STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN FRANCISCO COMMUNITY COLLEGE DISTRICT FEDERATION OF TEACHERS, LOCAL 2121, CFT/AFT, AFL-CIO,	)	
Charging Party,	)	Case No. SF-CE-201
vs.	)	PERB Decision No. 105
SAN FRANCISCO COMMUNITY COLLEGE DISTRICT,	)	October 12, 1979
Respondent.	)	

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) for San Francisco Community College District Federation of Teachers, Local 2121, CFT/AFT, AFL-CIO; Ronald A. Glick, Board Representative for San Francisco Community College.

Before Gluck, Chairperson; Moore and Gonzales, Members.

DECISION

This case of first impression is before the Public Employment Relations Board (hereafter PERB or Board) itself after an evidentiary hearing but without a hearing officer's recommended decision. Oral argument was presented to the Board itself on March 13, 1979. The central issue here is whether the San Francisco Community College District (hereafter District) committed an unfair practice in responding to the passage of Proposition 13[1] by unilaterally changing certain

[1]Proposition 13, a tax relief measure which added article XIIIA to the California Constitution, placed significant limitations on the taxing power of local and State Government and sharply reduced the amount of revenue that local entities could raise by taxing property. The constitutionality

terms and conditions of employment without meeting and conferring with the certified exclusive representative, the San Francisco Community College District Federation of Teachers, Local 2121 (hereafter Federation). The District advanced a number of defenses to its conduct but, for the reasons discussed below, we find that the District refused to meet and negotiate in good faith with the Federation and that no circumstances existed that justified or excused this refusal.

FACTS

The District consists of a city college division (San Francisco City College campus) and a community college centers division comprised of eight separate facilities for continuing education for adults. These divisions have a combined total enrollment of 61,500. The District has 770 full-time and 1,140 part-time faculty.

The Federation was certified as the exclusive representative of these employees on March 23, 1978. On May 16, 1978, it submitted an initial proposal to the District requesting negotiations on career, professional growth, and yearly increments, as well as on wages, maintenance of past

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of this measure was upheld in Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization (1978) 22 Cal.3d 208. See also Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296.

practices, and other matters. Subsequently the parties agreed to meet to establish negotiating ground rules. Before that meeting, however, on June 6, 1978, the California electorate passed Proposition 13. Immediately after this initiative measure passed, there was statewide concern about its implications for local entities which were theretofore largely dependent upon property tax revenue to finance public services including schools. It was not clear whether, or when, any State "bailout" funds would be available.[2] This atmosphere of fiscal uncertainty led to the conduct that the Federation complains of here.

The day after Proposition 13 passed, the District chancellor/superintendent told Federation representatives that he would recommend that the Governing Board of the District cancel summer school, postpone sabbaticals, eliminate overtime, and institute a salary and hiring freeze. On the 8th, the Governing Board voted to cancel summer school and to defer all sabbatical leaves that had been awarded for the 1978-79 academic year.[3] On the 9th, the chancellor/superintendent

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[2]Two bail out bills were passed and signed by the Governor: SB 154, on June 24, 1978, and SB 2212 on June 30, 1978 (Gov. Code sec. 16250 et seq., as amended).

[3]The District's past practice had been to grant three percent of its certificated employees sabbatical leaves each year to study or travel abroad.

discussed the "pending fiscal crisis" with the academic senate. On the 15th, he declared his intent to urge the Governing Board to declare a state of emergency. That same day the Federation informed the District of its desire to negotiate and its willingness to meet "every day and all day until a tentative agreement. . . is reached on matters within the scope of representation that would be covered by the proposed declaration of emergency." The District replied that it could not negotiate because the resolution had not been approved by the Governing Board, because the public had not had an opportunity to respond to the Federation's initial proposal, and because procedures for negotiating had not been formalized.

At its June 20, 1978, public meeting, the District made public the Federation's initial proposal. The Board also declared a state of emergency and passed a resolution freezing certificated salaries and yearly and career increments at the 1977-78 rate, and withholding professional growth increments for 1978-79.[4] The resolution, to take effect at "mid-night June 30-July 1," stated that it was not intended to be in derogation of the negotiating rights of employees. It said:

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[4]Yearly increments are essentially longevity step increases. Eighteen steps are possible. Thereafter, employees with three years at the previous rating plus a satisfactory performance evaluation are eligible for career increments. Professional growth increments reward additional educational credits.

> The Governing Board reaffirms its willingness to negotiate and consult in good faith with recognized employee representatives to reach equitable adjustment of the emergency resolutions hereby adopted, consistent with the the District's ability to pay and the requirements of the educational program.

The Federation's unfair practice charge, filed on June 26, 1978, and amended on October 18, 1978, alleges that the District's conduct violated sections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (hereafter EERA or Act).[5] The District denied that it had violated the Act, and asserted numerous affirmative defenses.

This matter proceeded to a PERB hearing on October 24, 1978, at which the parties stipulated that the Federation

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[5]The Educational Employment Relations Act is codified at Government Code section 3540 et. seq. Section 3543.5 provides in pertinent part:

> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

All section references herein are to the Government Code unless otherwise noted.

had demanded negotiations on all the items in issue in this case.

DISCUSSION

This Board has already decided that a District may not unilaterally change matters within the scope of representation[6] without meeting and negotiating upon

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[6]Section 3543.2 states in pertinent part:

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

request with its employees' exclusive representative.[7] (San Mateo County Community College District (6/8/79) PERB Decision No. 94.) See also Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51, relying on NLRB v. Katz (1962) 369 US. 736 [50 LRRM 2177].) In this regard, we have adhered to federal precedent and have declined to follow those jurisdictions that exempt public sector employers from the prohibition against unilateral change. (Id. at 17. Compare, e.g., Board of Coop. Educ. Services v. PERB (1977) 41 N.Y. 2d 753 [95 LRRM 3046].) The District does not dispute that salary increases and sabbatical leaves are mandatory subjects of negotiations. It agrees that the Federation sought discussions on these items. But it urges this Board to excuse or justify its conduct on several grounds.

The District's main defense is that its conduct was a response to an emergency created by the passage of Proposition 13. In addition, the District claims that it was barred from negotiating with the Federation until the public notice

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[7]Section 3543.3 provides:

> A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

See also sections 3543.5(c) and 3540.1(h).

requirements established by sections 3547 (a) and (b)[8] were satisfied. The District further asserts that certain provisions of the California Constitution and the Education Code prohibited it from granting salary step increments or career or professional growth increments. It claims that the Federation waived negotiations on these items by not continuously renewing its request that the District discuss them. Finally, the District posits a number of contract law defenses.

The District's "emergency" defense.

The District argues that the passage of Proposition 13 "mandated" it to "preserve in every possible way the resources of the District." In addition, in its post-hearing brief, the District asserts that "good-faith bargaining was impossible" because it did not know what its revenue would be and "without this minimal knowledge, there is really no way to formulate

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[8]Section 3547 provides in pertinent part:

> (a) All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.
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> (b) Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer.

even the items that may be negotiated." As in San Mateo County Community College District, supra, PERB Decision No. 94, the District has confused a negotiating position with a defense to a unilateral action. While the lack of information may be a reason to maintain the status quo and defer negotiations until more is known, it does not justify a refusal to negotiate. (NLRB v. Minute Maid Corp. (5th Cir. 1960) 283 F.2d 705 [47 LRRM 2072].) Thus the District's legitimate economic concerns did not authorize it to act unilaterally or relieve it of the obligation to meet and negotiate with the Federation.

The passage of Proposition 13 engendered statewide concern that it would result in fiscal chaos. Yet speculative concern over the effect a law may have on the economy of local public entities is not itself an emergency justifying unilateral change. In Sonoma County Organization of Public Employees v. County of Sonoma, supra, 23 Cal.3d 296, the California Supreme Court struck down as unconstitutional provisions of SB 2212 voiding contractual agreements of local public entities insofar as such agreements granted local public employees cost of living increases in excess of those received by state employees. The court explained that although in some circumstances a state may impair contractual obligations because of an emergency, bail out legislation was passed before the effects of Proposition 13 were realized on July 1, 1978, and alleviated the emergency that the Legislature claimed justified the salary limitation. Furthermore, the

court concluded, no impairment of contracts was permissible because notwithstanding the Legislature's declaration there was no showing that an emergency in fact existed.[8] The District here acted prematurely, out of panic, and not in response to a bona fide emergency. Even as it acted on June 20, 1978, legislation was in the works that would mitigate the effects of Proposition 13. (SB 154 and 2212.) This bail out measure made state surplus funds available to community college districts. Since the District had until August 8 to finalize its budget, the bail out bills were enacted in ample time to alleviate the District's concerns. In addition, even assuming the District had been correct in its assertion that it had to adopt a budget on July 1, SB 2212 extended budget deadlines for local agencies.[9]

Even when a District is in fact confronted by an economic reversal of unknown proportions, it may not take unilateral

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[8]Government Code section 16281 provides in pertinent part:

> It is the intent of the Legislature in enacting this chapter to alleviate the current fiscal crisis created by the passage of Proposition 13 (Article XIII A of the California Constitution), and to provide for maintaining essential services which would otherwise be lost.

[9]SB 2212, section 34, provides:

> Notwithstanding any other provision of law for the 1978-79 fiscal year, any local agency required by law to adopt a budget shall adopt a budget no later than September 30, 1978. Any other deadlines required for the development of the budget may be delayed 30 days.

action on matters within the scope of representation, but must bring its concerns about these matters to the negotiating table. An employer is under no obligation at any time to reach agreement with the exclusive representative. The duty imposed by the statute is simply--but unconditionally--the duty to meet and negotiate in good faith on matters within the scope of representation. Thus the confusion bred by the passage of Proposition 13 did not excuse the District's obligation to meet and negotiate with the Federation, nor did it justify the District's unilateral actions.

The public notice provisions defense.

Section 3547(a) requires all initial proposals of employee organizations and employers to be presented at a public meeting of the employer. Section 3547(b) prohibits meeting and negotiating "until a reasonable time has elapsed . . . to enable the public to become informed and the public has had the opportunity to express itself regarding the proposal at a meeting of the public school employer." In this case, the Federation's initial proposal was presented at a public meeting on May 23, 1978. A public hearing on it was held on June 24, 1978. The District's own initial proposal was presented on August 7 and adopted at a public meeting on September 5, 1978. Consequently, the District claims that it could not negotiate with the Federation before September 5.

Clearly the Legislature intended the public to be aware of and have input into the negotiations process, and this decision does not dilute that right. But sections 3547 (a) and (b) were not designed to preclude negotiations at the very times when discussion between the employer and the exclusive representative is most appropriate. The negotiations timetable the District describes was not immutable. The statute provides an elastic time frame precisely because what is "reasonable time" varies according to the circumstances surrounding negotiations. When an employer in fact must act on short notice, the statute telescopes the period for public response, thereby resolving any conflict between the employers' duties to meet and negotiate and to keep the public informed. As soon as the District learned that Proposition 13 had passed, it could have scheduled special meetings to consider resolution of the problems posed by the new constitutional provision. (See Education Code sections 72129-72131.)

The California Constitution and Education Code defenses.

The District claims that article XVI, section 18 of the California Constitution prohibited if from granting any salary increases. That section forbids school districts from "incur[ring] any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue

provided for such year, . . ."[10] But discussing matters within the scope of representation with the exclusive representative does not mean running afoul of the debt limitation provisions, since negotiating does not mean agreeing to salary increases in excess of revenue. As we have said before, the duty to negotiate does not imply a duty to reach an agreement.

Inherent in the District's argument appear to be two premises: (1) that its budget in fact had to be adopted before the start of the 1978-79 school year on July 1, 1978 (Ed. Code sec. 85023), and (2) that the District would be bound throughout 1978-79 by the salary rate paid on July 1. (See, e.g., Rible v. Hughes (1944) 24 Cal.2d 437, 444 [150 P.2d 455, 154 A.L.R. 137]; Abraham v. Sims (1935) 2 Cal.2d 698, 711 [34 P.2d 790, 42 P.2d 1029]; A.B.C. Federation of Teachers v. A.B.C. Unified Sch. Dist. (1977) 75 Cal.App.3d 332, 337-339 [142 Cal. Rptr. 111].) Neither premise is correct. By statute, community college districts must file their tentative budgets with the county superintendent of

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[10]One court of appeal has reconciled the constitutional debt limitation provision with the statutory minimum salary for certificated employees (e.g., Cal. Ed. Code sec. 87826) by holding that the debt limitation applies only to a district's voluntary--as opposed to statutorily mandated--undertakings. (County of Los Angeles v. Byram (1951) 36 Cal.2d 694, 699-700; Wright v. Compton Unified Sch. Dist. (1975) 46 Cal.App.3d 177.)

schools on or before July 1.[11] (Ed. Code sec. 85023(a)). The Education Code outlines procedures by which the tentative budget can be corrected and changed before the adoption of the final budget on or before August 8 and its approval by the county superintendent of schools on or before August 15. (Cal. Ed. Code secs. 85023(b), (c), (d), (e).) Thus, even under normal circumstances the District would have had the latitude to adjust and readjust its budget in view of new information.

The Education Code directs governing boards of community college districts to "fix and order paid the compensation of persons in public school service requiring certification qualifications employed by the board unless otherwise prescribed by law." (Ed. Code sec. 87801, emphasis added.)

Under factual situations that arose prior to EERA, similar provisions of the Education Code have been held to require districts to fix the compensation to be paid to teachers by July 1, the statutory date the school year begins.[12] Unless a District acts to set salaries, the rate paid on July 1 becomes the new salary schedule by operation of law. (E.g.,

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[11]An analogous argument was raised and rejected in San Mateo County Community College District, supra, PERB Decision No. 94 at pages 20-21, a case concerning classified employees.

[12]California Education Code section 79000 states:

> The school year begins on the first day of July and ends on the last day of June.

Rible v. Hughes, supra, 24 Cal.2d 437, 433; Abraham v. Sims, supra, 2 Cal.2d. 698, 711; A.B.C. Federation of Teachers v. A.B.C. Unified Sch. Dist., supra, 75 Cal.App.3d 332, 338.) See also City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 930 at n. 18.)

When public school employees select an exclusive representative, that representative has the right to negotiate with the district about "wages, hours of employment, and other terms and conditions of employment." (Gov. Code sec. 3543.3. See also Government Code sections 3543.5(a), 3540.1(h).) Collective negotiations thus supercedes the manner in which salaries were theretofore set. Similarly, once an exclusive representative and an employer negotiate an agreement, that agreement supercedes individual employment contracts between the employer and members of the negotiating unit.[13]

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[13]See J. I. Case Co. v. National Lab. Rel. Bd. (1944) 321 U.S. 332, 338 [88 L. Ed. 762], in which the United States Supreme Court said:

> The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.

See also, e.g., Leechburg Sch. Dist. v. Educ. Assn. (Pa. 1977) 380 A.2d 1203 [97 LRRM 2133]; Kolcum v. Board of Education (Del. 1975) 335 A.2d 618 [90 LRRM 2339]; Local 55 v. School District (Iowa 1974) 222 N.W.2d 403 [88 LRRM 2302]; Weest v. School

The District's argument that it had to adopt a salary schedule by July 1 is not persuasive. While the tentative budget is due on July 1, the final budget is not due until August 8. (Cal. Ed. Code secs. 85023(b), (d).) The Act directs parties to begin the meeting and negotiating process "prior to the adoption of the final budget for the ensuing year . . . so that there is adequate time for agreement to be reached or for the resolution of an impasse." (Gov. Code sec. 3543.7, emphasis added.) In other words, EERA itself authorizes a district and an exclusive representative to negotiate a wage schedule after July 1. Thus, the District here was not constrained to adopt and implement a salary schedule by July 1.

Waiver

The District contends that the Federation waived negotiations on salary increases and sabbatical leaves. But at the hearing in this matter, the parties stipulated that the Federation had requested negotiations on all items in dispute. In fact, prior to the time the District adopted its emergency resolution freezing wages and deferring sabbatical leaves, the Federation notified the District that it was willing to negotiate around-the-clock to resolve the problems Proposition 13 presented. Six days after the District refused negotiations

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Commissioners (Ind. 1974) 320 N.E.2d 748 [88 LRRM 2208]; Lullo v. International Association of Firefighters (N.J. 1970) 55 N.J. 409 [262 A.2d 681, 73 LRRM 2680].

and unilaterally changed working terms and conditions of unit members, the Federation filed the instant unfair practice charge. This Board will not readily infer that a party has waived its rights under EERA;[14] we will find a waiver only when there is an intentional relinquishment of these rights, expressed in clear and unmistakable terms.[15] By no means did the Federation waive its negotiations rights here. Once the District acted unilaterally, the Federation was not obligated to continously reiterate its demand for negotiations in order to safeguard its right to bring an unfair practice charge against the District. Requiring the Federation to pursue negotiations from this changed position would be tantamount to requiring it to recoup its losses at the negotiations table. Instead the Federation properly sought vindication of its rights through PERB's unfair practice provisions.

The District's Contract Law Defenses

The District proffers a potpourri of contract law defenses, all urging that under the circumstances created by Proposition 13

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[14]Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74 at p. 8. See also Timken Roller Bearing Co. v. NLRB (6th Cir. 1963) 325 F.2d 746 [54 LRRM 2785].

[15]See Blair v. Pitchess (1971) 5 Cal.3d 258, 274, [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A LR.3d 1206]. City of Los Angeles v. Monahan (1976) 55 Cal.App.3d 846, 852 [127 Cal.Rptr.763]; NLRB v. Perkins Machine Co. (1st Cir. 1964) 326 F.2d 488 [55 LRRM 2204].

any express or implied contract the District had with the Federation or its individual members must fall.[16] There may be circumstances in which a violation of a collectively negotiated agreement also constitutes an unfair practice. In such cases, PERB has jurisdiction over the unfair practice, but does not otherwise have the authority to enforce agreements. (Sec. 3541.5(b)).[17] Since the District's contract law defenses are separate from the negotiating issues here, they are irrelevant in light of PERB's jurisdiction.

The Violations

The Board finds that the District violated section 3543.5(c) of the Act by failing and refusing to meet and

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[16]The District alleged that any express or implied contract with the Federation or any of the employees it represented was null and void because of frustration of purpose, mutual mistake, and/or as prejudicial to the public interest.

We note that at the time the conduct complained of occurred, the Federation had only recently been certified as he exclusive representative of District certificated employees. The parties had no negotiated agreement.

[17]Section 3541.5(b) provides:

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

negotiate at the Federation's request over matters within the scope of representation. In addition, we find that this same conduct concurrently violated section 3543.5(b) by denying the Federation its statutory right as an exclusive representative to represent unit members in their employment relations with the District. (Sec. 3543.1(a).) In so holding, we disapprove of the logic expressed in Placerville Union School District (9/18/78) PERB Decision No. 69, in which the Board unanimously found it unnecessary to find a section 3543.5(b) in addition to a section 3543.5(c) violation when such a finding would not afford the charging party additional relief from PERB. Separate cease and desist orders are separate remedies, even when each is directed at the same employer conduct. (See sec. 3541.5(c).) The unfair practice provisions of the EERA unconditionally prohibit certain employer conduct that impedes employees or employee organizations in their exercise of protected rights. If the same employer conduct concurrently violates more than one unfair practice provision, it is the duty of the Board to find more than one violation.

We further find that the District's failure to meet and negotiate with the Federation interfered with employees because of their exercise of representational rights in violation of section 3543.5(a). Collective negotiations is the cornerstone of the EERA. To this end, employees have the right to select an exclusive representative to meet and negotiate with the

employer on their behalf. (Sec. 3543.) An employer's unilateral change of matters within the scope of representation is in derogation of its duty to negotiate with the exclusive representative and necessarily interferes with employees in their exercise of protected rights. This interference constituted at least slight harm, and although the District offered numerous reasons for its actions, none constituted operational necessity that might excuse the District's conduct. The Federation's charge is therefore sustained. (Carlsbad Unified School District (1/30/79) PERB Decision No. 89 at pages 1-12.)

The Remedy

Section 3541.5(c) gives PERB broad powers to remedy unfair practices. In this case, the District violated sections 3543.5(c) and (a) by unilaterally withholding salary increases and deferring sabbatical leaves for 1978-79. It is therefore appropriate to order restoration of yearly, career and professional growth increments retroactive to July 1, 1978, with interest paid at the rate of 7 percent. (San Mateo County Community College District, supra, PERB Decision No. 94 at p. 27; Cal. Civ. Code sec. 3287; Cal. Const. art. XXII, sec. 22. See also Sanders v. City of Los Angeles (1970) 3 Cal.3d 252, 261-263.) Since sabbatical leaves cannot be reinstated retroactively, we order the District to offer the next opportunity to take sabbatical leave to those employees whose

1978-79 sabbaticals were deferred. Moreover, we order the District to reimburse those employees, upon proof, for any directly related, unrecoverable out-of-pocket expenses they incurred because their 1978-79 sabbaticals were deferred. In the event that the parties are unable to settle among themselves questions relating to reimbursement of such expenses, PERB retains jurisdiction over this matter and upon the Federation's request will conduct an additional hearing limited to the proof of such expenses.

ORDER

Upon the foregoing facts, conclusions of law and the entire record in this case, it is hereby ORDERED that the San Francisco Community College District and its representatives shall:

> (1) Cease and desist from failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation, as defined by section 3543.2.
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> (2) Cease and desist from denying the Federation its right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation.
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> (3) Cease and desist from interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

(4) Take the following affirmative action which is necessary to effectuate the policies of the Educational Employment Relations Act:

(a) Reinstate yearly increments, career increments, and professional growth increments for certificated employees, with interest at the rate of 7 percent for the amount due from July 1, 1978, to the date of reinstatement.

(b) Offer to employees whose sabbatical leaves for 1978-79 were deferred the next available opportunity to take sabbatical leaves.

(c) Reimburse those employees whose sabbatical leaves for 1978-79 were deferred for any directly related, unrecoverable out-of-pocket expenses, as proven.

(d) Post at all school sites, and all other work locations where notices to employees customarily are placed, immediately upon receipt thereof, copies of the notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 consecutive work days from receipt thereof. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(e) Notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, within 20 calendar days from the date of this Decision, of what steps the District has taken to comply herewith.

This order shall become effective immediately upon service

of a true copy thereof on the San Francisco Community College District.

This is an official notice. It must remain posted for 30 consecutive work days from the date of posting and must not be defaced, altered or covered by any material.

By: _____
Barbara D. Moore, Member

_____
Harry Glück, Chairperson

The concurrence and dissent of Dr. Raymond J. Gonzales, Member, begins on page 26.

Appendix: Notice

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

After a hearing in which all parties had the right to participate, it has been found that the San Francisco Community College District violated the Educational Employment Relations Act by taking unilateral action freezing yearly increments, career increments, and professional growth increments, and deferring sabbatical leaves for 1978-79, without meeting and negotiating in good faith with the exclusive representative, the San Francisco Community College District Federation of Teachers, Local 2121, CFT/AFT, AFL-CIO. It has further been found that this same course of action interfered with San Francisco Community College District employees because of their exercise of rights protected by the Educational Employment Relations Act. As a result of this conduct, we have been ordered to post this notice, and we will abide by the following:

> (a) Cease and desist from failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation without providing the exclusive representative an opportunity to negotiate thereon.

(b) Cease and desist from interfering with employees' right to negotiate collectively through their exclusive representative by unilaterally changing matters within the scope of representation without providing the exclusive representative an opportunity to negotiate thereon.

(c) Offer employees whose sabbatical leaves for 1978-79 were deferred the next available opportunity to take such sabbatical leaves.

(d) Upon proof, reimburse employees whose sabbatical leaves for 1978-79 were deferred for any directly related, unrecoverable out-of-pocket expenses they incurred because of that action.

SAN FRANCISCO COMMUNITY COLLEGE DISTRICT

By: _____
Superintendent

Dated:

This is an official notice. It must remain posted for 30 consecutive work days from the date of posting and must not be defaced, altered or covered by any material.

Raymond J. Gonzales, Member concurring and dissenting in part:

I concur in the foregoing decision regarding the violation of EERA section 3543.5(c). I dissent regarding the findings of the majority concerning EERA sections 3543.5(a) and (b).

I do not find a section 3543.5(a) violation in the case because I do not believe the facts demonstrate the District interfered with protected EERA rights in a way section 3543.5(a) was designed to protect against. Section 3543.5(a) states:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. (Emphasis added.)

I have interpreted this section to require that a causal relationship exist between employer action and employee rights. "'Because of' connotes a causal relationship; the statute requires the employer to have acted because of the employees' exercise of their rights. This, to me, indicates that employer intent is a part of a violation of section 3543.5(a)." While intent may be inferred, I believe it can be rebutted by "an affirmative showing of legitimate and substantial or budgetary justification."[1] (See my concurrence in Carlsbad Unified School District (1/30/79) PERB Decision No. 89 at pages 20-21.) Here, I believe the record

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[1]It is difficult to understand exactly why there is a section 3543.5(a) violation under the majority's Carlsbad test, which provides for balancing between the competing interest of the employer and employee rights when the employer offers justification based on operational necessity, since the majority decision in this case does not develop any "balancing" type of analysis. See Carlsbad, supra, page 10.

shows the District has demonstrated ample justification for any possible "interference" with employees' representation rights, even though this justification was not sufficient to excuse its duty to negotiate with the exclusive representative.

Indeed, the majority acknowledges that the District had "legitimate economic concerns," and that "the passage of Proposition 13 engendered statewide concern that it would result in fiscal chaos." It further recognizes that there was "confusion bred by the passage of Proposition 13." Thus, the District's conduct appears to be quite understandable under the circumstances. It appears to have been motivated by a desire to preserve its financial options in the face of a perceived fiscal emergency and chaos, rather than by a desire or intent to undermine the employees' representation rights.

Further, in this case, the finding of a violation itself may not serve as an affirmative showing of unlawful intent. There has been no finding that the District negotiated in bad faith, which would suggest an intent to interfere with employee rights. To find a section 3543.5(c) violation, it has been necessary for us to find only that the District had an obligation to negotiate, that it in fact refused to negotiate, and that the refusal was not justified or excused by the District's perceived financial emergency. It has not been necessary for us to reach the issue of whether the District negotiated in good faith, since it

refused to negotiate at all.[2] There simply has been no persuasive showing that the District acted with anti-union motivation.

Although I would not find a section 3543.5(a) violation for the reasons stated above, I question the necessity and wisdom of reaching the issue at all. As I stated, the main issue in this case is whether there was an obligation for the District to meet and negotiate; i.e. whether the District's unilateral action was excused or justified, not whether the District negotiated in bad

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[2]In NLRB v. Katz (1962), 369 U.S. 736, [50 LRRM 2177] which we adopted as guiding precedent in unilateral action cases (see Pajaro Unified School District (5/22/78) PERB Decision No. 51), the U. S. Supreme Court explained why it was unnecessary to reach the issue of good faith in finding a section 8(a)(5) (failure to bargain) violation under the National Labor Relations Act, where a unilateral change was involved. It wrote:

> [DUTY TO BARGAIN]
>
> The duty "to bargain collectively enjoined by §8(a)(5) is defined by §8(d) as the duty to "meet . . . and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Clearly, the duty thus defined may be violated without a general failure to subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate *in fact*--"to meet . . . and confer" about any of the mandatory subjects. A refusal to negotiate *in fact* as to any subject which is within §8(d), and about which the union seeks to negotiate, violates §8(a)(5), though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of §8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of §8(a)(5) much as does a flat refusal. (Footnotes omitted)

Katz, supra, page 736.

faith. Thus, it seems the section 3543.5(a) violation is basically derivative of the section 3543.5(c) violation; the finding of this violation, as the cursory nature of the majority's discussion suggests, is merely an exercise in logic or illogic as to whether one subsection of section 3543.5 is inherent or implicit in, exclusive or inclusive of, some other subsection.

I see no reason for engaging in these mental exercises. To order a district to cease and desist from interfering with employees' representation rights in this case is essentially identical to, and adds no substantive relief to, ordering a district to cease and desist from refusing to negotiate with the exclusive representative representing the employees.

Similarly, I would not reach the issue of the section 3543.5(b) violation for the reasons expressed by a unanimous Board in Placerville Union School District (9/18/78) PERB Decision No. 69. While ordering the District to cease and desist from denying an exclusive representative's right to negotiate is technically distinct from ordering the District to cease and desist from refusing to negotiate with the exclusive representative, it is obviously redundant, and I believe unnecessary.

Probing the inter-relationships of subsections of the unfair practice section 8(a)(1)-8(a)(5) has created considerable confusion in interpreting the NLRA, especially sections 8(a)(3) and 8(a)(1), and I believe we should avoid willingly assuming this

burden of confusion which was born of a very different legislative history in the early 1930's from the 1976 statute we are interpreting here.[3]

/Raymond J. Gonzales, /Member

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[3]See my concurrence in Carlsbad Unified School District, supra, page 19. For a discussion of the legislative history of the unfair practice sections of the NLRA and the confusion in interpreting the inter-relationship of the unfair labor practices, see also The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails, 52 Cornell L.Q. 491 (1967). The complexity of the inter-relationship between sections 8(a)(1) and 8(a)(5) in "unilateral change" cases is suggested in the Katz case itself. It also involved the finding of a section 8(a)(1) "interference" violation along with the section (a)(5) refusal to bargain order but where no cease and desist order was issued by the NLRB on the "interference" violation. NLRB v. Katz, 369 U.S. 736, Fn. 9, 50 LRRM 2177; NLRB v. Katz (2d Cir. 1961)[47 LRRM 2967, 2973.]