OVERRULED IN PART by Fresno County In-Home Supportive Services Public Authority (2015) PERB Decision No. 2418-M

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMPTON UNIFIED SCHOOL DISTRICT, Charging Party,	)	Case No. LA-CO-396
v.	)	PERB Order No. IR-50
COMPTON EDUCATION ASSOCIATION, CTA/NEA, Respondent.	)	March 17, 1987

Appearances: Jones & Matson by Urrea C. Jones, Jr., for Compton Unified School District; Rosalind D. Wolf, Attorney, California Teachers Association, for Compton Education Association, CTA/NEA.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION AND ORDER

PORTER, Member: The Compton Unified School (District) filed an unfair practice charge alleging that the Compton Education Association, CTA/NEA (Association) violated the Educational Employment Relations Act[1] (EERA or Act) section

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

Section 3543.6 states:

> 3543.6. UNLAWFUL PRACTICES: EMPLOYEE ORGANIZATION
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> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

3543.6 (c) and (d) when it commenced strikes against the District while negotiations were still in progress following a fact-finder's report. In addition to filing the unfair practice charge, the District seeks injunctive relief pursuant to the Public Employment Relations Board's (PERB or Board) authority to seek such relief under EERA section 3541.3(j).[2] As a defense, the Association asserts that: (1) it is striking "post-impasse" and (2) it is striking in response to the District's unfair practices.

The Association filed unfair practice charges against the District on November 12, 1986, alleging that the District was not bargaining in good faith by not providing information and by making unilateral changes in its drug and alcohol abuse policy and teacher evaluation procedures. The Association did not file a petition with PERB seeking injunctive relief against the District for this conduct.

> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

[2]Section 3541.3 states:

> 3541.3. POWERS AND DUTIES OF BOARD
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> . . . . . .
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> (j) To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions or rulings or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the board may petition the court for appropriate temporary relief or restraining order.

Following a number of work stoppages by the employees, the District filed this unfair practice charge against the Association on January 28, 1987.

On January 30, 1987, PERB's General Counsel issued unfair practice complaints against the Association and the District, respectively. On February 12, 1987, the Association engaged in another work stoppage. On February 17, 1987, the District filed its request with PERB that injunctive relief be sought against the Association's work stoppages.

In support of its request for injunctive relief the District alleges, through its pleadings and supporting declarations, the following summarized factual scenario.[3]

Following negotiations, impasse, mediation and fact-finding, the three-member fact-finding panel issued its recommended decision on October 28, 1986. From November 5, 1986 through February 19, 1987, the District and the Association engaged in post fact-finding negotiations on 24 occasions. They met for the last 5 of those 24 days with a PERB administrative law judge (ALJ) acting as mediator. The District alleges it increased its salary proposals throughout these negotiating sessions, proffering various combinations of

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[3]These allegations are summarized only to reflect generally what was occurring with respect to the strikes; the actual facts involved and the merits of the underlying charges filed by the Association and the District remain to be determined in a full evidentiary hearing on the merits and are not resolved in this Decision.

percentages and contingencies.

During this same period, the Association struck on the following days, preceeded by the indicated notice:

Tuesday, November 11, 1986 (notice given Friday, November 7);
Friday, November 14 (notice given Thursday, November 13);
Monday, Tuesday, November 17 and 18 (notice given Friday, November 14 for the Monday strike; no notice given for the Tuesday strike);
Wednesday, December 3 (notice given Tuesday, December 2);
Wednesday, December 10 (notice given Tuesday, December 9);
Monday, January 12, 1987 (notice given Wednesday, January 7 that if no agreement reached by January 12, the Association would strike. Notice given on Friday, January 9 that they would indeed strike on the 12th);
Tuesday through Friday, January 13, 14, 15, 16 (notice given at 2:00 p.m. on the day preceeding each strike day that the Association would be out on the following day);
Tuesday, January 20 (notice given on Friday, January 16);
Wednesday, January 28 (notice given on Friday, January 23);
Thursday, February 12 (notice given at 5:05 p.m. on Tuesday, February 10).

The District asserts that striking teachers disrupted the school operations when approximately 150 teachers occupied the main administration building on January 13, 1987, from 10:00 a.m. to 5:45 p.m., and then occupied the main conference room, refusing to vacate to allow the school board to conduct its closed session meeting until the Compton police were forced to arrest and remove several teachers. Due to the extreme congestion in the halls and noise made by the striking teachers who occupied part of the building, much of the normal work of

the administrative staff could not be performed. Eighty percent of the District's security force personnel were reassigned from their regular patrol and security duties. Two security guards were injured in the fray while attempting to secure the building. One guard lost three days of work and both had to undergo physical therapy as a result of injuries.

The average number of teachers participating each day of the strike was 898 out of a bargaining unit of 1266. The lowest number out on strike was 817, while the highest number was 968. In addition, an average of 125 teachers called in ill on each day of the strike. The maximum number of substitute teachers that the District was able to employ on a strike day was 43. This left District administrators covering classes of the remaining 850 or so teachers.

Between the first day of school on September 9, 1986 and November 11, 1986, the District experienced one building fire. However, from November 11 to January 13, there were four incidences of fires of "suspicious origin" at District schools, one of which caused an estimated $20,000 damage.

With respect to the effect on the students, the District asserts that Association members encouraged school age children to walk picket lines during the hours that schools were in session, and did not remove pupils who were walking picket lines during school hours; and further alleges that teachers sent students home from school after they arrived to attend school on strike days.

District attendance dropped off dramatically during the strike. A majority of district students did not attend school on strike days, and a significant number continued their absenteeism on days following each day of strike. On normal school days, there is an average absentee rate of 9.75 percent of the student enrollment of 28,255. On strike days, however, the rate rose an additional average of 61.25 percent absenteeism. On three of the strike days, the absentee rate was 71 percent. Even on nonstrike days during this period between November 11, 1986 and January 20, 1987, 29.25 percent of the students were absent in addition to the normal 9.75 percent. During this two month period then, nearly 40 percent of the students of the District received no instruction whatsoever. Because of this pattern of poor attendance, 38 days of instruction have been lost or significantly undermined for a large percentage of students. This represents 21 percent of the 180-day school year. In addition, similar absentee rates occurred on January 28, 1987 (19,031 students absent--67.5 percent), and on February 12 (20,019 students absent--nearly 71 percent).

The District further alleges that District students, on the average, score well below county, state, and national norms, and they need every instructional day possible. As a result of the low academic achievement among students in the District, the District had scheduled a comprehensive program of inservice training for its teachers and staff, which had to be canceled,

since the training sessions were either scheduled for days on which the teachers were on strike or for days on which the District was unsure of whether the teachers would be on strike, or due to the additional work requirements of administrators who were forced to cover classrooms or handle strike related matters rather than attend to their normal duties. Also canceled during this period were supervision of instruction activities, curriculum monitoring and development activities, and educational, physical and psychological testing activities and competitions. Supplementary sessions for high school seniors to prepare them for the California Assessment Program test administered in December were canceled, as were additional supplementary instructional activities scheduled for approximately 75 percent of the District's students, who are designated as educationally disadvantaged due to low test scores. These latter supplementary instructional activities are funded by federal and state programs, set up to provide extra reading and math assistance through special labs and tutoring and assistance from specialized instructional personnel, many of whom were not available due to the strike. As a result, this supplementary help for low-achieving students was unavailable for these students.

For those students who did attend school on strike days, instructional time was severely curtailed because of lack of substitute teachers, delays in the beginning of instruction which occurs as a result of the time required to organize and

consolidate class groups and because of lack of teaching personnel.

According to the documents filed by the District:

> The curtailment or cancellation of instruction time and activities, teacher inservice training, enrichment activities, monitoring and planning activities, and support services have significantly and irreparably harmed the quantity and quality of knowledge and learning that District pupils have experienced and acquired in the current school year. . . . As a result of the strikes, all students have experienced a significant diminution in instruction or received no instruction at all, and a severe dislocation in the planned sequence of instruction, in the re-teaching and enrichment required for the mastery of basic skills, in the acquisition of language proficiency, and in the acquisition of knowledge of course content, which have already resulted in irreparable harm to the progress of the pupils' instruction and learning.

The Association, in its opposition to the District's request for injunctive relief, does not deny that the work stoppages were disruptive to the educational process within the District. Instead, it argues that all strikes, almost by definition, are disruptive in order to be effective.

Questions Presented

This matter presents three issues:

1. Does EERA grant to public school employees the right to engage in work stoppages such as "unfair practice strikes" or "post-impasse economic strikes" for the purpose of collective bargaining or other mutual aid or protection?

2. Do "unfair practice strikes" or "post-impasse economic strikes" constitute unfair practices and/or violations under EERA?

3. If work stoppages constitute unfair practices and/or violations under EERA, is there "just and proper" cause to seek their enjoinment in this case?

For the reasons which follow, this opinion concludes that EERA does not grant to public school employees the right to strike for the purpose of collective bargaining or other mutual aid or protection, that such work stoppages constitute unfair practices and violations under EERA, and that there is "just and proper" cause to seek their enjoinment in this case.

Discussion

I. INTRODUCTION TO ANALYSIS

Present at the threshold step of construing any legislative enactment are certain basic assumptions. First, in enacting a statute the Legislature knew and was familiar with: (a) the California Constitution; (b) existing and related statutes, and the acts of previous legislatures; (c) judicial decisions which have construed the words, phrases and provisions of the California Constitution and the statutes; and (d) the common law. Second, the Legislature enacted the statute in light of such knowledge. (Estate of McDill (1975) 14 Cal.3d 831, 837-839 and cases cited therein; Bailey v. Superior Court

(1977) 19 Cal.3d 970, 977-978, fn. 10; Fuentes v. Workers' Compensation Appeals Board (1976) 16 Cal.3d 1, 7; Keeler v. Superior Court (1970) 2 Cal.3d 619, 625; Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen (1960) 54 Cal.2d 684, 688-689; Buckley v. Chadwick (1955) 45 Cal.2d 183, 200 and cases cited therein; Sutter Hospital v. City of Sacramento (1952) 39 Cal.2d 33, 38; Rosenthal v. Cory (1977) 69 Cal.App.3d 950, 953; Favalora v. County of Humboldt (1976) 55 Cal.App.3d 969, 973; American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 260, hg. den.; People v. Welch (1971) 20 Cal.App.3d 997, 1002; and see Civ. Code, sec. 13; Code Civ. Proc., sec. 16.)

These assumptions with respect to the Legislature's knowledge of relevant constitutional, statutory and decisional law are inextricably tied to the application of other fundamental rules of statutory construction. Namely, the intent of the Legislature should be ascertained so as to effectuate the purposes of the law. (Tripp v. Swoap, Director of Department of Social Welfare (1976) 17 Cal.3d 671, 679; Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230; West Pico Furniture Co. v. Pacific Finance Loans (1970) 2 Cal.3d 594, 607; Select Base Materials v. Board of Equalization (1959) 51 Cal.2d 640, 645; Code Civ. Proc., sec. 1859.) And in determining such intent, the starting point is the language used by the Legislature in the statute. (Leroy T. v. Workmen's Compensation Appeals Board (1974)

12 Cal.3d 434, 438; Moyer v. Workmen's Compensation Appeals Board, supra, 10 Cal.3d 222, 230; Consumer Product Safety Commission v. GTE Sylvania (1980) 447 U.S. 102, 108.) Moreover, the provisions of a statute must be construed together, significance being given to every word, phrase, sentence and part of an act in pursuance of the legislative intent and purpose. (Turner v. Board of Trustees, Calexico Unified School District (1976) 16 Cal.3d 818, 826; Moyer v. Workmen's Compensation Appeals Board, supra, 10 Cal.3d 222, 230.)

Thus, before attempting to analyze and apply the relevant statutes, we must first examine what the existing constitutional, statutory, and decisional law was with respect to the public school system and to the rights of public employees--more specifically, public school employees--to engage in strikes at the time the Legislature enacted the Educational Employment Relations Act in 1975.

The Public School Education System

In analyzing any legislative enactment affecting the operation of our public schools, one must recognize and be ever mindful of the predominant position of the public school system within California's constitutional and statutory scheme, as well as its premier role in the public policy of this State. (Cal. Const., art. IX; Serrano v. Priest (1971) 5 Cal.3d 584, 604-610, 619, appeal after remand 18 Cal.3d 728 cert. den.

432 U.S. 907; Hartzell v. Connell (1984) 35 Cal.3d 899, 906-909; Piper v. Big Pine School District (1924) 193 Cal. 664, 669; Hall v. City of Taft (1956) 47 Cal.2d 177, 179-181; Turner v. Board of Trustees, Calexico Unified School District, supra, 16 Cal.3d 818, 825; Myers v. Arcata Union High School District (1969) 269 Cal.App.2d 549, 556, hg. den.; Akin v. Board of Education of Riverside Unified School District (1968) 262 Cal.App.2d 161, 167, cert. den. 393 U.S. 1041; In re Shinn (1961) 195 Cal.App.2d 683, 686-687; People v. Oken (1958) 159 Cal.App.2d 456, 461, hg. den.; Gonzales v. State of California (1972) 29 Cal.App.3d 585, 590.)

The education of the children of this State is an obligation which the State took over to itself by adoption of the California Constitution. (Piper v. Big Pine School District, supra, 193 Cal. 664, 669.) The California Legislature has the constitutional duty to provide for the education of California's children and has the constitutional duty and power in connection therewith to maintain and operate a system of free public education in this State. (Cal. Const., art. IX; Whitmore v. Brown (1929) 207 Cal. 473; Myers v. Arcata Union High School District, supra, 269 Cal.App.2d 549, 556; Akin v. Board of Education of Riverside Unified School District, supra, 262 Cal.App.2d 161, 167.) Thus, as was stated in Hall v. City of Taft, supra, 47 Cal.2d 177, 179:

> The public schools of this state are a matter of statewide rather than local or municipal concern; their establishment,

> regulation and operation are covered by the Constitution and the state Legislature is given comprehensive powers in relation thereto.

This constitutional duty to maintain and operate a public school system is discharged through the public school districts. (Gonzales v. State of California, supra, 29 Cal.App.3d 585, 590.)

The unique and predominant status of the public school system in California public policy and within the public sector is expressively set forth by the Supreme Court in the seminal decision of Serrano v. Priest (1971) 5 Cal.3d 584, appeal after remand 18 Cal.3d 728 (1976) cert. den. 432 U.S. 907 (Serrano I). In Serrano I, the Supreme Court not only recognized public school education as a fundamental interest of individuals and society but also that the delivery of public school education services is perhaps the most important function of state and local government, even exceeding public safety services in its impact on the welfare of the people of California. In the Serrano I decision, after first concluding that the property-based school financing system discriminated on the basis of the wealth of a district and its residents, the Supreme Court declared in pertinent part:

B
Education as a Fundamental Interest

> But plaintiffs' equal protection attack on the fiscal system has an additional dimension. They assert that the system not only draws lines on the basis of wealth but that it "touches upon," indeed has a direct

and significant impact upon, a "fundamental interest," namely education. It is urged that these two grounds, particularly in combination, establish a demonstrable denial of equal protection of the laws. To this phase of the argument we now turn our attention.

Until the present time wealth classifications have been invalidated only in conjunction with a limited number of fundamental interests--rights of defendants in criminal cases [citations] and voting rights [citations]. Plaintiffs' contention--that education is a fundamental interest which may not be conditioned on wealth--is not supported by any direct authority.

We, therefore, begin by examining the indispensable role which education plays in the modern industrial state. This role, we believe, has two significant aspects: first, education is a major determinant of an individual's chances for economic and social success in our competitive society; second, education is a unique influence on a child's development as a citizen and his participation in political and community life. "(T)he pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable." (Note, Development in the Law--Equal Protection (1969) 82 Harv.L.Rev. 1065, 1129.) Thus, education is the lifeline of both the individual and society.

The fundamental importance of education has been recognized in other contexts by the United States Supreme Court and by this court. These decisions--while not legally controlling on the exact issue before us--are persuasive in their accurate factual description of the significance of learning.

The classic expression of this position came in Brown v. Board of Education (1954) 347 U.S. 483, which invalidated de jure segregation by race in public schools. The

high court declared: "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. . . ." [Citation.]

The twin themes of the importance of education to the individual and to society have recurred in numerous decisions of this court. . . .

When children living in remote areas brought an action to compel local school authorities to furnish them bus transportation to class, we stated: "We indulge in no hyperbole to assert that society has a compelling interest in affording children an opportunity to attend school. This was evidenced more than three centuries ago, when Massachusetts provided the first public school system in 1647. [Citation.] And today an education has become the sine qua non of useful existence . . . . In light of the public interest in conserving the resource of young minds, we must unsympathetically examine any action of a public body which has the effect of depriving children of the opportunity to obtain an education." (Fn. omitted.) (Manjares v. Newton (1966) 64 Cal.2d 365, 375-376.)

And long before these last mentioned cases, in Piper v. Big Pine School Dist., supra, 193 Cal. 664, where an Indian girl sought to attend state public schools, we declared: "(T)he common schools are doorways opening

into chambers of science, art, and the learned professions, as well as into fields of industrial and commercial activities. Opportunities for securing employment are often more or less dependent upon the rating which a youth, as a pupil of our public institutions, has received in his school work. These are rights and privileges that cannot be denied." (Id. at p. 673). . . .

It is illuminating to compare in importance the right to an education with the rights of defendants in criminal cases and the right to vote--two "fundamental interests" which the Supreme Court has already protected against discrimination based on wealth. Although an individual's interest in his freedom is unique, we think that from a larger perspective, education may have far greater social significance than a free transcript or a court-appointed lawyer. "(E)ducation not only affects directly a vastly greater number of persons than the criminal law, but it affects them in ways which--to the state--have an enormous and much more varied significance. Aside from reducing the crime rate (the inverse relation is strong), education also supports each and every other value of a democratic society--participation, communication, and social mobility, to name but a few." (Fn. omitted.) (Coons, Clune & Sugarman, supra, 57 Cal.L.Rev. 305, 362-363.)

The analogy between education and voting is much more direct: both are crucial to participation in, and the functioning of, a democracy. Voting has been regarded as a fundamental right because it is "preservative of other basic civil and political rights. . . ." [Citations.] The drafters of the California Constitution used this same rationale--indeed, almost identical language--in expressing the importance of education. Article IX, section 1 provides: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific,

moral, and agricultural improvement." (See also Piper v. Big Pine School Dist., supra, 193 Cal. 664, 668.) At a minimum, education makes more meaningful the casting of a ballot. More significantly, it is likely to provide the understanding of, and the interest in, public issues which are the spur to involvement in other civic and political activities.

The need for an educated populace assumes greater importance as the problems of our diverse society become increasingly complex. The United States Supreme Court has repeatedly recognized the role of public education as a unifying social force and the basic tool for shaping democratic values. The public school has been termed "the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . at once the symbol of our democracy and the most pervasive means for promoting our common destiny." (McCollum v. Board of Education (1948) 333 U.S. 203, 216, 231 (Frankfurter, J., concurring).) In Abington School Dist. v. Schempp (1963) 374 U.S. 203, it was said that "Americans regard public schools as a most vital civic institution for the preservation of a democratic system of government." (Id. at p. 230 (Brennan, J., concurring).)

We are convinced that the distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a "fundamental interest."[26]

First, education is essential in maintaining what several commentators have termed "free enterprise democracy"--that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. Accordingly, the public schools of this state are the bright hope for entry of the poor and oppressed into the mainstream of American society.

Second, education is universally relevant. "Not every person finds it necessary to call upon the fire department or even the police

in an entire lifetime. Relatively few are on welfare. Every person, however, benefits from education. . . ." (Fn. omitted.) (Coons, Clune & Sugarman, supra, 57 Cal.L.Rev. at p. 388.)

Third, public education continues over a lengthy period of life--between 10 and 13 years. Few other government services have such sustained, intensive contact with the recipient.

Fourth, education is unmatched in the extent to which it molds the personality of the youth of society. While police and fire protection, garbage collection and street lights are essentially neutral in their effect on the individual psyche, public education actively attempts to shape a child's personal development in a manner chosen not by the child or his parents but by the state. (Coons, Clune & Sugarman, supra, 57 Cal.L.Rev. at p. 389.) "(T)he influence of the school is not confined to how well it can teach the disadvantaged child; it also has a significant role to play in shaping the student's emotional and psychological make-up." [Citation.]

Finally, education is so important that the state has made it compulsory--not only in the requirement of attendance but also by assignment to a particular district and school. Although a child of wealthy parents has the opportunity to attend a private school, this freedom is seldom available to the indigent. . . .

. . . . . .

. . . Obviously, any judgment invalidating the existing system of public school financing should make clear that the existing system is to remain operable until an appropriate new system, which is not violative of equal protection of the laws, can be put into effect.

By our holding today we further the cherished idea of American education that in a democratic society free public schools

shall make available to all children equally the abundant gifts of learning. This was the credo of Horace Mann, which has been the heritage and inspiration of this country. "I believe," he wrote, "in the existence of a great, immortal immutable principle of natural law, or natural ethics,--a principle antecedent to all human institutions, and incapable of being abrogated by any ordinance of man. . .which proves the absolute right to an education of every human being that comes into the world, and which, of course, proves the correlative duty of every government to see that the means of that education are provided for all. . ." (Original italics.) (Old South Leaflets V, No. 109 (1846) pp. 177-180 (Tenth Annual Report to Mass. State Bd. of Ed.), quoted in Readings in American Education (1963 Lucio ed.) p. 336.)

Footnote 26, supra, set forth:

The uniqueness of education was recently stressed by the United States Supreme Court in Palmer v. Thompson (1971) 403 U.S. 217, where the court upheld the right of Jackson, Mississippi to close its municipal swimming pools rather than operate them on an integrated basis. Distinguishing an earlier Supreme Court decision which refused to permit the closing of schools to avoid desegregation, the court stated: "Of course that case did not involve swimming pools but rather public schools, an enterprise we have described as 'perhaps the most important function of state and local governments.' Brown v. Board of Education, supra, at 493." (Id. at p. 221.) This theme was echoed in the concurring opinion of Justice Blackmun, who wrote: "The pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities." (Id. at p. 229.)
(Serrano v. Priest, supra, 5 Cal.3d 584, 604-610, 619.)

In 1984, the Supreme Court reinforced its recognition in Serrano I of the vital importance of the operation of the public school system in Hartzell v. Connell, supra, 35 Cal.3d 899, 906-909. In rejecting an attempt by a high school district to require students to pay fees for participation in extracurricular music and sports activities, the Supreme Court stated (Id. at pp. 906-913):

> . . . this court must examine the role played by education in the overall constitutional scheme. Because the nature of the free school concept has rarely been addressed by the courts, it will be necessary to explore its underpinnings in some depth.
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> The free school guarantee was enacted at the Constitutional Convention of 1878-1879. Also adopted was article IX, section 1, which proclaims that "[a] general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people. . . ." (Original italics.) Joseph W. Winans, chairperson for the convention's Committee on Education, elaborated: "Public education forms the basis of self-government and constitutes the very corner stone of republican institutions." (Debates and Proceedings, Cal. Const. Convention 1878-1879, p. 1087 [hereafter Proceedings].) [Fn. omitted.] In support of section 1, delegate John T. Wickes argued that "a liberal education . . . breaks down aristocratic caste; for the man who had a liberal education, if he has no money, if he has no wealth, he can stand in the presence of his fellow-men with the stamp of divinity upon his brow, and shape the laws of the people . . . ." (Proceedings, at p. 1088.)
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> This theme runs like a unifying thread through the writings of our forefathers. In 1786, Thomas Jefferson wrote from France, then a monarchy: "I think by far the most

important bill in our whole code is that for the diffusion of knowledge among the people. No other sure foundation can be devised for the preservation of freedom, and happiness. . . . Preach, my dear Sir, a crusade against ignorance; establish and improve the law for educating the common people. Let our countrymen know that the people alone can protect us against these evils [of kings, nobles, and priests]." (Jefferson, Letter to George Wythe, in The Portable Thomas Jefferson (Peterson edit. 1979) pp. 399-400.)

John Swett, California's most prominent free school advocate at the time section 5 was adopted, warned: "Our destruction, should it come at all, will be . . . . [f]rom the inattention of the people to the concerns of their government . . . . I fear that they may place too implicit confidence in their public servants and fail properly to scrutinize their conduct . . . . Make them intelligent, and they will be vigilant; give them the means of detecting the wrong, and they will apply the remedy." (Quoted in Cloud, The Story of California's Schools (194?) p. 20.) Without education for all, a majority of the people would be--in the words of Horace Mann--"the vassals of as severe a tyranny, in the form of capital, as the lower classes of Europe are bound to in the form of brute force." (Mann, Twelfth Annual Report, in Educational Ideas in America: A Documentary History (Rippa edit. 1969) p. 199.)

Perhaps the most eloquent expression of the free school idea came not from a political leader or educator, but from the poet, Ralph Waldo Emerson: "We have already taken, at the planting of the Colonies, . . . the initial step, which for its importance might have been resisted as the most radical of revolutions, thus deciding at the start the destiny of this country,--this, namely, that the poor man, whom the law does not allow to take an ear of corn when starving, nor a pair of shoes for his freezing feet, is allowed to put his hand into the pocket of the rich, and say, You shall educate me, not

as you will, but as I will: not alone in the elements, but, by further provision, in the languages, in sciences, in the useful and in elegant arts." (Emerson, Education, in Educational Ideas in America: A Documentary History, supra, at p. 176.)

The contribution of education to democracy has a political, an economic, and a social dimension.

As this court has previously noted, education prepares students for active involvement in political affairs. (Serrano v. Priest (1971) 5 Cal.3d 584, 607-608 [96 Cal.Rptr. 601, 487 P.2d 1241, 481 A.L.R.3d 1187] [hereafter, Serrano I].) [Fn. omitted.] Education stimulates an interest in the political process and provides the intellectual and practical tools necessary for political action. Indeed, education may well be "the dominant factor in influencing political participation and awareness." (San Antonio School District v. Rodriguez (1973) 411 U.S. 1, 114, fn. 72 [36 L.Ed.2d 16, 90, 93 S.Ct. 1278] (dis. opn. of Marshall, J.).) With the rise of the electronic media and the development of sophisticated techniques of political propaganda and mass marketing, education plays an increasingly critical role in fostering "those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion" (Wieman v. Updegraff (1952) 344 U.S. 183, 196 [97 L.E. 216, 225, 73 S.Ct. 215] (conc. opn. of Frankfurter, J.).) Without high quality education, the populace will lack the knowledge, self-confidence, and critical skills to evaluate independently the pronouncements of pundits and political leaders. Moreover, education provides more than intellectual skills; it also supplies the practical training and experience--from communicative skills to experience in group activities--necessary for full participation in the "uninhibited, robust, and wide-open" debate that is central to our democracy (New York Times Co. v. Sullivan (1964)

376 U.S. 254, 270 [11 L.Ed.2d 686, 701, 84 S.Ct. 710, 95 A.L.R.2d 1412].)

> Not only does education provide skills useful in political activity, it also prepares individuals to participate in the institutional structures--such as labor unions and business enterprises--that distribute economic opportunities and exercise economic power. Education holds out a "bright hope" for the "poor and oppressed" to participate fully in the economic life of American society. (Serrano I, supra, 5 Cal.3d at p. 609.) And, it is "an essential step in providing the disadvantaged with the tools necessary to achieve economic self-sufficiency." (San Antonio School District v. Rodriguez, supra, 411 U.S. at p. 115, fn. 74 [36 L.Ed.2d at p. 91] (dis. opn. of Marshall, J.).)
>
> Finally, education serves as a "unifying social force" among our varied population, promoting cohesion based upon democratic values. (Serrano I, supra, 5 Cal.3d at p. 608; see also Ambach v. Norwick (1979) 441 U.S. 68, 77 [60 L.Ed.2d 49, 56, 99 S.Ct. 1589].) The public schools bring together members of different racial and cultural groups and, hopefully, help them to live together "'in harmony and mutual respect.'" (Washington v. Seattle School Dist. No. 1 (1982) 458 U.S. 457, 473 [73 L.Ed.2d 896, 909, 102 S.Ct. 3187, 3196].)

The court continued by discussing the importance of extracurricular activities, describing them as constituting "an integral component of public education" and "generally recognized as a fundamental ingredient of the educational process." (Id. at p. 909.) Consequently, the court held that such activities fall within the free school guarantee of the Constitution, and no fee may be imposed for participation in those activities. Thus, it is clear from the court's

discussion that extracurricular activities stand in no different stead than does the regular instructional program in terms of importance to the provision of public education. The court concluded by saying:

> Finally, defendants warn that, if the fees are invalidated, many school districts may be forced to drop some extracurricular activities. They argue that invalidation would--in the name of the free school guarantee--produce the anomalous result of reducing the number of educational opportunities available to students.
>
> This court recognizes that, due to legal limitations on taxation and spending (see ante, fn. 1), school districts do indeed operate under difficult financial constraints. However, financial hardship is no defense to a violation of the free school guarantee. . . .
>
> Perhaps, in the view of some, public education could be more efficiently financed by peddling it on the open market. Under the California Constitution, however, access to public education is a right enjoyed by all--not a commodity for sale. Educational opportunities must be provided to all students without regard to their families' ability or willingness to pay fees or request special waivers. This fundamental feature of public education is not contingent upon the inevitably fluctuating financial health of local school districts. A solution to those financial difficulties must be found elsewhere--for example, through the political process. . . . (35 Cal.3d at pp. 912-913.)

It is therefore evident that the operation of public schools occupies a preeminent position in California, and the right to an education has been determined by the Supreme Court to be a fundamental interest. In looking at the relevant

provisions of the California Constitution which bear on any statutes--including EERA--that could affect the operation of the public school system, such provisions must be viewed in light of section 26 of article I of the Constitution which prescribes: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." (Cal. Const., art. I, sec. 26.) In State Board of Education v. Levit (1959) 52 Cal.2d 441, 460, our Supreme Court pointedly emphasized the necessity of adhering to this constitutional mandate with respect to article IX provisions:

> Before examining further the provisions of section 7, article IX of the Constitution, it should be noted that the Constitution of 1879 provides in section 22 [now sec. 26] of article I, as follows: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." As early as January 1881 this court held in Matter of Maguire, 57 Cal. 604, at page 609, as follows: "The Constitution furnishes a rule for its own construction. That rule is that its provisions are 'mandatory and prohibitory, unless by expressed words they are declared to be otherwise.' (Art. I, sec. 22.) We find no such express words in the Constitution. This rule is an admonition placed in this the highest of laws in this State, that its requirements are not meaningless, but that what is said is meant, in brief, 'we mean what we say.' Such is the declaration and command of the highest sovereignty among us, the people of the State, in regard to the subject matter under consideration." Thereafter, in 1886, in Oakland Paving Co. v. Hilton, 69 Cal. 479, this section was referred to and at page 512 it was held: ". . . (U)nder our constitution no question can be made whether the provision in it for its amendment is mandatory or directory. That question is

> settled by the constitution itself, which ordains in the most solemn form and manner that each and all of its provisions are mandatory and prohibitory, unless by express words declared to be otherwise. (Art. 1, sec. 22.) This section, in our judgment, not only commands that its provisions shall be obeyed, but that disobedience of them is prohibited. Under the stress of this rule, it is the duty of this court to give effect to every clause and word of the constitution, and to take care that it shall not be frittered away by subtle or refined or ingenious speculation. The people use plain language in their organic law to express their intent in language which cannot be misunderstood, and we must hold that they meant what they said." . . . In Santa Clara County v. Superior Court (1949) 33 Cal.2d 552, this court again held in no uncertain terms at page 554, as follows: "Unquestionably, it must be recognized that our Constitution (art. I, sec. 22) makes its provisions 'mandatory and prohibitory, unless by express words they are declared to be otherwise'; that this declaration applies to all sections of our Constitution alike, and every one subject to its mandate--county authorities as well as departments of the state government--must comply." The provisions of section 22 of article I are therefore binding upon this court in its construction of the provisions of the Constitution. (52 Cal.2d at 460-461.)

This clear command of section 26 of article I is binding upon all branches of state government, including this Board. (Mosk v. Superior Court & Commission on Judicial Performance (1979) 25 Cal.3d 474, 493, fn. 17; Jenkins v. Knight, Governor of State of California (1956) 46 Cal.2d 220, 224; Unger v. Superior Court of Marin County (1980) 102 Cal.App.3d 681, 685, cert. den. 449 U.S. 1131.)

With the foregoing in mind, we begin with section 1 of

article IX of the Constitution which provides that:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement. (Cal. Const., art. IX, sec. 1, emphasis added.)

Moreover, the public policy expressed and mandated in section 1 of article IX is to support, maintain and strengthen the public school system. (Whitmore v. Brown, supra, 207 Cal. 473.)

Next, and of major significance in any analysis of EERA provisions relevant in the instant matter, are the mandates of section 5, article IX:

> The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established. (Cal. Const., art. IX, sec. 5, emphasis added.)

Section 6 of article IX prescribes annual minimum salaries[4] for full-time teachers in the public school system. Section 6 also mandates the Legislature to yearly add to the State School Fund an amount not less than $180 for every pupil in average daily attendance (ADA) in a school district during the preceding school term and to apportion the entire State School Fund each fiscal year to the school districts and

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[4]This constitutionally mandated minimum annual salary for full-time teachers may not be reduced by contract. (See 26 Ops.Cal.Atty.Gen. 27, 28 (1955).)

other agencies maintaining the public schools, including to each school district a minimum of $120 per pupil in ADA in the school district[5]. The State School Fund has priority on all state revenues. Section 8 of article XVI of the Constitution prescribes that "(f)rom all state revenues there shall first be set apart the monies to be applied by the state for support of the public school system and public institutions of higher education." (Cal. Const., art. XVI, sec. 8.) Over fifty percent (50%) of California's state budget each year is budgeted for and committed to the public schools, with billions of tax dollars being spent every year to maintain and operate the schools. (Serrano v. Priest (1977) (Serrano III) 20 Cal.3d 25, 46, fn. 18.)

To implement the constitutional mandates of section 5 and other sections of article IX, the Legislature enacted a comprehensive Education Code and delegated to the school districts the operation of the public schools. (Myers v. Arcata Union High School District, supra, 269 Cal.App.2d 549, 556; Akin v. Board of Education of Riverside Unified School District, supra, 262 Cal.App.2d 161, 167; California Teachers Association v. Board of Trustees of Fullerton Union High School District (1978) 82 Cal.App.3 244, 254, hg. den.)

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[5]The ADA sum per pupil is actually much higher due to legislative supplements designed to equalize, maintain and improve school operations, including increasing the number of instructional days, reducing class sizes, etc. (See Serrano v. Priest, supra, (Serrano I) 5 Cal.3d 584, 591-595.)

In complying with the constitutional mandate of section 5 that the public schools be maintained and operated "at least six months in every year" (Cal. Const., art. IX, sec. 5; California Teachers Association v. Board of Education of the Glendale Unified School District (1980) 109 Cal.App.3d 738, 744, hg. den.; Slayton v. Pomona Unified School District (1984) 161 Cal.App.3d 538, 548), the Legislature has statutorily prescribed in Education Code section 41420 that a school district must maintain regular school days for at least 175 days during the year. Education Code section 37201 provides that a "school month" is 20 school days or 4 weeks of 5 school days each, thus the minimum 175 days mandated by section 41420 equates to 35 school weeks or 8 and 3/4 school months, nearly 9 school months.

The Legislature also enacted the Compulsory Education Law (Ed. Code, secs. 48200-48324) requiring full-time attendance during the district's school days for all persons between the ages of 6 and 16 years (Ed. Code, sec. 48200), subjecting to arrest as a truant any minor who is away from home and absent from school during school hours (Ed. Code, sec. 48264; In re Miguel G. (1980) 111 Cal.App.3d 345, 349-350, hg. den.), and making it a crime for any parent, guardian or other person having custody or charge of any minor to violate the Compulsory Education Law (Ed. Code, sec. 48293).

The importance of the Compulsory Education Law to those constitutional mandates which require the Legislature to

provide for and maintain public schools in each school district for at least six months of each year was emphasized in In re Shinn, supra, 195 Cal.App.2d 683, a truancy case in which the parents had prevented their children from attending public school because they felt the children were of superior intelligence and could benefit more by a home education program involving correspondence courses. In affirming the lower court's judgment making the children wards of the juvenile court and ordering the parents, under bond, to deliver the children to public school and to keep them in public school during the school year, the court stated (195 Cal.App.2d at 686-687):

> The people of California recognize the maintenance of a democratic form of government depends in part upon an educated citizenry and declared in their Constitution that a general diffusion of knowledge and intelligence was essential to the preservation of the rights and liberties of the people. They made it the duty of the Legislature to encourage by all suitable means intellectual, scientific, moral and agricultural improvement. (Cal. Const., art. IX, sec. 1.) As a means of achieving a general diffusion of knowlege and intelligence, the Legislature was directed to provide for a public school system of common free schools. (Cal. Const., art. IX, secs. 5, 6, 7 and 14.) In obedience to the constitutional mandate to bring about a general diffusion of knowlege and intelligence, the Legislature, over the years, enacted a series of laws. A primary purpose of the educational system is to train school children in good citizenship, patriotism and loyalty to the state and nation as a means of protecting the public welfare. (Gabrielli v. Knickerbocker, 12 Cal.2d 85, 92.) The Supreme Court of the

> United States, in the case of Pierce v. Society of Sisters, 268 U.S. 510, held that: "No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare." Included in the laws governing the educational program were those regulating the attendance of children at school and the power of the state to enforce compulsory education of children within the state at some school is beyond question. (Meyer v. Nebraska, 262 U.S. 390; Ex parte Liddell, 93 Cal. 633, 640.) The basic compulsory education law is set forth in Education Code, section 12101, reading: "Each parent, guardian, or other person having control or charge of any child between the ages of 8 and 16 years, not exempted under the provisions of this chapter (commencing at section 12101), shall send the child to the public full-time day school for the full time for which the public schools of the city, city and county, or school district in which the child lives are in session."

Nor is this enforced compulsory school attendance by California's children for at least 8 and 3/4 months of each year as mandated by the Constitution and the Legislature all one-sided. California's children (as well as their parents and the people of this State) are constitutionally and statutorily guaranteed the legal right to have the public schools in operation, open to their attendance, and providing uninterrupted instruction and educational activities for the minimum mandated school term each year. (Cal. Const., art. IX;

Ed. Code, secs. 41420, 48200-48324; Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548-549; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-911; Serrano v. Priest, supra, 5 Cal.3d 584, 595-596, 605-610.) These constitutional and statutory educational prescriptions and rights are succinctly summarized in Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, at 548-549:

> . . . California has extended the right to an education by virtue of two constitutional provisions, one calling for legislative encouragement of education (Cal. Const., art. IX, sec. 1) and the other requiring the Legislature to create a system of "free schools" in each district of the state (Cal. Const., art. IX, sec. 5). It has also extended the right to an education by a statutory prescription for a compulsory full-time education for all persons between the ages of 6 and 16 (Ed. Code, sec. 48200). The early case of Ward v. Flood (1874) 48 Cal. 36, considered the provisions of the Constitution of 1849 relative to educational affairs which, in all material respects, were similar to the present Constitution. The Supreme Court said: "The opportunity of instruction at public schools is afforded the youth of the state by the statute of the state, enacted in obedience to the special command of the constitution of the state, directing that the legislature shall provide for a system of common schools, by which a school shall be kept up and supported in such district, at least three months every year, etc. (art. XIX, sec. 3). The advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is therefore, a right--a legal right--as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be protected by all the guarantees by which other legal rights are

> protected and secured to the possessor." (48 Cal. at p. 50, italics added; quoted in Piper v. Big Pines School Dist. (1924) 193 Cal. 664, 670.)

To provide for the mandatory nine months of public school education, the Education Code requires school districts to employ teachers, instructors, and other nonteaching personnel, and establishes in connection therewith "a complete system dealing with the credentials, employment, tenure, leave, salaries, dismissal, retirement, and other employee rights and obligations applicable to public school employees." (California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools (1969) 272 Cal.App.2d 514, 529, hg. den.) Insightful is the decision in Compton Community College Federation of Teachers, AFT Local 3486, AFL-CIO v. Compton Community College District (1985) 165 Cal.App.3d 82, hg. den., where, in dealing with the issue of whether the constitutional debt limitation barred the payment by the school district of a negotiated retroactive salary increase, the court observed (165 Cal.App.3d at 92-95):

> C. California Law Imposes a Specific Duty on the Compton College District to Employ Teachers and Not to Reduce Their Compensation During the Contract Year.
>
> The Duty begins with the California Constitution which makes education one of the highest priorities of state and local government. (Cal. Const., art. IX, secs. 1, 5; art. XVI, sec. 8; Serrano v. Priest (1976) 18 Cal.3d 728, 763-767, cert. den. Clowes v. Serrano (1977) 432 U.S. 907.) Education Code section 72290 requires each district to employ and assign instructors

> and other personnel. Nor is a district free to hire anyone it wants as instructors, sections 87211, 87274-87277 and 87289-87290 describe the qualifications and certification required of persons a district employs to educate its students. Government Code section 3543.2 makes the duty still more specific. It requires community college districts to set salary schedules after engaging in good faith bargaining about "wages, hours of employment, and other terms and conditions of employment." (San Mateo City School District v. Public Employment Relations Bd. (1983) 33 Cal.3d 850, 856.)
>
> Thus, the Compton College District had a specific duty to employ the teachers needed to provide education to its citizens and to pay them according to a set salary schedule. This is not a case like City of Petaluma, where the District had a choice whether to engage in the activity which triggered the state-mandated expenditure. Here the District had a statutory duty to provide education and to employ those needed to carry out that function. . . .
>
> . . . . . .
>
> It makes no difference how the board arrives at the salary levels for the year--whether by negotiations with a union or by contracting with individual teachers on a case by case basis or by establishing a standard salary schedule. Once the amount is set, it cannot be reduced during that year. . . .

In relation to construing any statutory rights of public school employees, the paramount right of California's children to attend the public schools and obtain for themselves and society the benefits thereof is cogently recognized in McGrath v. Burkhard (1955) 131 Cal.App.2d 367, 377. In that case, in dealing with educational statutes and a teacher's

contract of employment, the court observed:

> . . . It must be borne in mind that the respondent school authorities are entrusted with the responsibility of administering the affairs of the school district and that as stated in Bates v. Board of Education, 139 Cal. 145, at page 148:
>
> > "The public schools were not created, nor are they supported, for the benefit of the teachers therein, as implied by the contention of the appellant, but for the benefit of the pupils and the resulting benefit to their parents and the community at large."
>
> And as stated in Knickerbocker v. Redlands High School District, 49 Cal.App.2d 722, at page 727:
>
> > "The whole system of legislation regulating the educational machinery is based upon the consideration of the welfare and best interests of the children. The proper regulation of tenure in office and other rights of teachers were also properly considered and regulated, but the fundamental purpose and primary object of the legislature was the consideration of the welfare of the children. This fundamental purpose must not be lost sight of by courts in the construction of legislation dealing with our education system." (Emphasis added.)

In the same vein is the pronouncement of our Supreme Court in Turner v. Board of Trustees, Calexico Unified School District, supra, 16 Cal.3d 818, 825 (emphasis added):

> In considering the student's need for education, the teacher's need for job security, and the school board's need for flexibility in evaluating and hiring employees who may remain 40 years, the Legislature may determine whether a teacher's vested right shall be granted, postponed or denied. (Board of Regents v.

> Roth (1972) 408 U.S. 564, 577.) Our school system is established not to provide jobs for teachers but rather to educate the young. Establishing a test period for teachers to prove themselves is essential to a good education system. While refusal to grant total job security at the time of initial hiring may be repugnant to those pursuing a teaching career, repeated statutory amendments relating to probationary teachers' rights [citation] reveal that the Legislature has been well aware of the delicate balancing necessary to accommodate these sometimes competing interests.

Consequently, in construing any legislation which could affect the operation of the public schools, a lodestar which we must keep in view is the affording of educational services to, and the welfare of, the children. (Centinela Valley Secondary Teachers Association v. Centinela Valley Union High School District (1974) 37 Cal.App.3d 35, 42, hg. den.; San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850, 863; Santa Barbara Federation of Teachers v. Santa Barbara High School District (1977) 76 Cal.App.3d 223, 234, hg. den.; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-911, 921-922; Knickerbocker v. Redlands High School District (1942) 49 Cal.App.2d 722, 727, hg. den.; Serrano v. Priest, supra, 5 Cal.3d 584, 605; Turner v. Board of Trustees, Calexico Unified School District, supra, 16 Cal.3d 818, 825; Crawford v. Board of Education of City of Los Angeles (1976) 17 Cal.3d 280, 297.)

Thus, in analyzing any statute which relates to or could affect the operation of the public schools, we must remain

cognizant--as we must assume the Legislature was--of the predominant position of the public school system as established by our Constitution and implemented through the Education Code (Cal. Const., arts. IX and XVI, sec. 8; Ed. Code, secs. 1-99176; Serrano v. Priest, supra, 5 Cal.3d 584, 604-610, 619; Crawford v. Board of Education of City of Los Angeles, supra, 17 Cal.3d 280, 297; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-913; California Teachers Association v. Board of Trustees of Fullerton Union High School District, supra, 82 Cal.App.3d 244, 254), the required operation of the public schools for a minimum school year term of at least 6 months as mandated by the Constitution (Cal. Const., art. IX, sec. 5; Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548-549; California Teachers Association v. Board of Education of the Glendale Unified School District, supra, 109 Cal.App.3d 738, 744) and which has been statutorily mandated at nearly 9 months by the Legislature, with attendance by those of 6 to 16 years of age being compulsory (Ed. Code, secs. 41420, 48200), and the constitutionally guaranteed rights of California's children to attend and receive such education during the mandated school year term (Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548-549; California Teachers Association v. Board of Education of Glendale Unified School District, supra, 109 Cal.App.3d 738, 744-745; Serrano v. Priest, supra, 5 Cal.3d 584, 604-608; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-913; Ward v. Flood (1874) 48 Cal. 36,

50; Piper v. Big Pine School District, supra, 193 Cal. 664, 670).

And we must bear in mind that it is the shining star of the children's education which is at the apex of the statutory educational pyramid formed by article IX and the Education Code, and that any and all statutes affecting the public schools must be in support of and subservient thereto. (Turner v. Board of Trustees, Calexico Unified School District, supra, 16 Cal.3d 818, 825; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-916; McGrath v. Burkhard, supra, 131 Cal.App.2d 367, 377; Centinela Valley Secondary Teachers Association v. Centinela Valley Union High School District, supra, 37 Cal.App.3d 35, 42; San Mateo City School District v. Public Employment Relations Board, supra, 33 Cal.3d 850, 863; Santa Barbara Federation of Teachers v. Santa Barbara High School District, supra, 76 Cal.App.3d 223, 234; Knickerbocker v. Redlands High School District, supra, 49 Cal.App.2d 722, 727; Serrano v. Priest, supra, 5 Cal.3d 584, 605; Crawford v. Board of Education of City of Los Angeles, supra, 17 Cal.3d 280, 297.)

The Law with Respect to Strikes by Public Employees

To understand the statutory labor law enactments of the California Legislature, and to put them in their proper context, it is helpful to outline the development of both private and public sector labor laws.

In 1932, Congress enacted the Norris-LaGuardia Act (47 Stat. 70, 29 U.S.C. sec. 102) dealing with the injunctive relief jurisdiction of the federal courts in labor matters and which set forth statutory language expressing public policy that employees should be free: (1) to organize, join and assist labor organizations; (2) to engage in collective bargaining through their chosen representatives; and (3) "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." There then followed section 7(a) of the National Industrial Recovery Act (48 Stat. 195, 198), section 7 of the National Labor Relations Act of 1935 (NLRA, the Wagner Act, 49 Stat. 449, 452), and section 7 of the Labor Management Relations Act of 1947 (LMRA, the Taft-Hartley Act, 61 Stat. 136, 140, 29 U.S.C. sec. 157), all of which set forth in identical statutory language in granting to employees these same three rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. (29 U.S.C. sec. 157; July 5, 1935, ch. 372, sec. 7, 49 Stat. 452; June 23, 1947, ch. 120, tit. 1, sec. 101, 61 Stat. 140; emphasis added.)

These employee section 7 rights "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" were then--and are now--protected under the NLRA by section 8(a)(1) which provides:

> (a) It shall be an unfair practice for an employer . . .
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . . (29 U.S.C. sec. 158(a)(1); 49 Stat. 452, ch. 372, sec. 8).

In 1937, the California Legislature enacted chapter 1, "Contracts Against Public Policy," of part 3 (Privileges and Immunities), division 2 of the Labor Code. Within chapter 1 was--and is--Labor Code section 923 which covered the three sets of rights which had been granted to employees under the NLRA (i.e., organize and join labor organizations, collectively bargain through chosen representatives, and engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection):

> In the interpretation and application of this chapter, the public policy of this State is declared as follows:
>
> Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capitol control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the

> individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in his designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Lab. Code, sec. 923; Stat. 1937, ch. 90, emphasis added.)

The aforesaid "other concerted activities" which employees had the right to engage in "for the purpose of collective bargaining or other mutual aid or protection" were held to mean and include strikes,[6] picketing, and boycotts. (United Auto Workers v. O'Brien (1950) 339 U.S. 454, 456-457; Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board (1951) 340 U.S. 383, 389-390; James v. Marinship Corp. (1944) 25 Cal.2d 721, 728-729; Park & Tilford Import Corp. v. International Brotherhood of Teamsters (1946) 27 Cal.2d 599, 603-613; and G. C. Breidert Co. v. Sheet Metal Workers International Association (1956) 139 Cal.App.2d 633, 638-639,

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[6]Strikes within the meaning of "other concerted activities" include "economic strikes" in connection with collective bargaining, "sympathy strikes," and strikes in response to an employer's unfair labor practices, the so-called "unfair practice strikes." (NLRB v. Peter Cailler Hohlor Swiss Chocolate Co. (2nd Cir. 1942) 130 F.2d 503 [10 LRRM 852, 854-855]; NLRB v. City Yellow Cab Co. (6th Cir. 1965) 344 F.2d 578 [59 LRRM 2001, 2006]; NLRB v. Louisville Chair Co. (6th Cir. 1967) 385 F.2d 922 [66 LRRM 2698, 2703], cert. den. 390 U.S. 1013.)

hg. den.) Addressing this particular provision in United Auto Workers v. O'Brien, supra, 339 U.S. 454 at 456-457, the U.S. Supreme Court held:

> In the National Labor Relations Act of 1935, 49 Stat. 449, ch. 372, 29 U.S.C.A. sec. 151, as amended by the Labor-Management Relations Act of 1947, 61 Stat. 136, ch. 120, 29 U.S.C.A. sec. 141, Congress safeguarded the exercise by employees of "concerted activities" and expressly recognized the right to strike.

And as succinctly set forth in G. C. Breidert Co. v. Sheet Metal Workers International Association, supra, 139 Cal.App.2d 633 at 638-639:

> Section 7 of the National Labor Relations Act, as amended by the Labor Management Relations Act provides that, "Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ."
>
> These "concerted activities" protected by Section 7 of the Federal Act clearly include the right to strike, peacefully picket, and boycott for purposes and by methods not prohibited by Section 8. (Federal citations.)

California appellate decisions have consistently held that Labor Code section 923's provisions--including the "other concerted activities" proviso--codify and prescribe the public policy toward, the rights of, and the concomitant protections for employees in California's private sector (C. S. Smith Metropolitan Market Co. v. Lyons (1940) 16 Cal.2d 389, 400; Park & Tilford Import Corp. v. International Brotherhood of Teamsters, supra, 27 Cal.2d 599, 603-613; In re Porterfield

(1946) 28 Cal.2d 91, 115-118; Adams v. Wolff (1948) 84 Cal.App.2d 435, 443, hg. den.; City of Los Angeles v. Los Angeles Building and Construction Trades Council (1949) 94 Cal.App.2d 36, 45, hg. den.; Elsis v. Evans (1958) 157 Cal.App.2d 399, 408-409, hg. den.; Newmarker v. Regents of the University of California (1958) 160 Cal.App.2d 640, 647; Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687-689; Glenn v. Clearman's Golden Cock Inn (1961) 192 Cal.App.2d 793, 795-798, hg. den.; Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union (1964) 61 Cal.2d 766, 769, cert. den. 380 U.S. 906; Annenberg v. Southern California District Council of Laborers (1974) 38 Cal.App.3d 637, 644, 646; Knopf v. Producers Guild of America, Inc. (1974) 40 Cal.App.3d 233, 246-247; Escamilla v. Marshburn Brothers (1975) 48 Cal.App.3d 472, 481-482; Service Employees International Union v. Hollywood Park, Inc. (1983) 149 Cal.App.3d 745, 759-760).

California appellate decisions have also consistently held that Labor Code section 923's provisions do not apply to public employees in California's public sector. (Nutter v. City of Santa Monica[7] (1946) 74 Cal.App.2d 292, 296-303, hg. den.;

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[7]This 1946 case dealing with Labor Code section 923 involved an unsuccessful attempt by the Brotherhood of Railroad Trainmen to require the City of Santa Monica to negotiate a contract concerning the terms and conditions of employment of

Adams v. Wolff, supra, 84 Cal.App.2d 435, 443; City of Los Angeles v. Los Angeles Building and Construction Trades Council, supra, 94 Cal.App.2d 36, 45; State of California v. Brotherhood of Railroad Trainmen (1951) 37 Cal.2d 412, 417; Newmarker v. Regents of the University of California, supra, 160 Cal.App.2d 640, 647; Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276, 294; Berkeley Teachers Association v. Board of Education of Berkeley Unified School District (1967) 254 Cal.App.2d 660, 671-672, hg. den.)

In the twenty-year period preceding enactment of EERA, 1955 to 1975, the Legislature adopted no less than twenty-two (22) public employer-employee relations acts. These acts included a wide range of labor relations provisions, and demonstrate that the Legislature knows the language to use when it wants to confer a right to strike on public employees.

In 1955, the Legislature enacted the Transit District Law (Stats. 1955, ch. 1036; Pub. Util. Code, secs. 24501-27509) authorizing a two-county public transit district to meet a transit problem in Alameda and Contra Costa counties. Existing public and private transportation facilities in the two counties could be acquired by the public transit district with "special provisions relating to" such transfers "and to the

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the city's bus operators. See the subsequent 1960 decision in Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, post, involving the 1957 Los Angeles Metropolitan Transit Authority Act.

employees of these facilities." (Pub. Util. Code, sec. 24561; Behneman v. Alameda-Contra Costa Transit District (1960) 182 Cal.App.2d 687, 692, hg. den.)

In this transit district law, dealing with the acquisition of the facilities of existing public and privately owned utilities, the Legislature set up a statutory scheme of labor relations providing for the transit district board's adoption of a personnel system including the establishment of positions along with salary and wage schedules for the public and private transportation employees of the facilities acquired. The law also provides for employee representation by a labor organization and for negotiations between such a labor organization and the transit district board "to reach agreement on the terms of a written contract governing wages, salaries, hours, working conditions and grievance procedures," and for mutually-agreed-to "binding interest arbitration" on matters the parties are unable to resolve. (Pub. Util. Code, secs. 24886, 25051-25053; Grier v. Alameda-Contra Costa Transit District (1976) 55 Cal.App.3d 325, 331-332, hg. den.; and see Stockton Metropolitan Transit District v. Amalgamated Transit Union (1982) 132 Cal.App.3d 203, 207, 210, 213-214, hg. den.) Significantly, there is no provision in this transit district law authorizing the employees to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (See Pub. Util. Code, secs. 25051-25053.)

Two years later, in 1957, the Legislature enacted two additional public transit district acts. The first of these was the Los Angeles Metropolitan Transit Authority Act of 1957 (Stats. 1957, ch. 547; Pub. Util. Code, appen. 1, secs. 1.1-13.1) which provided for a "public corporation" transit authority to operate transportation facilities in four southern California counties. The two principal transit companies in the Los Angeles metropolitan area at the time were privately owned public utilities with private employees who were exclusively represented by the Brotherhood of Railroad Trainmen and who had the right to strike under Labor Code section 923. In section 3.6(c) of the Los Angeles Act, the Legislature prescribed the following rights for the employees:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . (Emphasis added.)

The Act also provided for a civil service system, representational elections, collective bargaining, and mutually-agreed-to binding arbitration for unresolved disputes. (Secs. 3.6, 4.24.)

After the transit authority acquired the privately owned transit companies and their employees, it brought a declaratory relief action to obtain a judgment that the employees did not have the right to strike because they were now public employees

of a public employer. The trial court so held, and the Brotherhood of Railroad Trainmen appealed. Thus came to the Supreme Court the issue of whether the Legislature had statutorily authorized and granted to the public employees of the Los Angeles Metropolitan Transit Authority the right to strike, and in its 1960 decision in Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, our Supreme Court definitively held that the Legislature had statutorily granted these public employees the right to strike:

> In the absence of legislative authorization public employees in general do not have the right to strike (see 31 A.L.R.2d 1142, 1159-1161), and the questions presented here are whether the act creating the transit authority gave its employees such a right. . . .
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> Subdivision (c) of section 3.6 of the act provides: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection....Notwithstanding any other provision of this act...the authority...shall enter into a written contract with the accredited representative of its employees governing wages, salaries, hours and working conditions...." (Italics added.)
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> Language identical with the italicized words of subdivision (c) first appeared in section 2 of the Norris-LaGuardia Act (47 Stat. 70; 29 U.S.C., sec. 102), and it has been contained in section 923 of our Labor Code since 1937. [Fn. omitted.] The identical language was also used in section 7(a) of

the National Industrial Recovery Act (48 Stat. 195, 198), section 7 of the National Labor Relations Act of 1935 (the Wagner Act, 49 Stat. 449, 452), and section 7 of the Labor-Management Relations Act of 1947 (the Taft-Hartley Act, 61 Stat. 136, 140; 29 U.S.C., sec. 157). The courts have uniformly interpreted these words as including the right to strike peacefully to enforce union demands with respect to wages, hours, and working conditions. (Weber v. Anheuser-Busch, Inc. (1955) 348 U.S. 468, 474-475; Amalgamated Association etc. M.C.E. v. Wisconsin Employment Relations Board (1951) 340 U.S. 383, 398; International Union of United Automobile etc. Workers of America v. O'Brien (1950) 339 U.S. 454, 456-457; Collins Baking Co. v. National Labor Relations Board, 193 F.2d 483, 486; National Labor Relations Board v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505; G.C. Breidert Co. v. Sheet Metal etc. Association, 139 Cal.App.2d 633, 638.) The cases have applied the language to a number of specific stituations and have determined that it includes other activities as well as strikes but does not sanction all collective conduct of workingmen or all kinds of strikes; for example, sit-down strikes have not been included within the right to engage in other concerted activities. (See International Union of United Automobile etc. Workers of America v. O'Brien (1950) 339 U.S. 454, 457-459; International Union etc. A.F.L. v. Wisconsin Employment Relations Board (1949) 336 U.S. 245, 255 et seq.; Park & T.I. Corp. v. International etc. of Teamsters, 27 Cal.2d 599, 604-605.)

When legislation has been judicially construed and a subsequent statute on the same or an analogus subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes. (Scripps etc. Hospital v. California Emp. Com., 24 Cal.2d 669, 677; Holmes v.

> McColgan, 17 Cal.2d 426, 430; Union Oil Associates v. Johnson, 2 Cal.2d 727, 734.) Although the cases which have interpreted the italicized words involved private employees, the act before us incorporates the exact language, consisting of 16 words, found in the earlier statutes, and it is unlikely that the same words would have been repeated without any qualification in a later statute in the absence of an intent that they be given the construction previously adopted by the courts.
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> Terms such as "concerted activities" are commonly used by courts as well as legislative bodies to refer to strikes. This court, for example, on a number of occasions has used the words "concerted action" as an inclusive term referring to strikes, picketing and boycotts. (See, e.g., Petri Cleaners Inc. v. Automotive Employees etc., Local No. 88, 53 Cal.2d 455, 469 et seq.; Park & T.I. Corp. v. International etc. of Teamsters, 27 Cal.2d 599, 603; James v. Marinship Corp., 25 Cal.2d 721, 729.) Our codes provide that technical words and phrases, and others which have acquired "a peculiar and appropriate" meaning in law, are to be construed according to such meaning. (Civ. Code, sec. 13; Code Civ. Proc., sec. 16.) (54 Cal.2d 684, at 687-689, emphasis added except the court's italizing of the "16 words" on page 687.)

Significant too in the Los Angeles Metropolitan Transit Authority decision is the Supreme Court's rejection of the contention that the Legislature had engaged in discriminatory classification by granting the transit authority's employees the right to strike while statutorily withholding the right from public employees of other transit systems:

> The fact that statutes creating other transit systems do not contain provisions similar to the one involved here with respect to the right to strike cannot be a

> proper basis for a claim that subdivision (c) is discriminatory. Section 1.1 of the act provides that because of the "unique problem" presented in the Los Angeles metropolitan area and the facts and circumstances relative to the establishment of a mass rapid transit system there, the adoption of a "special act" and the creation of a "special authority" are required.
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> If any state of facts can reasonably be conceived which would support a classification made by the Legislature, the existence of that state of facts is presumed, and one who challenges the classification has the burden of showing that it is arbitrary. (State v. Industrial Acc. Com., 48 Cal.2d 365, 371-372; City of Walnut Creek v. Silveira, 47 Cal.2d 804, 811.) The Legislature could have concluded that conditions existing in the area relating to the availability of transit workers made it necessary to give plaintiff's employees the right to strike in order to obtain an experienced and efficient working force. For example, at the time the act was adopted in 1957, transit service was principally provided in the area by privately-owned utilities whose employees were represented by labor unions and had the right to strike, and many of these employees might have refused to work for plaintiff if deprived of that right. The act contemplated that plaintiff would acquire such utilities and, as we have seen, provided that their employees should not suffer any loss of benefits. Plaintiff has made no showing that the conditions which exist with respect to other transit systems are the same as those in the Los Angeles area. (54 Cal.2d at 694.)

During the very same 1957 legislative session in which it had enacted the Los Angeles Metropolitan Transit Authority Act, the Legislature also enacted the San Francisco Bay Area Rapid Transit District Act of 1957 ("BART" Stats. 1958, ch. 1056;

Pub. Util. Code, secs. 28500-29757) prescribing similar labor provisions as those set forth in the 1955 Alameda-Contra Costa Transit District Act (Pub. Util. Code, secs. 24501-27509) including: personnel system, representation by a labor organization, collective bargaining, and mutually-agreed-to binding interest arbitration (Pub. Util. Code, secs. 28767, 28850-28855). There is, however, no provision in the 1957 BART Act authorizing BART's employees to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (see particularly Pub. Util. Code, sec. 28852 setting forth the employees' rights; and see San Francisco Bay Area Rapid Transit District v. Superior Court (1979) 97 Cal.App.3d 153, 157-165, hg. den.; Rae v. Bay Area Rapid Transit Supervisory & Professional Association (1980) 114 Cal.App.3d 147, 151-153).

In 1959, in response to firefighters' concerns over having been barred from organizing or even joining a labor organization,[8] and against the statutory background of a long-established public safety policy against any interruption

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[8]See International Association of Fire Fighters, Local No. 1319, AFL-CIO v. City of Palo Alto (1963) 60 Cal.2d 295, 300; International Association of Fire Fighters, Local No. 1396, AFL-CIO v. County of Merced (1962) 204 Cal.App.2d 387, 390; Professional Fire Fighters, Inc. v. City of Los Angeles, supra, 60 Cal.2d 276, 288-289, 294; and see Perez v. Board of Police Commissioners of the City of Los Angeles (1947) 78 Cal.App.2d 638, hearing denied.

or interference in the delivery of fire fighting services,[9] the Legislature enacted what has since been referred to as the Firefighters Act. (Stats. 1959, ch. 723; Lab. Code, secs. 1960-1963.) This act gave firefighters the right "to join any bona fide labor organization of their own choice" (Lab. Code, sec. 1960), and the rights to form, organize join, and assist labor organizations, to present grievances and recommendations regarding wages, salaries, hours, and working conditions to their public employer, and to discuss such matters with their public employer through such labor organizations (Lab. Code, sec. 1962). However, no provision in the Firefighters Act authorizes firefighters to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and the last section of the Act, Labor Code section 1963, states that the enactment of the Firefighters Act "shall not be construed as making the provisions of Section 923 of this code applicable to public employees" (Lab. Code, sec. 1963). Also, to make absolutely certain that there was no confusion regarding the right of firefighters to strike or observe a picket line, the act expressly states that firefighters shall not have the right to "strike, or to recognize a picket line of a labor organization

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[9]See Penal Code section 148.2, subdivisions (1) and (4) (former Pen. Code, sec. 385 enacted in 1872 and former Health and Saf. Code, sec. 13006 (Stats. 1939)); Public Resources Code, section 4165; and 53 Ops.Cal.Atty.Gen. 324, 326-327 (1970).

while in the course of the performance of their official duties." (Lab. Code, sec. 1962.)[10]

In Professional Fire Fighters, Inc. v. City of Los Angeles, supra, 60 Cal.2d 276, the defendant City of Los Angeles contended that the Firefighters Act was invalid in that it singled out and treated firefighters differently from all other public employees (60 Cal.2d at 288), to which our Supreme Court responded:

> In enacting the instant Labor Code sections the Legislature undoubtedly had in mind many logical distinctions between firefighters and other public employees. By Government Code sections 3500-3509, inclusive, it granted to all public employees the right to join labor unions, but therein provided that the employing agencies might except police from the operation of the statute. No one can doubt that the denial of the overall benefits to the police was a reasonable denial of benefits and privileges to a class of persons charged with duties which might be inimicable to union membership. At the same time the Legislature stated (Gov. Code, sec. 3508) that firefighters should not be subject to the same exceptions as provided in the case of police. Realizing that the duties of firefighters differed sufficiently

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[10]With respect to the Legislature preventing firefighters' strikes and/or picketing from being labor disputes or controversies, see 53 Ops.Cal.Atty.Gen. 324, 325-327 (1970); California Emergency Services Act (Gov. Code, secs. 8550-8668, former Cal. Disaster Act of 1943); Military and Veterans Code, section 1505.

> from those of public employees in general, and yet not sufficiently to except them in toto from the benefit of organization, the Legislature set forth their rights and obligations in a similar (but slightly different) legislative enactment (Lab. Code, secs. 1960-1963). It cannot be said that the distinctions therein are any more arbitrary or without reasonable basis than the many other legislative distinctions predicated upon specific occupations. (60 Cal.2d at 289.)

In 1961, the Legislature enacted the George Brown Act (Stats. 1961, ch. 1964; Gov. Code, secs. 3500-3509[11]) which authorized local public employees "to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations" (Gov. Code, sec. 3502), including having such organizations represent them in conferring with local governing bodies as to the terms and conditions of their employment (Gov. Code, secs. 3504, 3505; Glendale City Employees' Association, Inc. v. City of Glendale, supra, 15 Cal.3d 328, 331; Los Angeles County Employees Association v. County of Los Angeles, supra, 168 Cal.App.3d 685, 687). Government Code section 3502, which prescribes the

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[11]The George Brown Act was amended and expanded in 1968 and then became known as the Meyers-Milias-Brown Act (MMBA) (Stats. 1968, ch. 1390; Gov. Code, secs. 3500-3510). See discussion post. The primary change in 1968 was the legislative authorization for local public labor and management representatives "not only to confer but to enter into written agreements for presentation to the governing body." (Glendale City Employees' Association, Inc. v. City of Glendale (1975) 15 Cal.3d 328, 331; Los Angeles County Employees Association v. County of Los Angeles (1985) 168 Cal.App.3d 683, 687, hg. den.)

rights granted to local public employees (and which rights are protected by Gov. Code, sec. 3506), does not include the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." The last section of the act, Government Code section 3509, declared that its enactment "shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public employees." Lastly, Government Code section 3508 authorized the governing body of a public agency to limit or prohibit the right of law enforcement employees to form, join or participate in employee organizations where it is in the public interest to do so, but exempted therefrom employees (firefighters) who were subject to the provisions of Labor Code sections 1960-1964 (Gov. Code, sec. 3508; Professional Fire Fighters, Inc. v. City of Los Angeles, supra, 60 Cal.2d 276, 289).

In 1961, the Legislature also enacted the Fresno Metropolitan Transit District Act of 1961 (Stats. 1961, ch. 1932; Pub. Util. Code, appen. 2, secs. 1-11) to provide a transit district for the City of Fresno and parts of Fresno County. Section 4.1 of the 1961 act provided certain rights for employees of a public or private utility acquired by the transit district, but did not grant such employees the right to engage "in other concerted activities for the purpose of

collective bargaining or other mutual aid or protection."[12]

In 1963, the Legislature enacted the Stockton Metropolitan Transit District Act of 1963 (Stats. 1963), ch. 839; Pub. Util. Code, secs. 50000-50507) to provide a transit district for the San Joaquin County metropolitan area. In its labor provisions, the Stockton Act provides for a personnel system for the employees including accrued credits for employees of a public utility acquired by the district (Pub. Util. Code, sec. 50122), and that when a majority of employees are represented by a labor organization, then the transit district and the labor organization are to engage in collective bargaining, with mandatory binding interest arbitration on unresolved disputes (Pub. Util. Code, sec. 50120; Stockton Metropolitan Transit District v. Amalgamated Transit Union, Local 276, AFL-CIO, supra, 132 Cal.App.3d 203, 206-207, 210, 214). The Stockton Act does not grant the employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In the First Extraordinary Session of 1964, the Legislature enacted three acts involving public employees and labor relations. The first of these 1964 acts was the Southern

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[12]The Fresno Act was amended in 1971, post, and the Legislature at that time specifically granted the district's employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Stats. 1971, ch. 1335; Pub. Util. Code, appen. 1, sec. 4.1.)

California Rapid Transit District Act (Stats. 1st Ex. Sess. 1964, ch. 62; Pub. Util. Code, secs. 30000-31520) providing for an enlarged rapid transit district in the Los Angeles area and for the inclusion and merger of the Los Angeles Metropolitan Transit District (Stats. 1957, ch. 547; Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687) into the new district (Pub. Util. Code, secs. 31000-31005, 30750(b)). This new Southern California Act provided for: a personnel system for positions not represented by a labor organization (Pub. Util. Code, sec. 30257), for assumption of all existing labor contracts upon acquisition of the Los Angeles Metropolitan Transit District (Pub. Util. Code, sec. 30750(b)), collective bargaining (Pub. Util. Code, secs. 30750(a) and (c), 30755), mutually-agreed-to binding arbitration (Pub. Util. Code, sec. 30750(d)) and, if no mutual agreement, referral to the State Conciliation Service, followed by a fact-finding commission for 30 days, with a final fact-finding report to the Governor and a 30-day "cooling off" period thereafter (Pub. Util. Code, sec. 30756[13]). Public Utilities Code section 30755 prescribes:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own

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[13]Public Utility Code section 30756 was amended in 1974 (Stats. 1974, ch. 51) to provide for a 60-day fact-finding period, with the final report to the Governor followed by a 10-day "cooling off" period.

> choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Emphasis added.)

The second 1964 act was the Marin County Transit District Act of 1964 (Stats. 1st Ex. Sess. 1964, ch. 92; Pub. Util. Code, secs. 70000-80019) involving a transit district for Marin County. Public Utilities Code section 70120 of the Marin Act states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . (Emphasis added.)

The Marin Act further provides for mutually-agreed-to binding arbitration in case of unresolved disputes and, if no such mutual agreement, referral to the State Conciliation Service, followed by a fact-finding commission for 30 days, with a final fact-finding report to the Governor and a 30-day "cooling off" period thereafter (Pub. Util. Code, sec. 70120).

The third 1964 act was the West Bay Rapid Transit Authority Act (Stats. 1st Ex. Sess. 1964, ch. 104; Pub. Util. Code, appen. 2, secs. 1.1-14.3) to provide for an interurban rapid transit system in the County of San Mateo. In its labor provisions, the West Bay Act provides for a personnel system for the employees (secs. 13.90(a), 13.97), for accrued credits for employees of an acquired public utility (sec. 13.92), and that when a majority of employees choose to be represented by a

labor organization, then the transit authority and the labor organization are to engage in collective bargaining (sec. 13.90(a)), with mutually-agreed-to binding arbitration on unresolved disputes (sec. 13.90(c)) and, if no such mutual agreement, referral to the State Conciliation Service, followed by a fact-finding commission for 30 days, with a final fact-finding report to the Governor and a 30-day "cooling off" period thereafter (sec. 13.96). Section 13.95 of the West Bay Act prescribes the following employee rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

In 1965, the Legislature enacted four acts involving public employees and labor relations. The first 1965 act was the Santa Barbara Metropolitan Transit District Act of 1965 (Stats. 1965, ch. 1835; Pub. Util. Code, secs. 95000-97100) enacted to provide a single public transit district in Santa Barbara County. In its labor provisions, the Santa Barbara Act provides for a personnel system for the employees including accrued sick leave, vacation and seniority credits for employees of a public utility acquired by the district (Pub. Util. Code, sec. 95652), and that when a majority of the employees choose to be represented by a labor organization, then the transit board and the labor organization are to engage in collective bargaining (Pub. Util. Code, sec. 95650), with

mandatory binding arbitration on unresolved disputes (Pub. Util. Code, sec. 95650). The Santa Barbara Act does not grant the employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

The second 1965 act enacted by the Legislature was the Orange County Transit District Act of 1965 (Stats. 1965, ch. 1899; Pub. Util. Code, secs. 40000-40617) to provide for an interim transit district in Orange County pending Orange County's possible inclusion in the Southern California Rapid Transit District (Pub. Util. Code, secs. 40010, 40600-40617). Under its labor provisions, the Orange County Act does not grant the employees the right to engage in "other concerted activities for the purpose of collective bargaining or other mututal aid of protection." The act does provide for employee representation by labor organizations, for collective bargaining and for binding arbitration in dispute resolution. The 1965 enactment further provided that if binding arbitration was not agreed to, then referral to the State Conciliation Service, followed by the appointment of a fact-finding commission by the Governor, a 30-day fact-finding period, a final fact-finding report to the Governor, and a 30-day "cooling off" period thereafter[14] (Pub. Util. Code, sec.

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[14]Public Utilities Code section 40120 was amended in 1981 (Stats. 1981, ch. 493) to specify mutual agreement for binding arbitration and to repeal the State Conciliation, fact-finding report to the Governor, and 30-day "cooling off" provisions.

40120; and see Stockton Metropolitan Transit District v. Amalgamated Transit Union, Local 276, AFL-CIO, supra, 132 Cal.App.3d 203, 214). Public Utilities Code section 40123 prescribes that the transit district is to assume and observe all existing labor contracts of public utilities it acquires; and sections 40127 and 40130 provide for a retirement system under the Orange County Employees Retirement System if no retirement system is bargained collectively.

The third 1965 enactment by the Legislature was the San Diego County Transit District Act of 1965 (Stats. 1965, ch. 2039; Pub. Util. Code, secs. 90000-93017) to provide a transit system covering the San Diego metropolitan area and southern San Diego County (Pub. Util. Code, secs. 90020, 90050). Public Utilities Code section 90300(a) of the San Diego Act prescribes:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . (Emphasis added.)

The San Diego Act further provides for mutually-agreed-to binding arbitration to resolve disputes and, if no mutual agreement, referral to the State Conciliation Service, followed by a report to the Governor, appointment by the Governor of a fact-finding commission within 10 days, a 30-day period for fact-finding, a final fact-finding report to the Governor and then a 30-day "cooling off" period (Pub. Util. Code, sec.

90300(a)). The transit district is required to assume and observe all existing labor contracts of any public utilities it acquires, and accrued sick leave, vacation, seniority and pension credits for employees of such acquired public utilities (Pub. Util. Code, sec. 90300(c)).

The fourth relevant 1965 legislative enactment was the so-called "Pre-Winton Act"[15] (Stats. 1965, ch. 2041) dealing with employer-employee relations in the public school system, and which added former Education Code sections 13080 through 13088 to the Education Code. Education Code section 13082 prescribed the following public school employee rights:

> Except as otherwise provided by the Legislature, public school employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer.

This section did not grant public school employees the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Education Code section 13086 protected public school employees

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[15]The 1965 enactment carried no common name designation, but upon its amendment in 1970, was designated the "Winton Act" (Stats. 1970, ch. 1413, former Ed. Code, sec. 13089).

in their exercise of rights granted under section 13082. The pre-Winton Act also provided that the public school employer was to "meet and confer" with the employee representatives on all matters relating to employment conditions, including wages, hours and other terms and conditions of employment, as well as conferring with representatives of certificated[16] employees on certain educational objectives (Ed. Code, secs. 13084, 13085). Education Code section 13085 further provided that when there was more than one employee organization representing certificated employees, then there was to be a "negotiating council" composed of representatives of the various certificated employee organizations--in a proportioned number--to "meet and confer" with the public school employer. To "meet and confer" did not authorize collective bargaining but afforded public school employees the right to voice their views and concerns through recognized representatives and have such views and ideas considered by the public school employer. (Berkeley Teachers Association v. Board of Education of the Berkeley Unified School District, supra, 254 Cal.App.2d 660, 671-672; California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools, supra, 272 Cal.App.2d 514, 523-525, 534-535, 538-540; Westminster School District of Orange

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[16]"Certificated employees" are those public school employees required by the Education Code to possess certification (e.g., teachers) as opposed to noncertificated personnel--the "classified" employees (e.g., clerical, bus drivers, cafeteria employees, etc.).

County v. Superior Court & Westminster Teachers Association (1972) 28 Cal.App.3d 120, 128, hg. den.) Lastly, Education Code section 13088 prescribed that: "(t)he enactment of this article shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees."

In 1967, the Legislature enacted the Santa Cruz Metropolitan Transit District Act of 1967 (Stats. 1967, ch. 978; Pub. Util. Code, secs. 98000-98407) to provide a transit district for the Santa Cruz metropolitan area. In its labor provisions, the Santa Cruz Act prescribes the establishment of a civil service merit system for the district's employees (Pub. Util. Code, sec. 98160), and that employees of an acquired public utility were to be given credit for accrued sick leave and vacation credits, seniority, and pension rights (Pub. Util. Code, secs. 98163, 98164). Public Utilities Code section 98162 authorizes the district employees to associate together in connection with their employment, and to "designate representatives of their own choosing and collectively or individually they may exercise their right of petition to the transit district board concerning wages, hours, or other conditions of employment." The Santa Cruz Act does not grant the district's employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In 1968, the Legislature amended the local public employee

law (George Brown Act, Stats. 1961, ch. 1964; Gov. Code, secs. 3500-3509), with the amended act being designated the Meyers-Milias-Brown Act (Stats. 1968, ch. 1390; Gov. Code, secs. 3500-3510). As amended in 1968, the MMBA "authorized labor and management representatives not only to confer but to enter into written agreements for presentation to the governing body of a municipal government or other local agency." (Glendale City Employees' Association, Inc. v. City of Glendale, supra, 15 Cal.3d 328, 331; Los Angeles County Employees Association v. County of Los Angeles, supra, 168 Cal.App.3d 683, 687; Chula Vista Police Officers' Association v. Cole, City Manager (1980) 107 Cal.App.3d 242, 247-248.) While authorizing collective bargaining for local public employees, the amended MMBA does not grant them the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (see Gov. Code, secs. 3502, 3505, 3505.1; Stationery Engineers v. San Juan Suburban Water District (1979) 90 Cal.App.3d 797, 801), and Government Code section 3509 proscribing the MMBA from being construed to give local public employees Labor Code section 923's rights and protections was retained by the Legislature and not changed.

In 1969, the Legislature enacted the Santa Clara County Transit District Act of 1969 (Stats. 1969, ch. 180; Pub. Util. Code, secs. 100000-100500) to deal with public transit problems in Santa Clara County. In its employee provisions, Public

Utilities Code section 100300 grants the following rights to district employees:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

The Santa Clara Act provides for collective bargaining (Pub. Util. Code, sec. 100302), mediation from the State Conciliation Service (Pub. Util. Code, sec. 100304), mutually-agreed-to binding arbitration, including "interest arbitration," for dispute resolution (Pub. Util. Code, sec. 100305) and, if no such mutual agreement, referral to the State Conciliation Service, then to the Governor for appointment of a fact-finding commission within 10 days, a 30-day period for fact-finding, then a final fact-finding report to the Governor followed by a 30-day "cooling off" period (Pub. Util. Code, sec. 100306). Public Utilities Code section 100350 further prescribes that the transit district shall assume and observe all existing labor contracts of any public utilities it acquires.

In 1971, the Legislature enacted two acts involving public employees and labor relations and amended a third such act. The first of these 1971 acts was the Greater Bakersfield Metropolitan Transit District Act[17] (Stats. 1971, ch. 1161;

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[17]In 1973, the Act was amended and was designated as the Golden Empire Transit District Act (Stats. 1973, ch. 590).

Pub. Util. Code, secs. 101000-101372) to meet public transit problems within the city of Bakersfield and adjacent Kern County areas. In its labor provisions, Public Utilities Code section 101340 grants the following district employee rights:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . . (Emphasis added.)

The Greater Bakersfield Act provides for collective bargaining (Pub. Util. Code, secs. 101340, 101348), mutually-agreed-to binding arbitration for dispute resolution (Pub. Util. Code, sec. 101341) and, if the parties do not mutually agree to binding arbitration, referral to the State Conciliation Service for mediation, then to the Governor for the appointment of a fact-finding commission, 30-days for fact-finding, then a final fact-finding report to the Governor followed by a 30-day "cooling off" period (Pub. Util. Code, sec. 101342). Public Utilities Code section 101345 prescribes that the transit district shall assume and observe all existing labor contracts of public utilities it acquires.

The second 1971 enactment by the Legislature was the Sacramento Regional Transit District Act (Stats. 1971, ch. 1374; Pub. Util. Code, secs. 102000-102700) to meet mass and rapid transit needs of the Sacramento region. In its employee relations provisions, Public Utilities Code section 102400 grants the following employee rights:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

The Sacramento Act provides for collective bargaining (Pub. Util. Code, secs. 102401, 102407) and for mutually-agreed-to binding arbitration, including interest arbitration, in dispute resolution (Pub. Util. Code, sec. 102401). Public Utilities Code section 102404 prescribes that the transit district shall assume and observe all existing labor contracts of public utilities it acquires, and shall give employees of acquired public utilities their accrued sick leave, seniority, vacation and pension credits. Lastly, Public Utilities Code section 102410 prescribes that if the employees choose an exclusive collective bargaining representative, then the provisions of the MMBA (Gov. Code, secs. 3500-3510) are not applicable to the district and its employees.

The public employee law amendment enacted by the Legislature in 1971 is particularly significant. The Legislature amended the Fresno Metropolitan Transit District Act of 1961 (Stats. 1961, ch. 1932) to specifically grant to the District's employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Stats. 1971, ch. 1335; Pub. Util. Code, appen. 1, sec. 4.1; and see Anderson v.

I. M. Jameson Corp. (1936) 7 Cal.2d 60, 67-68.)

In 1974, the Legislature enacted the San Mateo County Transit District Act (Stats. 1974, ch. 502; Pub. Util. Code, secs. 103000-103700) as an urgency measure to meet public transit problems in San Mateo County. In its employee relations provisions, Public Utilities Code section 103400 grants the following employee rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

The San Mateo Act provides for collective bargaining (Pub. Util. Code, sec. 103402), mediation by the State Conciliation Service (Pub. Util. Code, sec. 103404), mutually-agreed-to binding arbitration, including interest arbitration, for dispute resolution (Pub. Util. Code, sec. 103405) and, if the parties do not agree to binding arbitration, referral to the State Conciliation Service, a fact-finding commission appointed by the Governor, a 30-day period for fact-finding, and then a final fact-finding report to the Governor followed by a 30-day "cooling off" period (Pub. Util. Code, sec. 103406). Public Utilities Code sections 103420 and 103421 further provide for appointment without examination of employees of acquired public utilities, and that such employees be credited with their accrued sick leave, seniority, vacation and pension credits.

In 1975, the year the Legislature enacted the Educational Employment Relations Act (Stats. 1975, ch. 961), it also enacted two other acts involving public employees and labor relations, and one act involving private employees. The first of these was the Mills-Deddeh Transit Development Act (Stats. 1975, ch. 294; Pub. Util. Code, secs. 120000-120702) to provide for public mass transit guideways in the City of San Diego and portions of southern San Diego County. In its labor provisions, Public Utilities Code section 120500 prescribes:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities as permitted under the Federal Labor Management Relations Act, 1947, as amended, for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

The Mills-Deddeh Act provides for collective bargaining (Pub. Util. Code, secs. 120501, 120506), mutually-agreed-to binding arbitration for dispute resolution (Pub. Util. Code, sec. 120502) and, if no such mutual agreement, referral to the State Conciliation Service, then to the Governor for appointment of a fact-finding commission within 10 days, 30-days for fact-finding, and then a 30-day "cooling off" period following the submission of the fact-finding report to the Governor (Pub. Util. Code, sec. 120503). Public Utilities Code sections 120520 and 120521 further prescribe that employees of acquired privately or publicly owned corporations or utilities shall be

appointed without examination and shall be credited with accrued sick leave, vacation, seniority and pension credits, and that the district board shall assume and observe all existing labor contracts of the acquired corporations or utilities.

In 1975, the Legislature also enacted the North San Diego County District Development Board Act (Stats. 1975, ch. 1188; Pub. Util. Code, secs. 125000-125561) for transit systems in northern San Diego County. In its labor provisions, Public Utilities Code section 125520 prescribes:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. (Emphasis added.)

The North San Diego Act also provides for collective bargaining (Pub. Util. Code, sec. 125522), mediation by the State Conciliation Service (Pub. Util. Code, sec. 125524), mutually-agreed-to binding arbitration, including interest arbitration, for dispute resolution (Pub. Util. Code, sec. 125525) and, if no mutual agreement on binding arbitration, referral to the State Conciliation Service, then to the Governor for appointment of a fact-finding commission, 30-days for the fact-finding, and then a 30-day "cooling off" period following the submission of the fact-finding report to the Governor (Pub. Util. Code, sec. 125526). Public Utilities Code

sections 125540 and 125541 further provide that employees of acquired publicly or privately owned utilities shall be appointed without examination and shall be credited with accrued sick leave, vacation, seniority and pension credits, and that the transit board shall assume and observe all existing labor contracts of the acquired utilities.

Finally, in 1975, after the enactment of the Mills-Deddeh and the North San Diego acts, and subsequent to its enactment of EERA in 1975, the Legislature enacted the Agricultural Labor Relations Act (ALRA) (Stats. 3d Ex. Sess. 1975, ch. 1; Labor Code, secs. 1140-1166.3) covering private agricultural employees and establishing a state Agricultural Labor Relations Board (ALRB). Labor Code section 1152 prescribes the agricultural employees' rights:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." (Emphasis added.)

The agricultural employees' right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" is protected by Labor Code section 1153(a) which protects agricultural employees "in the exercise of the rights guaranteed in Section 1152."

In summary, between 1955 and 1975[18]--and not counting EERA or ALRA--the Legislature enacted twenty-two (22) public employer-employee relations acts, rich and varied in their provisions, and covering a wide range of labor relation and dispute resolution matters, including: (1) right to organize, join, assist and participate in labor organizations; (2) representation by labor organizations; (3) bargaining units; (4) elections of representatives; (5) "exclusive" representatives; (6) right to "meet and confer" with public employer; (7) right to engage in collective bargaining with public employer; (8) right to engage "in other concerted activities (including strikes) for the purpose of collective bargaining or other mutual aid or protection;" (9) mutually-agreed-to binding arbitration; (10) mandatory binding arbitration for dispute resolution, including interest arbitration; (11) mediation by the State Conciliation Service; (12) when binding arbitration not mandatory and parties do not agree to binding arbitration: (a) mediation by State Conciliation Service, (b) fact-finding commission appointed by

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[18]Subsequent to the enactment of EERA in 1975, the Legislature enacted two other major public employer-employee acts: the State Employer-Employee Relations Act (SEERA) (Stats. 1977, ch. 1159; Gov. Code, secs. 3512-3524) and the Higher Education Employer-Employee Relations Act (HEEERA) (Stats. 1978, ch. 744; Gov. Code, secs. 3560-3599). In both SEERA and HEEERA the Legislature did not grant the covered state employees and higher education employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

governor, (c) fact-finding, and (d) final fact-finding report to Governor with 30-day "cooling off" period thereafter; and (13) personnel systems, including merit/civil service, with "absorbed" former private employees being appointed without examination and receiving accrued credits, etc.

A comparison of the provisions of the various public employee acts shows that the Legislature granted the right to strike in twelve (12) of the twenty-two (22) acts. Originally, the Legislature did not grant the right to strike to Fresno Metropolitan Transit District public employees (Stats. 1961, ch. 1932) but ten years later, in 1971, amended the Fresno Act (Stats. 1971, ch. 1335) specifically to give them the right.

Act	Code	Right to Strike "16 Words"
Stats. 1955, ch. 1036 (Transit Dist. Law)	PUC 24501 - 27509	No
Stats. 1957, ch. 547 (L.A. Met. Authority)	PUC Append. 1	Yes
Stats. 1957, ch. 1056 (S.F. Bay R.T.)	PUC 28500 - 29757	No
Stats. 1959, ch. 723 (Firefighters)	Lab. 1960 - 1963	No
Stats. 1961, ch. 1964 (Brown Act - Local)	Gov. 3500 - 3509	No
Stats. 1961, ch. 1932 (Fresno Met. Transit)	PUC Append. 2	No
Stats. 1963, ch. 839 (Stockton Met. Transit)	PUC 50000 - 50507	No
Stats. 1964, ch. 62 (So. Calif. R.T.)	PUC 30000 - 31520	Yes

Stats. 1964, ch. 92 (Marin County Transit)	PUC 70000 - 80019	Yes
Stats. 1964, ch. 104 (West Bay R.T.)	PUC Append. 2	Yes
Stats. 1965, ch. 1835 (Santa Barbara Met.)	PUC 95000 - 97100	No
Stats. 1965, ch. 1899 (Orange County Transit)	PUC 40000 - 40617	No
Stats. 1965, ch. 2039 (San Diego Co. Transit)	PUC 90000 - 93017	Yes
Stats. 1965, ch. 2041 (Public Schools)	Ed. 13080 - 13088	No
Stats. 1967, ch. 978 (Santa Cruz Met. Tran.)	PUC 98000 - 98407	No
Stats. 1968, ch. 1964 (MMBA - Local)	Gov. 3500 - 3509	No
Stats. 1969, ch. 180 (Santa Clara County)	PUC 100000 - 100500	Yes
Stats. 1971, ch. 1161 (Gt. Bakersfield Met.)	PUC 101000 - 101372	Yes
Stats. 1971, ch. 1374 (Sacramento R.T.)	PUC 102000 - 102700	Yes
Stats. 1971, ch. 1335 (Fresno Met. - Amend)	PUC Append. 1	Yes
Stats. 1974, ch. 502 (San Mateo County)	PUC 103000 - 103700	Yes
Stats. 1975, ch. 294 (Mills-Deddeh Transit)	PUC 120000 - 120702	Yes
Stats. 1975, ch. 1188 (North San Diego Co.)	PUC 125000 - 125561	Yes

We turn now to the statutory provisions of EERA, keeping in mind the Legislature's knowledge of and familiarity with the constitutional and statutory mandates with respect to the operation of the public schools and its knowledge and

familiarity with the statutory language granting the right to strike. (Estate of McDill, supra, 14 Cal.3d 831, 837-839 and cases cited therein; Bailey v. Superior Court (1977) 19 Cal.3d 970, 977-978, fn. 10; Fuentes v. Workers' Compensation Appeals Board, supra, 16 Cal.3d 1, 7; Keeler v. Superior Court, supra, 2 Cal.3d 619, 625; Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 65 Cal.2d 684, 688-689; Buckley v. Chadwick, supra, 45 Cal.2d 183, 200 and cases cited therein; Sutter Hospital v. City of Sacramento, supra, 39 Cal.2d 33, 38; Rosenthal v. Cory, supra, 69 Cal.App.3d 950, 953.)

II. PUBLIC SCHOOL EMPLOYEE RIGHTS GRANTED AND PROTECTED BY THE EDUCATIONAL EMPLOYMENT RELATIONS ACT

Various appellate court decisions ably identify, describe and trace the status of public school employees with respect to: (1) organizing; (2) bargaining collectively through their chosen representatives; and (3) engaging "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (specifically, the right to strike), in the years preceding and up to the enactment of the Educational Employment Relations Act in 1975 (Stats. 1975, ch. 961).

In California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools (1969) 272 Cal.App.2d 514, the court dealt with an attack on the constitutionality of the Winton Act

(former Ed. Code, secs. 13080-13088). The Winton Act (which was repealed and superseded by EERA) prescribed certain rights to public school employees and provided for a "negotiating council" when there was more than one employee organization. The Oxnard decision, in discussing the constitutionality of the Winton Act, first considered the subject matter, history and legislative purpose of the statute:

> California in 1933 declared its legislative policy concerning the regulation of employment relations in private industry (Lab. Code, secs. 920 et seq.). The common law policy of the state was codified in Labor Code section 923, revised in 1937, as follows: ". . . Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This section . . . guarantees to private employees the right to organize, to engage in collective bargaining (Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 385), and to participate in concerted activities to secure legitimate employment benefits. (Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra, 53 Cal.2d 455, 469-471.) Labor Code section 923 does not, however, impose upon the employer the legal duty to engage in collective bargaining (Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra, p. 474) and it has been judicially determined that specific legislation is required to extend to public employees the right to bargain collectively which would "establish an entirely new

system in the field of public employment." (Nutter v. City of Santa Monica, 74 Cal.App.2d 292, 301; City of Los Angeles v. Los Angeles etc. Council 94 Cal.App. 2d 36, 46; State of California v. Brotherhood of R.R. Trainmen, supra, 37 Cal.2d 412, 417, cert. den. 342 U.S. 876.)

Since the policy underlying Labor Code section 923 had no necessary application to public employees, who occupy a status in relation to their employer different from that of their private counterparts, separate and distinctive legislative treatment has been accorded the regulation of their employment relations. The Legislature, acceding to the demands of public employees for a more effective and substantial voice in the determination of the terms and conditions of their employment, has only recently been confronted with the need to reconcile those elements which differentiate the position of public employees relative to their employer from that of private employees. In attempting to formulate statutes to extend to public employees appropriate opportunitites to participate in determinations relating to the terms and conditions of their employment, the Legislature has been compelled to reevaluate procedures such as collective bargaining, exclusive representation, and strikes which fulfill a traditional role in private labor negotiations with respect to the appropriateness of their application not only to the public sector generally, but to the wide variety of occupations and professions encompassed within the field of public employment.

The separate treatment of public school system employees under the Winton Act should be viewed in its sociological and historical perspective. It was not the first legislative attempt to govern public employment relations in California but evolved through a series of enactments designed to regulate separately various aspects of public employment. The first of these was the Los Angeles Metropolitan

Transit Authority Act of 1957 (Stats. 1957, ch. 547, p. 1609) which extended to employees of the then newly organized Los Angeles Metropolitan Transit Authority the right to form labor organizations and to engage in collective bargaining and was held constitutional in the face of charges of arbitrary classification. (Los Angeles Met. Transit Authority v. Brotherhood of R.R. Trainmen, 54 Cal.2d 684, 694 [8 Cal.Rptr. 1, 355 P.2d 905].) The California Fire Fighters Act (Lab. Code, secs. 1960-1963), which in 1959 extended to the fire fighters the right to self organization to present to their employer grievances and recommendations relating to their working conditions but specifically proscribed to them the policies of Labor Code section 923, was subsequently held constitutional against similar charges. (Professional Fire Fighters Inc. v. City of Los Angeles, 60 Cal.2d 276, 287 [32 Cal.Rptr. 830; 384 P.2d 158].)

In 1961 the Brown Act (Gov. Code, secs. 3500-3509) extended to employees of "the various public agencies in the State" (Gov. Code, sec. 3500) the right to form and to join employee organizations which had as one of their primary purposes the representation of such employees in their relations with the public agency employer, and to be represented by such employee organizations or to represent themselves individually (Gov. Code, secs. 3501, 3502), but again Labor Code section 923 was specifically rendered inapplicable. The Winton Act (Ed. Code, secs. 13080-13087) passed in 1965, was patterned upon and is in many respects similar to the Brown Act, and it contains the same limitation with respect to Labor Code section 923. (Ed. Code, sec. 13088.) It removes from the application of the Brown Act and treats separately the employees of public school systems, both certificated and noncertificated, and declares that its purpose is, inter alia, to provide recognition of the right of public school employees to be represented by organizations in their professional as well as their employment relationships, and "to afford certificated employees a voice in the

formulation of educational policy." (Ed. Code, sec. 13080.) Although the Brown Act was amended in 1968 (Stats. 1968, ch. 1390) to require that the governing body of a public agency should "meet and confer in good faith" and should reduce its employment agreements to writing (Gov. Code, sec. 3505) only the Los Angeles Metropolitan Transit Authority Act, supra, has adopted and applied to employees in public service in California the collective bargaining concepts of the National Labor Relations Act or similar state statutes. The California Legislature has clearly been attempting to reconcile by selective innovation the divergent elements inherent in public employer-employee relations including the acknowledged distinctions in the status and obligations of public and private employees, as well as the various occupations and professions represented by public employment.

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It is generally acknowledged that essential distinctions exist between educational public agencies and general, non-educational public agencies, and for this reason educational agencies have traditionally received separate legislative treatment. (See Minneapolis Fed. of Teachers, Local 59 v. Obermeyer (1966) 275 Minn. 347 [147 N.W.2d 358].) The Education Code accordingly establishes a complete system dealing with the credentials, employment, tenure, leave, salaries, dismissal, retirement, and other employee rights and obligations applicable to public school employees. (Ed. Code, secs. 12901-13777; 24201-24324.) This legislation, separate from statutes relating to state, county and other public agency employees, differentiates certificated employees (Ed. Code, secs. 13101-13575.7) from noncertificated employees (Ed. Code, secs. 13580-13756) in the public school and junior college systems and, consistently, differentiates academic from non-academic employees in the state colleges. (Cal. Admin. Code, tit. 5, secs. 42700-43700.) . . . .

. . . . . .

The Winton Act is constructed upon the premise that all groups concerned with the subject matter (teachers and other school employees as well as administrators and school board members) are genuinely and primarily interested in the welfare of schools and pupils and are willing, given appropriate means, to work harmoniously in order to secure the legitimate demands of school employees <u>without detriment to the educational institutions</u> . . . .

. . . . . .

The local public school board, which is traditionally composed of elected interested lay personnel, currently finds itself in a singular position relative to its functions. It must respond on the one hand to its constituents, on the other to its legislative peers, and it is confronted in every direction by organizations of certificated employees which have recently risen to contend for teachers the same rights to self determination of their employment conditions as their counterparts in private industry. The board is, as heretofore mentioned, charged by legislative mandate with conducting the affairs of the local school district according to the comprehensive statutory scheme of regulating salaries, leaves, certification, tenure, and other circumstances affecting teaching personnel. It is elected to determine, elucidate and implement the district's policy considerations and, at the conclusion of general open discussion and the presentation of recommendations, the board is left with the ultimate decision. While giving consideration to the recommendations of the majority as well as the participating minority organizations among its certificated employees, the board must nonetheless continue responsive to the will of the local electorate and the legislative dictates relating to employment conditions and curriculum requirements within this state. Finally, it is by the Winton Act directed to listen and respond to the suggestions of employee organizations and it must tread carefully in its attempt to reconcile all these imperatives in an

equitable manner. Clearly, the board in its effort to negotiate these hurdles, is compelled to rely upon the recognition on the part of the district's highly educated and trained, certificated employees, that their professional obligation to the community demands of them a high degree of cooperation, responsibility to render continuing services, and to refrain from interference with the essential operation of educational institutions even in times of conflict. It is assumed that certificated personnel, dedicated to their occupational goals, will in good faith participate in whatever statutory procedures may reasonably be established to assure a free exchange of communication, both interorganizational and between the board and the employee organizations competing within the District.

"Teachers are earnest and devoted people with a high degree of professional training and experience. They know children and what goes on in the classroom and in the learning process. A lay board should make full use of their willingness, and their knowledge and experience in matters of vital concern to both. Their voices should be heard and their recommendations thoughtfully considered. This should be rudimentary in good procedure. If boards and superintendents aren't doing this, they should. The critical question now is this: Is the superimposing of the already outgrown and inadequate industrial bargaining theory and techniques upon this quite different set of conditions the best way to achieve our purposes? Is this the desired spirit and procedure? Is industrial type 'bargaining' the way to select a reader for the third grade, or decide whether to introduce the new math for the eleventh, or whether the class size shall be 22 or 27, or which teacher shall teach in which school? Can't we find a better way, in a different context, to solve difficult professional questions that must be reasoned and analyzed and decided, but not 'bargained' in this ritualistic sense?" (Hatcher, Alexander F. Morrison Lecturer, 42 State Bar J., pp. 50-51.)

> The air is stirring with the demands of public employees for recognition and the right to organize in the interests of influencing their employment conditions, and they are entitled to have these demands acknowledged and accorded to them within reasonable statutory bounds and limitations. Our Legislature in its inimitable wisdom has responded to the challenge by evolving the negotiating council, which incorporates provision for representation by appointed members of various minority organizations, in order to encourage the free exchange of ideas and the resolution of internal conflicts between these novice entries into the labor negotiation arena. It is the aim of such legislation to encourage the peaceful coexistence of employee organizations representing different philosophies and to allow for the voice of dissent, minimizing the coercion of minorities to the majority will. "The Legislature is uniquely able to amass economic data and hold hearings where it can give heed to many representatives of the public besides parties to a controversy." (Messner v. Journeymen Barbers etc. International Union, 53 Cal.2d 873, 882 [4 Cal.Rptr. 179, 351 P.2d 347].) Having carefully considered the problem of employment relations in the public school systems the Legislature arrived at a sound statutory determination of its tentative solution. This court has, under the circumstances, the duty and obligation to sustain the validity of the statutory scheme and to enjoin upon appellants the responsibility to cooperate and participate in good faith in order to enhance the declared appropriate legislative objectives. (272 Cal.App.2d at 519-540, emphasis added.)

Three years later, in Westminster School District of Orange County v. Superior Court & Westminster Teachers Association (1972) 28 Cal.App.3d 120, 127-129, the Court of Appeal stated:

> The background and history of the California Legislature's attempts to deal with public employer-employee relations in this state,

> including the background and reasons for enactment of the Winton Act, are admirably reviewed and discussed in California Federation of Teachers v. Oxnard Elementary Sch., 272 Cal.App.2d 514, 520-524, 529-530, 532-535, 538-540 [77 Cal.Rptr. 497] (see also Berkeley Teachers Assn. v. Board of Education, 254 Cal.App.2d 660, 663-664 [62 Cal.Rptr. 515]), and it would serve no useful purpose to repeat here what is there set forth. Suffice it to summarize as follows. "The California Legislature has clearly been attempting to reconcile by selective innovation the divergent elements inherent in public employer-employee relations including the acknowledged distinctions in the status and obligations of public and private employees, as well as the various occupations and professions represented by public employment." (California Federation of Teachers v. Oxnard Elementary Sch., supra, 272 Cal.App.2d at p. 523.)
>
> The Winton Act does not embody the concept of collective bargaining. (Ed. Code, sec. 13088; California Federation of Teachers v. Oxnard Elementary Sch., supra, 272 Cal.App.2d at pp. 523, 534, 538-540; Berkeley Teachers Assn. v. Board of Education, supra, 254 Cal.App. 2d at p. 671.) Its provisions make clear that the right conferred upon certificated public school employees is to voice their views and ideas through recognized representatives and to have these views and ideas considered by the public school employer but that all final decisions are left to the public school employer. (Secs. 13085, 13088.)

While the Winton Act afforded certain limited rights to public school employees, it also contained Education Code section 13088 which prescribed that: "The enactment of this article [Winton Act] shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees."

Appellate decisions prior to 1975 were unanimous in their holdings that public employees--including public school employees--do not have the right to strike unless statutorily authorized by the Legislature. (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687; Newmarker v. Regents of the University California, supra, 160 Cal.App.2d 640, 646-647; Almond v. County of Sacramento (1969) 276 Cal.App.2d 32, 36-38, hg. den.; City of San Diego v. American Federation of State, County and Municipal Employees (1970) 8 Cal.App.3d 308, 310-311, hg. den.; Trustees of California State Colleges v. Local 1352, San Francisco State Teachers (1970) 13 Cal.App.3d 863, 867, hg. den.; Los Angeles Unified School District v. United Teachers (1972) 24 Cal.App.3d 142, 145-146, hg. den.; Berkeley Teachers Association v. Board of Education (1967) 254 Cal.App.2d 660, 671, hg. den.)

In 1975, the Legislature repealed the Winton Act and enacted the Educational Employment Relations Act (Stats. 1975, ch. 961; Gov. Code, secs. 3540-3549.3). EERA section 3540 sets forth the intent and purpose of the Legislature in enacting EERA, including "recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to

afford certificated employees a voice in the formulation of educational policy." EERA sections 3543.3, 3543.2 and 3540.1(h) provide for collective bargaining between the public school employer and the exclusive representative of a public school employees unit as to matters within the scope of representation.

As to whether the Legislature has granted public school employees the right to strike under EERA, there are two pertinent EERA sections: Government Code sections 3543 and 3549. EERA section 3543 prescribes:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7 no employee in that unit may meet and negotiate with the public school employer.
>
> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of

> the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

Significantly, EERA section 3549 provides in pertinent part: "The enactment of this chapter [EERA] shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees . . . ." (Gov. Code, sec. 3549, emphasis added.)

Conspicuously absent and intentionally omitted by the Legislature from the rights granted to public school employees in Section 3543 is the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Keeping in mind the Legislature's knowledge of the California Constitution, of existing and related statutes, and judicial decisions construing those statutes, in addition to the governing rules of statutory construction, it is patently clear that the Legislature withheld and did not grant to public school employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," which includes, of course, the right to strike.

The Legislature's ommission from EERA section 3543 of the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection," must be construed as intentional, not inadvertent. Where statutes referring to one subject contain a critical word or

phrase, omission of that vital word or phrase from a similar statute on the same or related subject is presumed to have been deliberate by the Legislature and expressing a different legislative intent. (Estate of Simpson (1954) 43 Cal.2d 594, 600; Richfield Oil Corp. v. Crawford (1952) 39 Cal.2d 729, 735; People v. Valentine (1946) 28 Cal.2d 121, 142; Signal Oil & Gas Co. v. Bradbury (1960) 183 Cal.App.2d 40, 51, hg. den.; Craven v. Crout (1985) 163 Cal.App.3d 779, 783; Allis-Chalmers Corp. v. City of Oxnard (1981) 126 Cal.App.3d 814, 821; Estate of Trego (1978) 81 Cal.App.3d 530, 534; Marsh v. Edwards Theatres Circuit Inc. (1976) 64 Cal.App.3d 881, 891, hg. den.; Hennigan v. United Pacific Insurance Co. (1975) 53 Cal.App.3d 1, 8; City of Burbank v. Metropolitan Water District (1960) 180 Cal.App.2d 451, 461-462; and see Judson Steel Corp. v. Workers' Compensation Appeals Board (1978) 22 Cal.3d 658, 666; Balboa Insurance Co. v. Aguirre (1983) 149 Cal.App.3d 1002, 1007, hg. den.; County of Los Angeles v. Department of Social Welfare (1953) 41 Cal.2d 455, 459.)

Not only do we have the selective grant by the Legislature of the "16 words" concerted activities right in various statutes prior to 1975 (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d. 684, 687-689; Pub. Util. Code, secs. 30755, 70120, 90300(a) 100300, 101340, 102400, 103400), but in 1975, the very same year the Legislature enacted EERA, it also enacted two other public employee acts (Stats. 1975, ch. 294; Stats. 1975,

ch. 1188) in which it granted the "16 words" concerted activities right to the covered public employees (Pub. Util. Code, secs. 120500, 125520.) Also in 1975, subsequent to the enactment of EERA, the Legislature enacted the Agricultural Labor Relations Act (ALRA - Stats. 1975 3d Ex. Sess, ch. 1; Lab. Code, secs. 1140-1166) which granted private agricultural employees (who were not covered by the federal NLRA) the rights to organize, to bargain collectively through their chosen representatives and to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (Lab. Code, sec. 1152). Appellate decisions have reiterated that the right to engage in "concerted activities" granted to agricultural employees under Labor Code section 1152 includes the right to strike, picket, and participate in other types of "concerted activities" for the purpose of collective bargaining or other mutual aid or protection. (Kaplan's Fruit & Produce Co. v. Superior Court (1979) 26 Cal.3d 60, 71; Nash-DeCamp Co. v. ALRB (1983) 146 Cal.App.3d 92, 95, 104-112; ALRB v. California Coastal Farms, Inc. (1982) 31 Cal.3d 469, 482; George Arakelian Farms, Inc. v. ALRB (1980) 111 Cal.App.3d 258, 274-277 hg. den.)

The Legislature circumspectly reinforced its intent that public school employees were not to have the right to strike for the purpose of collective bargaining or other mutual aid or protection by placing in EERA section 3549 which proscribes EERA from being construed so as to make Labor Code section 923

provisions applicable to public school employees. Since EERA itself grants to public school employees all of the rights provided by Labor Code section 923 save and except the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," the prohibitory purpose of section 3549 with respect to public school employee strikes is unmistakable.

The statutory evidence is overwhelming that the Legislature did not grant to public school employees the right to strike.

Furthermore, any attempt to otherwise interpret or read into EERA a right of public school employees to strike or engage in other concerted activities interfering with or having a disruptive effect on the operation of the public schools would bring EERA into direct conflict with the California Constitution and the Education Code. Article IX of our Constitution mandates the Legislature to operate the public schools at least six months each school year, and the Legislature, through the Education Code, has extended the minimum operation of the public schools to almost nine months each school year. (Cal. Const., art. IX, sec. 5; Ed. Code, secs. 41420, 48200; California Teachers Association v. Board of Education of the Glendale Unified School District, supra, 109 Cal.App.3d 738, 744; Compton Community College Federation of Teachers, AFT Local 3486, AFL-CIO v. Compton Community College District, supra, 165 Cal.App.3d 82, 92-93; Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538,

548-549; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-911; Serrano v. Priest, supra, 5 Cal.3d 584, 595-596, 605-610; In re Shinn, supra, 195 Cal.App.2d 683, 686-687.)

We may not presume that the Legislature would statutorily authorize public school employees to engage in concerted activities, such as a strike, which could violate the constitutional and statutory mandates concerning the operation of the public schools and the constitutional rights of California's children to attend and receive their education. For if the Legislature were to grant public school employees the right to strike, then public school employees could lawfully engage in work stoppages which interfere with and disrupt the operation of the public schools. And, if public school employees may lawfully engage in a work stoppage for one day, they may lawfully extend it to one week; and, if a week, then a month; and, if a month, then two months; and so on. However, any such interference and disruption in the operation of the public schools directly contravenes the constitutional and statutory mandates concerning the operation of the schools and the constitutional rights of the children. (Cal. Const., art. IX; Ed. Code, secs. 41420, 48200-48324; Hartzell v. Connell, supra, 36 Cal.3d 899, 906-911; Serrano v. Priest, supra, 5 Cal.3d 584, 595-596, 605-610; Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548; California Teachers Association v. Board of Education, Glendale Unified School District, supra, 109 Cal.App.3d 738, 744.)

Case law has firmly established that, even where the operation of the schools is constitutionally defective due to racial or financial discrimination, schools must nevertheless remain in operation and continue to provide services without interference or disruption while the discrimination is being remedied. (Serrano v. Priest, supra, 5 Cal.3d 584, 619; Crawford v. Board of Education of the City of Los Angeles, supra, 17 Cal.3d 280; N.A.A.C.P. v. San Bernardino City Unified School District (1976) 17 Cal.3d 311; People v. Serna (1977) 71 Cal.App.3d 229, 233, hg. den.) This is due to the preeminent importance of the uninterrupted and continued operation of public schools to the constitutional rights of the students and the welfare of the people of this State. Certainly, no less is true when an unresolved labor dispute threatens such an interruption or interference. (California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools, supra, 272 Cal.App.2d 514, 532, 539.)

Nor may this Board, should it believe that the right to strike is a necessary adjunct to meaningful collective bargaining in the public sector, insert such an omitted right into EERA under the guise of statutory interpretation and rewrite the statute to conform to an assumed legislative intention that does not appear in the language of the statute. This is particularly so in the instant matter where the Legislature has not only intentionally omitted the "concerted activities" right from the statute but has also simultaneously

enacted EERA section 3549 which statutorily proscribes this Board from construing or interpreting the enactment of EERA's provisions so as to afford such a right to public school employees. (Regents of the University of California v. Public Employment Relations Board & Laborers Local 1276, LIUNA, AFL-CIO (1985) 168 Cal.App.3d 937, 942, 944-945; Bailey v. Superior Court, supra, 19 Cal.3d 970, 977-978; Estate of McDill, supra, 14 Cal.3d 831, 838; Signal Oil & Gas Co. v. Bradbury, supra, 183 Cal.App.2d 40, 51; Cadiz v. Agricultural Labor Relations Board (1979) 92 Cal.App.3d 365, 371-372, 375-377, hg. den.; Kaiser Steel Corp. v. County of Solano (1979) 90 Cal.App.3d 662, 667, hg. den.; Hennigan v. United Pacific Insurance Co., supra, 53 Cal.App.3d 1, 7-8; Vallerga v. Department of Alcoholic Beverage Control (1959) 53 Cal.2d 313, 318; Rowan v. City of San Francisco (1966) 244 Cal.App.2d 308, 314, hg. den.; Hutchins v. Waters (1975) 51 Cal.App.3d 69, 73; People v. Knowles (1950) 35 Cal.2d 471, 475; People v. One 1940 Ford V8 Coupe (1950) 36 Cal.2d 471, 475; Seaboard Acceptance Corp. v. Shay (1931) 214 Cal. 361, 369; Richardson v. City of San Diego (1961) 193 Cal.App.2d 648, 650-651, hg. den.; Blair v. Pitchess (1971) 5 Cal.3d 258, 282; Shaughnessy v. Wilsona School District of Los Angeles County (1972) 29 Cal.App.3d 742, 749; Orlandi v. State Personnel Board (1968) 263 Cal.App.2d 32, 36-37; Wilcox v. Enstad (1981) 122 Cal.App.3d 641, 653; Wisdom v. Eagle Star Insurance Co. (1963) 211 Cal.App.2d 602, 605; Kirkwood v. Bank of America

(1954) 43 Cal.2d 333, 341; and see Vogel v. County of Los Angeles (1967) 68 Cal.2d 18, 25-26; Goins v. Board of Pension Commissioners (1979) 96 Cal.App.3d 1005, 1009-1010, hg. den.; In re W.R.W. (1971) 17 Cal.App.3d 1029, 1032-1033; Buss v. J. O. Martin Co. (1966) 241 Cal.App.2d 123, 132-133; MacLead v. City of Los Altos (1960) 182 Cal.App.2d 364, 369; Code Civ. Proc., sec. 1858.)

From the foregoing, it is manifest that the Legislature has not authorized nor granted to public school employees the right to engage in strikes for the purpose of obtaining their collective bargaining goals or for other mutual aid or protection purposes, and that any such strikes or concerted activities are not protected by EERA.

Prior Board Decisions

Earlier decisions of this Board have held that an "economic strike"[19] engaged in prior to the completion of statutory impasse procedures violates EERA subsections 3543.6(c) and (d), since it constitutes a refusal to negotiate in good faith. (Fresno Unified School District (1982) PERB Decision No. 208, pp. 9-14; Westminster School District (1982) PERB Decision No. 277, pp. 14-17.)

PERB has not yet directly ruled on whether public school

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[19]See discussion, infra, at pages 123-125 for definitions of pre-impasse and post-impasse economic strikes and unfair practice strikes.

employees have the right--and thereby the concomitant protection--under EERA to engage in economic strikes after statutory impasse procedures have been exhausted. (San Ramon Valley Unified School District (1984) PERB Order No. IR-46, p. 10; Modesto City Schools (1983) PERB Decision No. 291, p. 64, fn. 35.) PERB has ruled that "unfair practice strikes" engaged in by public school employees in response to alleged unfair practices by public school employers are rights authorized by the Legislature in EERA section 3543 and are protected by EERA regardless of when they may occur in the bargaining process. (Modesto City Schools, supra, PERB Decision No. 291; San Ramon Valley Unified School District, supra, PERB Order No. IR-46; and see Fresno Unified School District, supra, PERB Decision No. 208; Westminster School District, supra, PERB Decision No. 277; Rio Hondo Community College District (1983) PERB Decision No. 292.)

In Modesto City Schools, supra, PERB Decision No. 291, this Board held that EERA section 3543 authorized work stoppages (strikes) by public school employees. After concluding that there was no statutory language in EERA directly prohibiting strikes, this Board stated:

> Even though EERA does not prohibit strikes, the Board cannot hold that a work stoppage is protected unless there is language in EERA which actually authorizes such a decision. We find that there is.
>
> Neither the NLRA or section 923 of the Labor Code contain plain and explicit language permitting strikes, yet the right of employees covered by these statutes to

> strike is protected. As the Court points out in San Diego Teachers Association, supra, at p. 6, and as the U.S. Supreme Court has held pursuant to the NLRA, a legislative "declaration that workers are to be free from employer interference in 'concerted activities . . . or other mutual aid or protection' is generally understood to confer a right to strike." (See, e.g., NLRB v. Mackay Radio & Telegraph Co. (1938) 304 U.S. 333 [2 LRRM 610]; NLRB v. Thayer Co. (1st Cir. 1954) 213 F.2d 748 [34 LRRM 2250], cert. den. (1954) 348 U.S. 883 [35 LRRM 2100].)
>
> EERA contains no reference to concerted activities. It does, however, in section 3543, guarantee public school employees the right, free from employer interference, "to form, join, and participate in the activities of employee organizations of their own choosing. . . ."
>
> The only difference we find between the right to engage in concerted action for mutual aid and protection and the right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process. Membership drives, meetings, bargaining, leafletting and informational picketing are activities which are, without question, authorized by section 3543. Similarly, work stoppages must also qualify as collective actions traditionally related to collective bargaining. Thus, except as limited by other provisions of EERA, section 3543 authorizes work stoppages. (Modesto City Schools, No. 291, pp. 61-62.)

Such an interpretation and administrative rewriting of EERA section 3543 by this Board so as to insert into the statute a right intentionally omitted by the Legislature ignores the applicable and governing rules of statutory construction, the

relevant provisions of our Constitution and related statutes, the proscription of EERA section 3549, and the applicable appellate decisions. We must assume "that the Legislature was cognizant of the correct meaning and use of the terms and that it drafted its enactment in the light of the code provisions and decisions of the courts of this state relating thereto." (Anderson v. I. M. Jameson Corp., supra, 7 Cal.2d 60, 67; Estate of McDill, supra, 14 Cal.3d 831, 837-839; Bailey v. Superior Court, supra, 19 Cal.3d 970, 977-978, fn. 10; Fuentes v. Workers' Compensation Appeals Board, supra, 16 Cal.3d 1, 7; Keeler v. Superior Court, supra, 2 Cal.3d 619, 625; Buckley v. Chadwick, supra, 45 Cal.2d 183, 200; Sutter Hospital v. City of Sacramento, supra, 39 Cal.2d 33, 38.) The aforesaid is particularly true where, as here, the use of particular words or phrases has acquired a particular meaning in law and the Legislature has placed them in some statutes but omitted them from others. (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 689; Signal Oil & Gas Co. v. Bradbury, supra, 183 Cal.App.2d 40, 51.)

On point is the recent decision in Regents of the University of California v. Public Employment Relations Board & Laborers Local 1276, LIUNA, AFL-CIO, supra, 168 Cal.App.3d 937, involving an issue of whether the Higher Education Employer-Employee Relations Act (HEERA - Gov. Code, sec. 3560 et seq.) had granted to "nonexclusive" employee organizations

the right to advance notice and discussion of employer work-rule changes. This Board interpreted the statute so as to find such a right. The Court of Appeal reversed and set the Board's decision aside:

> The University contends . . . HEERA contains no language conferring a right of representation upon nonexclusive representatives. The University suggests that the Board, in interpreting HEERA, "divines an implied legislative intent to include that which was omitted from HEERA." The University argues that an interpreter of a statute, whether a court or an administrative agency, cannot supply what the Legislature has omitted in an attempt to make the statute conform to a presumed intent of the Legislature which is not expressed in the statutory language.
>
> . . . the Board reasoned . . . that HEERA's language and overall statutory scheme indicated that the Legislature intended to expand representational rights, not to "consign nonexclusive representatives to a state of powerless limbo." The Board found that HEERA's express provisions indicated a legislative intent to preserve representational rights for the employees and employee organizations until such time as an exclusive representative was selected.
>
> . . . . . .
>
> We agree with the Board's conclusion that a non-exclusive union may play a significant role before selections of an exclusive representative. <u>We disagree with the Board's creation of a "right to represent" where the Legislature failed to establish such a right</u>.
>
> . . . . . .
>
> <u>HEERA is significant not so much for what it provided as for what was omitted.</u> Beginnning in 1971 with the George Brown Act, the Legislature established a pattern of providing for the employees' rights and

the employee organizations' rights in two successive code sections: first, the employees' right to ". . . form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . ." (sec. 3527); and then, in the next code section, that the "[e]mployee organizations shall have the right to represent their members in their employment relations, . . ." (sec. 3528.) This quoted language was used again in sequential code sections in EERA (adopted in 1975) (secs. 3543, 3543.1) and in SEERA (adopted in 1977) (secs. 3515, 3515.5). In each case other portions of the sections differed, but the operative langauge quoted above was identical.

HEERA, adopted one year after SEERA, used the quoted language to establish the right of employees to form, join, and participate in employee organizations (sec. 3565), but omitted entirely the provision establishing the employee organization's right to represent. . . . Later in the Act, the Legislature revealed that it had not forgotten the formula for its three previous public employment enactments, because it again used the quoted language from the George Brown Act, amending it to apply to "supervisory employees." It established both the supervisory employees' right to "form, join, and participate" (sec. 3581.1) and the organization's right to represent supervisory employees in higher education (sec. 3581.2).

We cannot agree with the Board's conclusion that HEERA's ommission of a "right to represent" was without significance. It is true that we must accord great respect to an administrative agency's interpretation of the statute it is charged with enforcing [citations]. But upholding such a reading would go well beyond respect for the agency's interpretation. It would authorize the Board to rewrite the statute to suit its notion of what the Legislature must have intended to say about organizational rights. It would do this in the face of

> strong evidence of a contrary legislative intent: the Legislature's use of the same constructions in four different pairs of statutes, and its failure to use that construction in the statute under scrutiny. (168 Cal.App.3d at 941-945, emphasis added.)

Likewise, in Westminster School District of Orange County v. Superior Court & Westminster Teachers Association, supra, 28 Cal.App.3d 120, the Court of Appeal had before it a provision of the Winton Act involving the formation of a three-member "persistent disagreement committee" as authorized by former Education Code section 13087.1. To aid in the resolution of persistent disagreements between a school district and its employees, the statute prescribed that each party (the school district and the employee council) would designate a committee member and the two designated members would then select the third member. The statute provided no procedure for selecting the third member if the two designees could not agree. In Westminster, the two designees could not agree and the employee council sought to have the superior court appoint the third member, which the superior court did. On appeal, the employee council contended that the statute created a substantive right to the formation of a persistent disagreement committee and that if the parties could not agree on the third member of the committee that "the court must have the power to fashion a remedy for the appointment of a third member under such circumstances because, otherwise, the statutorily created right would be meaningless." (28 Cal.App.3d

at 127). In rejecting the employee council's contention and reversing the superior court, the Court of Appeal set forth:

> Having carefully considered the problem of employment relations in the public school systems, the Legislature has enacted the Winton Act as a unique, experimental procedure representing a tentative solution [citation]. The act provides for the selection of a persistent disagreement committee of three members by agreement of the parties and their representatives. (Sec. 13087.1.) Obviously, it was foreseeable to the Legislature that the parties might not be able to agree upon the selection of the third member of such committee [citations], yet the Legislature has provided no procedure for imposing on either party a member of such committee selected by the court. Both the philosophy underlying the act and the Legislature's refusal to adopt measures designed to establish such a procedure persuade us that the omission was intentional, not inadvertent. It is inappropriate for the courts to alter a comprehensive, unique, experimental scheme enacted by the Legislature by interjecting therein procedures intentionally omitted by the Legislature. (28 Cal.App.3d at p. 129.)

We must assume that the Legislature knew what it was saying and meant what it said; that the Legislature knew what it was authorizing in EERA section 3543, and knew what, by omission, it was not authorizing. The Legislature knew the "formula" or "16-word" language to use if it wanted to authorize public school employees to engage in strikes. Had this been its intent, it would have given them the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra,

54 Cal.2d 684, 687-689.) It did not do so. Furthermore, the Legislature's intent in this respect is further emphasized and reinforced by its simultaneous enactment of EERA section 3549, which expressly prohibits this Board from construing EERA so as to find such a right. We may not by administrative interpretation insert into the statute that which the Legislature has omitted. (Regents of the University of California v. Public Employment Relations Board & Laborers Local 1276, LIUNA, AFL-CIO, supra, 168 Cal.App.3d 937, 942-945; Bailey v. Superior Court, supra, 19 Cal.3d 970, 977-978; Estate of McDill, supra, 14 Cal.3d 831, 838; Signal Oil & Gas Co. v. Bradbury, supra, 183 Cal.App.2d 40, 51; Cadiz v. Agricultural Labor Relations Board, supra, 92 Cal.App.3d 365, 371-372, 375-377; Kaiser Steel Corp. v. County of Solano, supra, 90 Cal.App.3d 662,667; Hennigan v. United Pacific Insurance Co., supra, 53 Cal.App.3d 1, 7-8; Vallerga v. Department of Alcoholic Beverage Control, supra, 53 Cal.2d 313, 318; Rowan v. City of San Francisco, supra, 244 Cal.App.2d. 308, 314; Hutchins v. Waters, supra, 51 Cal.App.3d 69, 73; People v. Knowles, supra, 35 Cal.2d 471, 475; People v. One 1940 Ford V8 Coupe, supra, 36 Cal.2d 471, 475; Seaboard Acceptance Corp. v Shay, supra, 214 Cal. 361, 369; Richardson v. City of San Diego, supra, 193 Cal.App.2d 648, 650-651; Blair v. Pitchess, supra, 5 Cal.3d 258, 282; Shaughnessy v. Wilsona School District of Los Angeles County, supra, 29 Cal.App.3d 742, 749; Orlandi v. State Personnel Board, supra, 263 Cal.App.2d 32, 36-37; Wilcox v. Enstad,

supra, 122 Cal.App.3d 641, 653; Wisdom v. Eagle Star Insurance Co., supra, 211 Cal.App.2d 602, 605; Kirkwood v. Bank of America, supra, 43 Cal.2d 333, 341; Riebe v. Budget Finance Corp. (1968) 264 Cal.App.2d 576, 585; Woodmansee v. Lowery (1959) 167 Cal.App.2d 645, 652, hg. den.; and see Vogel v. County of Los Angeles, supra, 68 Cal.2d 18, 25-26; Goins v. Board of Pension Commissioners, supra, 96 Cal.App.3d 1005, 1009-1010; In re W.R.W., supra, 17 Cal.App.3d 1029, 1032-1033; Buss v. J. O. Martin Co., supra, 241 Cal.App.2d 123, 132-133; MacLead v. City of Los Altos, supra, 182 Cal.App.2d 364, 369; Code Civ. Proc., sec. 1858.)

Aside from its failure to adhere to the applicable rules of statutory construction, the Modesto City Schools decision has other analytical flaws. First, Modesto City Schools adopted an initial premise that "[n]either the NLRA or section 923 of the Labor Code contain plain and explicit language permitting strikes, yet the right of employees covered by these statutes to strike is protected." This initial premise failed to recognize the long-standing appellate decisions holding that the specific "16 words" language granting employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" is the Legislature's explicit term or proviso for the right to strike. (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687-689; United Auto Workers v. O'Brien (1950) 339 U.S. 454,

456-457; Amalgamated Association of Street, Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board, supra, 340 U.S. 383, 389-390; James v. Marinship Corp., supra, 25 Cal.2d 721, 728-729; Park & Tilford Import Corp. v. International Brotherhood of Teamsters, supra, 27 Cal.2d 599, 603-613; G. C. Breidert Co. v. Sheet Metal Workers International Association, supra, 129 Cal.App.2d 633, 638-639.)

Second, not finding any right to strike or right to engage in "concerted activities" language in EERA, this Board in Modesto City Schools then asserted that the only difference between the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" and Government Code section 3543's right "to form, join, and participate in the activities of employee organizations of their own choosing . . ." is that the latter language is simply "plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process." And, since "work stoppages must also qualify as collective actions traditionally related to collective bargaining," Government Code "section 3543 authorizes work stoppages." (Modesto City Schools, supra, PERB Decision No. 291, pp. 61-62.) However, Modesto City School's quote omitted a portion from the section 3543 right: "to form, join, and participate in the activities of employee organizations of their own choosing . . ."; that is, it is "for

the purpose of representation on all matters of employer-employee relations." (Gov. Code, sec. 3543, emphasis added.) Moreover, the quoted language is identical to, and comes from, the rights language contained in the predecessor Winton Act (Stats. 1965, ch. 2011, amended Stats. 1970, ch. 1412; former Ed. Code, secs. 13080-13088) in which former Education Code section 13082 prescribed:

> Except as otherwise provided by the Legislature, public school employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . . (Emphasis added.)

Thus, the "plainer and more universally understood language" relied on by Modesto City Schools as authorizing work stoppages by public school employees, comes in haec verba from the rights granted to public school employees in the predecessor 1965 Winton Act, which did not even provide a right to engage in collective bargaining, much less a right to engage in work stoppages. (San Mateo City School District v. Public Employment Relations Board, supra, 33 Cal.3d 850, 860; California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools, supra, 272 Cal.App.2d 514, 519-540; Westminster School District of Orange County v. Superior Court and Westminster Teachers Association, supra, 28 Cal.App.3d 120; Berkeley Teachers Association v. Board of Education of Berkeley Unified School District, supra, 254 Cal.App.2d 660, 671.)

This Board's decision in Modesto City Schools, supra, PERB Decision No. 291 is clearly incorrect and is overruled insofar as it interprets EERA section 3543 as authorizing work stoppages by public school employees for the purpose of collective bargaining or other mutual aid or protection.

Likewise, San Ramon Valley Unified School District, supra, PERB Order No. IR-46 is also incorrect and is overruled insofar as it follows Modesto City Schools and holds that public school employees have a protected right under EERA to engage in unfair practice strikes. (San Ramon Valley Unified School District, supra, pp. 9-10.)

County Sanitation District No. 2

In the recent tort case, County Sanitation District No. 2 of Los Angeles v. Los Angeles County Employees Association, Local 660, SEIU, AFL-CIO (1985) 38 Cal.3d 564 (County Sanitation), a local public agency employer had obtained a tort damages judgment against a local public employee union for the union's tortious involvment in a labor strike which had damaged the public employer. In reversing the tort damages judgment, a plurality of a divided and splintered court held that the common law prohibition against public employee strikes should no longer be recognized in California and, accordingly, that public employee strikes are not tortious under California common law.

Three members of the court, with the Chief Justice concurring, formed the plurality opinion which concluded that "the common law prohibition against public sector strikes should not be recognized in this state" and "[c]onsequently, strikes by public sector employees in this state as such are neither illegal or tortious under California common law". (38 Cal.3d at 592-93, emphasis added.) Two members of the court, in a separate opinion, reversed the tort damages judgment on the basis that peaceful strikes did not give rise to a tort cause of action under existing California law and that it was not necessary to reach the question of whether such strikes were legal or illegal under California common law. (38 Cal.3d at 592-593.) The Chief Justice, in a separate opinion, contended that employees have a constitutional right to strike. (38 Cal.3d at 593-609.) One Justice dissented from all of the foregoing opinions. (38 Cal.3d at 609-613.)

In addressing the common law prohibition against public employee strikes, the plurality opinion also considered the Meyers-Milias-Brown Act (Gov. Code, secs. 3500-3511) which by statute--as compared to common law--deals with part of the employment relations between local public agency employers and local public employees. In concluding that the MMBA did not expressly prohibit strikes by local public employees, County Sanitation's plurality opinion was dealing with whether local public employee strikes were prohibited and thus tortious, under the statutory provisions of the MMBA. County Sanitation

did not deal with or determine whether the MMBA grants a right to strike to local public employees, much less whether public school employees have a right to strike under EERA and/or whether public school employee strikes constitute unfair practices under EERA.

But even though County Sanitation is neither applicable nor controlling on the issue of whether public school employees have a right to strike under EERA, it is still appropriate that we examine the plurality opinion's analysis of what it deemed the Legislature's position to be with respect to public employee strikes, as well as the plurality's interpretation of MMBA provisions which are similiar to EERA provisions. For, if the plurality's reasoning is persuasive as to the Legislature's position on public employee strikes, it could affect this Board's interpretation of EERA.

Prior to the commencement of its common law discussion, the plurality asserts that, except as to legislation regarding firefighters, the Legislature has chosen to remain silent as to any general prohibition against public employee strikes (38 Cal.3d at 571), that with respect to local public employees the Legislature in enacting MMBA had left the issue "shrouded in ambiguity" by intentionally avoiding the inclusion in MMBA of any provision which could be construed as either a blanket grant or prohibition of a right to strike (38 Cal.3d at 572-573), and thus that "In the absence of clear legislative directive on this crucial matter, it becomes the task of the

judiciary to determine whether, under the law, strikes by public employees should be viewed as a prohibited tort." (38 Cal.3d at 573, emphasis added.)

Upon judicially examining and judicially rejecting the policy reasons advanced for the common law prohibitions against public employee strikes (38 Cal.3d at 573-583), and after reasserting that the Legislature has been silent (38 Cal.3d at 584), the plurality opinion concludes "that the common law prohibition against public sector strikes should not be recognized in this state" and "[c]onsequently, strikes by public sector employees in this state as such are neither illegal nor tortious under California common law." (38 Cal.3d at 585, emphasis added.) However, the plurality opinion places a limiting condition on this judicial modification of common law:

> . . . strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health or safety of the public.
> (38 Cal.3d at 586, emphasis added.)

It is readily apparent that the plurality's judicial reversal of the California common law prohibition against public employee strikes was based on the plurality's assumption that the Legislature has been silent as to either any general authorization for, or prohibition against, public employee strikes, and that the Legislature has not--on behalf of the people--statutorily expressed itself on the right of public

employees to strike.[20]

But, did the plurality opinion proceed from an invalid premise as to the Legislature's silence? Has the Legislature been silent?

Early in the plurality opinion, in referring to prior decisions of the Supreme Court to show that the Supreme Court itself had not ruled on whether public employee strikes were lawful, the plurality opinion cited Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687-688. After describing as "dictum" the court's statement that "[i]n the absence of legislative authorization public employees in general do not have the right to strike, . . ." the plurality then observed that Los Angeles Metropolitan Transit Authority did hold "that a statute affording public transit workers the right 'to engage in other concerted activities for the purpose of collectively bargaining or other mutual aid or protection' granted these employees a right to strike." (38 Cal.3d at 570, emphasis added.) But in

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[20]As discussed post, the judiciary may change or modify the common law where the Legislature has been silent, provided that the judicial change is not repugnant to or inconsistent with the Constitution and statutes, and does not nullify existing legislation or frustrate legitimate legislative policy. (Civ. Code, sec. 22.1; Ferguson v. Keays (1971) 4 Cal.3d 649, 654; Rodriquez v. Bethlehem Steel Corp. (1974) 12 Cal.3d 382, 394-395; Li v. Yellow Cab Co. (1975) 13 Cal.3d 804, 814; Victory Oil Co. v. Hancock Oil Co. (1954) 125 Cal.App.2d 222, 229, hg. den.; City of Rohnert Park v. Superior Court (1983) 146 Cal.App.3d 420, 427-428; Lowman v. Stafford (1964) 226 Cal.App.2d 31, 39, hg. den.; Corcoran v. City of San Mateo (1953) 122 Cal.App.2d 355, 359, hg. den.)

later concluding that the Legislature had been silent, the plurality inexplicably failed to remember the Supreme Court's recognition in Los Angeles Metropolitan Transit Authority of the Legislature's clear statutory grant of the right to strike. Nor did the plurality recall the Supreme Court's response in Los Angeles Metropolitan Transit Authority in answer to the contention raised therein that the Legislature had engaged in discriminatory classification by granting the transit authority's public employees the right to strike while statutorily withholding that right from public employees of other transit systems. The Supreme Court had held that differing circumstances faced by public employers would justify the Legislature's selective granting or withholding of the right to strike among various groups of public employees. (54 Cal.2d at 694.)

This recognition by the Supreme Court in Los Angeles Metropolitan Transit Authority, that the Legislature has necessarily taken a selective rather than a general approach to public employee strikes, was more fully elaborated upon in the previously cited case (California Federation of Teachers, AFL-CIO v. Oxnard Elementary Schools, supra, 272 Cal.App.2d 514) that addressed public school employee rights under the Winton Act (former Ed. Code, secs. 13080-13088).

As cited earlier in this opinion, the court in Oxnard reviewed the evolution of labor statutes in this state, concluding that the Legislature's treatment of public employee

labor relations reflected its careful consideration of the applicability of traditional private sector procedures, such as collective bargaining, exclusive representation, and the right to strike, to the relationship between public employees and their employers. Not only did the Legislature evaluate the appropriateness of these procedures for public employees generally, but it also considered the "wide variety of occupations and professions encompassed within the field of public employment." The Winton Act, with its separate treatment of public school employees, "evolved through a series of enactments designed to regulate separately various aspects of public employment." (Oxnard, supra, at p. 522.) The court then compared various acts, some of which granted the right to strike, and some of which withheld it. In those in which the Legislature did not grant the right to strike, it also specifically stated that the Act shall not be interpreted so as to make Labor Code section 923 applicable. The Winton Act fell into this latter category. The court stated:

> The California Legislature has clearly been attempting to reconcile by selective innovation the divergent elements inherent in public employer-employee relations including the acknowledged distinctions in the status and obligations of public and private employees, as well as the various occupations and professions represented by public employment. (272 Cal.App.2d at 523, emphasis added.)

In accord with the foregoing recognition of the Legislature's selective approach to the employment relations

between the various and diversified public employers and public employees are: Westminster School District of Orange County v. Superior Court & Westminster Teachers Association, supra, 28 Cal.App.3d 120; Professional Fire Fighters, Inc. v. City of Los Angeles (1963) 60 Cal.2d 276, 289.

This selective rather than general approach of the Legislature to the difficult questions and problems concerning which, if any, public employees should be granted the right to strike, could explain why the County Sanitation plurality asserted that the Legislature had been silent as to an authorization for or prohibition against public employee strikes. However, there appears to be no explanation for the County Sanitation plurality's having ignored the selective approach of the Legislature in its extensive and definitive granting or withholding of the right to strike in conjunction with a multitude of public employee labor relations enactments. Such statutory prescriptions and proscriptions involve numerous public employers and public employee groups, and exhibit a sophisticated legislative approach to rights, remedies and procedures in various appropriate combinations involving: the forming, joining and participating in employee organizations; representation by employee organizations; "meeting and conferring" with public employers; bargaining units; representation elections; exclusive representation; collective bargaining; "other concerted activities (including strikes) for the purpose of collective bargaining or other

mutual aid or protection"; mutually-agreed-to binding interest arbitration; mandatory binding interest arbitration; mediation; referral of unresolved issues to the Governor for appointment of a fact-finding commission; 30-day "cooling off" period after the fact-finding report has been submitted to the Governor; "impasse" procedures; unfair labor practices; a public employment relations board to administer and enforce various acts; etc. (Stats. 1955, ch. 1036 (Pub. Util. Code, secs. 24501-27509); Stats. 1957, ch. 547 (Pub. Util. Code, appen. 1 secs. 1.1-13.1); Stats. 1958, ch. 1056 (Pub. Util. Code, secs. 28500-29757); Stats. 1959, ch. 723 (Lab. Code, secs. 1960-1963); Stats. 1961, ch. 1964 (Gov. Code, secs. 3500-3509); Stats. 1961, ch. 1932 (Pub. Util. Code, appen. 2, secs. 1-11); Stats. 1963, ch. 839 (Pub. Util. Code, secs. 50000-50507); Stats. 1964, 1st Ex. Sess., ch. 62 (Pub. Util. Code, secs. 30000-31520); Stats. 1964, 1st Ex. Sess., ch. 92 (Pub. Util. Code, secs. 70000-80019); Stats. 1964, 1st Ex. Sess., ch. 104 (Pub. Util. Code, appen. 2); Stats. 1965, ch. 1835 (Pub. Util. Code, secs. 95000-97100); Stats. 1965, ch. 1899 (Pub. Util. Code, secs. 40000-40617); Stats. 1965, ch. 2039 (Pub. Util. Code, secs. 90000-93017); Stats. 1965, ch. 2041 (Ed. Code, secs. 13080-13088); Stats. 1967, ch. 978 (Pub.Util. Code, secs. 98000-98407); Stats. 1968, ch. 1964 (Gov. Code, secs. 3500-3509); Stats. 1969, ch. 180 (Pub. Util. Code, secs. 100000-100500); Stats. 1971, ch. 1161 (Pub. Util. Code, secs. 101000-101372); Stats. 1971, ch. 1374 (Pub. Util. Code, secs.

102000-102700); Stats. 1971, ch. 1335 (Pub. Util. Code, appen. 1, sec. 4.1); Stats. 1974, ch. 502 (Pub. Util. Code, secs. 103500-103700); Stats. 1974, ch. 51. (Pub. Util. Code, sec. 30756); Stats. 1975, ch. 294 (Pub. Util. Code, secs. 120000-120702); Stats. 1975, ch. 1188 (Pub. Util. Code, secs. 125000-125561); Stats. 1975, ch. 961 (Gov. Code, secs. 3540-3549.3); Stats. 1975, 3d Ex. Sess., ch. 1 (Lab. Code, secs. 1140-1166.3); Stats. 1976, ch. 961 (Gov. Code, secs. 3540-3549.3); Stats. 1977, ch. 1159 (Gov. Code, secs. 3512-3536); Stats. 1978, ch. 744 (Gov. Code, secs. 3560-3599).)

Of the twenty-five (25) public employer-employee acts enacted by the Legislature, plus their amendments, prior to County Sanitation, the Legislature specifically granted the right to strike to the public employees covered by twelve (12) of the acts, while withholding the right to strike from the remainder, which includes the MMBA (local public employees), EERA (public school employees), SEERA (state employees), and HEERA (higher education employees).

It would thus appear that the County Sanitation plurality proceeded on an invalid premise as to the Legislature's silence with respect to public employee strikes.[21]

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[21]The only such possible "legislative silence" prior to County Sanitation was its silent acquiescence to the unanimous chain of appellate decisions holding that all public employee strikes were illegal unless statutorily authorized by the Legislature. (See City & County of San Francisco v. United Association of Journeymen of United States & Canada (1986) 42 Cal.3d 810, Lucas, J. dissenting at p. 819.)

Turning to the County Sanitation plurality's treatment of MMBA section 3509 (Gov. Code, sec. 3509), which is similar to EERA section 3549 (Gov. Code, sec. 3549), the plurality concluded that section 3509 does not prohibit strikes by local public employees. The plurality's interpretation was based on two factors. First, while an identical provision was included in the Firefighters Act, the Legislature also included therein an express prohibition against strikes. Second, in San Diego Teachers Associationn v. Superior Court (1979) 24 Cal.3d 1, 13, the court had stated that the similar EERA section 3549 specifically did not prohibit strikes. (County Sanitation, supra, 38 Cal.3d at 573.)

As to the Firefighters Act (Lab. Code, secs. 1960-1963), the plurality opinion contains no analysis of the circumstances under which the Firefighters Act was enacted in 1959. Prior to its enactment, and in furtherance of the long-established public safety policy against any interruption or interference in the delivery of firefighting services, firefighters had been barred from organizing or even joining a labor organization. (International Association of Fire Fighters, Local 1319, AFL-CIO v. City of Palo Alto, supra, 60 Cal.2d 295, 300; International Association of Fire Fighters, Local No. 1396, AFL-CIO v. County of Merced, supra, 204 Cal.App.2d 387, 390; Professional Fire Fighters, Inc, v. City of Los Angeles, supra, 60 Cal.2d 276, 288-289, 294; and see Perez v. Board of Police Commissioners of the City of Los Angeles (1947) 78 Cal.App.2d

638, hg. den.; Pen. Code, sec. 148.2, subds. (1) & (4), former Pen. Code, sec. 385 enacted in 1872, and former Health & Saf. Code, sec. 13006 (Stats. 1939); Pub. Resources Code, sec. 4165; 53 Ops.Cal.Atty.Gen. 324, 326-327 (1970); Cal. Emergency Services Act, Gov. Code, secs. 8550-8668, former Cal. Disaster Act of 1943; Mil. & Vet. Code, sec. 1505.)

In response to the insistent demands of firefighters that they be allowed to join labor organizations, the Legislature enacted the Firefighters Act. (Lab. Code, sec. 1960-1963.) The act begins with Labor Code section 1960, which proscribes the state, counties and cities from prohibiting, denying or obstructing "firefighters" from joining "any bona fide labor organization of their own choice." Labor Code section 1962 then prescribes that "employees" (defined by Lab. Code, sec. 1961 as employees of fire departments and fire services):

> . . . shall have the right to self-organization, to form, join, or assist labor organizations, to present grievances and recommendations regarding wages salaries, hours and working conditions to the governing body, through such an organization, but shall not have the right to strike, or to recognize a picket line of a labor organization while in the course of the performance of their official duties. (Lab. Code, sec. 1962, emphasis added.)

Lastly, Labor Code section 1963 proscribed the enactment of the Firefighters Act as being construed so as to make the provisions of Labor Code section 923 applicable to public employees.

The Legislature was clearly concerned that, in granting

firefighters the right to organize and become involved with labor organizations, there be no resultant disruption or interference in the delivery of firefighting services by way of strikes or in the on-duty observance of picket lines. In this 1959 enactment--which was prior to the definitive 1960 decision of the Supreme Court in Los Angeles Metropolitan Transit Authority, supra, 54 Cal.2d 684, concerning legislative language with respect to the right to strike--the Legislature obviously acted with an overabundance of statutory caution in this very volatile area of firefighting services. That under such circumstances the Legislature was so circumspect in Labor Code section 1962 does not equate to the Legislature not intending to prohibit such strikes and picket line observances as part of its Labor Code section 1963 proscription insofar as such type of activities were authorized by the provisions of Labor Code section 923.

With respect to San Diego Teachers, supra, and its interpretation of EERA section 3549 as not prohibiting strikes, again there is a lack of any analysis by the majority in San Diego Teachers as to the role of section 3549 in EERA. The majority opinion annulled contempt orders against the teachers association on the basis that PERB has exclusive initial jurisdiction to determine whether a strike is an unfair practice under EERA and if so, what remedies, if any, should be pursued. Early in the decision, the majority states at page 6:

> The trial court also relied on section 3549, which states that the EERA "shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees." Labor Code section 923's declaration that workers are to be free from employer interference in "concerted activities for the purpose of collective bargaining or other mutual aid or protection" is generally understood to confer a right to strike. (Los Angeles Met. Transit Authority v. Brotherhood of Railroad Trainmen (1960) 54 Cal.2d 684, 687-688.)
>
> Petitioners [teachers' association] contend that the ERRA, though excluding Labor Code section 923's protection of the right to strike, does not itself prohibit strikes. The exclusion may be explained, it is argued, by a concern that the wholesale introduction of rules protecting collective bargaining in the private sector into the public sector might conflict with tenure and other aspects of public employment that fall outside the negotiating process mandated by the EERA. (Secs. 3540, 3540.1, subd. (h).) Petitioners further contend that strikes by public employees have been outlawed in the past because there were no provisions for public employment collective bargaining [citations]. They argue that the EERA's guarantee of the right to participate in organizational activities for "representation on all matters of employer-employee relations" (sec. 3543) and for the negotiation of written contracts between public school employers and employee organizations (sec. 3540.1, subd. (h)), implies legality of strikes to make the negotiation effective and meaningful. (Emphasis added.)

The majority then proceeded to discuss PERB's exclusive initial jurisdiction. And, later in the opinion in response to an amicus contention that PERB had no exclusive initial jurisdiction since strikes violate section 3549, the majority, without any analysis or discussion, stated in response:

> . . . As pointed out above, however, section 3549 does not prohibit strikes but simply excludes the applicability of Labor Code section 923's protection of concertedactivities." (24 Cal.3d at p. 13, emphasis added.)

The only previous mention of section 3549 in the decision was merely the summary of petitioner's arguments, which the court neither adopted, rejected nor even discussed. The lack of analysis in support of the foregoing statement by the majority is cogently observed by Justice Richardson in his dissenting opinion (concurred in by Justice Clark and the late Justice Wiley Manuel):

> Conversely, it also has been held that legislation which purports to deprive a particular class of employee of the right to engage in concerted activities, or which withholds the applicability of the provisions of Labor Code section 923, demonstrates a legislative intent to withhold the right to strike. (Pasadena Unified Sch. Dist. v. Pasadena Federation of Teachers, supra, 72 Cal.App.3d. 100, 106; Almond v. County of Sacramento (1969) 276 Cal.App.2d 32, 37-38.)
>
> The majority acknowledge that the EERA, under section 3549 of the Government Code, expressly provides that "The enactment of this chapter (regarding meeting and negotiating in public educational employment) shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees. . . ." Because section 923 declares as a public policy the right of a private worker to engage "in other concerted activities," judicially defined as including the right to strike (Los Angeles Met. Transit Authority, supra, at p. 689) it seems to me inescapable that the foregoing language of section 3549 conclusively establishes the Legislature's intent to deny

> this weapon to public school employees. Indeed, this very language was held in Pasadena to constitute a legislative affirmance of an intent "to withhold the right to strike from public educational employees." (72 Cal.App.3d 100, 106-107; see Almond v. County of Sacramento, supra, 276 Cal.App.2d 32, 37-38.)
>
> The majority's disposition of section 3549 is wholly unsatisfactory in its insistence that ". . . section 3549 does not prohibit strikes but simply excludes the applicability of Labor Code section 923's protection of concerted activities." (Ante, p. 12.) In my view, the argument is manifestly wrong, as the above quoted Pasadena holding indicates. To the contrary, by withholding the protection of section 923 the Legislature necessarily retained the preexisting prohibition against all public employment strikes.
>
> Therefore, in examining those sections of EERA relied on by the majority, we should bear in mind that, under EERA's own provisions, public school strikes remain unlawful. (24 Cal.3d at p. 19, emphasis court's.)

It may also be observed that County Sanitation's interpretation of MMBA section 3509--to the effect that the section merely denies the protection afforded by Labor Code section 923 for concerted activities--leaves treacherous shoals in its wake for local public employees who, in mistaken reliance on County Sanitation, may sail out on strike waters. In dealing with whether MMBA section 3509 prohibits local public employee strikes and would thus constitute a statutory basis for a tort cause of action, and in holding that section 3509 did not so prohibit, the plurality did not hold that the MMBA grants the right to strike to local public employees.

Inasmuch as local public employees do not have the right to strike under the MMBA, they accordingly have no MMBA protection for any strike in which they engage. (Gov. Code, secs. 3502, 3506; Stationary Engineers v. San Juan Suburban Water District (1979) 90 Cal.App.3d 796, 801; Healdsburg Police Officers Association v. City of Healdsburg (1976) 57 Cal.App.3d 444, 451-452.) So, if they engage in strikes, although they are no longer potentially liable for tort damages under the common law, they will nonetheless be placing their government jobs in jeopardy by engaging in conduct unprotected by the MMBA (as well as unprotected by Lab. Code, sec. 923).

Thus, while County Sanitation is applicable and controlling as to public employee strikes no longer being tortious under California common law (unless they affect public health or safety), the assumption of the plurality opinion as to the Legislature's intent and silence with respect to public employee strikes, as well as its reasoning concerning MMBA section 3509 is unpersuasive and does not alter our determination that public school employees do not have a right to strike under EERA.

III. THE STATUS OF A STRIKE BY PUBLIC SCHOOL EMPLOYEES AS UNFAIR PRACTICES AND/OR VIOLATIONS UNDER EERA

Since public school employees do not have the right under EERA to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,"

strikes by public school employees are not protected by EERA (Gov. Code, sec. 3543.5). There remains then the question of whether public school employee strikes constitute unfair practices and/or violations under EERA.

In relation to the collective bargaining process under EERA, there are three types of strikes[22] in which public school employees might engage: (1) the "pre-impasse economic strike," a strike engaged in to achieve bargaining goals prior to impasse or before the exhaustion of the statutory impasse procedures (Gov. Code, secs. 3548-3548.5); (2) the "post-impasse economic strike," a strike engaged in to achieve bargaining goals after the exhaustion of the statutory impasse procedures (Gov. Code, secs. 3548-3548.5); and (3) the "unfair practice strike," a strike engaged in purportedly in response to an alleged unfair practice by the public school employer, and which may occur pre-impasse, during impasse, or post-impasse.

As to "pre-impasse economic strikes," this Board has already held that public school employee strikes engaged in to achieve bargaining goals and undertaken prior to impasse or before the exhaustion of the statutory impasse procedures constitute unfair practices under EERA in that the public school employees are thereby failing or refusing to meet and

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[22]Strikes may involve various types of work stoppages such as: a one-day strike, a "rolling" or intermittent strike, a continuous strike, a "sick out," a work slowdown, etc.

negotiate in good faith. (Gov. Code, sec. 3543.6(c) and (d); Fresno Unified School District, supra, PERB Decision No. 208, pp. 9-14; Westminster School District, supra, PERB Decision No. 277, pp. 14-17; and see El Dorado Union High School District (1986) PERB Decision No. 537a.)

As to the "unfair practice strikes," which may occur pre-impasse, during impasse, or post-impasse, this Board has heretofore held that public school employees have a right under EERA to engage in such strikes and, accordingly, that such strikes are not unfair practices because employee rights under EERA are protected by EERA. (Modesto City Schools, supra, PERB Decision No. 291, pp. 52-65; and see San Ramon Valley Unified School District, supra, PERB Order No. IR-46, pp. 9-10.) But, as already discussed, supra, EERA section 3543 does not grant public school employees the right to engage "in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Therefore, Modesto City Schools was incorrectly decided as to public school employees having a right under EERA section 3543 to engage in "unfair practice strikes." The public school employees' remedy to an unfair practice by the public school employer would be to file an unfair practice charge with this Board against the employer. (Gov. Code, secs. 3541.5, 3543.5.) If the public school employer's unfair practice is of a nature necessitating immediate relief, the public school employees may also petition this Board to seek injunctive relief. (Gov. Code, sec.

3541.3(j); PERB Regs. Cal. Admin. Code, tit. 8, secs. 32450-32470; and see Stationery Engineers v. San Juan Suburban Water District (1979) 90 Cal.App.3d 796, 801.)

There remains the "post-impasse economic strike" engaged in by public school employees to force from the public school employer a change or changes in wages, hours, duties and/or other terms and conditions of employment which they have not been able to achieve at the bargaining table. This Board has not previously ruled on whether such post-impasse economic strikes constitute unfair practices under EERA. (San Ramon Valley Unified School District, supra, PERB Order No. IR-46, pp. 9-10.)

Before examining the situation of the collective bargaining status quo of public school employers and employees following the exhaustion of the statutory impasse procedures, a brief discussion may be in order with reference to a contention sometimes raised by public school employees following the expiration of a collective bargaining agreement, that they have been working "without a contract," apparently mimicking their counterparts in the private sector. To be accurate, they could say they have been working without a collective bargaining agreement, but the law is well-established that this does not mean they do not have a "contract." Due to the nature of their public employment, and the statutory and constitutional protections afforded them, they are indeed under contract and their failure to perform can theoretically be deemed a breach

of contract.

It has long been held by the courts of California that, the tenure laws notwithstanding, the employment relationship between a teacher and the school board is contractual. Once a teacher achieves permanent status, he or she acquires a vested right to teach as a permanent instructor and may be removed from the position only for cause pursuant to statutory procedures, but such right "attaches" to the contract.

As stated by the California Supreme Court in Abraham v. Sims (1935) 2 Cal.2d 698, 710-711:

> The result of these enactments [the laws regulating tenure] was not to make the relation any the less one originating in contract, but to annex to contracts of employment when repeated for a sufficient time certain legal consequences. These consequences are not contractual except in the broadest sense of being annexed by operation of law to the contract and have been said to be "in the nature of a civil service regulation." [Citations.] One of the consequences is a permanent right to teach so long as the board's reasonable regulations are complied with. . . . The right to teach is an incident to classification as a permanent teacher and after three [now two] consecutive years of employment and service, and reelection by the board for the next succeeding school year, the law as of the beginning of that year automatically effects the classification and nothing more is required to accomplish it . . . [N]o affirmative action of the board is requisite to accomplish such reemployment . . . and a permanent teacher need not even notify the board of his acceptance. . . . The manifest implication is that unless he notifies the board to the contrary or fails to appear for the purpose of teaching at the opening of the school year, he must be deemed to have accepted the reemployment.

The Court of Appeal stated in Frates v. Burnett (1970) 9 Cal.App.3d 63, 69:

> It has been held that "rules and regulations adopted by a board of education are, in effect, a part of a teacher's employment contract and the teacher is entitled to their enforcement." [Citation.] Although this rule has been made on behalf of teachers, no distinction is seen between a teacher and a classified employee of the district.

With the advent of collective bargaining, July 1 may pass without a resolution of the terms of a new or successor collective bargaining agreement. While there are no specific cases on point, presumably the employees' individual contracts remain in effect until there is a mutual agreement to alter those terms reached by the exclusive representative and the governing board. However, once an agreement is reached, the employees are entitled to enforcement of the terms of the agreement. (Compton Community College Federation of Teachers, AFT Local 3486, AFL-CIO v. Compton Community College District, supra, 165 Cal.App.3d 82, 95.) Thus, it can be said that, while the collective bargaining agreement establishes various terms and conditions of employment within scope, it is but a mere overlay to the actual contract of employment created by operation of law and renewed annually, with no further action required by either the employer or the employee to make it enforceable, presumably by either party.

This ongoing contractual relationship creates a significant distinction between private sector employees whose collective

bargaining agreement has expired, and public school employees in the same situations. So, after the expiration of an agreement, public school employees may be working without a new agreement, but they are not "working without a contract."

And, while private sector employees--and certain statutorily authorized public employees--have a protected right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and thus may engage in post-impasse economic strikes to obtain their bargaining goals without committing an unfair practice under the respective California and federal labor laws applicable to them (see, e.g., Lab. Code, secs. 923, 1152, 1153(a); Pub. Util. Code, secs. 30755, 70120, 90300(a), 100300, 101340, 103400, 120500, 125520; 29 U.S.C.A., sec. 157), public school employees do not have such a protected right under EERA.

Work Stoppages as an Unfair Negotiating Pressure Tactic

When public school employees engage in work stoppages to obtain their bargaining demands, they are using the disruption and interference in the operation of the public schools as a coercive pressure tactic to force the public school employer to come to the bargaining table and capitulate to their demands.

Such bargaining pressure tactics not only detrimentally affect the negotiating process between the parties, but they are also antithetical to another basic underlying concern of EERA as well as a recognized responsibility of this Board:

"[To] further the public interest in maintaining the continuity and quality of educational services." (San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 11; El Rancho Unified School District v. National Education Association (1983) 33 Cal.3d 946, 957; Pittsburg Unified School District v. California School Employees Association (1985) 166 Cal.App.3d 875, 887-888, hg. den.; and see Cal. Const., art. IX.) Such conduct by the public school employees involves third parties -- the public, the children, and the children's parents -- as well as the constitutional right of the children to their education, and thrusts such interests and rights into the bargaining arena in an attempt to pressure the public school employer to yield to their demands.

While public school employees may contend that they are simply engaging in the traditionally recognized "economic strike" to bring economic pressure on the employer to accede to their bargaining demands, such strikes in the public schools simply do not equate to the traditional "economic strikes" in the private sector. "Economic strikes" against a private employer are brought to exert true economic pressure on the private employer to cause the employer to acquiesce to the strikers' demands. Such private sector striking is directed at the private employer's products, sales and/or services to its customers. The private sector economic strike is aimed at the employer's income through stopping the employer's production, preventing the sale of products or services to the employer's

customers, dissuading the employer's customers from patronizing the employer's business, diverting customers to the employer's competitors, etc. The private employer has to be concerned with loss of business, loss of profits, loss of its regular customers to competitors, and, if a corporation, disgruntled stockholders. Also, the private sector employer may, for business reasons, choose to "lock-out" the employees and/or "accept" a strike in order to pressure the employees to cease the work stoppage or to give in to the employer's bargaining demands.

Unlike private employers, who seek their income from their customers, public school employers do not obtain their income from a business and have no "customers" as such. Rather, schools are under a constitutional and statutory mandate to provide educational services to the children and to keep the public schools in operation. (Cal. Const., art. IX; Ed. Code, secs. 41420, 48200-48324.) School districts receive their funding from the state and federal governments. They have a mandated, compulsory "clientele" of the school-age children living in their districts. These children have a constitutional right to attend the district's schools and receive educational services from the public school employer. The district's children and their parents may <u>not</u> change their "patronage" to an adjoining school district. And, unlike private sector employers, when impasse is reached, the public school employer may <u>not</u> "lock-out" the public school

employees. (Cal. Const., art. IX; Ed. Code, sec. 41420.)

Accordingly, the "economic strike" by public school employees is more realistically described as being political rather than economic in nature. It is an attempt to bring political pressure from the public and the children's parents on the elected public school board to force the public school employer to give in to the strikers' demands in order to return the schools to normal operation. By engaging in an asserted "economic strike" to obtain their bargaining demands, the public school employees are in reality attempting to hold hostage the children's education, relying on the resultant public, parental and statutory pressures on the elected school district board to force it to pay the "ransom" -- the bargaining demands of the strikers -- for the resumption of normal school operations.

Such coercive tactics, which necessarily compromise the children's right to an education by interfering with the continuity and quality of educational services, for the purpose of forcing the public school employer's surrender to the employees' demands, are unfair, in bad faith, repugnant to the purposes of EERA, and constitute a failure to negotiate in good faith, thereby violating EERA section 3543.6(c).

Work Stoppages as Unlawful Unilateral Changes

An attempt by public school employees to gain their collective bargaining goals by engaging in post-impasse work

stoppages, or by refusing to attend to or perform one or more of the existing terms and conditions of their employment, obviously changes the then-existing status quo as to their hours, duties and/or other terms and conditions of their employment. Relevant to whether such changes in hours, duties and terms and conditions of employment constitute unfair practices under EERA are the two EERA unfair practice sections 3543.5 and 3543.6 which prescribe in pertinent part:

> 3543.5 It shall be unlawful for a public school employer to:
>
> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> . . . . . .
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with section 3548).
>
> 3543.6 It shall be unlawful for an employee organization to:
>
> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.
>
> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with section 3548).

Prior decisions of this Board concerning whether unilateral changes in the status quo as to wages, hours, or other terms and conditions of employment constitute unfair practices have dealt with unilateral changes in the status quo by the public

school employer. The status quo is the existing wages, hours, duties, and other terms and conditions of employment in the employment relationship between the public school employer and the public school employees as established by the applicable provisions of the Education Code, the last executed collective bargaining agreement and/or the established past practice of the parties. (Davis Unified School District et al. (1980) PERB Decision No. 116, p. 9; Grant Joint Union High School District (1982) PERB Decision No. 196, p. 8.)

This Board has held that the public school employer commits an unfair practice in violation of EERA section 3543.5 if it unilaterally acts to change the status quo as to wages, hours, duties, or other terms and conditions of employment within the scope of representation. The public school employer may not so unilaterally act at any time, whether it be during the life of an existing collective bargaining agreement or during the pre-impasse, impasse, or post-impasse stages of the bargaining over a successor agreement. (Modesto City Schools, supra, PERB Decision No. 291, p. 12; Oakland Unified School District (1983) PERB Decision No. 367, p. 22.) The only exception is that the public school employer may, post-impasse, unilaterally act to implement its last best offer. (Modesto City Schools, supra, at pp. 32-32, 38; Gov. Code, sec. 3549.) Should the employer otherwise unilaterally change the status quo with respect to wages, hours, duties, or any other term or condition of employment, it would commit an unfair practice in violation of

EERA section 3543.5(c) in that it did not first successfully negotiated the change with the public school employees.

What then of the public school employees? Having failed to negotiate their desired changes in wages, hours, duties or other terms and conditions of their employment, may they, post-impasse, unilaterally change the status quo in their hours, duties, or other terms and conditions of their employment in order to pressure the public school employer and achieve their bargaining goals? As to unilaterally changing the status quo with respect to their wages, or achieving some other change in the status quo which they could not effect and which would necessitate employer action or funds, the answer is obviously no. (See Associated Musicians Local 802 (1967) 164 NLRB 23 [65 LRRM 1048], affd. sub nom. Cutler v. NLRB (2d Cir. 1968) 395 F.2d 287 [68 LRRM 2317, 2319].) On the other hand, by engaging in a work stoppage, public school employees do make and effect a unilateral change in the status quo as to their hours, duties, and other terms and conditions of their employment. This is so in that by striking, such employees are quite clearly and effectively unilaterally changing the status quo as to their hours (from x hours to zero hours), their duties (absenting themselves from the classroom, instruction, etc.), and their other terms and conditions of employment which they are obligated to perform.

If a unilateral change in the status quo by the public school employer constitutes an unfair practice in violation of

EERA section 3543.5(c), then so too must a unilateral change in the status quo by public school employees constitute an unfair practice in violation of EERA section 3543.6(c). Changes in the status quo must be by bilateral, negotiated agreement between the parties. Public school employees may not unilaterally change or reduce--much less cease performing at all--their working hours, duties and other terms and conditions of their employment when they are unable to successfully negotiate a desired change in salary or other term and condition of employment.[23]

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[23]Our dissenting colleague cites Moreno Valley Unified School District v. PERB (1983) 143 Cal.App.3d 191 for the propositions that 1) based on his assertion that there is a suspension of the duty to bargain upon reaching second impasse, there can be no (c) violation, and 2) public school employee strikes do not equate to a unilateral change. However, Moreno Valley is easily distinguishable.

In Moreno Valley, the court was dealing with the public school employer's unilateral change during EERA's statutory impasse procedure. (Gov. Code, secs. 3548-3548.4.) PERB had found that such a unilateral change was both a refusal to participate in good faith in the statutory impasse procedure (Gov. Code, sec. 3543.5(e)) and a refusal or failure to meet and negotiate in good faith (Gov. Code, sec. 3543.5(c)). The Moreno Valley court held that, since the unilateral change occurred after impasse had been reached and during the statutory impasse procedure period, the only violation was of EERA section 3543.5(e)--refusal to participate in good faith in the statutory impasse procedure.

Moreno Valley did not involve a post-statutory impasse unilateral change by the employer. The latter situation has already been ruled on by this Board in a case wherein PERB successfully sought an injunction against a public school employer's post-statutory impasse unilateral change, based on a violation of EERA section 3543.5(c)--refusal or failure to meet and negotiate in good faith (Modesto City Schools District

That employees may commit a unilateral change cognizable as an unfair labor practice is by no means a novel proposition. The National Labor Relations Board (NLRB) has likewise held that private sector employees commit unfair practices under the federal law when they unilaterally change the status quo without having first successfully negotiated such a change, or when they unilaterally change the status quo in order to achieve a bargaining goal. As recognized in basic labor law texts:

(1980) PERB Order No. IR-12, affirmed in PERB v. Modesto City Schools District (1982) 136 Cal.App.3d 881, 894-895, 900-901, hg. den.).

Moreover, the dissent asserts, in essence, that where there is no duty to bargain, there can be no (c) violation, and concludes that the duty to bargain is suspended upon the parties reaching second impasse. Thus, according to the dissent, a strike under the circumstances of this case cannot constitute a (c) violation. The flaw in this argument is that, while the employer may adopt its last best offer at this stage, it may not make unilateral changes inconsistent with that offer, and doing so, it commits a (c) violation. (Modesto City Schools District, id.)

The dissent's citation to Moreno Valley as holding that a unilateral change in employment conditions does not equate to a strike is misplaced. The case came to the court on the district's appeal from a PERB finding that it committed an unfair practice when it made a unilateral change during the impasse procedures. The district had argued that since a strike at this stage would not constitute a per se unfair practice, then neither would the employer's unilateral adoption of its last best offer. Thus, the district was attempting to characterize its action as "self-help" akin to the strike. The court rejected the analogy, finding that the two are not equivalent, since the employer's analogous self-help remedy would be a lock-out. The court explains the harm inherent in the employer's unilateral change, but does not address the legality of strikes generally, or the unavailability of the lockout as an employer self-help action.

> Although for obvious reasons, the charge of refusal to bargain by taking "unilateral action" on wages and working conditions is normally leveled at the employer, there are rare cases in which a union has been found to violate section 8(b)(c)[24] by forcing a change in working conditions without bargaining with the employer. (Gorman, Labor Law (1976 ed.) p. 442.)[25]

Initially it may be observed that this "rarity" of unfair unilateral changes by private employees--particularly with respect to post-impasse changes in the status quo--is the result of private employees having a protected right under the federal act[26] to engage "in concerted activities for the purpose of collective bargaining or other mutual aid or protection." Accordingly, strikes and other concerted activities of private employees which unilaterally change the status quo in their hours, duties, and working conditions are not unfair labor practices under the federal act because of the private employees' protected right to engage in "post-impasse strikes" and/or "unfair practice strikes" to obtain their

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[24]29 U.S.C.A. section 158(b)(3):

> (b) it shall be an unfair labor practice for a labor organization or its agents--(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title; . . .

[25]And see: 1 Morris, The Developing Labor Law (2d ed. 1983) pages 564-566; BNA, The Developing Labor Law, 2d ed., First Supplement 1982-1984 (1985) pages 147-148.

[26]29 U.S.C.A., section 157.

bargaining goals or to protect themselves from an employer's unfair practice.

In System Council T-6, International Brotherhood of Electrical Workers (1978) 236 NLRB 1209 [98 LRRM 1497] enforcement granted NLRB v. System Council T-6 (1st Cir. 1979) 599 F.2d 5 [101 LRRM 2413], the employer had an established practice of temporarily assigning unit members to supervisory positions. After unsuccessfully attempting to get the employer to stop the practice, the union promulgated an internal union rule prohibiting union members from accepting such temporary assignments. The NLRB held that such union action affected the existing status quo and thus constituted an unfair labor practice in that the union had failed to negotiate the change. And while there was also contractual recognition of the employer's right to make such temporary assignments, the NLRB cogently observed:

> Furthermore, even if we were to find no contractual recognition of the Company's right to make temporary management assignments, the Union's conduct would still violate the Act. Company appointment of bargaining unit employees to temporary supervisor slots is a common and established practice. Consequently, by promulgating the ban on such assignments, the Union unilaterally changed a term and condition of employment over which they were required to bargain.
> (236 NLRB at 1210.)

Accord Communication Workers of America, Local 1170 (1972) 194 NLRB 872 [79 LRRM 1113] enforcement granted NLRB v.

Communication Workers of America, Local 1170 (2d Cir. 1972) 474 F.2d 778, 780-782 [82 LRRM 1201]).

In Bay Counties Council of Carpenters, Local 478 (1964) 145 NLRB 1775 [55 LRRM 1219], remanded Associated Home Builders v. NLRB (9th Cir. 1965) 352 F.2d 745 [60 LRRM 2345], a collective bargaining agreement between an employer group and a union group contained no provision or mention concerning any production limitation. The unions unilaterally and internally established production quotas and fined union members by deducting the fines from their union dues if they exceeded the quotas. The NLRB held that the unions' application of the dues to the imposed fines constituted an interference with the employees' rights and an unfair practice. The employers appealed on a separate issue, contending that the NLRB had not addressed or rendered a decision on whether the unions' action also constituted an unfair practice in that it unilaterally changed the terms and conditions of employment. The federal appeals court agreed that it was such a unilateral change and--indicating that the unions' unilateral change was a significant unfair practice against the employers--remanded the case back to the NLRB for further appropriate proceedings, findings and remedy. (60 LRRM at 2350-2353.)

See also, IATSE, Local 702 (1972) 197 NLRB 937 [80 LRRM 1820] [after unsuccessful effort to negotiate change in employer's right to transfer irrespective of union seniority, union's invocation of internal seniority rule constituted

unlawful unilateral change in terms and conditions of employment]; Teamsters Local 100 (1974) 214 NLRB 1094 [88 LRRM 1036], enforcement granted NLRB v. Teamsters Local 100 (6th Cir. 1975) 526 F.2d 731 [90 LRRM 3310] [union's order to members not to perform other assigned work violated provision of the collective bargaining agreement and was held to constitute an unlawful unilateral change in the terms and conditions of employment]; Brotherhood of Painters, New York District Council No. 9 (1970) 186 NLRB 964 [75 LRRM 1465], enforcement granted New York District Council No. 9 v. NLRB (2d Cir. 1971) 453 F.2d 783 [79 LRRM 2145], cert. den. 408 U.S. 930 (1972) [after failing to achieve production quota in negotiations, union's internal adoption of production quota constituted an unlawful unilateral change in terms and conditions of employment]; International Chemical Workers Union, Local 29 (1977) 228 NLRB 1101 [94 LRRM 1696] [union's insistence on recording grievance meeting, which violated established practice, found to constitute unlawful unilateral change]; Stayton Canning Company Cooperative, supra, 275 NLRB No. 127, p. 13 [119 LRRM 1236]; Halle Brothers Co. (1981) 253 NLRB 1090 [106 LRRM 1201], enforcement den. sub nom. NLRB v. Teamsters, Local 582 (9th Cir. 1982) 670 F.2d 855 [109 LRRM 3226]; Brotherhood of Teamsters, Local 70 (1972) 198 NLRB 552 [80 LRRM 1727] sub nom. Nabisco, Inc. v. NLRB (2d. Cir. 1973) 479 F.2d 770 [83 LRRM 2612]; United Mine Workers (1967) 165 NLRB 592, 593-594 [65 LRRM 1450]; Sheet

Metal Workers International Association, Local 141 (1965) 153 NLRB 537, 543 [5 LRRM 1512]; United Plumbers, Local 420 (1981) 254 NLRB 445 [106 LRRM 1183]; and Communication Workers of America, Local 1122 (1976) 226 NLRB 97 [93 LRRM 1161].)

In the absence of a negotiated, agreed change in their hours, duties, and/or other terms and conditions of their employment, public school employees may not change or refuse to abide by the status quo in their hours, duties, and terms and conditions of employment (Gov. Code, sec. 3543.6(c)), any more than the public school employer may unilaterally change the status quo (other than by post-impasse adoption of its last best offer). (Gov. Code, sec. 3543.5(c).) Unilateral changes in the status quo by the public school employees engaging in work stoppages are just as destablizing and disorienting to employer-employee affairs as are unilateral changes in the status quo committed by the public school employer. (San Mateo County Community College District (1979) PERB Decision No. 94, pp. 14-17.)

Acquiring Agreement Through the Use of Work Stoppages

Since public school employee strikes are contrary to public policy, a negotiated agreement secured in part on the basis of the striking employees returning to work and/or not renewing their work stoppage is based on unlawful consideration, and the union that employs such unlawful consideration has failed to negotiate in good faith.

A collective bargaining agreement is a contract and is subject to the applicable contract laws of this State. California Civil Code section 1607 prescribes as to contracts:

> The consideration of a contract must be lawful within the meaning of section sixteen hundred and sixty-seven.

And Civil Code section 1667 prescribes:

> That is not lawful which is:
>
> 1. Contrary to an express provision of law;
>
> 2. Contrary to the policy of express law, though not expressly prohibited; or
>
> 3. Otherwise contrary to good morals.
> (Emphasis added.)

Thus, to be lawful, a contract cannot be based on unlawful consideration, that is, consideration that is contrary to public policy.

The public policy of this state resides first with the people of California as expressed in their Constitution, and then with the representatives of the people--the Legislature--as expressed in the statutes. (Civ. Code, secs. 22, 22.1;[27] Jensen v. Traders & General Insurance Co.

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[27]The Civil Code states:

> 22. Law is a solemn expression of the supreme power of the state.
>
> 22.1 The will of the supreme power is expressed:
> (a) By the Constitution
> (b) By the statutes.

(1959) 52 Cal.2d 786, 794; Brunzell Construction Co. v. Harrah's Club (1967) 253 Cal.App.2d 764, 775; Nevcal Enterprises Inc. v. Cal-Neva Lodge, Inc. (1961) 194 Cal.App.2d 177, 180, hg. den.) Then, the public policy may also be found in the common law and judicial modifications thereto, to the extent they are consistent with the express provisions of the Constitution and statutes and the underlying policies.[28] However, as expressed by a unanimous Supreme Court in Ferguson v. Keays, supra:

> . . . the court should only exercise those common law powers which are not otherwise repugnant to or inconsistent with our Constitution and statutes; inherent powers should never be exercised in such a manner as to nullify existing legislation or frustrate legitimate legislative policy. (4 Cal.3d 649, 654.)

Thus, if the Constitution and the statutes are silent on the subject, then the common law, including its modifications by the courts (Muskopf v. Corning Hospital District, supra, 55 Cal.2d 211; Rodriguez v. Bethlehem Steel Corp., supra, 12 Cal.3d 382, 394-395; Li v. Yellow Cab Co., supra, 13 Cal.3d 804-814; Victory Oil Co. v. Hancock Oil Co., supra, 125 Cal.App.2d 222, 229), expresses public policy, but only so

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[28]Civil Code section 22.2 states:

> 22.2 The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State. (Emphasis added.)

far as it is not repugnant to or inconsistent with other provisions of our Constitution or statutes. (Ferguson v. Keays, supra, 4 Cal.3d 649, 654; City of Rohnert Park v. Superior Court, supra, 146 Cal.App.3d 420, 427-428; Lowman v. Stafford, supra, 226 Cal.App.2d 31, 39; Corcoran v. City of San Mateo, supra, 122 Cal.App.2d 355, 359; Civ. Code, sec. 22.2.)

While it is true that where the Constitution and statutes are silent on a subject, the judiciary may declare what they perceive the public policy to be (Safeway Stores v. Retail Clerks International Association (1953) 41 Cal.2d 567, 574-575; Altschul v. Sayble (1978) 83 Cal.App.3d 153, 162; Kinner v. World Savings & Loan Association (1976) 57 Cal.App.3d 724, 728-729, hg. den.), when the Constitution declares the public policy or the Legislature statutorily addresses the subject, the courts may not declare the public policy (Breaux v. Gino's, Inc. (1984) 153 Cal.App.3d 379, 382).

Turning to the California Constitution and the state statutes, the public policy is clear with respect to the uninterrupted operation of the public schools and to strikes by public school employees.

At the zenith of California's constitutionally expressed public policy, is the operation of the public schools, including the mandate that they be operated for a minimum of six months each year. (Cal. Const., art. IX; art. XVI, sec. 8; art. I, sec. 26; State Board of Education v. Levit, supra,

56 Cal.2d 441, 460; Serrano v. Priest, supra, 5 Cal.3d 584, 604-610, 619; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-909; Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548-549; California Teachers Association v. Board of Education of the Glendale Unified School District, supra, 109 Cal.App.3d 738-744.) This constitutional mandate is carried out by the Legislature through the public school districts and is implemented and reinforced through the Education Code's comprehensive statutory scheme which includes the minimum school year of nearly nine months and compulsory full-time school attendance. (Ed. Code, secs. 1-99176; California Teachers Association v. Board of Trustees of Fullerton Union High School District, supra, 82 Cal.App.3d 244, 254; Myers v. Arcata Union High School District, supra, 269 Cal.App.2d 549-556; Akin v. Board of Education of Riverside Unified School District, supra, 262 Cal.App.2d 161, 167; In re Shinn, supra, 195 Cal.App.2d 683, 686-687.)

Furthermore, this constitutional public policy, with respect to the operation of the public schools and compulsory full-time school attendance, is mirrored by the recognized constitutional right of California's children to attend school and to receive such public school education. (Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548-549; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-911; Serrano v. Priest, supra, 5 Cal.3d 584, 595-596, 605-610.)

Since strikes or other concerted work stoppages by public

school employees necessarily interfere with and disrupt the operation of the public schools, they are clearly contrary to the constitutionally and statutorily established public policies of California concerning the operation of the public schools.

Moreover, the Legislature has enacted a series of successive acts addressing public school employer-employee labor relations; the former pre-Winton and Winton Acts (former Ed. Code, secs. 13080-13088) and the present EERA (Gov. Code, secs. 3540-3549.3). In these acts, the Legislature has specifically withheld from public school employees the right to strike. (See former Ed. Code, sec. 13082 and present Gov. Code, sec. 3543; Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687-689.) To insure that there be no doubt as to its intent regarding public school employee strikes, the Legislature specifically prohibited EERA from being construed so as to give public school employees the right to strike granted to other employees by Labor Code section 923. (Gov. Code, sec. 3549; and see former Ed. Code, sec. 13088; Westminster School District v. Superior Court & Westminster Teacher Association, supra, 28 Cal.App.3d 120, 128.) Since Labor Code section 923's granting of the right to strike to private employees is a statutory declaration of public policy (Lab. Code, sec. 923; Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union, supra, 61 Cal.2d 766, 769; Glenn v. Clearman's

Golden Cock Inn, supra, 192 Cal.App.2d 793, 796-797; Annenberg v. Southern California District Council of Laborers, supra, 38 Cal.App.3d 637, 644; Holayter v. Smith, supra, 29 Cal.App.3d 326, 333; Elsis v. Evans, supra, 157 Cal.App.2d 399, 408-409), the deliberate ommission by the Legislature from Government Code section 3543 of the right to strike and the Legislature's proscription in Government Code section 3549 against construing EERA so as to give public school employees the right to strike are, similarly, statutory declarations by the Legislature of the public policy against public school employee strikes (Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen, supra, 54 Cal.2d 684, 687-689, 694).

As to County Sanitation's holding that public employee strikes are no longer illegal and tortious under California common law, that decision did not address whether public school employees have a right to strike under EERA. Such a judicial reversal of the California common law, that is, that all public employee strikes are no longer illegal and tortious, can neither override nor subvert the public policy as declared by the Constitution and the Legislature. (Cal. Const., art. IX, art. I, sec. 26; Ed. Code, secs. 41420, 46200-46300, 48200-48810; Gov. Code, sec. 3549; Civ. Code, sec. 22.2; Ferguson v. Keays, supra, 4 Cal.3d 649, 654; City of Rohnert Park v. Superior Court, supra, 146 Cal.App.3d 420, 427-428.) Accordingly, County Sanitation cannot, and did not, change the

constitutional and statutory public policies with respect to the operation of the schools and public school employee strikes.

Given then that public school employee strikes are contrary to public policy, forebearance from striking cannot act as consideration for a contract, and thus their use to achieve negotiation demands constitutes bad faith bargaining.

To obtain a lawful change in their wages, hours, duties and/or other terms and conditions of employment, public school employees must meet and negotiate in good faith--including the proffering of lawful consideration to the public school employer--in order to obtain a lawful agreement securing a change or changes in their wages and working conditions. If they fail to obtain such lawful contractual changes in the pre-impasse bargaining (Gov. Code, secs. 3540.1(h), 3543.2, 3543.3, 3543.5(c), 3543.6(c), 3543.7) or in the statutory impasse proceedings (Gov. Code, secs. 3548-3548.4, 3543.5(e), 3543.6(d)), public school employees are left post-impasse with the unchanged status quo in their wages and working conditions.[29] Either the public school employer or the public school employees will have to make some positive, lawful "movement" in their respective bargaining positions in order to have the parties return to the bargaining table and achieve a

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[29]Save and except for "last best offer" changes by the public school employer such as implementing a percentage wage increase and/or a health and welfare benefits increase which constituted the employer's last best offer. (Modesto City Schools, supra, PERB Decision No. 291.)

mutual agreement as to any changes. (Modesto City Schools, supra, PERB Decision No. 291, pp. 52-65.)

But public school employees may not engage in concerted activities which are contrary to public policy in order to pressure and coerce the public school employer to give in and yield to the contract changes they seek in return for the public school employees ending their strike and the concomitant interference and disruption in the operation of the public schools.

In Grasko v. Los Angeles City Board of Education (1973) 31 Cal.App.3d 290, a pre-EERA case occurring under the Winton Act (former Ed. Code, secs. 13080-13088), public school teachers had engaged in a four-and-one-half week strike to obtain a written agreement between the teachers' Negotiating Council (former Ed. Code, sec. 13085) and the Los Angeles Unified School District. The court held that California school districts were not authorized under the Winton Act to enter into binding agreements with teachers' negotiating councils. (31 Cal.App.3d at 300-305.) The court also held that notwithstanding that the agreement was unauthorized, the agreement was invalid in that part of the consideration for the agreement was the teachers' termination of the strike. Public school strikes being contrary to public policy, the termination of the strike in partial exchange for the school district's agreement to the teachers' demands constituted unlawful

consideration and invalidated the agreement. As set forth in Grasko in 31 Cal.App.3d at 297-298:

> The Agreement Was Properly Enjoined as Contrary to Public Policy
>
> The trial court found that had the illegal teachers' strike not occurred, the board of education would not have consented to enter into the agreement herein involved . . . .
>
> In view of the length of the strike, the number of teachers involved, and the effect of the strike upon the school district, it is readily apparent that the termination of the strike formed a substantial part of the consideration for the proposed agreement, as the court's findings clearly imply.
>
> The agreement is invalid since the consideration was not lawful. (Civ. Code sections 1607, 1667.)
>
> We think the reasoning of the Wyoming Supreme Court in Campbell v. Prater, 64 Wyo. 293 (191 P.2d 160), is particularly apropos here. . . .
>
> . . . . "It has been said that 'just as a contract may be invalid because it is contrary to public policy in its substance and purposes, so it may be invalid because it is contrary to public policy in respect of the coercive method of its procurement.' Salmond on Contracts, 1947 Ed., 286, quoted from an earlier edition in Mutual Finance v. John Wetton & Sons (1937) 2 K.B. 389. See, also, Restatement of Contracts, section 578." (Italics added.) (64 Wyo. at p. 311, 191 P.2d at p. 166.)
>
> The parallel is obvious, and we hold that it was contrary to public policy for public school employees who were conducting an illegal strike to exact a consideration for the cessation of that illegal activity. The subject agreement was therefore void (not merely voidable) and the trial court properly enjoined its threatened

consummation.[30]

This invalidity of agreements when the consideration is unlawful with respect to public policy was recently expressed in Kallen v. Delug (1984) 157 Cal.App.3d 940, 949-950:

> A contract may be illegal or in contravention of public policy either in its apparent substance and purpose [citation] or in the consideration upon which it is based [citations]. Unlawful consideration is that which is: "1. Contrary to an express provision of law; 2. Contrary to the policy of express law though not expressly prohibited; or, 3. Otherwise contrary to good morals." (Civ. Code, secs. 1607-1667.) The concept of unlawful consideration embraces a promise to refrain from wrongful conduct directed at the promisee or a third person [citations]. As Campbell noted in a different factual context, illegal consideration encompasses such a promise because it is contrary to law or public policy for an individual who has acted wrongfully to the injury of another to exact a consideration for relinquishing such conduct. In other words, the law finds repugnant the coercion inherent in a promise which carries the implied threat that, without acquiescence in the return promise exacted, the wrongful conduct will continue. [Citations.]

In like principle, if public school employees seek to secure an agreement to their bargaining demands by engaging in a strike with its concomitant interference and disruption in the operation of the public schools, and the strike's cessation or

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[30]Grasko was questioned, but not overruled, in County of Los Angeles v. Superior Court (1975) 13 Cal.3d 721, 728-729; City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 916-917. Cf East Bay Municipal Employees Union v. County of Alameda (1970) 3 Cal.App.3d 578, 584.

nonrenewal forms part of the consideration for the public school employer's acquiescence to the employees' demands, the agreement so obtained would be invalid as being based in part on unlawful consideration. (Cal. Const., art. IX; Civ. Code, secs. 1607-1667; Ed. Code, secs. 41420-48200; Serrano v. Priest, supra, 4 Cal.3d 584, 604-610; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-909; California Teachers Association v. Board of Education of the Glendale Unified School District, supra, 109 Cal.App.3d 738-744; City & County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 916-918; Kallen v. Delug, supra, 157 Cal.App.3d 940, 949-950; Grasko v. Los Angeles City Board of Education, supra, 31 Cal.App.3d 290, 297-298.)

Accordingly, it is an unfair practice under EERA for public school employees to engage in strikes or other public school work stoppages to force the public school employer to capitulate to their demands in order to keep the public schools in operation. By engaging in such conduct, public school employees are failing and refusing to negotiate in good faith to obtain their bargaining goals. (Gov. Code, sec. 3543.6(c).) They are "negotiating" away from the bargining table by engaging in a concerted action which is clearly contrary to public policy and are presenting the public school employer with an unlawful consideration (stopping the strike) to obtain their demands. (Civ. Code, secs. 1607, 1667; Kallen v. Delug, supra, 157 Cal.App.3d 940, 949-950; Grasko v.

Los Angeles City Board of Education, supra, 31 Cal.App.3d 290, 297-298.)

Public school employee strikes thus constitute unfair practices and are unlawful under EERA in that the employees are failing or refusing to meet and negotiate in good faith when they: (1) disrupt and interfere with the continuity and quality of educational services as a coercive pressure tactic to obtain their negotiating demands, (2) make a unilateral change in the status quo, and/or (3) attempt to acquire an agreement to their demands through the use of unlawful consideration. (Gov. Code, sec. 3543.6(c).)

Work Stoppages Constitute Violations of EERA

While work stoppages constitute unfair practices in violation of EERA section 3543.6(c) for the reasons set forth above, they likewise constitute independent violations of EERA when they disrupt and interfere with the continuity and quality of educational services.

EERA was established "to promote the improvement of personnel management and employer-employee relations within the public school systems . . ." (Gov. Code, sec. 3540), with one of the underlying reasons being to avert the disruption caused by strikes. In San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 11, the court stated:

> It is argued that PERB's determination to seek an injunction, as well as its application to the court, would reflect only

> a narrow concern for the negotiating process mandated by the EERA and would ignore strike-caused harm to the public and particularly the infringement on children's rights to an education. . . . [paragraph] That argument erroneously presupposes a disparity between public and PERB interests. The public interest is to minimize interruptions of educational services. Yet did not an identical concern underlie enactment of EERA? . . . PERB's responsibility for administering the EERA requires that it use its power to seek judicial relief in ways that will further the public interest in maintaining the continuity and quality of educational services.

Further, it is well-established that PERB has jurisdiction to investigate and remedy violations of EERA even when such violations do not fit neatly into the provisions of sections 3543.5 and 3543.6, which specify unlawful conduct by the employer and the employee organization respectively. Government Code section 3541.3(i) grants the Board the power:

> To investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect of these charges or alleged violations as the board deems necessary to effectuate the policies of this chapter. (Emphasis added.)

Case law has established that such power in the Board is not limited to remedying allegations that a party has violated the provisions of sections 3543.5 or 3543.6, but also includes alleged general violations of EERA. (Leek v. Washington Unified School District (1981) 124 Cal.App.3d 43, 48-53, hg. den.; Link v. Antioch Unified School District (1983) 142 Cal.App.3d 765, 768-769; Mt. Diablo Unified School District

(1978) PERB Decision No. 68, pp. 11-13; and see San Jose Teachers Association v. Superior Court and Abernathy (1985) 38 Cal.3d 839, 844, 861-863, fn. 14 on p. 861, vacated and remanded on other grounds ___ U.S. ___ (1986) 89 L.Ed.2d 599 [106 S.Ct. 1372] vacated on other grounds 42 Cal.3d 130 (1986).) As explained in Leek v. Washington Unified School District, supra, 124 Cal.App.3d at 47-53:

> [EERA] section 3541.5 provides, inter alia, that "[t]he initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board." Appellants' position is that they have not alleged charges of unfair practices and indeed, that their grievances do not plausibly constitute unfair practices, and PERB is without jurisdiction to hear and rule upon the complaints. Both sides agree that sections 3543.5 (listing activities "unlawful" for a public school employer) and 3542.6 (listing activities"unlawful" for an employee organization) provide the basic definitions for what acts constitute unfair practices.
>
> As formulated by the parties, the preliminary and crucial question is whther appellants have alleged plausible violations of either section 3543.5 or 3543.6. Respondents are in the position of having to make a somewhat procrustean effort to fit each of appellants' allegations within the parameters of unlawfulness as defined by sections 3543.5 and 3543.6.
>
> We conclude the parties have based their arguments upon the erroneous premise that PERB is limited to investigating only charges which are defined as "unlawful" under sections 3543.5 and 3543.6. The Legislature has further vested PERB with authority to investigate other alleged

violations of the EERA and to make determinations with respect to such alleged violations. Section 3541.3, subdivision (i), provides that the board shall have the power and duty "[t]o investigate unfair practice charges or alleged violations of this chapter, and to take such action and make such determinations in respect of such charges or alleged violations as the board deems necessary to effectuate the policies of this chapter." [Emphasis added by the court.] Subdivision (h) of section 3541.3 empowers the board to hold hearings, and subdivision (j) permits the board to enforce its decision or ruling by bringing an action in a court of competent jurisdiction. Subdivision (n) empowers the board "[t]o take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter."

While it was appropriate for the court in San Diego Teachers Assn., supra, (24 Cal.3d 1) to focus upon whether the strike therein could be considered an unfair practice, we determine the appropriate preliminmary question in this case is whether the matters complained of could constitute either unfair practice charges or alleged violations of the EERA. The authority of the board to deal with matters other than those which are "unlawful" under sections 3543.5 and 3543.6 was not disputed by the court in San Diego Teachers Assn. The court noted an argument made in an amicus brief that a comparison of section 3541.5 to section 3541.3, subdivision (i) (giving PERB power to deal with "unfair practice charges or alleged violations of this chapter"), demonstrates that there is no exclusive initial jurisdiction over EERA violations other than unfair practices and was unpersuaded, explaining "EERA specifies no 'unfair practices' but only acts that are 'unlawful' (secs. 3543.5, 3543.6) and thus does not segregate unfair practices from other violations." (Id. at p. 13.)

. . . . . .

> . . . As noted, the board has the power to make determinations with respect to such charges or alleged violations as the board deems necessary to effectuate the policies of the EERA. (sec. 3541.3, subd. (i).) Under subdivision (n) of section 3541.3 the board is given broad powers to effectuate the purpose of the EERA, and subdivision (j) of that same section empowers the board "[t]o bring an action in court of competent jurisdiction to enforce any of its orders, decisions or rulings . . ." (124 Cal.App.3d at 47-49, 52-53, emphasis added.)

The public school employer in this case alleges that the work stoppages engaged in by the public school employees are disruptive and have interfered with the continuity and quality of educational services. The respondent teachers' association does not deny that the work stoppages are disruptive. A basic underlying purpose and policy of EERA is to preserve and foster the continuity of the educational process. (San Diego Teachers Assn. v. Superior Court, supra, 24 Cal.3d at 11; El Rancho Unified School District (1983) 33 Cal.3d 946, 957; Pittsburg Unified School District v. California School Employees Association (1985) 166 Cal.App.3d 875, 887-888, hg. den.; and see Serrano v. Priest, supra, 5 Cal.3d 584, 604-610; Hartzell v. Connell (1984) 35 Cal.3d 899, 906-909.) Accordingly, we find that these public school employee work stoppages are repugnant to EERA, constitute violations of EERA, and, in this case, that it is just and proper to seek injunctive relief from the courts to enjoin such work stoppages pending a hearing and final decision by this Board. (Gov.

Code, secs. 3540, 3541.3, subds. (h), (l), (j) and (n); Leek v. Washington Unified School District, supra, 124 Cal.App.3d at 48-53, hg. den.; Link v. Antioch Unified School District, supra, 142 Cal.App.3d at 768-769; Amador Valley Secondary Educators Assn. v. Newlin, supra, 88 Cal.App.3d at 257; and see San Jose Teachers Assn. v. Superior Court and Abernathy, supra, 38 Cal.3d at 844, 861-863, fn. 14 at p. 861, vacated and remanded on other grounds ___ U.S. ___ (1986) 89 L.Ed.2d 599 [106 S.Ct. 1372] vacated on other grounds 42 Cal.3d 130 (1986).)

In this case, because the Association is attempting to secure an agreement through this conduct which violates EERA generally, the injunctive relief request is enforceable also through section 3543.6(c) since such conduct constitutes a failure to negotiate in good faith. (See Mt. Diablo Unified School District, supra, PERB Decision No. 68, pp. 11-13.)

Furthermore, to the extent that such work stoppages cause the public school employer's administrators and negotiators to devote their efforts to attempting to keep the schools operational, thereby restricting their ability to prepare for further negotiations aimed toward resolving the impasse, work stoppages violate EERA's policies of promoting and improving employer-employee relations (Gov. Code, sec. 3540) and meeting and negotiating in good faith (Gov. Code, secs. 3540.1(h), 3543.3, 3543.6(c).)

IV. PUBLIC SCHOOL EMPLOYEE STRIKES ARE INJURIOUS TO THE OPERATION OF THE PUBLIC SCHOOLS

Having concluded that public school employee strikes constitute unfair practices and violations under EERA, PERB has exclusive initial jurisdiction to seek injunctive relief to halt such unlawful activity. (San Diego Teachers Association v. Superior Court, supra, 24 Cal.3d 1, 14.) In seeking such relief, the courts have established a two-prong inquiry. First, PERB must determine that it is likely that an unfair practice has been committed. That aspect has been demonstrated above. Second, PERB must show that injunctive relief is just and proper. (Public Employment Relations Board v. Modesto City Schools District, supra, 136 Cal.App.3d 881, 896.)

The operation of the public schools is so important to the State and to California's children (Cal. Const., art. IX; Serrano v. Priest, supra, 5 Cal.3d 584, 604-610, 619; Hartzell v. Connell, supra, 35 Cal.3d 899, 906-909; In re Shinn, supra, 195 Cal.App.2d 683, 686-687; Slayton v. Pomona Unified School District, supra, 161 Cal.App.3d 538, 548-549) that work stoppages that interfere with or disrupt the operation of the public schools so as to affect the continuity and quality of educational services present just and proper cause for their enjoinment.

The public school employee work stoppages in this case clearly interfered with and disrupted the continuity and

quality of the educational services to children in Compton Unified School District. There is, therefore, just and proper cause for their enjoinment.

CONCLUSION

We conclude that these work stoppages violate the EERA and are, therefore, unlawful under EERA.[31] In this case, the allegations support at least four bases for concluding that it is likely that the work stoppage constitutes an unfair practice: (1) by engaging in the work stoppage, the Association has used the disruption and interference in school operations caused by the work stoppage as a coercive negotiating tactic to attempt to obtain employer capitulation to the Association's bargaining demands; (2) it has unilaterally changed the terms and conditions of employment of the bargaining unit members who participated in the strike and therefore allegedly has failed and refused to negotiate in good faith; (3) it has attempted to acquire agreement through the use of unlawful consideration, by engaging in conduct that is contrary to public policy and, therefore, allegedly has failed or refused to negotiate in good faith; and (4) the disruption and interference caused by the work stoppage violated one of

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[31]As noted earlier, in reaching this conclusion we overrule Modesto City Schools, supra, PERB Decision No. 291 and San Ramon Valley Unified School District, supra, PERB Order No. IR-46, insofar as they are inconsistent with the conclusions herein.

the underlying policies of EERA, which is to maintain the continuity and quality of educational services, and, since in this case such conduct is engaged in to secure bargaining concessions, it also constitutes a failure and refusal to negotiate in good faith. Further, we find on this record that the disruption and interference to the educational services constitutes just and proper cause to seek injunctive relief.

ORDER

We therefore direct the General Counsel to amend the complaint issued against Respondent Association to include the additional grounds set forth above, and to petition the superior court for injunctive relief against further work stoppages by the Respondent Association.

Chairperson Hesse's concurrence begins on page 162.

Member Craib's dissent begins on page 171.

Hesse, concurring: This matter came before the Board because of a request for injunctive relief filed by the Compton Unified School District (District). This request, attached to an unfair practice charge, comes as the result of a strike by the Compton Education Association (CEA or Association). The strike included a number of work stoppages, lasting from one to five days at a time.[1] These stoppages began in early November 1986 and have continued through March 1987. CEA has given no indication that it will not call for any more work stoppages, and there is reasonable cause to believe that the strike will continue while the parties are without an agreement.

Teachers have engaged in a work stoppage on 16 separate days. The District has been unable to replace the strikers to any significant degree.[2] Student attendance on strike days

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[1]The intermittent nature of the strike up to this point has presumably been the tactic used because it permits the emloyees to draw enough salary to be able to meet financial obligations while still disrupting services. Presumably, employees also receive full benefits even during the work stoppages. This intermittent technique is disfavored in the private sector because it results in one side, management, suffering greatly while the employees are relatively unharmed. (First National Bank of Omaha (1968) 171 NLRB 1145, en'f (8th Cir. 1969) 413 F.2d 921.) The discussion in this opinion, however, is premised on the harm caused by the strike, regardless of whether it is intermittent in nature or not.

Member Craib's reliance on NLRB v. Insurance Agents' International Union (1960) 361 US 477 fails to recognize the difference between public and private sector strikes.

[2]The average number of strikers on any given day was 898. The average number of substitutes employed to replace the strikers was 43.

was down approximately 70% from normal pre-strike attendance. Equally significant, however, is the fact that attendance on days when no work stoppage was in progress also was below the normal attendance rate that predated the strike activity. In other words, once the teachers began their strike, attendance was significantly affected, even on days when the teachers were in the classrooms. A reasonable assumption is that the uncertain nature of the teachers' attendance directly caused the drop in student attendance after November 10, 1986.

If the goal of a work stoppage is to disrupt the educational process, one can only conclude that the CEA strike has been successful. For the period November-January, nearly 40% of the students received no education whatsoever because they did not attend school. The ones who did attend classes on the strike days were largely "warehoused." Adequate numbers of substitutes were not available to teach even half of the students. Where instruction did take place, it could not meet even minimal levels because so few teachers had responsibility for so many students. Due to the intermittent nature of the strike, continuity of instruction either by substitutes or by regular teachers was compromised at best and impossible at worst.

In addition to the overt disruption of the students' instructional program, the strike has had an indirect impact on the educational program in, for example, the cancellation of teacher training programs; curriculum monitoring and

development; and educational, physical, and psychological testing. The total number of training and supplemental programs that have been cancelled is listed in the declarations of District personnel.

CEA admits in its papers that the strike has been disruptive, and makes the argument that strikes, by their very nature, are meant to be disruptive. Additionally, it claims that a number of the individual work stoppages were provoked by unfair practices committed by the District.[3]

This Board is now presented with the issue of whether injunctive relief is proper in this case, during the pendency of the unfair practice charge proceedings. To reach that issue, we must rule on: (1) whether PERB has jurisdiction over this dispute, as determined by whether the strike is arguably unlawful under the Educational Employment Relations Act (EERA or Act); (2) if PERB does have jurisdiction, whether the actions of CEA constitute a violation of EERA or an unlawful practice under the Act; and (3) whether the standards for seeking injunctive relief under PERB v. Modesto City Schools

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[3]As set forth in Member Porter's opinion, I concur that the Board's earlier interpretation of section 3543 is incorrect and I join Member Porter in overruling Modesto City Schools (1983) PERB Decision No. 291 on that point. But just as EERA confers no statutory right to strike, neither does it expressly by law prohibit strikes. The sole issue before the Board in any strike case is whether the facts of that strike can lead to a finding that the strike is an unlawful activity under EERA.

District (1982) 136 Cal.App.3d 881 are met.[4]

I. PERB has Jurisdiction Over this Dispute

Under San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 11, PERB has initial exclusive jurisdiction to determine whether parties have engaged in conduct that is an unlawful practice under EERA. (See El Rancho Unified School District v. National Education Assn. (1983) 33 Cal.3d 946, 953-956; Sears Roebuck & Co. v. Carpenters (1959) 436 US 180, 186-188; San Diego Building Trades Council v. Garmon (1959) 359 US 236, 244-247; 3 L.Ed.2d 775, 782-784; 79 S.Ct. 773.) Indeed, both CEA and the District concede PERB's jurisdiction in this case. (See District's Request for Injunctive Relief at p. 22; CEA's Opposition to Request for Injunctive Relief at p. 37.) Typical of PERB's exercise of jurisdiction over strikes are cases where the Board has found unlawful an economic strike that occurred prior to exhaustion of impasse procedures (Fresno Unified School District (1982) PERB Decision No. 208; Sacramento City Unified School District (1987) PERB Order No. IR-49) but not a strike in response to unfair practices (Modesto City Schools (1983) PERB Decision No. 291). Although PERB has had no prior opportunity to rule on a post-impasse economic strike, that lack of opportunity does not mean that

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[4]The dissent's accusation that this Board has not given equal treatment to employee associations is curious in light of our decisions to seek injunctive relief in Selma Unified School District S-CE-773 and Buckeye Elementary School District S-CE-863.

the teachers' conduct is neither "arguably protected or arguably prohibited," the standard under which initial exclusive jurisdiction is conferred.[5] Indeed, PERB's willingness to address the issue of strikes, coupled with EERA's statutory scheme developed to prevent labor unrest, lead inexorably to the conclusion that PERB has initial exclusive jurisdiction over this dispute.

II. The Strike is Arguably Unlawful Under EERA[6]

As noted by Member Porter, this Board has wide discretion in determining violations of EERA. (San Diego Teachers Assn. v. Superior Court, supra; Leek v. Washington Unified School District (1981) 124 Cal.App.3d 43, 47-49.) As stated by the court in Leek (but not, apparently, agreed to by the dissent), "The authority of the board to deal with matters other than those which are 'unlawful' under sections 3543.5 and 3543.6 was not disputed by the [Supreme Court.]" (Id. at 49.)

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[5]See San Diego Teachers Assn., supra, citing San Diego Building Trades Council, supra. (See also, El Rancho Unified School District, supra.)

[6]I would distinguish the instant situation from County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees' Assn., Local 660, SEIU, AFL-CIO (1985) 38 Cal.3d 564, because that tort case involved the Meyers-Milias-Brown Act, and no public agency oversees that statute. The Supreme Court explicitly stated that it did not rule on statutes governing other public employees. (County Sanitation, supra, fn. 14 at p. 10, and fn. 17 at p. 13.) Additionally, that case addressed the common-law prohibition against strikes and this dispute addresses only the alleged statutory violation of EERA. Thus, County Sanitation would be instructive to a court of law only where it heard a dispute because an administrative agency had no jurisdiction over that matter. Such is not the case here.

A seminal question, therefore, is whether the tactic of causing a total breakdown in education, and the lack of even basic instruction in Compton, so vividly portrayed in the District's moving papers, can constitute a violation of EERA and, if so, what is the appropriate way for the Board to adjudicate such an alleged violation.

I find that the strike is such a violation of the Act. This conclusion is reached because the strike was employed to cause a total breakdown of two discrete activities that are guaranteed by statute and case law: (1) basic education for students and (2) negotiations free from coercive tactics that hold hostage that education. The former activity is guaranteed by the California Constitution, by numerous statutes, and by our Supreme Court in San Diego Teachers Assn., supra, when it stated that both the public and PERB have an interest in minimizing interruptions of educational services. (San Diego Teachers Assn., supra, at 11.) Member Porter has written at length on the constitutional and statutory guarantees to an education, and I concur that PERB must do what it can, under its jurisdiction, to fulfill those guarantees.

The latter activity, protecting parties from highly coercive tactics designed to force concessions at the bargaining table is guaranteed by section 3543.6(c), the requirement that the employee association negotiate in good faith. Here, the total inability of the District to provide even basic, minimum-day education by using substitute teachers

is, surely, an example of the "larger harm" stemming from a teachers' strike that the Supreme Court expressly permits PERB to address. (El Rancho Unified School District, supra, at 957.) Such harm is incompatible with the desire for good employer-employee relations that led to passage of the Act. Thus, this strike is an unlawful activity as a refusal to bargain in good faith, a violation of section 3543.6(c). The dissent's view that this opinion condemns all strikes as per se refusals to bargain is simply wrong.

In addition to the outright violation of section 3543.6(c), the strike arguably has resulted in a violation of section 3540, wherein EERA provides for the improvement of employer-employee relations. Taking heed from how violations of section 3544.9 are actionable through section 3543.6(b), I concur with Member Porter that violations of 3540 are redressable through section 3543.6(c).[7] Use of the unfair practice procedures allows a complaint to be issued so that the

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[7]That PERB has the authority to redress violations of EERA beyond those specifically addressed in sections 3543.5 and 3543.6 is evident from its actions in cases alleging a breach of the duty of fair representation, wherein alleged violations of section 3544.9 are adjudicated by PERB procedurally through section 3543.6(b). (See Rocklin Teachers Professional Association (1980) PERB Decision No. 124.) Allegations that parties have failed to comply with section 3547, public notice provisions, are also adjudicated by the Board. (Los Angeles Unified School District (1984) PERB Decision No. 397.) Thus, where allegations of statutory violations of the Act are made, and especially where those violations of the Act result in "strike-caused harm to the public and particularly the infringement on children's right to an education" (San Diego Teachers Association, supra, at 11), PERB can and must take action to prevent such violations.

due process rights of both labor and management are safeguarded.

For the reasons above, I concur with Member Porter that this strike must be redressed by the Board as a potential violation of the Act, and injunctive relief should be sought if the standards set forth in PERB v. Modesto City Schools, supra, are met.[8]

III. Injunctive Relief is Appropriate

The Court of Appeal in PERB v. Modesto City Schools, supra, delineated a two-part test under which PERB may seek an injunction during the pendency of an unfair practice proceeding: (1) where it is probable that a violation of the Act has been committed; and (2) where injunctive relief is just and proper. In light of the above discussion concerning the tactic used by the striking employees to cause a total breakdown of the educational process, I find it probable that a violation of the Act has been committed.

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[8]Although the Association argues that some of the one-day work stoppages were provoked by employer conduct, the activities after unsuccessful mediation by a PERB administrative law judge can reasonably be seen to be strictly economic tactics. The parties appear to have reached "final" impasse in February 1987, after unsuccessful negotiation/mediation that followed release of the factfinders report. (Gov. Code secs. 3548.2, 3548.3, 3548.4, Modesto City Schools, supra, at 32.) The employees may have struck prior to that time in response to the employer's alleged unfair practices, but their subsequent return to work moots the issue. Based on the declarations before us, the strike subsequent to final impasse was not provoked. We leave for the hearing on the merits the full litigation on any defense to the District's charges of unfair practices.

In addition, injunctive relief is just and proper because any remedy fashioned by PERB could not be considered adequate at law. Having lost at a minimum 16 instructional days, the students of the Compton school system, particularly the number of students who are educationally disadvantaged, are faced with an unknown number of additional days of educational idleness. The Association's suggestion that such lost days can be "made up" is a tacit admission that the school time already lost is of great importance to the students' education. Extending the school year, however, does not cure the lack of continuity in the program now. The inherent interruption of continuity and quality that occurred because of this strike needs to be redressed at this instant in order to meet the goals of the Legislature in reforming the state's schools. (SB 813, Stats. 1983, Ch. 498) Furthermore, a remedy of a cease and desist order that comes one, two, or, three years after a strike cannot make up for the disruption and lost educational opportunities suffered by the students at the time of the strike.

For the reasons above, I concur that the General Counsel be instructed to seek an injunction that would halt the work stoppage.

Craib, Member, dissenting: I must respectfully dissent from my colleagues' transparent attempt to distort the law to mesh with their personal abhorrence of teacher strikes. While I, too, have serious concerns about the effects of teacher strikes upon the educational process, existing law simply does not make such strikes unlawful. I submit that if a change in the law is warranted, it is properly the role of the Legislature or the courts to change it, not this Board.

Prior to the California Supreme Court's decision in County Sanitation District No. 2 of Los Angeles County v. Los Angeles County Employees Association, Local 660, SEIU, AFL-CIO (1985) 38 Cal.3d 564 (County Sanitation), public employee strikes were generally considered unlawful absent statutory authorization. In County Sanitation, the Supreme Court held that public employee strikes are no longer unlawful under common law, with the exception of those strikes which constitute a substantial and imminent threat to public health or safety. Consequently, where there is no substantial and imminent threat to public health and safety, public employee strikes are now lawful in California absent statutory prohibition. The relevant statute here is, of course, EERA, so we must examine its language to determine the legality of the strike at issue.

First, I can say categorically that there is no provision of EERA which expressly or impliedly prohibits all strikes.[1]

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[1]The Board has found that EERA's mandatory impasse resolution procedures imply a ban on economic strikes prior to

Member Porter's reliance on EERA section 3549 is without foundation. In San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 13, the Supreme Court rejected the notion that this provision can be read as a blanket prohibition on strikes. In County Sanitation, the Court affirmed that interpretation by similarly construing an identical provision of the Meyers-Milias-Brown Act. Whether Member Porter likes it or not, this issue has been definitively resolved.[2] Nor is there any provision in EERA which expressly or impliedly authorizes the Board to enjoin strikes solely on the basis that disruption of the educational process has resulted. That theory of illegality, as well as the grossly exaggerated importance attached by Member Porter to the absence of the "16 magic words" will be dealt with in greater detail later in this opinion. However, suffice it to say at this point that, while the absence of the "16 magic words" is an argument for finding strikes unprotected under EERA, it cannot reasonably be construed as a prohibition on strikes.

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the exhaustion of the procedures. See, e.g., Rio Hondo Community College District (1983) PERB Decision No. 292. In the instant case, the impasse procedures have been exhausted.

[2]Whether Member Porter agrees with the Supreme Court or not, he cannot simply ignore the precedential force of its decisions. While his opinion is suitable as a brief before the Court seeking reversal of its decisions or as a plea to the Legislature for a statutory prohibition on teacher strikes, in light of existing law it is conspicuously out of place as a decision of PERB.

As Member Porter points out at page 95 of his opinion, this Board has held that, except as limited by other provisions of EERA, section 3543 authorizes strikes. Modesto City Schools (1983) PERB Decision No. 291. In comparing section 3543 to section 7 of the NLRA and section 923 of California Labor Code, the Board concluded that the EERA uses clearer and more universally understood language to confer the right to engage in collective activities traditionally related to the bargaining process.

While acknowledging that section 3543 is susceptible to differing interpretations, I find the Modesto interpretation the most persuasive. Section 3543 expressly grants to employees the right to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." Strikes for the purpose of exerting pressure at the bargaining table are classic representational activities. Member Porter's musing that this same language did not confer the right to strike when contained in EERA's predecessor, the Winton Act, ignores the fundamental difference between the two acts, namely, that the Winton Act did not require public school employers to collectively bargain with employee organizations. Therefore, "representation" under the Winton Act had a fundamentally different meaning.[3]

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[3]The primacy of collective bargaining rights in any statutory analysis of the right to strike is illustrated by a

While I agree with the Board's Modesto decision that some strikes are protected under EERA, I would find the strikes thus far occurring in the Compton Unified School District, due to their intermittent nature, to be unprotected.[4] This is consistent with the view of the NLRB and the federal courts. (See generally Morris, The Developing Labor Law, 2d Ed., pp. 1016-1018. And see NLRB v. Insurance Agents' International Union (1960) 361 U.S. 477 [45 LRRM 2704] (Insurance Agents); NLRB v. Fansteel Metallurgical Corp. (1939) 306 U.S. 240 [4 LRRM 515]; United Auto Workers v. Wisc. Employment Relations Bd. (1949) 336 U.S. 245 [23 LRRM 2361]; Confectionery and Tobacco Drivers v. NLRB (2d Cir. 1963) 312 F.2d 108 [52 LRRM 2163]; Valley City Furniture Co., supra; NLRB v. Blades Mfg. Corp. (8th Cir. 1965) 344 F.2d 998 [59 LRRM 2210].)

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major pre-County Sanitation California Supreme Court case, Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen (1960) 54 Cal.2d 684. There, the Court relied on both the grant of collective bargaining rights and on the "16 magic words" noted by Member Porter. The Court noted that, under the facts of the case, it did not need to consider if the right to bargain collectively itself gave the right to strike, but cited several cases from other jurisdictions where it was so held.

[4]Though I would find that at least some of the one-day strikes were arguably provoked by District unfair practices, my view of intermittent strikes as unprotected does not vary depending on whether or not the strikes are provoked. While the NLRB once viewed all intermittent strikes as per se unprotected (see Valley City Furniture Co. (1954) 110 NLRB 1589 [35 LRRM 1265] enf'd (5th Cir. 1956) 230 F.2d 947 [37 LRRM 2740]), the NLRB now looks to the totality of the circumstances (see GAIU Local 13-B, Graphic Arts (1980) 252 NLRB 936). Since the distinctions between intermittent and full strikes which lead me to find the former unprotected do not vary depending on

The rationale behind finding partial or intermittent strikes unprotected stems from the view that such tactics interfere with the employer's business without placing a commensurate economic burden on the employees. In other words, such tactics, in contrast to a full strike, do not constitute the complete withholding of labor but, instead, are tantamount to working and striking at the same time. They are thus distinguishable from the classic strike form, the full strike, and thus need not be given protected status even where the right to strike is, generally speaking, protected. However, I must emphasize the fact that a specific form of strike activity is unprotected does not mean that it is unlawful.

First, I note that the instant case involves an intermittent strike and not a partial strike, sit-down strike or slowdown. While in the private sector these tactics are also generally regarded as unprotected, the intermittent strike is the form which most closely resembles the protected full strike. Any argument that such tactics are unlawful necessarily weakens as the particular strike form approaches the form of the full strike. As intermittent strikes do constitute the total withholding of labor, albeit for one or a few days at a time, I find the distinctions from full strikes to be insufficient to warrant prohibiting intermittent strikes. However, the

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the existence of provocation, I find the Valley City Furniture Co. approach the more instructive.

strike's traditional role as a weapon of all-out war brings with it the notion of economic sacrifice, i.e., "biting the bullet." Since the intermittent strike does not require such sacrifice, it can reasonably be viewed as distinct from the full strike, and thus not be extended protected status. On the other hand, the intermittent strike is not sufficiently different than a full strike, either in its form or in its effect upon the bargaining relationship, to justify deeming one unlawful and the other one not only lawful, but protected.

Furthermore, an attempt by this Board to deem intermittent strikes as unlawful bargaining tactics would impermissively inject the Board into the bargining process, and thus have the Board take on a role which traditionally has not been extended to similar labor boards. In condemning the NLRB's attempt to deem such strike tactics as unlawful, the U.S. Supreme Court in Insurance Agents, supra, stated:

> We believe that the Board's approach in this case--unless it can be defended, in terms of sec. 8(b)(3),[5] as resting on some unique character of the union tactics involved here--must be taken as proceeding from an erroneous view of collective bargaining. It must be realized that collective bargaining, under a system where the Government does not attempt to control the results of negotiations, cannot be equated with an academic collective search for truth--or even with what might be thought to be the

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[5]Section 8(b)(3) of the NLRA makes it an unfair labor practice for a union to refuse to bargain collectively with an employer. EERA contains a similar provision at section 3543.6(c).

ideal of one. . . . Abstract logical analysis might find inconsistency between the command of the statute to negotiate toward an agreement in good faith and the legitimacy of the use of economic weapons, frequently having the most serious effect upon individual workers and productive enterprises, to induce one party to come to the terms desired by the other. But the truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors--necessity for good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms--exist side by side. . . .

But surely that a union activity is not protected against disciplinary action does not mean that it constitutes a refusal to bargain in good faith. The reason why the ordinary economic strike is not evidence of a failure to bargain in good faith is not that it constitutes a protected activity but that, as we have developed, there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining. . . . Surely it cannot be said that the only economic weapons consistent with good-faith bargaining are those which minimize the pressure on the other party or maximize the disadvantage to the party using them. The catalog of union and employer weapons that might thus fall under ban would be most extensive. . . . [W]e think the Board's approach involves an intrusion into the substantive aspects of the bargaining process--again, unless there is some specific warrant for its condemnation of the precise tactics involved here. The scope of sec. 8(d) are exceeded, we hold, by inferring a lack of good faith not from any deficiencies of the union's performance at the bargaining table by reason of its attempted use of economic pressure, but solely and simply because tactics designed to exert economic pressure were employed during the course of the good-faith negotiations. Thus the Board in the guise of determining good or bad faith in negotiations could regulate what economic

> weapons a party might summon to its aid. And if the Board could regulate the choice of economic weapons that may be used as part of collective bargaining, it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. As the parties' own devices became more limited, the Government might have to enter even more directly into the negotiation of collective agreements. Our labor policy is not presently erected on a foundation of government control of the results of negotiations.

The role of this Board is not dissimilar from that of the NLRB. Like the NLRA, EERA simply requires good faith bargaining and does not require the parties to reach agreement. Nor is there any provision of EERA which authorizes the Board to inject itself into the bargaining process whenever, in its wisdom, the Board determines that one party is "on the ropes." This simple fact fatally undermines that portion of our colleagues' approach which would find a public school strike unlawful whenever it is disruptive, i.e., whenever it is effective. I seriously doubt my colleagues will rush in to equalize bargaining power if it is instead the employee organization that is overmatched.

The design and purpose of this Board is remarkably similar to that of the NLRB.[6] The Legislature was fully aware of existing labor law when it created EERA and PERB (as Member Porter points out). It was thus aware that similar boards

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[6]This Board will, of course, take into account differences between the public and private sectors in interpreting the statutes it administers.

administering similar statutes have not been given the authority to influence the balance of power in bargaining relationships. The Legislature could have created a statutory scheme which contemplated such a role for PERB, but it did not.

As my colleagues have noted, PERB may seek injunctive relief when: (1) it is more likely than not that a violation of EERA has been committed; and (2) injunctive relief is just and proper. As the intermittent strikes which have occurred in the Compton Unified School District are not arguably prohibited (nor protected) under EERA, injunctive relief is not available through PERB. In fact, since the strikes involved here are not arguably protected or prohibited under EERA, PERB simply has no jurisdiction to seek injunctive relief. San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1.

Therefore, the District is free to go directly to court to seek relief on some basis other than EERA. For example, the District could argue that the strike is unlawful at common law under the health and safety exception carved out by the Supreme Court in County Sanitation (or seek an expansion of that exception). Further, as the strikes are unprotected, the District is free to take disciplinary action against the strikers (consistent with other laws). While I recognize that public school employers are more restricted than private sector employers in the self-help measures that may be taken in response to strikes, they are far from powerless. I am

confident that competent counsel can devise numerous lawful responsive measures.

Now that I have outlined my position on the legality of the strike issue, I will more fully comment on the theories advanced by my colleagues. Chairperson Hesse and Member Porter argue that intermittent strikes or, indeed, any strike engaged in by the Compton Education Association is an unlawful refusal to bargain and therefore should be enjoined. Their arguments bear some comment. In my view, they depart from established and workable precedent and, in some cases, tend to destablize employer-employee relations.

The Board has erroneously concluded that a strike is a refusal to bargain. In this case, there is no evidence that a strike has frustrated the negotiating process.

Normally, the Board analyzes refusals to bargain under the "totality of circumstances" test. This test, long used by the NLRB, was adopted by this Board in Pajaro Valley Unified School District (1978) PERB Decision No. 51. As explained in Pajaro Valley, "this test looks to the entire course of negotiations to determine whether the employer has negotiated with the requisite subjective intention of reaching an agreement."[7] There are certain acts, however, which have the potential to frustrate

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[7]In Pajaro Valley, supra, the association alleged that the employer lacked the requisite subjective intent to bargain in good faith. Because employee organizations are under the same requirement to bargain in good faith (see Government Code section 3543.6(c)), the totality of circumstances test is equally applicable to employee organizations. El Dorado Union High School District (1985) PERB Decision No. 495.

negotiations and to undermine the exclusivity of the bargaining agent which may be held unlawful without any determination of subjective bad faith on the part of the employer. Pajaro Valley, supra, and see NLRB v. Katz (1962) 369 U.S. 736. The parties engaged in extensive negotiations prior to impasse, apparently engaged in the statutory impasse procedures in good faith and conducted extensive post-impasse negotiations. Once statutory impasse procedures have truly been exhausted and a "second impasse" has been reached, the "impasse under EERA is identical to impasse under the NLRA." Modesto City Schools (1983) PERB Decision No. 291. The District is not charging that CEA bargained in bad faith at the table, only that the failure to give sufficient notice and the strikes themselves constitute unlawful practices. The majority has accepted the District's view by concluding that any strike by CEA is itself a refusal to bargain in good faith. Because it cannot point to subjective bad faith, the Board has concluded that this strike is a per se unfair practice, thereby departing from private sector precedent which has decisively rejected the notion that striking is inconsistent with good faith bargaining. NLRB v. Insurance Agents International Union, supra.

To be consistent with the theory that some acts have such a potential to frustrate negotiations that they may be classified as per se violations of EERA, it is necessary to conclude that this strike, which is taking place after exhaustion of the statutory impasse procedures, is or has the potential to

frustrate negotiations. There is simply no evidence that this is the case. Rather, the evidence suggests that the parties simply cannot reach agreement. Nothing in the EERA requires that they agree. Oakland Unified School District (1982) PERB Decision No. 275. We should be leery of injecting ourselves into the bargaining process to force agreement in the name of labor peace. Thus, in my view, negotiations are not frustrated by CEA's actions; rather, the process has broken down in this case because neither party is willing to make the concessions necessary to gain agreement. The strike is a symptom, not the cause, of a bargaining breakdown. For this reason, I would not view CEA's actions as a per se violation because I do not think they significantly contribute to the stalemate that exists. Rather, consistent with experience under the NLRA, I view CEA's tactic as an unprotected activity. The majority incorrectly regards the strike as a per se refusal to bargain and does so by ignoring the rationale developed by PERB and the NLRB for concluding that certain acts, by their nature, are violations. Because the obligation to bargain is suspended, it is difficult to conceive how striking can be a refusal to bargain.

EERA does not specifically provide that the duty to negotiate ends after the completion of the statutory impasse procedures or that the duty is a continuous one. However, in Public Employment Relations Board v. Modesto City School District (1982) 136 Cal.App.3d 881, 897 the court noted:

> [I]t is well settled in the private sector that a legal impasse can be terminated by

> nearly any change in bargaining-related circumstances. "An impasse is a fragile state of affairs and may be broken by a change in circumstances which suggests that attempts to adjust differences may no longer be futile. In such a case, the parties are obligated to resume negotiations and the employer is no longer free to implement changes in working conditions without bargaining. Just as there is no litmus-paper test to determine when an impasse has been created, there is none which determines when it has been broken. . . . Most obviously, an impasse will be broken when one party announces a retreat from some of its negotiating demands." (Gorman, Labor Law (1976) p. 449; see also N.L.R.B. v. Sharon Hats, Incorporated (5th Cir. 1961) 289 F.2d 628.)

The above quotation clearly implies that the employer is free to implement unilateral changes consistent with its last best offer at the table and this in turn implies that the duty to bargain is suspended after impasse. In Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191, 202, the court made exactly this point. Noting that EERA comprehends that an impasse may be declared only when meeting and negotiating have come to an end, the court concluded that ". . . the start of impasse denoted the end of 'meeting and negotiating' in the formal sense. . . ." For this reason, the court, in Moreno Valley, supra, found that, although certain employer acts violated the duty to participate in good faith in the impasse process, they could not also violate the duty to bargain in good faith. In Victor Valley Union High School District (1986) PERB Decision No. 565, the Board held that the duty to bargain "was dormant because the parties were in the

midst of the statutory impasse procedures." The view that the obligation to bargain is suspended once impasse is reached is a well-accepted tenet of private sector labor law (see, generally, Morris, The Developing Labor Law, supra, at p. 636). In this case, the parties have exhausted impasse procedures, reached "true" impasse and nothing has broken the impasse between the parties. Nevertheless, the majority concludes that, because this strike disrupts the educational process (even though the bargaining obligation is dormant), it is a per se refusal to bargain.

Although Member Porter follows the traditional labor relations view when he says that the employer is free to make certain unilateral changes after impasse, he does not accept the logical consequences of his statement. Lawful unilateral changes may be made by the employer precisely because the duty to bargain is dormant.[8] It is inconsistent to hold that the duty to bargain is suspended for the employer but active for the employee association.

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[8]It is true that an employer's unilateral change that is inconsistent with its last best offer violates the duty to bargain, even during impasse. However, this does not change the fact that the duty to bargain is otherwise dormant. The inconsistent unilateral change is a bargaining violation because the employer must wait for a break in the impasse, then negotiate consistent with the intended change until another impasse (or agreement) is reached before instituting the change. There are no analgous restrictions on the right to strike because an otherwise lawful strike does not in any way undermine bargaining either presently or prospectively.

Disruption of the education process is not, standing alone, an unfair practice. PERB has no authority to enjoin something that is not an unfair practice.

The majority argues that strike activity on the part of the CEA is proscribed by its view that the general thrust of EERA prohibits disruption of the educational process. In a footnote to her concurring opinion, Chairperson Hesse says, "[T]he discussion in this opinion is premised on the harm caused by the strike, regardless of whether it is intermittent in nature or not." In the main portion of her opinion she notes, "A seminal question, therefore, is whether the tactic of causing a total breakdown in education . . . can constitute a violation of EERA and, if so, what is the appropriate way for the Board to adjudicate such an alleged violation." Strikes by their nature are disruptive and cause harm. Any effective teacher strike is a per se refusal to bargain according to Chairperson Hesse. However, as is readily apparent from a study of EERA, nothing in it directly prohibits strikes. In fact, as mentioned above, the Board has found that the language of section 3543 "uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process. . . . Thus, except as limited by other provisions of EERA, section 3543 authorizes work stoppages." Modesto Teachers Association, supra, at p. 62.

Further, nothing in EERA suggests it is anything more than a comprehensive labor relations statute. The purposes of EERA are

set forth in Government Code section 3540:

> to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relations with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.

The focus of EERA is the promotion of collective bargaining. It is not PERB's job to determine educational policy.

Unable to find specific language in EERA which makes strike activity unlawful, Chairperson Hesse expands upon what is a specific and limited legislative mandate. Citing San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1 and El Rancho Unified School District v. National Education Assn. (1983) 33 Cal.3d 946, Chairperson Hesse concludes that PERB may seek judicial intervention whenever, in its view, the continuity and quality of educational services are threatened. Continuity and quality of educational services are factors appropriately considered by the Board in exercising its remedial authority. Nothing in San Diego Teachers Association or El Rancho Unified School District holds that disruption of the educational process alone is an unfair practice. Such a broad reading of San Diego and El Rancho is not justified by the language of those cases.

San Diego Teachers Association, supra, held that PERB had initial exclusive jurisdiction because the conduct complained of by the district was arguably an unfair practice. The court, therefore, concluded that it was necessary for the district to exhaust administrative remedies, i.e., to seek a determination from PERB that the association was committing an unfair practice and to apply to PERB to enjoin that unfair practice. In rejecting the District's argument that the relief requested by PERB "would reflect only a narrow concern for the negotiating processes mandated by EERA and would ignore strike-caused harm to the public and particularly the infringement on children's rights to education," the court concluded that this argument erroneously presupposes "a disparity between public and PERB interests." Thus, in fashioning the relief requested there is no assumed disparity of interests between the District and PERB. However, the court went on to carefully emphasize that:

> it does not follow from the disruption attendant on a teachers' strike that immediate injunctive relief and subsequent punishment for contempt are typically the most effective means of minimizing the number of teaching days lost from work stoppages. (P. 11.)

Elsewhere in the decision the court noted that PERB's

> mission to foster constructive employment relations (section 3540) surely includes the long range minimization of work stoppages. PERB may conclude in a particular case that a restraining order or injunction would not hasten the end of a strike (as perhaps neither did here) and, on the contrary,

> would impair the success of statutorily mandated negotiations between union and employer.

Thus, Chairperson Hesse significantly enlarges upon the meaning of the phrases extracted from San Diego Teachers Association, supra.

Where a strike is arguably an unfair practice, PERB can seek judicial relief. However, PERB must first establish that it has reasonable cause to believe that the activity it seeks to enjoin is arguably prohibited. Public Employment Relations Board v. Modesto City Schools (1982) 136 Cal.App.3d 881, 901-902. Chairperson Hesse finds that, because this strike is disruptive, it is therefore unlawful. The Chairperson has not explained why this strike is unlawful.

While it is true that PERB has authority to redress violations of EERA beyond those specifically addressed in section 3543.5 and 3543.6, EERA specifically provides for the duty of fair representation and public notice. EERA section 3544.9 requires the employee organization to fairly represent all employees in the unit. Section 3547 sets forth public notice requirements and specifically authorizes the Board to adopt regulations implementing the public notice statutes. There is nothing in EERA which says that disruption of the educational process is itself, without more, a violation. Presumably, if the District were able to hire adequate substitutes to provide the basic minimum-day education, Chairperson Hesse would find the strike to be lawful or at least

not prohibited. As noted above, a rationale that labels activity unlawful only if it is effective impermissibly interjects the Board into the bargaining process. Further, an ad hoc rule which depends on the degree of disruption fails to provide parties with guidance for future conduct.

I do not mean to imply that a strike can never be prohibited. However, to be prohibited, it must violate a provision of EERA. My colleagues have not offered a plausible theory on which to find such a violation.

A work stoppage is not equivalent to a unilateral change.

Member Porter asserts that a work stoppage is an unlawful unilateral change. He does not distinguish between employees who seek to remain on the job and receive the benefits of working yet unilaterally change some of the terms of their employment and employees who are willing to withhold their labor. This crucial distinction is articulated in Moreno Valley, supra, at p. 197: "[I]t is manifest that a unilateral change in employment conditions is not the same thing as a strike, at any stage of the employment dispute." I recognize that Member Porter equates employee strikes with employee unilateral action while the Moreno court rejects the equation of employee strikes with employer unilateral action. What is significant, however, is that the Moreno court correctly rejects the view that unilateral acts are equivalent to a strike. The cases cited by Member Porter for the proposition that employee organizations can make unlawful unilateral changes have been

applied only where the employees sought to stay on the job, yet unilaterally determine the content of the job. Member Porter recognizes this but assumes the cases he cites are so limited because strikes are protected under NLRA and, therefore, there are no examples of strikes analyzed as unilateral changes. A more compelling reason why he can find no examples is that unilateral changes in terms and conditions of employment are not the same as the withholding of services. Employer unilateral changes signal the end of mutual dispute resolution, while a work stoppage is a pressure tactic designed to force mutual agreement. See Moreno Valley, supra, at pp. 197-198. Because intermittent strikes of the kind taking place here constitute a withholding of services with its consequent financial impact on teachers, they are not unilateral changes.

The argument that an agreement in exchange for not striking fails for want of lawful consideration begs the question.

Member Porter's argument that acquiring agreement through the use of work stoppages is based on unlawful consideration begs the question. To make this argument, one must assume that strikes are unlawful. Once this assumption is made, it logically follows that an agreement based on the threat of illegal activity is itself unlawful. While this argument does not elucidate the underlying reasons why strikes are illegal, it carries with it unsettling implications. Many contracts contain no-strike clauses. Presumably, under Member Porter's theory, such clauses would be void or unenforceable since a promise not to strike is unlawful consideration. Additionally, this

argument implies that as an expedient, an employer may agree with a striking employee organization to end the strike and afterwards freely repudiate the agreement, conduct that hardly promotes stability.

The absence of the "16 words" does not preclude finding strikes under EERA protected.

Member Porter argues that the Legislature deliberately chose to withhold the right to strike from employees covered by EERA. He finds this expression of legislative intent by the absence in EERA of the phrase "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," a recognized euphemism for the express right to strike. While I agree that the presence of this phrase would be a strong argument that the Legislature intended to protect strikes, the absence of this phrase does not mean that the Legislature intended to make strikes unprotected or prohibited.

To effectuate the intent of the Legislature, every statute should be construed with reference to the whole system of law of which it is a part. Cannon v. American Hydrocarbon Corp. (1970) 4 Cal.App.3d 639. Moreover, it is a basic rule of statutory construction to give effect to statutes according to the usual import of the language employed in framing them. Live and Learn v. City of Los Angeles (1986) 186 Cal.App.3d 407. In my view, we should look to the entire statutory scheme and the plain language of EERA to determine whether strikes are protected, unprotected or unlawful.

Applying these principles, for example, it is simple to conclude that the Firefighters Act, Labor Code sections 1960-1963, prohibits strikes by firefighters not because the statute does not contain the 16 words but because the Legislature has expressly prohibited them. Where there is no ambiguity, there is no need for interpretation. "Clear statutory language no more needs to be interpreted than pure water needs to be strained." Holder v. Superior Court (1969) 269 Cal.App.2d 314, 317. The fact that the Legislature chose not to rely on the absence of the 16 words suggests that the absence of those words is not dispositive.

Member Porter cites numerous public sector labor relations statutes, some of which contain the 16 words and some of which do not. These statutes vary greatly in their comprehensiveness, and it is often not apparent why some statutes contain the 16 words and why some do not. However, Member Porter would agree that strikes under statutes containing the 16 words are protected. From this I conclude that the Legislature has not condemned public sector strikes per se.

Looking at a statute as a whole may reveal obvious reasons why protection for strike activity has been withheld. For example, the Winton Act (Education Code sections 13080-13088), which preceded EERA, did not contain the 16 words. But the Winton Act does not provide for collective bargaining as that term is normally used. A strike designed to effectuate a collective bargaining agreement makes little sense in this

context. Again, the absence of the 16 words is not dispositive; rather, the limitations of the Winton Act itself suggest strikes are not protected.

The absence of the 16 words does not prove that strikes are prohibited or unprotected. Rather, I would look to what EERA actually says. I find that the language of section 3543 provides ample justification for the view that strikes are, in general, protected activity. I therefore disagree with my colleagues that strikes are not a protected activity.

Conflict with the Constitution and Education Code.

Member Porter argues that the Constitutional mandate of six months of instruction per year (Art. IX, section 5) and the Education Code requirement of nearly nine months of instruction (section 41420) are in direct conflict with the notion of public school employee strikes. While PERB is not empowered to enforce the Constitution or the Education Code,[9] it does have exclusive initial jurisdiction to enforce the statutes it administers,[10] in this case, EERA. Furthermore, it is within an administrative agency's traditional authority to interpret existing law in the course of discharging its statutory obligations. Goldin v. Public Utilities Commission (1979) 23 Cal.3d 638; Regents of the University of California v. PERB

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[9]See, e.g., California School Employees Association v. Travis Unified School District (1984) 156 Cal.App.3d 242; California School Employees Association v. Azusa Unified School District (1984) 152 Cal.App.3d 580.

[10]San Diego Teachers Association v. Superior Court, supra.

(1983) 139 Cal.App.3d 1037. Part and parcel of this process is the harmonizing, if possible, of EERA with other existing laws. Thus, it is proper for PERB to consider the existence of relevant provisions of the Constitution and the Education Code in interpreting EERA.

While Member Porter's argument is worthy of consideration in future cases, the facts before us here present no actual or imminent conflict between the teacher strikes and mandatory minimum days of instruction. Even if one assumes that instruction effectively ceased on the 15 days the Association has thus far been out on strike, there is no allegation that those days cannot be made up. In fact, the Association alleges that it has offered to make up the days lost so far. The facts at this time do not place the minimum number of instructional days guaranteed by the Constitution and the Education Code in jeopardy. Thus, the issue of potential conflict between such guarantees and teacher strikes is simply not ripe for our consideration. Member Porter's assertion that a strike could theoretically last indefinitely, while true, is not a sufficient basis for outlawing all strikes, of whatever duration. Furthermore, while <u>actual</u> conflict between teacher strikes and the Constitution and/or Education Code might necessitate finding some strikes <u>unprotected</u>, it is a separate issue entirely as to whether such conflict would render the strikes <u>unlawful</u> under EERA. In any case, the use of such a theory prematurely further reflects the desperate nature of my colleagues' quest to find a basis for enjoining strikes they find personally distasteful.