440, proposed dec., pp. 39-40.)

The District argues that parents transporting their own children to school cannot properly be characterized as "contracting out." While I recognize the intuitive force behind this argument, the mere involvement of parents does not automatically preclude finding a subcontracting relationship. The Education Code, expressly contemplates school districts entering into private contracts with the parents of the students being transported. (Educ. Code, § 39800.) In *Lincoln Unified School District* (1984) PERB Decision No. 465, PERB found that an employer violated the duty to negotiate in good faith by eliminating all special event bus driving assignments for its own employees, instead assigning that work to parent volunteers who were part of the local "booster club." (*Id*. at pp. 2-3, proposed dec., pp. 10-11.) The Board opined that if the employer simply discontinued all transportation services and the booster club independently volunteered to fill the gap, there would likely have been no violation. But, because the employer sought to continue bus service through a means other than its regular employees, that decision was subject to negotiations. (*Id*. at p. 3; see also *Ocean View School District* (1999) PERB Decision No. 1320, partial dismissal, p. 2 [holding employer's decision to hire a private company employing parent volunteers was considered contracting out].) Moreover, the Board defines "independent contractor" broadly. When discussing the difference between an "employee" and a "contractor," the Board found:

> "Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment; while, on the other hand, *where control is reserved only as to the result sought, the relationship is that of an independent contractor*."

(*Ventura County Community College District* (2003) PERB Decision No. 1547, pp. 21-22 (*Ventura County CCD*) (emphasis supplied, quoting *NLRB v. United Insurance Co*. (1968) 390 U.S. 254, p. 256.)

In this case, I conclude that the District's offer to pay parents for transporting students to school on the District's behalf qualifies as "contracting out" under the above-cited authority. This is not the situation where the District has decided to discontinue transportation services during the ESY. To the contrary, the District continues to offer those services, but has agreed to compensate District parents for providing that service in place of its own employees. Payment is contingent upon an outcome determined by the District, i.e., District verification that the student attended school during the relevant time period. In that sense, this arrangement fits the classic definition of "contracting out." (*Ventura County CCD*, *supra*, PERB Decision No. 1547, pp. 21-22.)

The District once again argues that the decision to use a private contractor for bus driving services during the 2014 ESY was part of a non-negotiable decision to change the direction and level of its bus driving services. I once again find the argument unpersuasive based on *Long Beach CCD* , *supra*, PERB Decision No. 1941, pp. 13-14 and *Oakland USD*, *supra*, PERB Decision No. 1770, proposed decision, pp. 29-30. As in those cases, the District here has not shown that its concerns about student transportation service levels could not have been adequately addressed through productive negotiations.[19]

[19] There was also limited evidence that a benefit derived from contracting with parents to transport their own children to school was that there was greater parent-teacher interaction. However, there is insufficient evidence in the record to conclude that this was a primary motivation, if any motivation at all, for the decision to enter into transportation contracts with parents.

iii. Notice and Opportunity to Request Negotiations

As stated above, an employer is obligated to provide reasonable advance notice and the opportunity to request bargaining before reaching a firm decision to enact a negotiable policy change. (*City of Sacramento*, *supra*, PERB Decision No. 2351-M, p. 28.)

The District argues that it notified CSEA of its intent to discontinue using bus drivers for ESY transportation work through the February 27, 2014 Notice. That document stated that the District was "considering contracting out transportation services for the 2014-2015 school year." It made no reference to the 2014 ESY. Nothing in the record states or suggests that the ESY was considered part of the following school year. In fact, the evidence suggests that this is not the case. The District's document supplied to parents for signing up for the ESY refers to the preceding, not the following school year.[20] In addition, McSparren explained that, for students requiring special education services, the ESY was designed to extend educational services for students who experienced regression from the immediately preceding school year. These facts both imply that the ESY bears a closer relationship to the preceding school year than it does to the following year. I find that the February 27, 2014 Notice did not clearly inform CSEA that the District was contemplating any changes for the 2014 ESY. The record shows that CSEA did not learn of the District's plans for the 2014 ESY until May 1, 2014, after the District had already finalized its subcontracting decision. The District never expressed any willingness to equivocate from that position. Because the District had already made up its mind on contracting out the work, there was no opportunity to request or engage in good faith negotiations at that point.

[20] The form used for the 2014 ESY was submitted as an exhibit at hearing. Its heading read "EXTENDED YEAR PROGRAM [SPECIAL DAY CLASS] 2013-2014."

iv. Generalized Effect or Continuing Impact

The final element of CSEA's prima facie case is whether the change at issue was an isolated breach or incident or is representative of an ongoing practice. It is undisputed that the District's practice of both offering parents $25 for transportation services and its use of American Logistics for students transportation continued not only throughout the 2014 ESY but also into subsequent ESYs. It is further undisputed that, because of this change, District bus drivers no longer perform any ESY driving work. This is sufficient to satisfy the final element of the unilateral change test.

v. Contract Waiver

The District reasserts its belief that it was entitled to contract out work under Articles III and XV of the expired CBA. I reject those arguments for this claim for the same reasons as stated above. The parties' CBA expired in 2010 and the District's authority to contract out bargaining unit work without providing notice and opportunity for bargaining expired along with it. In addition, because the District never notified CSEA of its intent to contract out ESY work, it never satisfied the requirements of Article XV. Thus, even if the contract were in effect, the District's defense would fail for that reason.

CSEA has satisfied all the elements of its prima facie case for a unilateral change. The District did not persuasively establish any defenses for failing to notify and bargain with CSEA. Therefore, the District's decision to contract out ESY bus driver work starting in 2014 violated the duty to negotiate in good faith under EERA, Section 3543.5, subdivision (c). This conduct also derivatively violated EERA, Section 3543.5, subdivisions (a) and (b). (*Lucia Mar USD*, *supra*, PERB Decision No. 1440, appendix.)

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5, subdivision (c), states:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

1. Remedy for the Information Request Violation

In *Santa Monica CCD, supra*, PERB Decision No. 2303, PERB held that an appropriate remedy in cases involving the failure to provide requested information include an order to cease and desist from violating EERA, to provide the requested information, and to post a notice of the violation. (*Id*. at p. 3.) Those are appropriate remedies here as well. The notice posting shall include both a physical posting of paper notices at all places where certificated bargaining unit members are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the bargaining unit." (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento, supra*, PERB Decision No. 2351-M.)

2. Remedies for the Unilateral Change Violations

The District unlawfully contracted out bus driver work without satisfying its bargaining obligations to CSEA. Appropriate remedies in such cases include an order to cease and desist from violating EERA and to return the parties and affected individuals to the status quo that existed before the unlawful acts. A notice posting specifying the employer's misconduct and the remedies ordered is also appropriate. (*Desert Sands Unified School District* (2010) PERB

Decision No. 2092, pp. 30-35.) All of these remedies are appropriate here as well, subject to the following discussion about returning the parties to the status quo that existed before the violations.

In cases involving unlawful decisions to contract out bargaining unit work, the Board recognized that an abrupt rescission of the contract may unduly disrupt student services. (*Oakland USD, supra*, PERB Decision No. 1770, proposed dec., p. 55; *Lucia Mar USD, supra*, PERB Decision No. 1440, pp. 2-3, proposed dec., pp. 56-57.) Thus, in *Lucia Mar USD*, PERB directed the employer to restore the contracted out work to the bargaining unit "at the earliest opportunity it can terminate the existing contract with the contractor." (*Id*. at p. 4.) In the interim, the Board ordered the employer to make whole, with interest, any employees who suffered financial losses from the unlawful contracts until the employees were either restored to their positions or until they rejected an offer of employment to their prior positions. (*Ibid*.) Those remedies are appropriate for the District's unilateral decision to layoff all its bus drivers and contract out all of that work to Hemet USD. The District is accordingly ordered to rescind its agreement with Hemet USD for bus driving services as soon as is reasonably possible, but no later than the end of the school year in which this order becomes final and effective.[21] Upon rescission, the District is also ordered restore bus driver work to CSEA's bargaining unit and to offer reinstatement to all bus drivers who were laid off on or around June 27, 2014.

The District is further ordered to make all those laid off drivers whole for lost wages and benefits, including any extra hours, starting from the date of their layoff until they are either reinstated or until they reject an offer of reinstatement. These amounts should be

[21] Nothing in this proposed decision precludes the District from continuing to contract with Hemet USD to maintain Hemet USD's buses.

augmented by interest at a rate of 7 percent per annum and are subject to reasonable mitigation. (*Lucia Mar USD*, PERB Decision No. 1440, p. 4.) For any bus driver entitled to back pay, CSEA is entitled to agency fees or union dues that would have been remitted but for the District's unlawful action. (*Regents of the University of California* (2014) PERB Decision No. 2398-H, p. 37 (*UC Regents II*); *City of Sacramento, supra*, PERB Decision No. 2351-M, p. 49; *Ventura County CCD, supra*, PERB Decision No. 1547.) Payment of fees/dues shall be augmented by interest at a rate of 7 percent per annum and shall be made by the District as individual employees who lost the benefits of union representation during their layoff should not be penalized for the District's unlawful acts. (*Ibid*.)

Regarding the District's unilateral decision to contract out ESY bus driving work, the District is similarly ordered to rescind its American Logistics Contract for ESY transportation work and to cease its practice of offering District parents $25 to transport their own children to and from school during the ESY at the soonest practical time.[22] Upon satisfaction of these two components of the order, the District is further ordered to reinstitute its practice of assigning ESY bus driving work to its own drivers by bid as it existed prior to May 1, 2014. (See *Anaheim City School District* (1983) PERB Decision No. 364, p. 31.)

Regarding employees' financial losses, employees in non-permanent or non-regular assignments who would have received such an assignment but for the employer's unilateral act should be made whole. (*San Jacinto Unified School District* (1994) PERB Decision No. 1078, proposed dec., pp. 38-39; *Lincoln USD, supra*, PERB Decision No. 465, proposed dec., pp. 14-16; *Los Gatos Joint Union High School District* (1980) PERB Decision No. 120, p. 5.)

[22] Nothing in this proposed decision precludes parents from voluntarily transporting their own children to and from school.

Thus, the District is ordered to calculate the amount of bus driver work it needed during the 2014 ESY and then, assuming that those drivers who had previously bid on Summer assignments would continue to do so, determine which of the laid off bus drivers would have been awarded a 2014 ESY bid. Each of those identified employees is entitled to lost wages and benefits for work he or she would have performed had the District not unilaterally contracted out the ESY work. These amounts should be augmented by interest at a rate of 7 percent per annum and are subject to reasonable mitigation. This same process is to be followed for every subsequent ESY until the District restores the ESY assignments bidding process and actually reemploys District drivers during its ESY. For any bus driver entitled to back pay under this portion of the order, CSEA is entitled to agency fees or union dues that would have been remitted but for the District's unlawful action. (*UC Regents II*, *supra*, PERB Decision No. 2398-H, p. 37.) Payment of these fees/dues shall be augmented by interest at a rate of 7 percent per annum and shall be made by the District. (*Ibid*.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Bellflower Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c). The District violated EERA by refusing to provide California School Employees Association & its Chapter 32 (CSEA) with requested information necessary and relevant to representing its members and by unilaterally contracting out bus driver work and laying off all its bus drivers, starting in Summer 2014. All other claims are hereby dismissed.

Pursuant to EERA section 3541.5, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to properly respond to CSEA's requests for information necessary and relevant to its representational duties.

2. Unilaterally implementing policies within the scope of representation.

3. Interfering with employees' right to be represented by their chosen employee organization.

4. Interfering with the right of CSEA to represent its members.

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

1. As soon as is practical, but not later than the end of the school year in which this decision and order becomes final, rescind its contract for bus driver services to transport students to and from school during the regular school year.

2. Upon completion of (B)(1), offer reinstatement to all bus drivers laid off in or around June 27, 2014.

3. Make whole for any financial losses suffered, including wages, benefit and extra hours wages, all laid off bus drivers until they are either reinstated or refuse an offer of reinstatement. These amounts should be augmented by interest at a rate of 7 percent per annum.

4. Remit to CSEA the sum equivalent of any dues or agency fees that CSEA would have received if the District did not unlawfully layoff its bus drivers until each laid off bus driver is either reinstated or refuses an offer of reinstatement. These amounts should be augmented by interest at a rate of 7 percent per annum.

5. As soon as is practical, rescind the private contract for bus services to transport students to and from District schools during the Extended School Year and cease

offering parents $25 to transport their own students to and from school during the Extended School Year.

6. Upon completion of (B)(5), reinstitute the bidding process used to assign Extended School Year work to District bus drivers.

7. Make whole for any financial losses any bus driver who lost Extended School Year bus driving work, during the 2014 Extended School Year and every subsequent ESY, until the bidding assignment process is reinstated. These amounts should be augmented by interest at a rate of 7 percent per annum.

8. Remit to CSEA the sum equivalent of any dues or agency fees that CSEA would have received if the District did not unilaterally assign Extended School Year bus driver work to outside sources, until it reinstitutes the Extended School Year bidding assignment process. These amounts should be augmented by interest at a rate of 7 percent per annum.

9. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in CSEA customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The Notice shall also posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with employees in CSEA's bargaining unit. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

10. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CSEA.

Right to Appeal

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service,

in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-5955-E, *California School Employees Association, Chapter 32 v. Bellflower Unified School District*, in which all parties had the right to participate, it has been found that the Bellflower Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by refusing to provide California School Employees Association, Chapter 32 (CSEA), with requested information necessary and relevant to representing its members and by unilaterally contracting out bus driver work and laying off all its bus drivers, starting in Summer 2014. All other claims were dismissed.

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

A. CEASE AND DESIST FROM:

1. Refusing to properly respond to CSEA's requests for information necessary and relevant to its representational duties.

2. Unilaterally implementing policies within the scope of representation.

3. Interfering with employees' right to be represented by their chosen employee organization.

4. Interfering with the right of CSEA to represent its members.

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

1. As soon as is practical, but not later than the end of the school year in which this decision and order becomes final, rescind the contract for bus driver services to transport students to and from school during the regular school year.

2. Upon completion of B.1. above, offer reinstatement to all bus drivers laid off in or around June 27, 2014.

3. Make whole for any financial losses suffered, including wages, benefit and extra hours wages, all laid off bus drivers until they are either reinstated or refuse an offer of reinstatement. These amounts should be augmented by interest at a rate of 7 percent per annum.

4. Remit to CSEA the sum equivalent of any dues or agency fees that CSEA would have received if the District did not unlawfully layoff its bus drivers until each laid off bus driver is either reinstated or refuses an offer of reinstatement. These amounts should be augmented by interest at a rate of 7 percent per annum.

5. As soon as is practical, rescind the private contract for bus services to transport students to and from District schools during the Extended School Year and cease offering parents $25 to transport their own students to and from school during the Extended School Year.

6. Upon completion of B.5. above, reinstitute the bidding process used to assign Extended School Year work to District bus drivers.

7. Make whole for any financial losses any bus driver who lost Extended School Year bus driving work, during the 2014 Extended School Year and every subsequent Extended School Year, until the bidding assignment process is reinstated. These amounts should be augmented by interest at a rate of 7 percent per annum.

8. Remit to CSEA the sum equivalent of any dues or agency fees that CSEA would have received if the District did not unilaterally assign Extended School Year bus driver work to outside sources, until it reinstitutes the Extended School Year bidding assignment process. These amounts should be augmented by interest at a rate of 7 percent per annum.

Dated: _____ BELLFLOWER UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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