STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN YSIDRO FEDERATION OF TEACHERS, CFT/AFT, LOCAL 3211 Charging Party, v. SAN YSIDRO SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-212 PERB Decision No. 134 June 19, 1980

Appearances: Lawrence Rosenzweig, Attorney (Levy, Koszdin, Goldschmid & Sroloff) for Charging Party; Michael Taggart, Attorney (Patterson & Taggart) for Respondent.

Before Gluck, Chairperson; Gonzales and Moore, Members

DECISION

The San Ysidro Federation of Teachers (hereafter Federation or SYFT) and the San Ysidro School District (hereafter District) except to the attached hearing officer's proposed decision dismissing, in part, unfair practice charges filed by the Federation. The charges allege that the District violated section 3543.5(a), (b), and (c), of the Educational Employment Relations Act (hereafter EERA)[1] by taking disciplinary action

[1]The EERA is codified at Government Code section 3540 et seq. All section references herein are to the Government Code unless otherwise indicated. Section 3543.5 provides in pertinent part:

against the teachers for using released time during negotiations and by engaging in surface bargaining. On two separate occasions, the SYFT negotiating team refused the District's order to return to work after negotiations had concluded for the day.

The SYFT argues that the teacher's actions on both occasions were a justified and legitimate response to the District's coercive bargaining techniques, which included a sudden unilateral change of an agreement allowing a full day of

---

> 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.
>
> (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.

The SYFT also alleged a violation of 3543.5(e), which provides:

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

However, this charge was dismissed at the hearing and that ruling was not appealed.

released time for the negotiations. The District claims that the Federation misunderstood the terms of the released time arrangement, that only one-half day was agreed upon and that the teachers' refusal was insubordination and an illegal work stoppage. Therefore, according to the District, discipline was fully justified.

The main issue presented for our resolution is whether the District's disciplining of these teachers for refusal to work constituted a violation of section 3543.5(a). We affirm the hearing officer's decision in part and modify it to the extent consistent with the discussion which follows.

FACTS

At all times relevant to this case, the SYFT was the exclusive representative of the certificated employees unit of the San Ysidro School District. In June of 1977, the parties concluded negotiations, resulting in a two-year contract with a yearly reopener clause.

On December 14, 1977, the District's bargaining representative, Cynthia Robinson,[2] contacted the Federation's chief spokesperson, Andrea Skorepa, concerning the commencement of reopeners on salary and benefits. They agreed that the

[2]Ms. Robinson was not an employee of the District, but was employed by the California School Boards Association which contracts with school districts for the provision of negotiating services.

first three sessions would be held on January 4, 10, and 11, 1978, and each would last only half a day due to Ms. Robinson's schedule. The schedule for January 4 and 11 was to be from 8:00 a.m. to 12:30 p.m., and on January 10, from 12:30 p.m. to 4:00 p.m.

There is conflict in the testimony, however, concerning the understanding between the parties on the released time offered by the District for the Federation's bargaining team.

After considering the entire record[3] the Board upholds the hearing officer's determination that on December 14, 1977, the District, through its representative, Ms. Robinson, offered a full day's released time to four negotiators at least for the meeting of January 4, 1978.

The parties met on January 4, 1978, and SYFT submitted a proposal on ground rules which embodied the same procedures under which the parties had negotiated the initial contract with two exceptions: that the number of teachers to be released for negotiations be changed from three to four, and that reference to a deadline for submitting proposals be deleted.

---

3 See Santa Clara Unified School District (9/26/79) PERB Decision No. 104, concerning the Board's approval of credibility findings made by hearing officers.

The District's first response was that ground rules were not necessary, although it soon retreated from this position and offered counterproposals. It's final offer on January 4 was to allow four teachers released time in exchange for elimination of a confidentiality proposal.[4] SYFT rejected this counteroffer. It is unclear from the record whether any of the proposals made on January 4 regarding released time contemplated a full day or a half day.

Upon the Federation's rejecting what the District characterized as its final offer, Ms. Robinson suggested that the parties start negotiating compensation issues without ground rules. This was immediately rejected by SYFT. At approximately 10:00 a.m., Ms. Robinson called off negotiations for that day over the protest of the SYFT team. She instructed the four members of the teachers' negotiating team, Andrea Skorepa, Melanie Miller, Patricia Darnell, and Tommy Hayden, to report back to their principals for possible assignment of duties and informed them that their failure to comply would result in their pay being docked for a half-day. The District also withdrew its counterproposals.

Ms. Skorepa replied on behalf of the SYFT bargaining team that they would not return to classes that afternoon since they

[4]This proposal in essence would prohibit unilateral release of information concerning negotiations prior to impasse,

understood that they had been released for the full day, and because they considered Ms. Robinson's statements to be threatening and coercive.[5] The teachers did not report to their principals and were subsequently docked a half-day's pay.

On January 9, Ms. Skorepa met with the District Superintendent, Robert Colegrove, at his request, to discuss the teachers' refusal to return to work on January 4 and to clarify the District's released-time policy for the mid-term negotiations. He informed her that the teachers would be docked for the January 4 incident and explained that in the future, when negotiating sessions were scheduled for only a half day, the SYFT team members would be expected to report

---

[5] Ms. Skorepa testified:

> Q. Why was it a threat?
>
> A. Because when you're sitting at the table and negotiating and because somebody doesn't like what you're saying, they fold up their books and start ordering your around, that's a threat. (Reporter's Transcript, p. 57, hereafter R.T.)
>
> . . . . . .
>
> A. . . . right before calling off negotiations . . . she told us that she was calling off negotiations and we were to report back to our schools. Then the CFT staff person that helps us to negotiate asked if she was threatening the negotiating team and she said not at this minute, but maybe in a few moments. [R.T. p. 23]

back to work at the conclusion of the negotiating session. Nevertheless, Colegrove then granted the SYFT team a full day's released time for the following day only.

The parties met at 12:30 p.m. on January 10 and resumed negotiations on ground rules. Because the District withdrew its proposals which offered released time for four teachers, the Federation again proposed essentially the same ground rules it had on January 4. The District countered with an offer of released time for three teachers and elimination of the confidentiality rule. It also proposed that teachers return to work if negotiations terminated prior to the end of the scheduled session. After these exchanges, this session ended at 4:00 p.m. without agreement. Ms. Robinson promised that she would make another counterproposal on the following day, and again suggested moving on to substantive issues. SYFT again refused, explaining that it felt negotiations could not proceed without an agreement on ground rules.

The parties met again on January 11 at 8:00 a.m. Ms. Miller, a member of the SYFT team, was not present. Ms. Robinson submitted a counterproposal which did not differ substantively from the District's proposal of the previous day, though it also included the earlier proposal that the parties operate without ground rules.

The SYFT protested that this was no counterproposal at all. The District then caucused for two hours, returned at

10:00 a.m., and declared impasse. The Federation did not at this time (or at any time subsequently) challenge this declaration. Ms. Robinson then handed each member of the SYFT bargaining team a memo from the superintendent instructing them to return to their respective schools at the conclusion of negotiations.

The teachers did not return to work because, according to their testimony, they felt the District was using the same tactics as on January 4. Each of the three was subsequently docked a half-day's pay.

On January 27, three of the four SYFT bargaining team members, Ms. Skorepa, Ms. Darnell, and Ms. Miller, received notices of unprofessional conduct pursuant to Education Code section 44934,[6] charging them with failure to return to assigned duties on January 4 and January 11 and "persistent violation of or refusal to obey school laws of the State and [reasonable regulations of the District]." Mr. Hayden, a probationary teacher, received a "notice of recommendation for nonreemployment" for the same reasons.[7]

---

[6]For text of this statute, see fn. 12 of proposed decision.

The filing of charges under this section is the first step in dismissing a teacher.

[7]In its exceptions, the SYFT pointed out an administrative law judge for the Office of Administrative

The PERB hearing officer found that the District's abrupt termination of negotiations on January 4 and its change in the released-time policy constituted a violation of section 3543.5(3), and that the teachers' refusal to return to work was a legitmate response to that violation. He, therefore, ordered the disciplinary action for that day withdrawn, as it also violated section 3543.5(a). The District's second work order issued on January 11, however, was justified by the change in the parties' bargaining posture according to the hearing officer.

The hearing officer ordered that all discipline be rescinded to the extent that it was based on the January 4 conduct. Because Ms. Miller participated on this day only, the discipline imposed on her was totally rescinded. He also ordered reinstatement of all the pay withheld by the District for January 4. However, he found that the District did not violate the EERA by its conduct on January 10 and 11, 1978 and that its discipline of Skorepa, Darnell and Hayden for their unjustified conduct on January 11 did not violate

---

Hearings had recommended that Mr. Hayden not be terminated; that the District accepted this ruling but placed a letter of reprimand in his file and, likewise, a similar letter has been placed in Ms. Miller's file and she was re-employed for the 1978-79 school year. Ms. Skorepa and Ms. Darnell were, instead, suspended for five months without pay. The District raised no objections to the inclusion of this material in the Federation's exceptions.

section 3543.5(a). Because he did not specify which portion of the discipline was based on unprotected conduct, he did not totally rescind the discipline or indicate the extent to which the penalty should be reduced.

DISCUSSION

I. Jurisdiction

Initially the District raises the question of PERB's jurisdiction to hear and decide unfair practice cases involving dismissal of teachers. It argues that, because the Education Code provides a procedure for dismissing teachers, it is improper for PERB to rule on the propriety of the District's decision to dismiss. The District contends that the review function is vested solely in the Commission on Professional Competence and that under the terms of EERA section 3540 8 no other agency can usurp that role. According to the District, an employee may raise as a defense before the Commission any District action which may also be a violation of section 3543.5; thus, individual rights would in no way be jeopardized. Additionally, the District argues that the

---

Government Code section 3540 states in relevant part:

> Nothing contained herein [EERA] shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system. . .

potential for conflicting decisions from PERB and the Commission, if the former had jurisdiction over teacher dismissals, would place the District in the impossible position of attempting to serve two masters.

The hearing officer ruled that sections 3541.5 and 3541.5(c)[9] granted PERB exclusive jurisdiction over dismissal

---

[9]Section 3541.5 states:

> The 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. Procedures for investigating, hearing, and deciding these cases shall be devised and promulgated by the board and shall include all of the following:
>
> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance

cases where employee rights guaranteed by EERA are at issue. We affirm this conclusion and further note that the California Supreme Court has held that PERB has exclusive initial jurisdiction to decide unfair practices.[10] In view of the facts here, we need not address the matter of conflicting agency decisions.

II. The Unfair Practices of January 4, 1978

The District contends in its exceptions that the discipline imposed on the teachers for their January 4 conduct was proper because the refusal to return to work was insubordination and

---

> machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.
>
> (c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

[10] San Diego Teachers Association v. Superior Court, (1979) 24 Cal. 3d. 1.

unprotected activity. It argues that the District allowed only a half day's released time, and that it was not responsible for the breakdown in negotiations on January 4. SYFT, on the other hand, argues that the teachers' refusal was justified because they did have a full day's released time, and because the teachers had a right to resist the District's attempt to coerce them at the bargaining table. Further, according to SYFT, the District representative did not have the authority to give a work order because she was not an employee of the District.

The Board affirms and adopts as its own the hearing officer's finding of fact and conclusion that the District's discipline of the teachers for their actions on January 4 violated section 3543.5(a), with the following modifications.

Although he characterized the District's conduct during negotiations on that day as "evidence of ... lack of good faith" [proposed decision, p. 29] the hearing officer did not specifically find that the District had violated 3543.5(c) on January 4. Instead, he found that the underlying District unfair practice which consisted of its walking out of negotiations at a point when the Federation was willing to continue bargaining and its abrupt change in the released-time agreement violated section 3543.5(a). Without expressly deciding whether the hearing officer correctly found these actions to be threatening and coercive in themselves, we conclude that the order to return to class violated

section 3543.5(c). The District reneged on a matter about which the parties had already reached agreement, i.e., a full day of released time for January 4. Such conduct, when viewed together with the District's abrupt termination of negotiations, accompanied by a withdrawal of its proposals, and conditioning further discussion on removal of ground rules from the table, was a dilatory and evasive approach to negotiations which failed to meet the standard of good faith.11 Such conduct concurrently violates section 3543.5(a) in that a failure to bargain in good faith necessarily interferes with employees' guaranteed right to meet and negotiate with their employer, San Francisco Community College District (10/12/79) PERB Decision No. 105.

III. Unfair Practice Charge of January 10, 1978

The only issue presented for resolution is whether the District refused to negotiate in good faith on this day. SYFT alleges that the District negotiated in bad faith on all three

---

[11]See Murphy Printing Co., Inc., (1978) 235 NLRB 621 [98 LRRM 1195]; NLRB v. A. W. Thompson, (1971) 449 F2d. 1333 [78 LRRM 2593]; (reneging on agreed-to proposals); Arkansas Grain Co. (1968), 172 NLRB 1742 [69 LRRM 1059] (walking out of bargaining sessions for irrelevant reasons); Shovel Supply Co. (1966) 162 NLRB 460 [64 LRRM 1080] (withdrawal of proposals); American Seating Co. v. NLRB (1970) 424 F2d. 106 [73 LRRM 2996] (conditioning agreement on union accepting employer demand on non-mandatory subject) .

days on which the parties met, but points to no conduct on January 10 which supports its claim.

The distinction between hard bargaining and "surface" bargaining is often a fine one. The standard applied in the private sector looks to the totality of the party's conduct. NLRB v. Stevenson Brick and Block Co. (1968) 393 F2d. 234, [68 LRRM 2086]. While it is clear that, in order to fulfill its duty to bargain in good faith, an employer must approach the table with a sincere intent to reach an agreement, there is no requirement in the law that the parties actually agree, NLRB v. Highland Park Mfg. (1940) 110 F2d. 632, [6 LRRM 786]; NLRB v. Reed and Prince Mfg. Co. (1941) 118 F2d. 874, [8 LRRM 478].

The circumstances of the January 10 bargaining session do not indicate any dereliction of the duty imposed by section 3543.5(c) on the part of the District. The parties met for the entire afternoon previously scheduled for bargaining. Each side submitted three different proposals on the ground rules during the course of the session. The three areas of disagreement by the end of the day were the number of SYFT team members who would receive released time, the amount of released time to be granted, and the confidentiality rule. The parties had reached agreement on all other ground rules.

In each of the three proposals submitted by the District on January 10, there was no change in the number of teachers to

receive released time or in the amount of released time to be granted.12

There is no doubt that the District was engaging in some hard bargaining with respect to these two issues. However, adamancy on a single issue is not a per se violation of the duty to bargain in good faith.[13] In light of the fact that it had moved from its position on January 4 of being unwilling to negotiate ground rules to an agreement on January 10 on the majority of the ground rules proposed by the Federation, it cannot be said that such hard bargaining in this instance amounts to the level of bad faith.

In sum, we cannot conclude the District's action on January 10 violated section 3543.5(c).

IV. The Unfair Practice Charge Concerning January 11, 1978

Early in this session negotiations broke down and the District declared impasse on the ground rules. At no time did the Federation object to the impasse declaration or ask PERB for a determination that an impasse did, in fact, exist.

12The District did alter its position on at least one other issue when it incorporated, in essence, the Federation demand to use the District's copying machines.

[13] Webster Outdoor Advertising (1968) 170 NLRB 1395; [67 LRRM 1589]; John S. Swift and Co., (1959) 124 NLRB 394 [44 LRRM 1388]; NLRB v. American National Insurance Co. (1952) 343 U.S. 395 [30 LRRM 2147.]

The hearing officer found that the teachers were insubordinate in refusing to return to class after impasse was declared. He reasoned that once impasse was reached there was no longer any obligation to meet and negotiate. Therefore, the work order could not have tainted the negotiating process. We expressly disavow this conclusion and rationale.

The legality of the District's January 11 work order turns on whether SYFT had actually or impliedly agreed to the District's reduction of a full day to a half day of released time. The testimony on this point is ambiguous. Skorepa testified about her conversation on January 9 with Superintendent Colegrove: [R.T. p. 25]

> Q. And did you have a discussion about released time for the 11th?
>
> A. Just in terms that we would hope that on the 10th that we were going to work something out on released time.
>
> -
>
> . . . we discussed released time and we discussed that there would be some way to work it out in the ground rules, and then that was all that was said about released time for the 10th the 11th and any negotiations in the future.

In testifying as to SYFT's position during 1977 contract negotiations on Ms. Robinson's authority to issue work orders, Ms. Skorepa stated:

> We said the only way we would go back to the classroom is if the superintendent came in and ordered us back to the classroom himself. [R.T. p. 52]

Mr. Colegrove's version of the January 9 discussion with Ms. Skorepa adds little illumination. After he explained that the teachers would have to report to class at the end of a negotiating session, he was asked:

> Q. What did Ms. Skorepa say to you when you made that statement to her?
>
> A. Well, one of her concerns, I think, at that discussion was that no one - that [if] the comment had come from me on the first time, that they would have reported back. [R.T. p. 197-8]

Later on cross examination, Mr.Colegrove testified:

> Q. Did you say at that time [January 9] that the dispute about released time and so on could be worked out at the negotiating table? And in particular the next day?
>
> A. I don't know about the next day. I certainly felt - I think that in our course of discussion, - yes, would be solved within the bargaining unit and the District, yes.
>
> Q. So as far as you can recall, you did say to her, well let's try to work this out at the bargaining table, or something to that effect?
>
> A. Have — sure, get a better understanding on it, certainly. [R.T. p. 209].

The credibility of neither Colegrove or Skorepa is in issue. Neither party has offered enough evidence to enable this Board to determine (1) whether the December 14 agreement of released time applied to the January 11 session; (2) if so, whether the District was attempting to unilaterally change the agreement on January 9 for the January 11 session; or (3)

whether SYFT, by apparently agreeing to follow directions from the superintendent, waived its claim that the District breached its original released-time agreement. Thus, we cannot determine whether the teachers were insubordinate for not returning to class on January 11. Nevertheless, even if we were to find that the teachers were insubordinate and not engaged in protected activity on January 11, the outcome of this case would not be materially affected.

The discipline imposed by the District on Andrea Skorepa, Pat Darnell, and Tommy Hayden was based on their actions occurring on both January 4 and 11. Because the District explicitly based that discipline on "mixed" conduct, i.e., part of which we find protected and part of which may not be protected, it is appropriate to order rescission of all the discipline imposed. The District has made it impossible to determine what portion of the discipline is not in violation of section 3543.5(a) and, therefore, beyond our jurisdiction. PERB will not review disciplinary actions unrelated to activity protected by EERA. But because it is impossible to determine what element of that discipline relates to the January 4 conduct, the entire penalty must fall. The hearing officer's order is modified accordingly.

Because Ms. Miller was involved only in the protected activity of January 4, the hearing officer ordered that all

discipline of her be rescinded and a half-day's pay be restored to her. We affirm this part of his order.

V. The 3543.5(b) Charge

The hearing officer dismissed that aspect of SYFT's charge alleging that the District had violated section 3543.5(b), supra, on the grounds that the Federation's rights had not been derogated by the District's released-time policy. Nor was SYFT's right to meet and negotiate abridged according to the hearing officer because, when reviewed as a totality, the District's bargaining conduct did not rise to the level of bad faith.

As discussed earlier, we conclude that the employer's unilateral and sudden change in its released-time policy on January 4, 1978, constituted a section 3543.5(c) violation. We found in San Francisco Community College District, supra, issued subsequent to the hearing officer's proposed decision in this case, that a section 3543.5(c) violation concurrently violates section 3543.5(b) because it inherently prevents the employee organization from representing its members through the negotiating process. Accordingly, we find that the District violated section 3543.5(b).

REMEDY

In addition to the affirmative actions required in the

Board's Order,[14] we find that a posting of the attached Notice to Employees would effectuate the purposes of EERA by notifying the employees of the District's unlawful conduct and of the Board's remedy.[15] Accordingly, the District will be required to sign and post for thirty (30) consecutive workdays in conspicuous places copies of the Notice.

By: Harry Gluck, Chairperson

The Order in this case begins on page 33.

Member Moore's concurrence begins on page 22.

---

[14]3541.5(c):

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

[15]See NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415], upholding a posting requirement.

Member Moore, concurring:

I agree with the result reached by Chairperson Gluck as to the events of January 4, 1978. I disagree, however, with his determination that neither party has offered sufficient evidence for the Board itself to determine whether the teachers were insubordinate for not returning to class on the afternoon of January 11, 1978. I also disagree that even if we found that the teachers were insubordinate the outcome of the case would not be materially affected. The issue of pay for the afternoon of the 11th is dependent on whether the teachers' conduct was protected or unprotected.

In order to resolve these issues it must be determined what period of time the parties intended their agreement on the amount of released time to cover. The Chairperson finds that the District had "offered a full day's released time to four negotiators at least for the meeting of January 4, 1978," (at p.4) and erroneously infers that this was also the hearing officer's determination. To the contrary, the hearing officer made a credibility finding that the District had offered a full day of released time to four teachers on the Federation's negotiating team for all three scheduled meetings between the parties on January 4, 10, and 11, 1978 (see pp. 8-9 of the proposed decision).[1] After considering the entire record, I

---

1 See Santa Clara Unified School District (9/26/79) PERB Decision No. 104 where the Board stated that it would afford

find, as explained more fully in the following discussion, that the parties intended that the original released time agreement would only apply to the initial negotiating sessions and would not extend into the mediation process.

The testimony of Ms. Skorepa, the Federation's chief spokesperson, supports this finding:

> Q. You had a phone conversation with Cynthia Robinson on December 14, correct?
>
> A. Right.
>
> Q. What did she specifically state to you?
>
> A. She said she was calling so that we could set up some times to start negotiating on re-openers. Then I said fine, and she said how does the 4th — she said I'm thinking in terms of setting up maybe three meetings and then after that, we'll see what we need to develop after that and she said I'm thinking of dates on the 4th, the 10th and the 11th and I checked my calendar and that was fine and she said, — she went on to discuss how it would be done. She said we would be released for the full day and our classes would be covered but because she was negotiating with the classified people and that the actual at the table time would be only half day, but for us not to worry about it. We would have full-day substitutes in our classroom even though we were only negotiating for half a day and then she went on to say — was that did I understand that and I said fine and she said, well, then we will release four and

---

deference to hearing officer's findings of fact which incorporate credibility determinations but that the Board itself was free to draw its own and perhaps contrary inferences after considering the entire record.

we'll see you on the 4th and then some pleasantries, (R.T. 48-49. Emphasis added.)

It is clear from this testimony that the parties contemplated that it may have been necessary to hold more than the three initially scheduled negotiating sessions on the reopener and that they would have to wait and see what developed before scheduling further sessions. This uncertainty as to the number of sessions that would eventually be necessary to consummate an agreement leads to the conclusion that the original agreement on the amount of released time was intended by the parties to apply only to the initial negotiations. I conclude therefore that the agreement between Ms. Skorepa and Ms. Robinson, the District's negotiator, established released time only for the initial negotiations and that neither party intended that the agreement would extend beyond then into the mediation process.

Based on the entire record, and, in particular, that testimony regarding the meeting between Ms. Skorepa and Mr. Colegrove, the District superintendent, on January 9, 1979 (R.T. 25, 52, 197-8, 209), I do not find that the Federation clearly and unmistakably waived its right to enforce the original agreement (Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74) or that the parties intended to modify that agreement. The original agreement therefore continued in existence and thus, contrary to the

Chairperson, I find that there is sufficient evidence in the record to determine whether the teachers were insubordinate for not returning to class on the afternoon of January 11.

When the District declared impasse on January 11, 1978, the Federation did not object nor did the Federation at any later time contest the existence of impasse. The declaration of impasse is the significant factor because I have found previously that the parties did not intend the released time agreement to extend into the mediation process. The District's action in ordering the teachers to return to work on January 11 following the declaration of impasse and the immediate termination of negotiations was therefore not a unilateral change in the agreement. The teachers were required to return to work because in this instance the original released time agreement expired upon the declaration of impasse.

Thus, I would not order the District to reinstate the amount of salary deducted from the teachers' pay warrants for the afternoon of January 11, 1978, as that portion of the penalty imposed by the District is clearly severable from the total penalty imposed. The remainder of the discipline imposed must fall, however, for the reason stated by the Chairperson: it is impossible to determine what portion of the discipline, other than loss of pay, is based on the conduct of the teachers

on January 4, 1978, and what portion is based on their conduct on January 11, 1978 (at p. 19).

I join in the Chairperson's opinion to the extent that it is in conformity with the foregoing discussion.

Barbara D. Moore, Member

The Order in this case begins on page 33.

Raymond J. Gonzales, Member, concurring and dissenting:

I concur substantially in the result reached by Chairman Gluck and with his reasoning except as to the teacher's alleged insubordination on January 11. I find violations of EERA sections 3543.5(a), (b) and (c) but disagree as to the remedy of ordering backpay for the afternoon of January 11. Rather, I agree with Member Moore on not ordering backpay for this period.

The Chairman finds that "the legality of the District's work order turns on whether SYFT had actually or impliedly agreed to the District's reduction of a full day to a half day of released time." I believe that, on balance, the evidence supports the finding that the teachers were not granted a full day's released time for January 11, as they had been on January 4. However, I also interpret the evidence to indicate that the teachers had been granted one-half day off released

time for the entire morning of January 11. This leads to the result that it was improper for the District to attempt to suddenly order the negotiators away from the bargaining table and back to their schools at mid-morning; the SYFT negotiating team members were within their EERA rights to resist the District's direction for them to return to their schools at 10 a.m. on January 11. Consequently, the disciplinary measures initiated by the District in response to the teacher's refusal were an unlawful reprisal.

Under the circumstances, the teacher's refusal to return to class at 10 a.m. on January 11 was a defensible, justifiable action. It is contended that the teachers should have returned to class at mid-morning on January 11 because the teachers only had released time for negotiations, and negotiations were over when the District declared impasse at 10:00 a.m. This contention, it seems to me, depends on the assumption that the grant of released time on January 11 was for the duration of actual negotiations until noon only if they lasted that long, and that the SYFT should reasonably have understood this. However, I do not believe the evidence supports such a finding.

Given the confusion on January 4 regarding duration of released time, I believe the District had an obligation to express its grant of released time in unambiguous, crystal

clear terms.[1] Colegrove's remark indicates released time for the entire morning — up until the scheduled end of the negotiating session -- at least as much as it indicates that the teachers had released time until noon or until negotiations broke down, whichever came first. The memo presented by the District to the teachers explicitly states that the teachers were required to return to class before noon if negotiations broke down earlier, but this was not communicated to the SYFT until 10 a.m., in the middle of the negotiating session.

For the above reasons, the negotiating teachers could have reasonably believed that they had the entire morning—until noon—as a predetermined period of released time. The District's abrupt calling off of negotiations, coupled with an order to return to school, could reasonably have been understood by the teachers as an effort by the District to

---

[1]As noted, there was a meeting between Colegrove and Skorepa on January 9, resulting from the confusion of the January 4 session, at which Colegrove supposedly clarified the District's grant of released time. The testimony, however, indicates the opposite. Skorepa, when asked about released time for the 11th, replied that it was hoped "that on the 10th (the next day) that we were going to work something out on released time." She also characterized the discussion as "vague."

Colegrove's version of this conversation with Skorepa is also ambiguous. He testified ". . .at the conclusion of the negotiating session which was just set up for just a half day, this wasn't a full day session, just a half day, they were to report back."

assert control over the negotiations, to punish the teachers for taking, and sticking to, a hard bargaining position.

Indeed, the evidence indicates that the session of January 11 was the most acrimonious of the January sessions, and tempers were running high. The emotionally charged atmosphere is suggested by the following excerpt from the testimony of Andrea Skorepa:

> A. Well, we — there was no discussion on the 11th. All that happened on the 11th was they were supposed to give us a counter-proposal. Well, Ms. Robinson came in and started talking about she had her directive from the School Board and I interrupted her and I said, do you have a counter-proposal. At which time she got — she became very, very upset and very angry and picked up what they considered their counter-proposal, threw it across the table and I picked it up and I said we would take a caucus and she said to us, well, take a caucus, take as long as you need because I know you're slow readers, and marched out of the door.

When the District returned to the negotiating table at 10 a.m., in a single breath it both declared impasse and ordered the negotiators back to school. In so doing, the District attempted to change roles from negotiator to boss, from sitting as an equal at the bargaining table to the employer with the power to give orders to its employees and to discipline them. As the hearing officer observed in finding the District's similar conduct on January 4 improper, "the flaw in the District's conduct was not in establishing a released-

time policy which was unreasonable per se, . . . but in establishing a policy and then altering it at a critical time during the . . . negotiating session and in a peremptory manner." (Citations omitted.)

Coming when it did, the District's manipulation of the negotiations released-time policy, with penalties for disobedience, has overtones of employing a "carrot and stick" tactic with the SYFT which is inconsistent with good faith negotiations.

Member Moore seems to argue that, since negotiations had broken down, as of 10:00 a.m. on Jan. 11, there was no longer any reason for the negotiators to have released time. In Cinderella fashion, they lost their status as negotiators and became once again teachers with only teaching responsibilities. I believe this is an overly mechanical, static view of the very dynamic give and take of the negotiations process, and fails to sufficiently insulate the negotiating process from the boss-employee relationship. Tempers were high and the District sought to change the rules in the middle of the game. I find such negotiating conduct is inconsistent with good faith negotiations and tends to thwart that process. Thus, I find a violation of Government Code section 3543.5(c).

The disciplinary action was taken in response to the teachers' action on January 4 and in response to the teachers'

alleged insubordination on January 11 when they refused to obey the order to return to their respective schools within 15 minutes. It should be noted in this regard that substitutes for the teachers on the negotiating team had already been hired for a full day and therefore the matter of abandonment of teaching or supervisory responsibilities never really was at issue. Indeed, the teachers were not instructed to report to their respective classes, but rather to report to their respective principals "for assignment". As explained above, discipline of the teachers because of these actions is improper because the teachers were engaged in the protected activity of negotiating, for which they had been granted released time. There is no indication that any discipline was imposed in response to the teachers' failure to return in the afternoon, independent of the other events. The entire discipline imposed, therefore, must fall.

As noted, the teachers could have reasonably believed that they had released time until 12 noon, the time negotiations were scheduled to end. However, no version of the conversation lends itself to an interpretation that the teachers on the negotiating committee had released time for the afternoon, and I would therefore not require the District to restore pay for the afternoon of January 11.

On both January 4 and January 11, the teachers were functioning as negotiators and were the object of reprisals and

threats of discipline while serving in that capacity. Certainly there is no more critical area of participation in the activities of an employee organization for representation purposes than that of negotiating. The District's conduct also constitutes a violation of EERA section 3543.5(a).

As I indicated in San Francisco Community College District, supra, I do not believe that there is automatically a section 3543.5(b) violation whenever a section 3543.5 (c) violation occurs. In this case, however, I find an independent violation of section 3543.5(b). I believe that EERA sections 3543.1(a) and (c) and section 3543 clearly imply a right of an exclusive representative to meet and negotiate with the employer. The threats and reprisals discussed above have the effect of denying SYFT its right to negotiate. The District actions were directed at the teachers in their capacity as negotiating representatives of the exclusive representative at a negotiating session.

Raymond J. Gonzales Member

The order in this case begins on page 33.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is hereby ORDERED that the proposed decision of the hearing officer on the charges filed by the San Ysidro Federation of Teachers is affirmed, as modified herein. It is further ORDERED that the San Ysidro School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Imposing or threatening to impose reprisals on District employees Andrea Skorepa, Patricia Darnell, Tommy Hayden and Melanie Miller, or in any manner interfering with, restraining, or coercing them because of their exercise of rights guaranteed by the Educational Employment Relations Act on January 4, 1978,

(b) Proceeding in any manner to dismiss or to impose any disciplinary action against Andrea Skorepa, Patricia Darnell, Tommy Hayden and Melanie Miller because of their exercise of rights guaranteed by the Educational Employment Relations Act on January 4, 1978.

(c) Denying the San Ysidro Federation of Teachers its right to represent its members by failing to meet and negotiate in good faith by reneging on prior agreements.

(d) Refusing to meet and negotiate in good faith by reneging on prior agreements.

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

(a) Rescind, nullify, and cancel all actions it has taken to dismiss or impose any disciplinary action against Melanie Miller, Andrea Skorepa, Patricia Darnell and Tommy Hayden.

(b) Remove from all personnel files of Melanie Miller, Andrea Skorepa, Patricia Darnell and Tommy Hayden all notices of unprofessional conduct and any other documents related to discipline or proposed discipline of these teachers for their conduct on January 4 or January 11, 1978.

(c) Restore to Andrea Skorepa and Patricia Darnell all pay withheld from their salaries during the period of their suspension, if a suspension was effectuated, plus interest on that amount, paid at a rate of 7 percent per annum.

(d) Pay to Andrea Skorepa, Patricia Darnell, Tommy Hayden, and Melanie Miller an amount equal to the salary deducted from their pay warrants for January 4, 1978,[1] plus interest on that amount, paid at a rate of 7 percent per annum.

(e) Immediately upon receipt of this decision prepare and post copies of the attached Notice marked "Appendix" at each of its school sites for thirty (30) consecutive workdays in conspicuous places, including all locations where notices to employees are customarily placed.

---

[1] Chairperson Gluck, dissenting in part:

I dissent from this portion of the Order which fails to restore pay for January 11. As I stated, the discipline imposed is not severable since it was based on a combination of protected and arguably unprotected conduct. (See opinion, p. 19).

(f) Notify the Los Angeles Regional Director of the Public Employment Relations Board in writing within twenty (20) calendar days from the date of service of this decision of the actions it has taken to comply with this Order.

3. IT IS FURTHER ORDERED that the charge is DISMISSED with respect to any allegations of unfair conduct by the District on dates other than January 4, 1978.

This Order shall become effective immediately upon service of a true copy thereof on the San Ysidro School District.

PER CURIAM

Appendix: Notice

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

After a hearing in Case No. LA-CE-212 in which all parties had the right to participate, it has been found that the San Ysidro School District violated the Educational Employment Relations Act by imposing or threatening to impose reprisals on District employees Andrea Skorepa, Patricia Darnell, Tommy Hayden, and Melanie Miller because of their exercise of rights guaranteed by the Educational Employment Relations Act, and by refusing on January 4, 1978, to meet and negotiate in good faith by reneging on a prior agreement on released time. It has further been found that the same refusal to meet and negotiate in good faith denied the exclusive representative its right to represent its members in their employment relationship with the District. As a result of this conduct, we have been ordered to post this notice, and we will abide by the following:

1. CEASE AND DESIST FROM:

(a) Imposing or threatening to impose reprisals on District employees Andrea Skorepa, Patricia Darnell, Tommy Hayden and Melanie Miller, or in any manner interfering with, restraining, or coercing them because of their exercise of rights guaranteed by the Educational Employment Relations Act on January 4, 1978;

(b) Proceeding in any manner to dismiss or to impose any disciplinary action against Andrea Skorepa, Patricia Darnell, Tommy Hayden and Melanie Miller because of

their exercise of rights guaranteed by the Educational Employment Relations Act on January 4, 1978.

(c) Denying the San Ysidro Federation of Teachers its right to represent its members by failing to meet and negotiate in good faith by reneging on prior agreements.

(d) Refusing to meet and negotiate in good faith by reneging on prior agreements.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

(a) Rescind, nullify, and cancel all actions it has taken to dismiss or impose any disciplinary action against Melanie Miller, Andrea Skorepa, Patricia Darnell and Tommy Hayden.

(b) Remove from all personnel files of Melanie Miller, Andrea Skorepa, Patricia Darnell and Tommy Hayden all notices of unprofessional conduct and any other documents related to discipline or proposed discipline of these teachers for their conduct on January 4 or January 11, 1978.

(c) Restore to Andrea Skorepa and Patricia Darnell all pay withheld from their salaries during the period of their suspension, if a suspension was effectuated, plus 7 percent interest on such sums.

(d) Pay to Andrea Skorepa, Patricia Darnell, Tommy Hayden and Melanie Miller an amount equal to the salary deducted from their pay warrants for January 4, 1978, including interest at a rate of 7 percent per annum.

SAN YSIDRO SCHOOL DISTRICT

By: _____
Superintendent

Dated: _____

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

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

In the Matter of:	)	
	)	
SAN YSIDRO FEDERATION OF TEACHERS, CFT/AFT, LOCAL 3211,	)	
	)	
Charging Party,	)	Unfair Practice
	)	
v.	)	Case No. LA-CE-212
	)	
SAN YSIDRO SCHOOL DISTRICT,	)	PROPOSED DECISION
		5/25/78
Respondent.	)	

Appearances: Lawrence Rosenzweig, Attorney (Levy, Koszdin, Goldschmid & Sroloff) for Charging Party; Michael Taggart, Attorney (Paterson & Taggart) for Respondent.

Before Jeff Paule, Hearing Officer.

STATEMENT OF THE CASE

On January 18, 1978, the San Ysidro Federation of Teachers, CFT/AFT, Local 3211 (Federation or Charging Party) filed an unfair practice charge against the San Ysidro School District (District or Respondent) with the Public Employment Relations Board (PERB) alleging a violation of Government Code section 3543.5(a), (b) and (c).[1]

[1] All section references are to the Government Code unless otherwise stated. Section 3543.5 provides that:

> 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.
>
> (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.

The charge alleges that on January 4 and 11, 1978 the District acted unlawfully' when its negotiator "ordered the bargaining team members to return to their respective schools for assignments and duties" and "threatened the bargaining team members with a loss of pay if they did not report to their schools" after negotiations were terminated on these dates.

On February 8, 1978, the Charging Party amended the charge to include an allegation that the District committed an unfair practice when it sent notices of unprofessional conduct to three of the four members of the Federation's negotiating team. The Charging Party contends that, "[t]he notices of unprofessional conduct are based upon the participation by the members of the negotiating team in activity which is protected by the [Educational Employment Relations Act]." The Charging Party also amended the charge to include an alleged violation of section 3543.5(e).[2]

On February 10, 1978, the Charging Party filed a second amendment to the unfair practice charge alleging that the fourth member of the bargaining team, a probationary employee, had received a notice of dismissal. The Charging Party contends in its second amended charge that this employee "will suffer irreparable harm as a result of the School District's retaliation against him for participation in protected activity." In this amendment the Charging Party requested that the General Counsel of the PERB seek an injunction to prevent the District from proceeding with the dismissal action. A separate request for injunctive relief was filed directly with the General Counsel on February 13, 1978.

---

[2]Sec. 3543.5(e) provides that:

> It shall be unlawful for a public school employer to:
>
> Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with section 3548).

On February 27, 1978, the District filed its answer to the unfair practice charge denying that the District had committed any unfair practices. In its answer, the District also opposed the Federation's request that the PERB General Counsel seek an injunction in this case.

On March 2, 1978, the General Counsel of the PERB denied the Federation's request for injunctive relief.[3]

The thrust of the Federation's unfair practice charge is that the District committed unlawful practices by initiating dismissal actions against the four members of the Federation's negotiating team when they were engaged in "protected activity" guaranteed by the Educational Employment Relations Act (EERA). The District's position is that the four members of the Federation's negotiating team were insubordinate and that under the Education Code such conduct is a basis upon which a school district can impose disciplinary action including dismissal.

A hearing was held in San Diego, California on March 21, 1978.

At the hearing, the Respondent moved to dismiss the unfair practice charge asserting that the PERB lacked jurisdiction to hear and decide "teacher dismissal cases." This motion is disposed of in accordance with the findings and conclusions below. Also, during the hearing, the parties stipulated that the alleged violation of section 3543.5 (e) be dismissed. This stipulation is accepted by the hearing officer.

ISSUES

1. Whether the Public Employment Relations Board has jurisdiction to hear and decide this case.

2. If the Public Employment Relations Board has jurisdiction, whether the San Ysidro School District violated Government Code section 3543.5 (a), (b) or (c).

---

[3] The denial was appealed to the Board itself where the matter is currently pending.

FINDINGS OF FACT[4]

San Ysidro School District is a small school district (enrollment: 2,745) located in southern San Diego County. The District employs approximately 165 certificated employees who are within the appropriate negotiating unit.[5] When teachers are absent, substitutes usually can be obtained only from the San Diego area on a full day basis.

During the hearing, the parties stipulated to the following facts:

1. The San Ysidro Federation of Teachers is the exclusive negotiating representative for the certificated employees of the District.
2. The negotiations which are the subject of the instant unfair practice charge are the "re-opener" negotiations pursuant to the collective negotiating agreement, and the subject matter of these negotiations concerns compensation and fringe benefits.
3. In the last eleven years, the District has not proceeded through any formal dismissal hearings involving certificated employees pursuant to the Education Code dismissal statutes prior to the four teachers who are involved in the instant case.
4. The status of the four teachers is as follows: Andrea Skorepa, Patricia Darnell and Melanie Miller are tenured certificated employees and Tommy Hayden is a probationary certificated employee.

---

[4] Certain conflicts and questions of credibility are noted and resolved; others are unmentioned inasmuch as they are not critical in deciding this case. However, all have been considered by the hearing officer.

[5] Information obtained from the 1977 California Public School Directory and the PERB representation file (Case No. IA-R-475) involving the San Ysidro School District.

5. Melanie Miller was docked a half day's pay for January 4, 1978.

6. Andrea Skorepa, Patricia Darnell and Tommy Hayden were docked a half day's pay for January 4, 1978 and for January 11, 1978.

History of Negotiations

After the Federation was selected as the exclusive representative of the certificated employees, the union commenced negotiations with the District on April 13, 1977. The parties participated in nine meet and negotiate sessions. The Federation was represented by three teachers who were on statutory released time.[6] The District granted full day released time even though negotiations usually lasted less than a full day. The negotiating sessions were as follows:

April 13, 1977: 10:30 A.M. to 4:30 P.M.;
April 19, 1977: 9:30 A.M. to 3:30 P.M.;
April 25, 1977: 9:30 A.M. to 1:30 P.M.;
May 4, 1977: 9:30 A.M. to 4:30 P.M.;
May 9, 1977: 9:45 A.M. to 4:30 P.M.;
May 17, 1977: 8:00 A.M. to 2:00 P.M.;
June 2, 1977: 9:30 A.M. to 4:00 P.M.;
June 6, 1977: 9:45 A.M. to 4:00 P.M.;
June 13, 1977: 8:00 A.M. to 4:30 P.M.[7]

Ms. Andrea Skorepa was the spokesperson for the Federation's negotiating team. She is also the only teacher involved in the instant unfair practice case who participated, while on released time, in these initial negotiations.

---

[6]Sec. 3543.1(c) provides that:

> A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

[7]There was evidence that teachers are to report to school at 8:15 A.M. Although there was no evidence with respect to the ending time, the collective negotiating contract between the parties provides for a 6-1/2 hour work day and a 45-minute lunch.

At the conclusion of the April 25, 1977 negotiating session (1:30 P.M.), the District's negotiator, Cynthia Robinson, instructed the members of the Federation's negotiating team to return to their respective schools. The Federation indicated to Ms. Robinson that only the Superintendent could issue such an order. Although Ms. Robinson apprised the Federation that she had such authority, nevertheless the teachers did not return to their schools. The teachers were paid for a full day of released time for April 25, 1977.

During the next scheduled negotiating session on May 4, 1977, the Superintendent, Robert Colegrove, attended the negotiating session and informed the Federation, including Ms. Skorepa, that Ms. Robinson had been delegated the authority to give directives and that she represented the school board's position in this matter. Mr. Colegrove specifically stated that Ms. Robinson had the authority to order the teachers to return to their respective classes following negotiations. During the remaining negotiating sessions in 1977, no such directive was ever issued.

The parties eventually entered into a collective negotiations agreement which expires June 30, 1979. The agreement contains a "re-opener" clause whereby negotiations for compensation and fringe benefits were to commence no earlier than November 1, 1977. There is no provision in the agreement pertaining to "ground rules" to govern the re-opener negotiations; however, the parties did operate under a set of written ground rules for the initial negotiations. These ground rules were as follows:

1. The San Ysidro Federation of Teachers, Local 3211 Negotiating team shall consist of nine (9) members, three of which will receive released time for the purpose of negotiation.

2. The date of the next meeting will be mutually agreed upon.

3. An agenda shall be jointly developed by the "District" and the "Union". Each party shall submit two (2) items for the day's negotiation. At the end of each day's negotiations, the agenda for the following day shall be set.

4. The confidentiality of negotiation shall not be abridged by either the "District" or the "Union". This shall include all press releases, newsletters, flyers, or District publications. This confidentiality of negotiations shall not be breached, unless both parties to negotiations agree to release information jointly or formal impasse has been reached.

5. The meeting place for the purpose of negotiation shall be decided by mutual consent of both parties.

6. Parties assert that each has full and complete authority to negotiate tentative agreements.

7. Tentatively agreed upon Articles shall be initialed by each party when agreement is reached.

8. As agreements are reached, the district will attempt to have them typed up by the next meeting. Counter proposals outside of regular negotiating time will be prepared by each party on their own time and at their own expense.

   The Federation will be allowed the use of district copy machines for making reasonable numbers of copies of negotiation items and information for use during negotiations. All such requests will be approved by the Superintendent.

9. Communications between the parties shall be through the chief spokesperson with copies of written communications to the Federation President and the Superintendent.

10. By April 19th and at the latest April 25, 1977, all proposals will be on the table. This does not constitute a waiver of rights guaranteed under the law.

Preliminary Discussions Pertaining to the Negotiating Sessions of January 4, 10 and 11, 1978"

A contract exists between the District and the California School Boards Association (CSEA) wherein it is agreed that from July 1, 1977 to June 30, 1978 the CSEA will perform certain services for the District including "to provide a person to perform negotiation tasks." This person is referred to in the contract as "CSEA's assigned person." The contract also states that the person assigned by the CSEA shall "provide other assistance as required by the School District."

Cynthia Robinson is the individual assigned by the CSBA to render services to the District pursuant to the contract.

On December 14, 1977, Ms. Robinson contacted Andrea Skorepa, the Federation's president and chief spokesperson, to discuss the convening of the re-opener negotiations on compensation and fringe benefits. It was agreed that the parties would meet on January 4, 10, and 11, 1978. On January 4, 1978, the session was to last from 8:00 A.M. to 12:30 P.M., on January 10, 1978, from 12:30 P.M. to 4:00 P.M., and on January 11, 1978, from 8:00 A.M. to 12:00 P.M. Ms. Skorepa and Ms. Robinson also discussed released time during this conversation and therein exists a conflict in the testimony.

Ms. Skorepa's version of the December 14, 1977 conversation is that Ms. Robinson stated that released time would be granted for the full day to four teachers. Ms. Robinson's testimony is that she told Ms. Skorepa that they would receive released time for a half day for three teachers.[8]

The hearing officer credits Ms. Skorepa's testimony primarily because of corroborating testimony by Patricia Darnell. Ms. Darnell was the Federation's "note taker" during negotiations. Ms. Darnell testified that she was told by Ms. Skorepa later in December that Ms. Robinson said the negotiating team would be released for a full day on January 4, 10 and 11. This testimony corroborates and supplements the testimony of Ms. Skorepa. Also, as the Federation's "note taker", Ms. Darnell recorded the following comments by Ms. Robinson:

> I'm sorry—misunderstanding over the phone for the table—form I used—3 is reasonable—what we did last year—3-250-300 teachers expensive to us—100/ day—give day off even though nego. 1/2 day.

The testimony by Ms. Darnell and the documentary evidence was not refuted by the District's "note taker", Mr. Carroll Williams, who also testified at the hearing.

---

[8] There is no conflict in the testimony regarding the fact that full day substitutes were to be provided for those days scheduled for negotiations.

Finally, the events at the negotiating session of January 4, 1978 have been considered in deciding the relative plausibility of the conflicting accounts of the December 14, 1977 conversation. In particular, when the four teacher-negotiators arrived on January 4, 1978, there is nothing in the record to indicate that Ms. Robinson or any District representative objected to there being four teachers present at the negotiating table. This would have been a natural response if only three had been authorized. Moreover, when negotiations terminated early that day and Ms. Robinson told the four teachers that they would be docked a half day's pay if they did not return to their schools, she was addressing all four teachers. It seems more credible that had Ms. Robinson only allowed three teachers to be on released time, her comment about docking the (teachers' pay on January 4, 1978 would have been directed to only three teachers.

For the foregoing reasons, it is found that the Federation was informed on December 14, 1977 that four negotiators would be released for a full day.

January 4, 1978

Negotiations on January 4, 1978 began at 8:45 A.M, with the Federation proposing ground rules to govern the negotiations. The proposal by the Charging Party was actually the ground rules under which the parties operated during the initial negotiating sessions in 1977 with two modifications. One of the changes the union desired was an increase in the number of teachers on released time from three to four.[9] The District responded by stating that ground rules were not necessary. This stance did not last very long and after caucusing for a short while, the District offered a counterproposal. The District's counterproposal included several changes, primarily offering three negotiators on released time and deleting the "confidentiality" ground rule (number four). The Federation reviewed the District's offer and then submitted a counterproposal to Ms. Robinson. Ms. Robinson and the District negotiating team reviewed this latest Federation proposal and then provided the Federation with the District's final offer. Ms. Robinson stated at the hearing:

9This modification was made orally and actually serves to confirm the recordation by Ms. Darnell of Ms. Robinson's statements on January 4, 1978.

"My final proposal on that day, the fourth, was that we would give them four people with paid released time providing they would allow each party to put out their own communique to the staff and the community." This last offer by the District was rejected by the Federation.

Ms. Robinson then suggested that the parties start negotiating compensation without ground rules. The Federation refused to negotiate compensation stating that ground rules were necessary. Ms. Robinson then terminated the negotiations. The time was approximately 10:00 A.M. Ms. Skorepa testified that the Federation's negotiating team wanted to remain at the table and negotiate ground rules. She said: "We were there and we were ready to negotiate and we were prepared to do it." Ms. Robinson testified that, "I had finally offered them four people on released time. I knew my parameters on the confidentiality. I had no other place to go—there was nothing else we really could discuss on that day . . .."

At this time MS . Robinson was asked whether she was threatening the team members. She replied, "No, not at this minute, maybe in a few moments." The District then caucused and after a few minutes Ms. Robinson returned to the negotiating table and directed the members of the Federation's negotiating team to return to their respective schools for possible assignment by the school principal. Ms. Skorepa, on behalf of the negotiating team, refused stating that she was told that the team members were released for the full day and that they were ready and prepared to negotiate. Ms. Skorepa also questioned whether Ms. Robinson had the authority to issue such an order, stating that she felt only the Superintendent could issue such an order. Ms. Robinson then said: "I'm ordering you back to your classrooms and if you don't report back to your classrooms, you're going to be docked a half day's pay!"

Ms. Skorepa testified that she considered Ms. Robinson's statements to be a threat, as follows:

Q. "[W]hy didn't you go back [to class] at that time?

A. "Because of the way it was done and because it was being used as a threat.

Q. "Why was it a threat?

A. "Because when you're sitting at the table and negotiating and because somebody doesn't like what you're saying, they . . . fold up their books and start ordering you about and that's a threat."

The Federation's negotiators did not return to their schools and instead returned to the Federation's offices and worked on language for counterproposals. They were docked one half day's pay.

Full day substitutes worked on January 4, 1978 for the four teachers. On January 5, 1978, the four teachers returned to their regular assignments.

Events Following January 4, 1978 Negotiating Session and Preceding January 10, 1978 Session

A few days following the January 4, 1978 negotiating session, the Superintendent, Robert Colegrove, sent a letter to the four negotiators, the substance of which is as follows:

> Your unauthorized absence from your teaching assignment after you were told to return to school at 10 a.m. and your continued absence for the remainder of the contractual school day does cause me some concern. Therefore, I would like to inform you that you may be in violation of Article VIII, Item 1, of the agreement between the district and the recognized bargaining unit. In addition, you may be in violation of Education Code section 44433, as a result of your early departure from service.
>
> Although, your absence was for a period of time greater than one half day, we will only deduct that portion of your salary which is equal to the loss of one half your daily rate of pay.
>
> Again, as I am deeply concerned about your possible breach of contract and unprofessional conduct as defined by Education Code section 44433, I would like to meet with you in the very near future.[10]

---

[10] Article VIII, Item 1 of the parties' collective agreement states that the employees in the unit are to work a 6-1/2 hour day.

Ed. Code sec. 44433 states as follows:

> If any teacher employed by a board of school trustees for a specified time, leaves the school before the expiration of the time, without the consent of the trustees, in writing, the teacher is guilty of unprofessional conduct, and the board of education of the county, upon receiving notice of the fact, may suspend the certificate of the teacher for the period of one year.

After receiving the above letter, Ms. Skorepa contacted the Superintendent and arranged for a meeting with him.

On January 9, 1978, Ms. Skorepa, on behalf of the negotiating team, met with the Superintendent. The Superintendent informed Ms. Skorepa that the negotiating session on January 4, 1978 had been scheduled for one half day and that the teachers should have reported back to school. He stated that if negotiations were scheduled for less than a full day in the future, the teachers were required to report back to their schools. The Superintendent also indicated that he hoped the parties would be able to work out their differences regarding the ground rules at the next negotiating session. Ms. Skorepa then asked him whether the negotiating team mariners should report to school the next morning, January 10, 1978, since negotiations were not scheduled to commence until 12:30 P.M. The Superintendent said no. Thus, the Federation was granted released *time*, for a full day on January 10, 1978.

The Superintendent also met with Melanie Miller, however, the details of this meeting are scant. The only direct evidence is that of the Superintendent who testified that Ms. Miller met with him prior to January 10, 1978 and informed him that "there would not be a problem in the future."

January 10, 1978

Pursuant to the Superintendent's authorization, the Federation received released time on the morning of January 10, 1978. Negotiations commenced at 12:30 P.M. Pursuant to her conversation with the Superintendent, Ms. Miller did not attend the session. At this session, the Federation submitted a proposal for ground rules which was substantially the same as the Federation's proposal of January 4, 1978. That is, the Federation desired four negotiators on released time and a confidentiality ground rule which would prevent each party from issuing its own press release or newsletter.

The District offered a counterproposal which included released time for three teachers, no confidentiality ground rule and a provision concerning guidelines for the duration of released time.

Negotiations continued throughout tie day basically centering around the confidentiality ground rule and the number of teachers to be on released time. Each party submitted three proposals, the last one by the District. The District attempted to discuss salaries and fringe benefits, however, the Federation adamantly refused to discuss these subjects until the dispute on ground rules was resolved.

The negotiating session of January 10, 19-78 adjourned at approximately 4:00 P.M. A school board meeting was scheduled for that evening and Ms. Robinson had informed the Federation that the District would have a new proposal the next morning.

January 11, 1978

On January 11, 1978, the parties commenced negotiations at 8:00 A.M. Ms. Miller did not attend the negotiating session. At the start of negotiations Ms. Skorepa immediately demanded to see the District's new counterproposal. According to Ms. Skorepa, Ms. Robinson "became very upset and angry" and picked up a purported counterproposal and threw it at Ms. Skorepa. Ms. Skorepa said the Federation would have to take a caucus to review the counterproposal and Ms. Robinson responded, "Well, take a caucus, take as long as you need because I know you're slow readers."

The Federation took a five minute caucus and returned exclaiming that the District's "counterproposal" was nothing more than a statement of the District's original position. Part of the District's counterproposal was that the parties start negotiating compensation. The Federation refused to negotiate compensation and did not propose any new language.

The District then took a caucus. Approximately two hours later, at 10:00 A.M., Ms. Robinson returned to the table. The District did not present any new

counterproposal. Instead, Ms. Robinson declared an impasse.[11] The Federation did not request further negotiations on ground rules or on any other subject. Ms. Robinson then read and handed out to the Federation (Ms. Skorepa, Ms. Darnell and Mr. Hayden) a typed memorandum from the Superintendent. In substance, the memorandum is as follows:

> Subject: Return to Regularly Assigned Duties, Following Negotiations
>
> 1. Following the negotiating session, or should such session be concluded prior to the 12:00 p.m. scheduled time at which said session is to end on this date, you are hereby directed to return to your assigned school and resume those duties to which you are normally assigned:
>
>   a. If negotiations are concluded at the scheduled time, you are to resume your regular duties following the normal 45-minute lunch period.
>
>   b. If negotiations are concluded prior to the 12:00 p.m. time, you are to report to your assigned school within 15 minutes after the negotiations are ended for the day.
>
> 2. Your cooperation is greatly appreciated.

Ms. Robinson, after declaring impasse and providing the Federation with a copy of the Superintendent's memorandum, directed the team members to return to their schools. The three members of the Federation's negotiating team

---

[11] The EERA defines "impasse" as a situation where "the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile. Sec. 3540.1(f).

The hearing officer takes official notice of the representation file involving the San Ysidro School District. A review of the file indicates that the Los Angeles Regional Director on January 18, 1978 determined that an impasse existed between the parties. The Federation did not file an objection to this determination. Thereafter, mediation commenced (see sec. 3548), which was unsuccessful. The parties are currently engaged in factfinding pursuant to sec. 3548.1. The issue before the factfinding panel is compensation.

did not return to their respective schools. Ms. Skorepa testified that the reason why the team members did not return to their schools was because "it was the same thing as the 4th" and because Ms. Robinson was "very angry." The teachers were docked one half a day's pay. Full day substitutes were in the teachers' classes as had been previously arranged.

After the declaration of impasse, and while the teachers were still In the negotiating room, a staff employee of the California Federation of Teachers, Clarence Boukas, who had been assisting the Federation in negotiations, approached Ms. Robinson and Mr. Colegrove in the Superintendent's office. Mr. Boukas informed them that the Federation's position on ground rules was not going to change.

Events Following the January 11, 1978 Negotiating Session

Later in the day, January 11, 1978, the Superintendent sent a letter to Ms. Skorepa, Ms. Darnell and Mr. Hayden. He did not send a letter to Ms. Miller. In his letter to Ms. Skorepa, the Superintendent states, in part:

> Today, I was informed that you again departed from service without authorization, an action that was directly contrary to both my oral and written directions. Therefore, it is my belief that you have clearly violated Education Code section 44433, and possibly Education Code section 44421.
>
> Your unauthorized departure from service and disregard for administrative direction requires me to take appropriate action as authorized by the California Education Code.

The Superintendent's letter to Ms. Darnell and Mr. Hayden state, in part:

> Today, I was informed that you again departed from service without authorization, an action that was directly contrary to both my oral and written instructions. I am requesting a conference with you on Tuesday, January 12, 1978, in my office, from 8:30 a.m. to 8:45 a.m. [11:30 a.m. to 11:45 a.m. for Mr. Hayden.]
>
> Thank you very much for your consideration and cooperation. I look forward to meeting with you.

The Superintendent testified that Ms. Darnell did, in fact, have a meeting with him; however, the nature of this conversation was not revealed. It is not known whether he met with Mr. Hayden.

On January 27, 1978, a notice of unprofessional conduct pursuant to Education Code section 44934 was served upon Ms. Skorepa, Ms. Darnell and Ms. Miller.[12] The notices were signed by the Superintendent. The three teachers were accused of "persistent violation of or refusal to obey school laws of the State and [reasonable regulations of the District]."

The "charge" against the three permanent teachers includes the following:

> After the commencement of the scheduled meeting on January 4, 1978, it became clear that negotiations could not usefully be continued because of disagreement between the negotiating parties with respect to "ground rules" for conducting negotiations; the negotiations were thus terminated at about 10:00 a.m. and the district's negotiator advised the subject employee and the other AFT negotiators that the District Superintendent's instructions were for them to return to their respective schools and to check with their principals regarding further assignments. The subject employee (as well as the other AFT negotiators) did not return to her school nor did she resume her regular duties either for

---

[12] 12 Ed. Code sec. 44934 states:

> Upon the filing of written charges, duly signed and verified by the person filing them, with the governing board of the school district, or upon a written statement of charges formulated by the governing board, charging that there exists cause for the dismissal of a permanent employee of the district, the governing board may, upon majority vote, except as provided in this article if it deems the action necessary, give notice to the permanent employee of its intention to dismiss him at the expiration of 30 days from the date of service of the notice, unless the employee demands a hearing as provided in this article.
>
> Any written statement of charges of unprofessional conduct or incompetency shall specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his defense. It shall, where applicable, state the statutes and rules which the teacher is alleged to have violated, but it shall also set forth the facts relevant to each occasion of alleged unprofessional conduct or incompetency.

The filing of charges under this section is the first step in dismissing a teacher under the Education Code.

the rest of the morning hours of school operation on January 4, 1978 nor for the remainder of that school day, the hours of work for which were established by Governing Board policy as set forth in Article VIII of the Agreement between the District and the San Ysidro Federation of Teachers.

After the commencement of the scheduled negotiating session on January 11, 1978, it again became apparent that negotiations could not continue because of continued disagreement between the negotiating parties and at 10:15 a.m. the District's negotiator declared an impasse. The District's negotiator read to the subject employee and to the other AFT negotiators a letter addressed to the "Members of the AFT Negotiating Team" dated January 11, 1978, a copy of which is attached as Enclosure (1) and incorporated herein by reference, and gave the subject employee and the other AFT negotiators copies of the letter; the letter instructed the subject employee and the other AFT negotiators to return to their schools and resume their regular duties in the event the negotiating session was terminated early on January 11, 1978 or to return and perform their regular duties for the rest of the day after the normal lunch period if the negotiating session continued for the scheduled time to 12:00 noon. Nevertheless, after the impasse was declared and negotiations terminated *early* at 10:15 a.m. on January 11, 1978 as aforesaid, the subject employee, as well as the other AFT negotiators, did not return to her school nor did she resume her regular duties either for the remainder of the morning hours of school operation on that day nor for the remainder of the school day, the hours of work for which were established by Governing Board policy as set forth in Article VIII of the Agreement between the District and the San Ysidro Federation of Teachers. [This paragraph was not included in the charge against Melanie Miller.]

The undersigned believes that the actions and behavior of the subject employee as set forth above constitute unprofessional conduct, a cause for dismissal set forth in subdivision (a) of Education Code section 44932, and also violations of (a) the provisions of section 5570 of Title 5 of the California Administrative Code providing that "All teachers shall observe punctually the hours fixed by regulation of the governing board of the school district for opening and closing school, and (b) Governing Board policy concerning hours of work as set forth in Article VIII of the Agreement between the District and the San Ysidro Federation of Teachers entered into and executed pursuant to the provisions of Chapter 10.7 (commencing with section 3540), Division 4, Title 1 of the Government Code, which are causes for dismissal set forth in subdivision (g) of Education Code section 44932.13

---

[13] Ed. Code sec. 44932(a) and (g) state:

No permanent employee shall be dismissed except for one or more of the following causes:

(a) Immoral or unprofessional conduct.

(g) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him.

Mr. Tommy Hayden is a probationary enployee and thus he did not receive a notice of unprofessional conduct. Instead, on February 8, 1978, the Superintendent sent to Mr. Hayden a "notice of recommendation for non-reemployment" for school year 1978-79 pursuant to Education Code section 44949 (a)[14]. The Superintendent stated that the reasons for the recommendation were that Mr. Hayden had exhibited a complete disdain for the constituted authority of the Governing Board of the District and of the District Superintendent and other District administrators responsible for the administration of the District's affairs, that he had conducted himself in a highly unprofessional manner, and that he had violated the school laws of the state and the regulations of the District.

---

[14] 14 Ed. Code sec. 44949(a) states that:

> No later than March 15 and before an enployee is given notice by the governing board that his services will not be required for the ensuing year, the governing board and the employee shall be given written notice by the superintendent of the district or his designee, or in the case of a district which has no superintendent by the clerk or secretary of the governing board, that it has been recommended that such notice be given to the employee, and stating the reasons therefor.
>
> If a probationary enployee has been in the employ of the district for less than 45 days on March 15, the giving of such notice may be deferred until the 45th day of employment and all time period and deadline dates herein prescribed shall be coextensively extended.
>
> Until the employee has requested a hearing as provided in subdivision (b) or has waived his right to a hearing, the notice and the reasons therefor shall be confidential and shall not be divulged by any person, except as may be necessary in the performance of duties; however, the violation of this requirement of confidentiality, in and of itself, shall not in any manner be construed as affecting the validity of any hearing conducted pursuant to this section.

CONCLUSIONS OF LAW

Jurisdiction of the Public Employment Relations Board

In its motion for dismissal, the District argues that the PERB does not have the authority "to get involved in teacher dismissal cases" and that the Education Code clearly provides that it is reserved to a commission on professional competency or an administrative law judge the power to determine whether a teacher has been legally terminated "for cause." The District bases its motion primarily on section 3540 which states that:

> . . . Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure . . .

The Respondent also contends that the Charging Party can raise as a defense in a hearing before a commission on professional competency that the teachers involved herein were not dismissed "for cause," but for conduct protected by the EERA.

The Charging Party asserts that the PERB is empowered by the EERA to protect those rights guaranteed by the EERA and that it is the PERB, and not another agency or administrative tribunal, which has the authority to remedy any proven violation of the EERA. In support of its argument, the Federation relies on section 3541.5(c) of the EERA which provides that:

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

The Charging Party states in its brief: "Clearly, the Legislature was aware of the Education Code provisions relating to dismissals of public school employees when [it] adopted section 3541.5(c). Nevertheless, despite the existence of the Education Code Dismissal Statutes, the Legislature empowered the [PERB] to reinstate employees in proper circumstances."

This is the first case to come before the PERB where the instant jurisdictional issue has been presented so clearly. The eventual determination of the PERB's jurisdiction in discharge cases will have an effect not only on the EERA but on other labor acts involving public employees which come under the PERB's authority to administer.

Federal court and National Labor Relations Board (NLRB) decisions arising under the National Labor Relations Act, as amended (NLRA), rely primarily on section 10 (c) of the NLRA. Section 10(c) of the NLRA expressly provides: "No order of the [NLRB] shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."[15] The concept of "cause" is not defined in the NLRA, but it is understood to refer to work-related justifications for discipline which would ordinarily be accepted as such under general industrial usages. See NLRB v. Electrical Workers (1953) 346 U.S. 464, 33 LRRM 2183, 2187 and Gorman, Labor Law, p. 139. Thus, it is the NLRB, and the federal courts if an appeal is taken, which examines the evidence to determine whether an employee was discharged for cause or for participation in protected activities under the NLRA.

Before turning to an analysis of the EERA and its relationship to the Education Code's dismissal statutes, a discussion of how this issue has been resolved in other states is useful.

The most enlightening decision in this area is that of the Massachusetts Supreme Court in Town of Dedham v. Labor Relations Commission (1974) 312 N.E. 2d 548, 86 LRRM 2918. In Dedham, a civil service employee was suspended for five days for "insubordination." (The charge against the teachers in the instant case alleges insubordination as a basis for their dismissal.) The employee requested a hearing before the state Civil Service Commission to determine whether the punitive action of a five-day suspension was "for cause." He also filed an unfair labor practice

---

[15] The EERA does not contain a comparable provision.

complaint with the state Labor Relations Commission alleging that his employer had committed an unfair labor practice in that it had violated his protected rights under the Massachusetts labor relations statute.[16]

After a hearing, the Civil Service Commission ruled that the punitive action was justified, but that the penalty was too severe and should be reduced to a two-day suspension.

After a hearing, the Labor Relations Commission ruled that an unfair labor practice had been committed and issued a cease and desist order against the employer and an "affirmative action" order as follows: (a) to reinstate the employee and to pay him back pay for the full five days, (b) to post a notice announcing its intention to comply with the cease and desist order, and (c) to notify the Labor Relations Commission as to the steps taken to comply with the order.

On appeal to the Massachusetts Superior Court, the court ruled that the Labor Relations Commission did not have jurisdiction. In reversing the lower court,, the Massachusetts Supreme Court stated that neither the civil service or labor board remedy is exclusive and that regardless of the Civil Service Commission action, where there is a claim of a violation of rights guaranteed by the labor statutes, the Labor Relations Commission has jurisdiction. In analyzing the jurisdiction question, the Massachusetts Supreme Court enunciated the following:

> Considering the indissoluble linkage of the character of a tribunal, its procedure, and the substantive law that it enforces, it seems clear that the parties before the Civil Service Commission would not—and in the nature of things could not—secure from that body alone substantive rights equivalent to those assigned by the statute for enforcement to the [Labor Relations Commission]. So the idea of using the Civil Service Commission as a

---

[16] The particular section of the Massachusetts law provides that employees shall be allowed to engage in protected activities free from "interference, restraint or coercion." Mass. Statutes, section 178H(1).

> substitute for the Labor Relations Commission in cases involving employees in the civil service would turn out to be quite unsatisfactory.
>
> Although the charge before the Civil Service Commission was "insubordination," it was not improbable that the question of anti-union bias might come up in the unfolding of the facts as possibly qualifying or negating the charge. *** In this situation, it would be strange indeed to say that the Labor Relations Commission lacked "jurisdiction", ... If not satisfied that the question of anti-union bias had been sufficiently explored, [the Labor Relations Commission] could issue its own complaint, and proceed to prosecute and later grant relief which might comprehend "reinstatement" and more.

In concluding that the state's Labor Relations Commission had jurisdiction the Massachusetts Supreme Court commented that it is a "rare case" where potentialities of conflict occur. The Court did suggest two possibilities where a conflict does, in fact, exist: (1) stay the proceedings before the Civil Service Commission when an arguable employee rights claim exists, or (2) proceed with both statutory remedies and if a conflict exists in the results, the Superior Court will resolve the matter on appeal. In this latter regard, the Massachusetts Supreme Court intimated in no uncertain language which proceeding should be given precedence when it stated:

> An employer's commission of a prohibited practice usually, if not always, so far pervades and dominates a case as to call for revoking the discipline ordered by the employer even if the employee could otherwise be properly called insubordinate.

Two recent cases from the State of New York are in accord with the reasoning of the Massachusetts Supreme Court in Dedham. In City of Albany v. PERB (1977) 395 NYS 2d 502, 96 LRRM 2500, a discharged employee appealed to both the New York Civil Service Commission, which upheld his dismissal, and to the New York Public Employment Relations Board, which found that the dismissal was motivated by union animus, and under New York's Taylor Law the PERB ordered reinstatement

with full back pay. In discussing the jurisdictional issue, the court declared that:

> [P]lainly, the EERB had jurisdiction to consider the legality of the dismissal in question. [T]he [employer] overlooks the fact that the PERB inquiry centered upon an entirely different issue, i.e., whether [the employee's] dismissal was motived by anti-union animus and, therefore, constituted an improper employer practice in contravention of [the Taylor Law].

The identical result was reached in Sag Harbor School District v. Helsby (1976) 388 NYS 2d 695, 94 LRRM 2307, a case involving the dismissal of two probationary teachers, in which the PERB and the court ordered reinstatement.

Much reliance is placed on the rationale of the above cases, and others,[17] and the hearing officer finds the courts' reasoning in these decisions to be fully applicable herein. No other result is reasonable. The PERB was created by the Legislature to protect certain statutorily' created rights and if there is an alleged denial or interference with any of the protected rights found in the EERA., it is the PERB which has exclusive jurisdiction to hear and decide such charges and to remedy any proven violations. See section 3541.5.[18]

Certainly, the Legislature contemplated as much when it enacted the EERA. Section 3541.5(c) provides that he PERB has the power to order reinstatement of employees ... as will effectuate the policies of the EERA." Were the PERB to be deprived of jurisdiction to hear and decide teacher dismissal cases when the alleged reason for the discharge is that a right guaranteed by the EERA has been violated, section 3541.5 (c) and other sections of the EERA would be reduced to

---

[17] Indiana EERB v. School Trustees (1976) 355 NE 2d 269, 93 LRRM 2490; Kenosha Teacher Union v. Wisconsin ERB (1968) 158 NW 2d 914.

[18] Sec. 3541.5 states:

> The 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. ...

a nullity. Moreover, as the Federation notes in its brief, section 3540 states that, "[n]othing contained [in the EERA] shall be deemed to supersede other provisions of the Education Code. . .." [Emphasis added.] In asserting jurisdiction in the instant case the PERB is not in any manner vitiating the provisions of the Education Code pertaining to the dismissal of teachers. "If it appears that the statutes were designed for different purposes, they are not irreconcilable, and may stand together." Rudman v. Superior Court (1973) 36 Cal.App. 3d. 22, 27. In the instant case, the EERA was enacted to protect certain employee rights and to promote the improvement of employer-employee relations within the public school systems. The provisions of the Education Code "were designed for different purposes." It is a cardinal rule of statutory construction that where possible statutes should be harmonized and construed in such a fashion as to give force and effect to all provisions. City of Hayward v. United Public Employees (1976) 54 Cal.App. 3d 761, 766.

For all the foregoing reasons, the PERB has jurisdiction to hear and decide this case and the Respondent's motion to dismiss for lack of jurisdiction is denied.[19]

---

[19] While counsel for the District was wise to raise the jurisdictional issue at the earliest possible time, the "conflict" of which the District is concerned is not yet a reality. The District states in its brief:

> [I]f PERB asserts jurisdiction in this matter while dismissal hearings are pending, there is a potential for a major confrontation between the Education Code provision dealing with dismissals and the unfair practice provisions of the Act. There is a potential that an Administrative Law Judge or a Commission on Professional Competency would rule that a teacher should be dismissed, which decision would be binding on the District in a hearing involving a permanent teacher, and PERB would find that the dismissal was improper. Since both PERB's decision and a Commission on Professional Competency's decision is final and binding on the District, there would be a major conflict.

The "confrontation" the District envisions will exist only if the final order of the PERB differs with the final decision of the Commission on Professional Competency, in which case, as suggested by the Massachusetts Supreme Court in Town of Dedham, v. Labor Relations Commission (1974) 312 N.E.2d 543, 86 LRRM 2918, the conflict could be resolved in a judicial forum.

Alleged Violation of Section 3543.5(a)

Section 3543.5(a) states that:

> It shall be unlawful for a public school employer to:
>
> 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 [the EERA].

In the instant case, one of the "rights guaranteed by the EERA" is the right of employees to participate in the meeting and negotiating process. See sections 3543 and 3543.3. The Legislature gave this "right" added significance when it enacted section 3543.1(c), which provides that:

> A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating.

Clearly, the right of employees to participate in the meeting and negotiating process goes to the very core of the rights guaranteed by the EERA and will be stringently protected by the PERB.

In determining if there has been a violation of section 3543.5(a), the inquiry is whether the District's actions in (1) terminating negotiations on January 4 and 11, 1978, (2) ordering the teachers back to class, (3) docking the pay of teachers for January 4 and 11, 1978, and (4) initiating dismissal and/or non-reemployment proceedings against them, constitute conduct prohibited by section 3543.5(a).

The determination of this question is not an easy one. In the federal context, cases such as the instant matter arise as allegations that an employer

violated section 8(a)(1) and 8(a)(3) of the NLRA.[20] The NLRB and the federal courts have evolved differing approaches for analyzing cases brought up under the two sections.

If the allegation is that the employer violated section 8(a)(1) by interfering with, restraining, or coercing employees engaged in protected activity, the NLRB and the federal courts engage in a balancing process. This process is best explained in NLRB v. Thor Power Tool Co. (7th Cir. -1965) 351 F.2d 584, 60 LRRM 2237, as follows:

> As other cases have made clear, flagrant conduct of an employee, even though occurring in the course of Section 7 activity, may justify disciplinary action by the employer. On the other hand, not every impropriety committed during such activity places the employee beyond the protective shield of the Act. The employee's right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect.

---

20 The relevant provisions of the National Labor Relations Act, as amended, are the following:

> Sec. 7. 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 8(a)(3).
>
> Sec. 8(a). It shall be an unfair labor practice for an employer —
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 ...
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

If the allegation is that the employer violated section 8 (a) (3) by discrimination to encourage or discourage membership in a labor organization, the NLRB and the federal courts look both at the inherent effect of the employer's conduct and the motivation behind it. Depending upon the nature of the employer's act, a showing of anti-union intent may be required. In NLRB v. Great Dane Trailers, Inc. (1967) 388 U.S. 26, 65 LRRM 2465, 2467, the U.S. Supreme Court explained the test as follows:

> First, if it can reasonably be concluded that the employer's conduct was "inherently distructive" of important employee rights, no proof of an anti-union motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct. Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer' to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him. [Emphasis in the original]

The EERA combines the protections of section 8(a)(1) and 8(a)(3) in Government Code section 3543.5(a). The PERB has examined and interpreted this section in two cases, San Dieguito Faculty Association v. San Dieguito Union High School District (9/2/77) EERB Decision No. 22 and California School Employees Association, Pittsburg Chapter No. 44 v. Pittsburg Unified School District, (2/10/78) PERB Decision No. 47. In San Dieguito, the PERB concluded that for a violation to be found it must be shown "at minimum" that an employer acted either with "the intent to interfere with the rights of the employees" or that the employer's conduct "had the natural and probable consequence of interfering with the employees exercise of their rights . . ., notwithstanding the employer's intent or motivation."

In the instant case, the pivotal issue is whether the District's actions against the members of the Federation's negotiating team had the natural and probable consequence of interfering with or restraining the employees' exercise of their rights to participate in the negotiating process. A close examination and analysis of the events which occurred on the critical dates, December 14, 1977, January 4, 1978 and January 9-10-11, 1978, is necessary to answer this question because of the shifting posture and attitude of the parties at the negotiating table during this period.

On December 14, 1977, the District's negotiator informed the Federation that four teacher-negotiators would be released for a full day even though the negotiations were scheduled for only a half day. While it is unclear whether this was the District's "established practice", nevertheless, there is evidence that during the initial negotiating sessions the teachers on occasion were released for a full day notwithstanding the fact negotiations continued for only a part of the day. Cf. Axelson, Inc. (1978) 234 NLRB No. 49, 97 LRRM 1234. In any event, there was an agreement between Ms. Robinson and Ms. Skorepa which allowed the Federation's negotiators released time for a full day and it was reasonable for the Federation to rely thereon.

At the negotiating session of January 4, 1978 the Federation desired to negotiate "ground rules", as had been done during the initial negotiations. The District's initial position was that ground rules were not necessary. Although the District's professed intent on this day was to negotiate, the events which occurred on January 4, 1978 do not support such a finding. Only one

counterproposal was exchanged after the initial proposals, and after a very short period of time (approximately 1-1/4 hours) Ms. Robinson abruptly terminated the negotiations and ordered the teachers back to class.--

The evidence is clear that the Federation desired to continue negotiations on ground rules. Although terminating negotiations before the scheduled time is sometimes necessary to "cool off", it more often causes a feeling of frustration and despair particularly, as in the instant case, when discussion on an issue has not been fully exhausted. Moreover, the particular order issued by the District's negotiator on January 4, 1978: "Go back to class'.", only served to exacerbate the situation.' This is particularly so inasmuch as the Federation had been told that they would receive released time for the full day. While it may be argued that a school district has the legal right to alter its policy on released time, announcing such a change during the middle of negotiations on January 4, 1978 is evidence of the District's lack of good faith on this day. It is true, as the District argues,- that under section 3543.1(c) the District can establish a "reasonable" policy on released time. The flaw in the District's conduct was not in establishing a released time policy which was per se unreasonable (see Magnolia Educators Association v. Magnolia School District (8/5/77) EERB Decision No. 31), but in establishing a policy and then altering it at a critical time during the January 4, 1978 negotiating session and in a peremptory manner.[22]

---

[21] 21 The Federation's argument that the District's negotiator did not have the authority to issue directives or orders is rejected. Of course she did; particularly after the Superintendent stated that she had such authority. The issue is not whether she had the authority, but the manner in which she exercised that authority and its effect on the negotiating process.

[22] It should be emphasized that no determination is made herein that the District's policy on released time was unreasonable.

Thus, it is found that the District's conduct during meeting and negotiating on January 4, 1978 in (1) abruptly terminating negotiations early when the union desired to continue negotiating on ground rules, and (2) ordering the teachers back to class and threatening them with a loss in pay if they did not return, when in fact they had been told they would receive the full day off, "at minimum" had the "natural and probable consequence" of interfering with the employees' exercise of their rights guaranteed under the EERA and therefore constitutes a violation of section 3543.5(a). The teachers' response when ordered to return to class was therefore reasonable given the conduct of the District on this day. The collective decision not to return to class was made not only because the teachers had been told they would receive released time for the full day, but also to protest the District's negotiating techniques and to exert pressure on the District to negotiate more earnestly with the Federation. See Shelly and Anderson Furniture Co. v. NLRB (9th Cir. 1974) 497 F.2d 1200, 86 LRRM 2619.

The inquiry with respect to a section 3543.5(a) violation does not end here, however, since the District's ultimate action in initiating dismissal proceedings against the teachers was based not only on the events which occurred on January 4, 1978, but also the events on January 11, 1978.[23]

On January 9, 1978 the Superintendent met with Ms. Skorepa to clarify the District's released time policy and to indicate to the Federation that the District was hopeful that the dispute concerning ground rules could be resolved so that the parties could start negotiating compensation. To facilitate this, the Superintendent expressly authorized a full day of released time for January 10, 1978 even though negotiations were scheduled only from 12:30 P.M. to 4:00 P.M. This action was taken, as the Superintendent testified, "to show good faith." The clarification vis a vis the District's released time policy was that unless

---

[23] This is, of course, not true with respect to Melanie Miller. See infra.

otherwise expressly authorized, teacher-negotiators were to report to their schools if negotiations lasted a half day.

The negotiating sessions of January 10-11, 1978 presented a marked contrast to the session of January 4, 1978. The Federation commenced the January 10, 1978 negotiating session by proposing a set of ground rules which were essentially the same as its first proposal on January 4, 1978. The parties negotiated throughout the day with each side submitting three different proposals. Although the January 10, 1978 session did not produce an agreement on ground rules, it was not because of any violation of the EERA. There is no violation of the EERA simply because an agreement is not reached. The EERA requires only that the parties engage in meeting and negotiating "in a good faith effort to reach agreement." Section 3540.1(h). During the negotiating session on January 10, 1978 the position of the Federation on the subject of ground rules was just as rigid as the District's. Under the NLRA, it has been held that the failure of the employer to retreat from a rigid position is justified if the union does not recede from its position. NLRB v. Stevenson Brick and Block Co. (4th Cir. 1968) 393 F.2d 234, 68 LRRM 2086.

At the end of the day, on January 10, 1978, the District suggested that the parties start negotiating compensation without ground rules. The Federation maintained its steadfast refusal. This request by the District was entirely reasonable; with essentially only *two* sub-issues placed on the table at that time (number of teachers on released time and a confidentiality ground rule), there were very few different counterproposals each side could have tendered. When a particular subject has been negotiated so extensively by the parties and agreement appears unlikely, it is arguably an unfair practice to refuse to negotiate another subject. While this was not the situation on January 4, 1978, clearly by 4:00 P.M. on January 10, 1978 the Federation's obstinate behavior was quite evident when it continued to refuse to negotiate salaries and fringe benefits.

On January 11, 1978 the parties commenced negotiations at 8:00 A.M. Although the last counterproposal tendered on January 10, 1978 was that of the District, Ms. Robinson had promised the Federation that the District would have a new proposal on January 11, 1978. The District did in fact present a proposal to the Federation on January 11, 1978; however, the Federation complained that the proposal "was nothing new." Part of the proposal by the District was to negotiate compensation without ground rules. The Federation refused to negotiate compensation. Ms. Robinson and Ms. Skorepa both became acrimonious at this point and after a few bitter exchanges both parties took a caucus.

After returning to the negotiating table the District thereupon declared an impasse. What followed is significant: The Federation did not object to the declaration of impasse; did not protest the cessation of negotiations on ground rules; and did not request negotiations on compensation. Ms. Robinson then read and hand-delivered to each Federation negotiator a memorandum from the Superintendent which in no uncertain language admonished the teachers to return to their respective schools. Immediately thereafter, a California Federation of Teachers staff employee, who was assisting the Federation in negotiations, approached Ms. Robinson and the Superintendent alone and informed them that the Federation's position on ground rules was not going to change. It was more than reasonable for the District to rely on this statement of the Federation's position. The teachers defied the Superintendent's directive and did not return to their schools.

Ms. Skorepa testified that the reason the teachers did not return to their schools was because "what had happened on the 11th was not significantly different than what happened on the 4th." Quite to the contrary, the events on January 11, 1978 were significantly different than the events on January 4, 1978 in at least two critical areas. First, the District had clarified its

policy on released time at the January 9, 1978 meeting between the Superintendent and Ms. Skorepa. The teachers were now on notice that unless otherwise expressly authorized they were to receive released time only for the time spent in actual negotiations and, if a session lasted only a half day, they were to report to their principals for possible assignment. Second, and more importantly, there was no protestation by the Federation when the District declared an impasse and there was no request to negotiate further on any subject.[24]

The existence of an impasse is the most notable distinction. Under any definition the parties were at impasse over the subject of ground rules on January 11, 1978. At that time, since there was not a request by the Federation to negotiate further on a different subject, there was no longer a legal obligation to meet and negotiate. Because no obligation to negotiate existed, the directive to return to class cannot be considered to have tainted negotiations. While meeting and negotiating again resumed under the auspices of a mediator (see section 3548), this procedure did not commence until several days later.

Thus, under the facts in this case, the District did not commit an unfair practice under section 3543.5(a) on January 11, 1978 when it (1) terminated negotiations and (2) ordered the teachers to return to their schools.

This conclusion gives rise to a rather unique situation where the District is found to have committed an unfair practice early in the negotiations and then is found to have purged its unlawful behavior by negotiating in good faith during later meeting and negotiating sessions. This issue will be addressed in more detail in the remedy section of this decision. What is clear here is that any disciplinary action taken against the teachers on January 11, 1978 was because of their refusal to obey an order by their employer and not because of their exercise of rights guaranteed by the EERA. As the District notes in its brief:

---

[24]The PERB representation file contains no formal objection by the Federation either to the declaration of impasse by the District or the official determination that an impasse exists by the Regional Director.

> [E]ven after Charging Party's representatives refused to return to school on January 4, 1978, the Superintendent during the meeting with Ms. Skorepa on January 9, 1978, in a good faith gesture in order to attempt to speed up the negotiating process, granted release time for the full morning of January 11 even though the negotiating session was not scheduled to commence until 12:30 P.M. This clearly does not show anti-union animus, but in fact shows just the opposite. Even when Charging Party's representatives refused to return to duty on January 4, 1978, the District only docked them one-half day's pay, even though the District could have docked them more pay. By sending to the individual employees [letters of warning], the District was simply notifying these individuals that they were in violation of the contract and they could be subject to serious disciplinary consequences. On January 11, 1978 when they again refused, the response by the District was much more stern due to the open defiance and insubordinate conduct of Charging Party's representatives. This was the only reason that the disciplinary action took place. (Emphasis added.)

The District's analysis is not correct, of course, with respect to Melanie Miller. Ms. Miller only attended the January 4, 1978 negotiating session and therefore she was disciplined not for her conduct on January 11, 1978 (as the District implies in its brief), but solely for her conduct on January 4, 1978. Inasmuch as the Federation's conduct on January 4, 1978 has been found to be entirely reasonable and proper under the circumstances, and moreover, since the District's conduct on that day constituted an unfair practice, it follows that Ms. Miller was disciplined solely because of the exercise of rights protected by the EERA. Therefore, any disciplinary action imposed against Ms. Miller cannot stand. Insofar as Ms. Miller is concerned, the events on January 4, 1978 were the only events in which she was a participant. It matters not what her reasons were for not attending the January 10, 1978 and January 11, 1978 negotiating sessions, she cannot be disciplined for conduct in which she did not partake.

Alleged Violation of Section 3543.5(b) and (c)

Section 3543.5(b) and (c) provides that:

> It shall be unlawful for a public school employer to:
>
> (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.

It is well established that the question of whether an employer is acting in good faith during meeting and negotiating must be determined in the "light of all relevant facts in the case." Joy Silk Mills v. NLRB (D.C. Cir. 1950) 185 F.2d 732, 27 LRRM 2012. It is clear from the evidence considered as a whole that the District made numerous proposals and counterproposals relating to the issue of ground rules. Given this fact and also that it was the Federation which refused to meet and negotiate on the issue of compensation, it is found that the District did not fail or refuse to meet and negotiate in good faith pursuant to section 3543.5(c).

With respect to section 3543.5(b), the District did not deny to the Federation any rights guaranteed by the EERA. The Federation was provided with released time for its teacher-negotiators pursuant to section 3543.1(c). Also, the Federation's right to meet and negotiate with the District pursuant to section 3543.3, when the evidence is examined in its totality, was not abridged. Therefore, it is found that the District did not violate section 3543.5(b).

The District's Defense of "Obey Now, Grieve Later."

The Respondent argues in its post-hearing brief that the teachers should have followed the "well established principle of 'obey now, grieve later.'"[25] Since it has been found that the District violated the EERA only with respect to its conduct on January 4, 1978, this defense is applicable, if at all, on this day only.

Actually, the Respondent does not argue that the teachers should have filed a grievance.[26] Rather, the Respondent contends that the teachers should

[25] This well-established principle, also stated as "work now, grieve later," was developed by the late Dean of Yale Law School, Harry Schulman, in an arbitration between Ford Motor Company and the United Auto Workers. Ford Motor Company (1944) 3 LA 779, 780-781.

[26] Indeed, the teachers could not file a grievance. Article V, section R of the parties' agreement states that, "Nothing contained herein shall deny to any employer his/her rights under state or federal constitutions and laws. No probationary teacher may use the grievance procedure in any way to appeal discharge or a decision by the public school employer not *to* renew his/her contract. No tenure teacher shall use the grievance procedure to dispute any action by the public

have obeyed the order to return to class and then filed an unfair practice charge.

An "obey now, file unfair practice charge later" doctrine would place upon the Federation an almost unbearable burden. In the instant case, the Federation had more than a reasonable basis to believe that the order "to return to class" on January 4, 1978 was unlawful in that it was issued solely to intimidate the negotiators and to impede the negotiating process. Under the circumstances, the Federation could not have been expected to obey what it reasonably perceived to be an unlawful order.

Although disobeying an unlawful order before it has been legally determined to be unlawful is risky, under the facts of this case the Federation did not have any other option available to it on January 4, 1978 which would not have rendered the union totally ineffective at the negotiating table.

Accordingly, the District's "obey now, file an unfair practice charge later" defense is rejected.

REMEDY

Section 3541.5(c) provides that:

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

In the instant case it has been found that the District committed an unfair practice in violation of section 3543.5(a) on January 4, 1978, but that its conduct on January 10-11, 1978 did not violate the EERA. The NLRB and the federal

---

Footnote 26 (cont'd.)

school employer which is applicable to the state tenure laws. No teacher shall use the grievance procedure to appeal any decision of the public school employer or administration if such decision is applicable to a state or federal regulatory commission or agency."

In Globe-Union, Inc. (1973) 42 LA. 713 (Paul Prascow, Arbitrator), the arbitrator held that the "work now, grieve later" principle is not applicable if there is no remedy available under the contract.

courts generally have refused to accept the notion that the discontinuance of an unfair labor practice is an absolute defense to ordering remedial action against the employer. Consolidated Edison Co. of New York v. NLRB (1938) 305 US 197, 3 LRRM 645. See also Clark Printing Co. (1964) 146 NLRB 121, 55 LRRM 1269; NLRB v. *V.* H. McGraw & *Co.* (6th Cir. 1953) 206 F.2d 635, 32 LRRM 2220; NLRB v. Oertel Brewing Co. (6th Cir. 1952) 197 F.2d 59; 30 LRRM 2236. Instead, the NLRB and the federal courts have viewed the conduct of the employer in its total context, and if the violation either is de minimus or of an isolated nature, then often times no remedial action is ordered at all.[27] See American Federation of Musicians, Local 76 (1973) 202 NLRB 620, 83 LRRM 1059 and International Paper Co. (1970) 184 NLRB 351, 74 LRRM 1438.

It seems clear that under the facts of the instant case the unfair practice committed by the District on January 4, 1978 was partially overshadowed by the actions of the Federation on January 10, 1978 and January 11, 1978. The hearing officer is mindful of the Massachusetts Supreme Court's comment that, "an employer's commission of a prohibited practice usually, if not always, so far pervades and dominates a case as to call for revoking the discipline ordered by the employer even if the employee could otherwise be properly called insubordinate." Town of Dedham v. Labor Relations Commission (1974) 312 N.E.2d 548, 86 LRRM 2918, 2924. In the instant matter, however, the District's conduct on January 4, 1978 does not "dominate and pervade [this] case." This is particularly so inasmuch as no unfair practice has been found to have been committed by the District on January 11, 1978.

---

27 Under the NLRA, the state of the law in this area is unclear. Some courts have held that the NLRA commands the NLRB to issue a remedy. Section 10(c) of the NLRA provides in pertinent part that, "...the [NLRB] shall state its findings of fact and ~~shall~~ issue [a cease and desist order], and to take such affirmative action...as will effectuate the policies of the [NLRA]." (Emphasis added) See Eichleay Corp. v. NLRB (3rd Cir. 1953) 206 F.2d 799, 32 LRRM 2628. The EERA, in section 3541.5(c), contains no such mandatory language. The EERA provides that the PERB shall have the power to issue a cease and desist order; it does not require that it do so in every case where a violation is found.

Under the facts presented herein, the proper remedy which will effectuate the purposes of the EERA, is to order the District to cease and desist from imposing any disciplinary action against the teachers based on the events of January 4, 1978 and to rescind the actions it has taken to dismiss the teachers insofar as they are based upon conduct of the Federation on January 4, 1978. Additionally, back pay for the teachers will be ordered for any loss in salary incurred on January 4, 1978. In view of the fact that the disciplinary action against Melanie Miller has been based solely on the events of January 4, 1978, and on this date the Federation's conduct has been found to be protected activity, it follows that the discipline imposed against her cannot stand. Thus, with respect to Ms. Miller, the District will be ordered to cease and desist from imposing any disciplinary action against her and to rescind the actions it has taken to dismiss her.

Also, the District will be required to post copies of the order. Posting copies of the order is appropriate in that it will provide employees with notice that the District is being required to cease and desist from the activity found to be unlawful. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy. A posting requirement has been upheld by the U. S. Supreme Court interpreting section 10(c) of the NLRA, which is nearly identical to section 3541.5(c), in NLRB v. Empress Publishing Co. (1941) 312 U.S. 426, 8 LRRM 415. A posting requirement has also been sanctioned in California in interpreting the Agricultural Labor Relations Act. See Pandol and Sons v. ALRB (1978) 77 Cal. App. 3d 822. Also in New York, that state's highest court upheld a posting requirement ordered by the New York PERB against a public agency. City of Albany v. Helsby (1972) 327 NYS 2d 658, 79 LRRM 2457.

The Federation argues in its brief that initiating dismissal proceedings against the teachers is a harsh penalty. The hearing officer agrees; however, under the EERA the issue is not the severity of the discipline imposed. If the

employer is found to have violated the EERA then the discipline imposed, no matter what the degree, cannot be allowed to stand. Inasmuch as the District did not commit an unfair practice on January 11, 1978, and further, that the actions of the Federation on this date did not constitute protected activity under the EERA, then the EERB does not have the authority to modify the penalty imposed or to recommend to the District that it modify the penalty.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that by its actions on January 4, 1978, the San Ysidro School District violated Government Code section 3543.5(a). Pursuant to Government Code section 3541.5(c), it is hereby ordered that the San Ysidro School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Imposing or threatening to impose reprisals on district employees Andrea Skorepa, Patricia Darnell, Tommy Hayden and Melanie Miller, or in any manner interfering with, restraining, or coercing them because of their exercise of rights guaranteed by the Educational Employment Relations Act on January 4, 1978;

(b) Proceeding in any manner to dismiss or to impose any disciplinary action against Melanie Miller because of her exercise of rights guaranteed by the Educational Employment Relations Act on January 4, 1978;

(c) Proceeding in any manner to dismiss or to impose any disciplinary action against Andrea Skorepa, Patricia Darnell and Tommy Hayden because of their exercise of rights guaranteed by the Educational Employment Relations Act on January 4, 1978.

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

(a) Rescind, nullify and cancel all actions it has taken to dismiss or impose any disciplinary action against Melanie Miller;

(b) Rescind, nullify and cancel all actions it has taken to dismiss or impose any disciplinary action against Andrea Skorepa, Patricia Darnell and Tommy Hayden to the extent such actions are based upon the conduct of these employees on January 4, 1978;

(c) Pay to Andrea Skorepa, Patricia Darnell, Tommy Hayden and Melanie Miller an amount equal to the salary deducted from their pay warrants for January 4, 1978;

(d) Prepare and post copies of this Order at each of its school sites for twenty (20) workdays in conspicuous places, including all locations where notices to employees are customarily-placed;

(e) Notify the Los Angeles Regional Director of the Public Employment Relations Board of the actions it has taken to comply with this Order.

3. IT IS FURTHER ORDERED that the charge is DISMISSED with respect to any allegations of unfair conduct by the District on dates other than January 4, 1978, pursuant to Government Code section 3543.5(a).

4. IT IS FURTHER ORDERED that the charge is DISMISSED with respect to any allegations under Government Code section 3543.5(b), (c) and (e).

5. IT IS FURTHER ORDERED that nothing contained herein shall be deemed to supersede any rights the Respondent may have under the Education Code (section 3540).

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final on June 19, 1978, unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this decision. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, sections 32300 and 32305, as amended.

Dated: May 25, 1978

Jeff Paule
Hearing Officer

PUBLIC EMPLOYMENT RELATIONS BOARD
Headquarters Office
923 12th Street, Suite 201
Sacramento, California 95814
(916) 322-3088

May 25, 1978

Lawrence Rosenzweig, Esq.
Levy, Kbszdin, Goldschmid & Sroloff
A Professional Corporation
3550 Wilshire Boulevard, Suite 1020
Los Angeles, Ca. 90010

Michael Taggart, Esq.
Paterson & Taggart
2550 Via Tejon, Suite 3N
Malaga Cove Box 1088
Palos Verdes Estates, Calif. 90274

In re: San Ysidro Federation of Teachers, CFT/AFT, Local 3211 v.
San Ysidro School District, Case No. LA-CE-212
Proposed Decision - Unfair Practice Charge

Dear Sirs:

Enclosed is the hearing officer's Proposed Decision in the above-entitled matter. Any party to the proceeding may file with the Board a statement of exceptions to the Proposed Decision. The statement of exceptions shall be filed with the Executive Assistant to the Board at the following address:

Public Employment Relations Board
923 12th Street, Suite 201
Sacramento, CA 95814

An original and four copies of the statement of exceptions must be filed with the Board no later than Wednesday, June 14, 1978 • (See Cal. Admin. Code, Title 8, Part III, Section 32300).

A document is considered "filed" when actually received before the close of business (5:00 pm) on the last date set for filing. (Cal. Admin. Code, Title 8, Part III, Section 32135).

The statement of exceptions shall be in writing, signed by the party or its agent and shall: (1) state the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identify the part of the Proposed Decision to which each exception is taken; (3) where possible, designate by page citation the portions of the record relied upon for each exception; (4) state the grounds for each exception. No reference shall be

made in the statement of exceptions to any matter not contained in the record of the case. An exception not specifically urged shall be waived. A supporting brief may be filed with the statement of exceptions.

Within twenty (20) calendar days after service of the statement of exceptions any party may file with the Executive Assistant to the Board a response thereto, (Cal. Admin. Code, Title 8, Section 32310). Service is defined in Section 32140 as follows:

> All documents referred to in these rules and regulations requiring "service" or required to be accompanied by "proof of service", except subpoenas, shall be considered "served" by the Board or a party when personally delivered or deposited in the first-class mail properly addressed. That portion of Section 1013 of the Code of Civil Procedure relating to extending time after mailing shall not apply.

All documents shall be accompanied by a proof of service on the other party(s). Proof of service in writing shall be filed with the Board itself.

Any party desiring to argue orally before the Board itself regarding the exceptions shall file with the statement of exceptions or the response thereto a written request setting forth the reasons therefor, (Cal. Admin. Code, Title 8, Section 32315).

Upon timely application and a showing of good cause, the Board may extend the filing dates required herein, (Cal. Admin. Code, Title 8, Section 32132).

The Proposed Decision shall become the final decision of the Board itself on the date specified in the Proposed Decision provided that no party files ly statement of exceptions. (Cal. Admin. Code, Title 8, Section 32305)

~~Very truly yours~~

William P. Smith
General Counsel

WPS:mm

cc: San Ysidro Federation of Teachers,
CFT/AFT, Local 3211
Attn: Andrea Skorepa, SYFT President
1390 Piedra St.
San Diego, Ca. 92154

San Ysidro School District
Attn: Robert Colegrove, Supt.
4350 Otay Mesa Road
San Ysidro, Ca. 92073

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final on June 19, 1978, unless a party files a timely statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this decision. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, sections 32300 and 32305, as amended.

Dated: May 25, 1978

Jeff Paule
Hearing Officer