STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,	)	
Charging Party,	)	Case No. LA-CE-474
v.	)	PERB Decision No. 215
BARSTOW UNIFIED SCHOOL DISTRICT,	)	June 11, 1982
Respondent.	)	

Appearances: Ronald C. Ruud, Attorney (Atkinson, Andelson, Ruud & Romo) for Barstow Unified School District; M. Susan Carter, Attorney for California School Employees Association.

Before Gluck, Chairperson; Jaeger and Tovar, Members.

DECISION

The Barstow Unified School District (District) excepts to those portions of the attached hearing officer's proposed decision finding that: (1) the District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA) by taking unilateral action with respect to leave policy; and (2) that it violated subsection 3543.5(a) of the Act by threatening to suspend the exclusive representative's organizational privileges.[1]

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[1]The EERA is codified at Government Code sections 3540 et seq. All statutory references are to the Government Code unless otherwise noted.

Subsections 3543.5(a), (b) and (c) state:

The Board has considered the entire record in this case, including the proposed decision and the District's exceptions. We hereby summarily affirm those portions of the hearing officer's decision excepted to by the District consistent with the discussion below.

In affirming the hearing officer's conclusion that Resolution No. 17 constituted an unlawful unilateral change of leave policy, we do not, and need not, pass on the question of whether the alleged sickout of April 2, 1979 was unprotected activity. Regardless of the unprotected character of employee conduct, an employer may not unilaterally change matters within the scope of representation in violation of the duty to negotiate in good faith.[2] Fresno Unified School District

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> 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.

[2]The scope of representation is set forth in subsection 3543.2(a).

(4/30/82) PERB Decision No. 208; see Chula Vista Police Officers' Association v. Cole (1980) 107 Cal.App.3d 242 [165 Cal.Rptr. 598].

REMEDY

The hearing officer found that there was an established practice in the District permitting it to require verification of illness from those employees "reasonably suspected of abusing their sick leave benefits." Pursuant to that finding, he ordered the District to reimburse those employees denied paid sick leave for April 2, 1979 one day's back wages, subject to a right to require verification of illness. While we agree with the hearing officer that the District, consistent with its past practice, may require verification of illness from employees reasonably suspected of abusing their sick leave, we feel that he has not adequately clarified those conditions in which verification may be required.

The uncontroverted testimony of District Superintendent Raymond Smith indicated that, in past instances in which employees had been reasonably suspected of abusing their sick leave, the District had required them to turn in a verification of illness. However, his testimony also clearly establishes that the verification requirements contained in Resolution No. 17 exceeded those required by the District as a matter of past practice. Therefore, although we find that the District may require verification of illness from those employees it

reasonably suspected of abusing their sick leave on April 2, 1979, it may not exceed the type of verification required of employees in past circumstances where suspected abuse of sick leave occurred. Consistent with that past practice, employees reasonably suspected of abusing their sick leave who cannot produce the required verification may be denied paid sick leave for April 2, 1979.

ORDER

Based upon the foregoing facts, conclusions of law and the entire record in this case, it is found that the Barstow Unified School District has violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act. It is hereby ORDERED that the District, its governing board and representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation, as defined by section 3543.2, and specifically with respect to the alteration of leave policies.

2. Denying CSEA the right to represent unit members by unilaterally altering leave policies without meeting and negotiating with the Association.

3. Interfering with employees because of their exercise of the right to select an exclusive representative to meet and

negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

4. Interfering with employees because of the exercise of their right to participate in the activities of an employee organization by threatening to suspend the employee organization's rights guaranteed to them by the EERA.

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

1. Rescind Resolution No. 17, adopted April 1, 1979, and reinstate the leave policy in effect prior to that date unless a new policy has been lawfully adopted through negotiations.

2. Make the affected employees whole by paying them the sick leave they would have received, plus interest at the rate of seven (7) percent per annum, had the unilateral changes not been made. Payment need not be made to those employees who fail to provide verification requested pursuant to the District's reasonable belief that such employees had abused their sick leave benefits. The verification required may not exceed the type requested of employees in past circumstances whose abuse of sick leave was suspected.

3. Within seven (7) workdays of this decision, post at all school sites and all other work locations where notices to employees customarily are placed, copies of the notice attached as Appendix 1. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall

be taken to ensure that said notices are not reduced in size, altered, defaced or covered by any other material.

4. At the end of the posting period, notify the Los Angeles regional director of the Public Employment Relations Board, in writing, of the action taken to comply with this order.

It is further ORDERED that the alleged violations of subsection 3543.5(a) and (b), which refer to the payment of increased wages to substitutes and substitute bus drivers, are hereby DISMISSED.

By: John W. Jaeger, Member

Harry Glick, Chairperson

Irene Tovar, Member

Appendix 1

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

After a hearing in Unfair Practice Case No. LA-CE-474 in which all parties had the right to participate, it has been found that the Barstow Unified School District has violated subsection 3543.5(c) of the Educational Employment Relations Act (EERA) by refusing or failing to meet and negotiate with the California School Employees Association by taking unilateral action in April 1979 with respect to the alteration of leave policies.

It has also been found that this same conduct violated subsection 3543.5(b) of the EERA since it interfered with the right of CSEA to represent its members.

It has also been found that this same conduct interfered with negotiating unit members' right to be represented by their exclusive representative, thus constituting a violation of subsection 3543.5(a) of the EERA.

It has also been found that the District, by threatening to suspend an employee organization's rights guaranteed to them by the EERA if the organization advocated that its members participate in a sickout, or other form or work stoppage, interfered with employees because of their exercise of their right to participate in the activities of an employee organization, thus constituting a violation of subsection 3543.5(a) of the EERA.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation, as defined by section 3543.2, and specifically with respect to the alteration of leave policies.

2. Denying CSEA the right to represent unit members by unilaterally altering leave policies without meeting and negotiating with it.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

4. Interfering with employees because of their exercise of their right to participate in the activities of an employee organization by threatening to suspend an employee organization's rights, guaranteed to them by the EERA, if the organization advocated that its members participate in a sickout or other form of work stoppage.

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

1. Rescind Resolution No. 17, adopted April 1, 1979, and reinstate the leave policy in effect prior to that date unless and until the parties adopt a new policy, either by reaching a negotiated agreement or exhausting the statutory impasse procedure.

2. Make the affected employees whole by paying them the sick leave they would have recieved, plus interest at the rate of seven (7) percent per annum, had the unilateral changes not been made, except that payment need not be made to those employees who fail to provide verification requested by the District pursuant to its reasonable belief that such employees had abused their sick leave benefits.

DATE:

BARSTOW UNIFIED SCHOOL DISTRICT

By _____
Authorized Representative

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

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. BARSTOW UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-474-78/79 PROPOSED DECISION (3/18/80)

Appearances: Ronald C. Ruud (Paterson & Taggart), Attorney for Barstow Unified School District; Ruth Rokeach and Michael Heumann, Attorneys for California School Employees Association.

Before Bruce Barsook, Hearing Officer.

PROCEDURAL HISTORY

This case presents the issue of what actions, if any, a school district may take to prepare itself for the consequences of an imminent sickout by district employees.

On May 16, 1979, the California School Employees Association (hereafter CSEA) filed an unfair practice charge against the Barstow Unified School District (hereafter District) alleging a violation of section 3543.5(c) of the Educational Employment Relations Act (hereafter EERA)[1].

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[1]The EERA is codified at section 3540 et seq. of the Government Code. All statutory references are to the Government Code unless otherwise indicated.

CSEA amended its charge to include allegations of violations of section 3543.5(a) and (b) on July 9 and July 18, 1979.

After an informal conference failed to resolve the matter, a formal hearing was held on July 26, 1979. Post-hearing briefs were filed and the case was submitted on November 5, 1979.

FINDINGS OF FACT

The California School Employees Association is the exclusive representative of the classified employees of the Barstow Unified School District. In October 1978, the parties entered into a collective bargaining agreement for the term of July 1978 to June 30, 1979.

Negotiations for a successor agreement began in March 1979. During the week of March 26, 1979, the District's classified employees engaged in various concerted activities, such as picketing, in an effort to put negotiating pressure on the District. Rumors of a possible sickout or other job action by classified employees were circulated.

Although impasse had not yet been declared, the District, on Saturday, March 31 received word that a sickout was to occur on the following Monday, April 2, 1979.[2] In an effort to

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[2]Whether or not CSEA organized, assisted or condoned the planned sickout is not important to the determination in this case. However, it should be noted that the denial by CSEA's business agent, David Dawson, that any sickout occurred lacks credibility in light of the attendance figures for that day and

prepare for the expected disruption of services,[3] the District's governing board, without notifying CSEA, met on Sunday, April 1, 1979 and passed an emergency resolution. The resolution, entitled Resolution 17 (hereafter Resolution) adopted various provisions relating to (among others) leave policy, substitute pay, and employee organization rights.[4] With respect to leaves, the Resolution indicated that: (1) classified employees will not be paid for leaves of absence unless the employee worked or was validly excused from work, both the workday before and the workday after the absence; (2) classified employees requesting sick leave must sign an affidavit of illness and submit a doctor's certificate of illness, both on a District-approved form, before being paid; and (3) personal necessity leaves will be restricted during the time of the sickout to emergencies as defined by the Education Code. With respect to substitute pay, the Resolution gave the

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indicates to the hearing officer that CSEA very well may have played a part in assisting the planning of the sickout. Mr. Dawson's evasive manner in answering questions further leads me to believe in CSEA's connection to the sickout of April 2, 1979.

[3]Classified employees are responsible for providing transportation services (40 percent of the students are transported by bus), student meals (delivery and preparation), supervision of students prior to their first class and at recess, clerical staffing to keep track of attendance, maintenance and custodial services and instructional support services.

[4]For a complete copy of the Resolution, see Appendix 1.

superintendent authority to hire substitutes and substitute bus drivers at a rate of pay higher than that paid prior to the adoption of the Resolution. Finally, with respect to termination of employee organization rights and privileges, the Resolution stated that any employee organization which urged its members to engage in a sickout or other illegal work stoppage would have its "privileges" as a "verified employee organization withdrawn" including but not limited to: use of District mail service, bulletin boards, telephones, meeting rooms, access to school sites, fringe benefit payments, and dues deduction.

In his testimony, Superintendent Raymond Smith admitted that prior to passage of Resolution No. 17, it was not the District's policy to deny pay for leaves of absence if an employee had not worked or was not validly excused on the workday before and after the absence; nor was it the District's policy to require either a doctor's excuse or an affidavit of illness on a District form.[5] However, he also indicated that it had been the District's practice to require verification whenever there was reason to question the legitimacy of a leave application. Mr. Smith further testified that the Resolution changed the payment schedule for substitute employees.

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[5]The collective bargaining agreement then in effect was silent on leave verification requirements.

On April 2, 1979, 182 out of 211 unit members were absent from work (over 10 times the normal number of absences). As a result, the District implemented Resolution provisions relating to leave verification procedures and the hire and payment of substitutes and substitute bus drivers.

Thereafter, CSEA and the District met on several occasions to discuss the District's action. CSEA made several attempts to negotiate the District's change in leave policies but no agreement was reached (on leave policies or any other aspect of the Resolution).

Forty-five unit members (out of 182 absences) were granted paid leave for their absence on April 2, 1979. The District took no disciplinary action against CSEA or any individual unit member as a result of the sickout of April 2, 1979.

Although the District superintendent testified that he thought that the Resolution expired by operation of law at the end of the school year, the Resolution has never been rescinded by the District Board of Trustees.

ISSUES

1. Whether the District's implementation of leave verification requirements and other leave policies violates section 3543.5(a), (b) or (c) of the EERA.

2. Whether the District's payment of increased wages to substitutes and substitute bus drivers violates section 3543.5(a) or (b).

3. Whether the District's threat to suspend an employee organization's rights and privileges for its advocacy of participation in a sickout or other form of work stoppage violates section 3543.5(a) or (b).

DISCUSSION

1. Change in Leave Policies

CSEA alleges that the District's promulgation and implementation of emergency regulations changing leave policies (i.e., introduction of verification requirements for sick leave and restrictions on use of personal necessity leave) constitute unilateral changes in terms and conditions of employment, as defined by section 3543.2, and as such, constitute violations of section 3543.5(a), (b) and (c)[6].

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[6]Sec. 3543.5(a), (b) and (c) provide as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to disciminate or threaten to disciminate 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.

Leave policies are specifically included in section 3543.2 as a term and condition of employment.[7] The evidence discloses that the District promulgated these changes without notifying CSEA or giving it the opportunity to meet and negotiate on them before they were passed.

Unilateral changes by an employer concerning matters which are proper subjects of negotiating are generally regarded as per se refusals to negotiate. San Mateo County Community College District (6/8/79) PERB Decision No. 94 at p. 12; Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51[8]. Thus, in the absence of a valid defense, the District's action violates section 3543.5(c).

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[7]Sec. 3543.2 provides:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959 of the Education Code. . . .

Cf. Sacramento City Unified School District (8/14/79) PERB Decision No. 100 (emergency regulations unilaterally promulgated affecting business and necessity leave).

[8]See also Murphy Diesel Company (1970) 184 NLRB 757 [76 LRRM 1469], enfd. (7th Cir. 1971) 454 F.2d 303 [78 LRRM 2993]

A. The Contract Defense

The District's first argument is that the terms of the agreement between the District and CSEA gave the District the authority to take the action it did. Specifically, the District points to two clauses in the article on "District Rights": One empowers the District to "take action on any matter in the event of an emergency;" the other permits the District to adopt policies in furtherance of its management prerogatives, limited "only by the specific and express terms" of the agreement. However, for the following reasons, neither clause constitutes a valid defense.[9]

The District's contention that a sickout (or other work stoppage) by school employees constitutes an emergency within the meaning of the District Rights clause and thereby authorizes the District to take unilateral action ignores the critical question of whether in fact an emergency existed at the time the emergency resolution was adopted on

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(unilateral promulgation of additional rules regarding employee absences held to constitute violation of NLRA; 29 U.S.C. sec. 158(a)(5)).

[9]Although sec. 3541.5(b) prohibits the Public Employment Relations Board (hereafter PERB or Board) from enforcing agreements between the parties, by analogy to National Labor Relations Act (hereafter NLRA) precedent, this Board may analyze a collective negotiations agreement where necessary to the determination of an unfair practice charge. See NLRB v. C & C Plywood Corp. (1967) 385 U.S. 421 [64 LRRM 2065]. In addition, it should be noted that the agreement between the parties does not provide for binding arbitration.

April 1, 1979. In examining this issue, the PERB has indicated that unilateral action by an employer will only be permitted if an emergency actually exists. San Francisco Community College District (10/12/79) PERB Decision No. 105. A perceived emergency is insufficient. Furthermore, the California Supreme Court in Sonoma Co. Organization of Public Employees v. County of Sonoma,[10] cited with approval by PERB in its San Francisco decision, states that not only must an emergency actually exist, it must also be shown that the means used are "reasonable and necessary."

In this case, the District has not shown that a state of emergency was in existence at the time the emergency resolution was passed. What the District has shown is a perceived emergency. At the time the Resolution was passed, there was no way a determination could reasonably be made as to how effective the sickout would be and thus whether an emergency would result. For example, there was no reliable way of determining whether transportation or food service would be affected in a substantial way or in an insignificant way. Yet, the language of the Resolution provided that the changes would take place regardless of the impact of the sickout.[11]

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[10](1979) 23 Cal.3d 296 [152 Cal.Rptr. 903; 591 P.2d 1].

[11]In fact, regardless of whether a sickout actually occurred.

Nor were the means used both reasonable and necessary. The District had other less drastic and less onerous alternatives available to it. For instance, a narrowly drawn resolution granting the superintendent the authority to take unilateral action if an emergency actually developed would greatly alleviate the improprieties of the resolution in issue. Furthermore, the District (after April 2) could have, pursuant to its past practice, requested verifications of illness for those individuals it reasonably suspected of abusing their sick leave benefit. The present Resolution placed all classified employees, the innocent as well as the guilty under suspicion. Finally, and as the District noted in its written brief in this matter, the District could have pursued its legal claims against CSEA for CSEA's involvement in the work stoppage in another forum.[12]

The District's contention that it had specific contract authority to adopt policies in furtherance of its management prerogatives, limited "only by the specific and express terms" of the contract, thereby justifying its adoption and implementation of the Resolution is equally without merit.

Without articulating it, the District appears to be arguing that CSEA has contractually waived its right to negotiate about

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[12]The District's brief cites Pasadena Unified School District v. Pasadena Federation of Teachers (1977) 72 Cal.App.3d 100, 111 [140 Cal.Rptr. 41].

changes in leave policy via its agreement to the District's Rights clause in the 1978-79 agreement. While it has been recognized that employee organizations may relinquish the statutory right to negotiate if, as part of the negotiating process, it elects to do so, only "clear and unmistakable language" or "demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer" will warrant a conclusion that waiver was intended. San Mateo County Community College District, supra; Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74 at p. 8 (citing NLRA precedent). There is no evidence that the parties, when negotiating the 1978-79 agreement, discussed or contemplated District authority to take unilateral action with respect to leave policies. In addition, it has been repeatedly found that the existence of a broad, non-specific management rights or zipper clause does not give an employer the right to act unilaterally on negotiable subjects during the term of a contract. See NLRB v. Auto Crane Co. (10th Cir. 1976) 536 F.2d 310 [92 LRRM 2363, 2364]; see generally, Morris, ed. The Developing Labor Law (1971) pp. 333-335 (and annual supplements). For these reasons, the District's argument is rejected.

B. The Statutory Right Defense

The District's second argument is that it had statutory authority to unilaterally adopt the leave verification

requirements. The District argues that Education Code section 45191 simultaneously supersedes conflicting provisions in the EERA and requires school districts to adopt sick leave verification rules and procedures. Section 45191 of the Education Code provides in pertinent part that:

> [t]he governing board of each school district shall adopt rules and regulations requiring and prescribing the manner of proof of illness or injury for the purpose of this section.

While it is true that section 3540 of the EERA provides in pertinent part that: "[n]othing contained [in the EERA] shall be deemed to supersede other provisions of the Education Code. . ." there is nothing in the nature or scope of Education Code section 45191 which is inconsistent with the EERA's obligation to meet and negotiate on matters within the scope of representation. Read together, sections 3540 and 3543.2 of the EERA and section 45191 of the Education Code provide that a school district shall adopt leave verification rules and regulations subject to its duty to negotiate any change in the working conditions of its employees.

The District's ultimate authority (and legal duty) is not questioned.[13] The EERA simply requires that the District provide the exclusive representative with the opportunity to negotiate the proposed rules and regulations before their

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[13]Cf. Gov. Code sec. 3549.

adoption. Consequently, the District's argument that it had a statutory right to take unilateral action is rejected.

C. Insufficient Time to Negotiate Defense

The District's next argument is that because it only had approximately 30 hours between the time it learned of the planned sickout and the time the sickout was to begin, it was excused from any obligation it normally would have to negotiate with CSEA. The District contends that it was placed in the untenable position of either negotiating with CSEA as to how it could make CSEA's sickout less effective or being left helpless to deal with fraudulent leave applications and the problems arising from an illegal work stoppage. Under such circumstances, the District argues, it should be excused from its negotiating responsibility.

However, the circumstances under which the District found itself were not untenable as the District alleges. As discussed earlier in this decision, the District had reasonable alternatives available to it but chose not to pursue them.[14] As a consequence, the District's failure to negotiate with CSEA is not excused and the District's argument is therefore rejected.

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[14]See pages 10-11, supra.

D. Waiver Defense

The District's final argument is that CSEA waived any right to negotiate over Resolution 17 by its failure to demand to negotiate. Even assuming that CSEA did not demand to negotiate matters within the scope of representation, a contention which the evidence belies, CSEA was under no duty to demand such negotiations since it was presented with a fait accompli. CSEA had neither the knowledge nor the opportunity to demand negotiations before the Resolution was adopted and implemented. Under these circumstances, any request to negotiate would have been a futile act, an act not required by the EERA. San Mateo County Community College District, supra at p. 22; San Francisco Community College District, supra at p. 17. The District's fourth and final argument is dismissed and it is therefore found that the District committed an unfair practice.

Summary

The PERB has been careful to balance the interests of employees in maintaining their working conditions with those of the employer to make what it considers to be necessary changes to preserve the soundness of the educational program. While there is no intention to inhibit school districts from maintaining their educational programs in the face of sickouts, strikes or other forms of work stoppages, the emergency resolution, based on speculative concern for the effect a sickout may have on the school district and not on the actual

existence of an emergency impermissibly sweeps too broadly. It unnecessarily punishes the innocent along with the guilty. As a result, the District's action violates the EERA. The District has violated section 3543.5(c) because it has unilaterally altered leave policies without meeting and negotiating with CSEA. It has also violated section 3543.5(a) and (b) because they are derivative violations of a section 3543.5(c) violation. San Francisco Community College District, supra.

2. Payment of Increased Wages to Substitutes and Substitute Bus Drivers

CSEA contends that the District's promulgation and implementation of an emergency resolution providing for payment of increased wages to substitutes and substitute bus drivers constitute a violation of section 3543.5(a). CSEA argues that the authorization for higher pay amounts to a flaunting of power on the part of the District, a statement that the District, not CSEA, has unilateral say over wages. Such a display of power, CSEA contends, undermines CSEA's credibility by making it appear weak and ineffectual, and coerces employee support away from the organization. CSEA's argument is not convincing.

Substitutes and substitute bus drivers are not part of the unit which CSEA represents. Thus, CSEA has no right to meet and negotiate over the wages paid to substitutes. Furthermore,

CSEA has not presented persuasive evidence why a district, faced with an imminent work stoppage, is precluded from hiring substitutes and paying them a wage sufficient to guarantee their presence during the work stoppage. If employees are going to stay away from their jobs to press negotiating demands, a school district should be permitted to take reasonable steps to ensure that the educational program is continued. CSEA's allegation is therefore dismissed.

3. Threats to Employee Organization Rights

CSEA alleges that the Resolution's threat to suspend "employee organization privileges" constitutes a violation of section 3543.5(a) and (b). CSEA argues that such threats misrepresent the "power relationship" between a school district and an employee organization and as such, undermine the credibility of the organization in the eyes of its members.

The District denies that it violated section 3543.5(a) or (b) and argues that: it did not deny CSEA any of its rights under the EERA--the Resolution provides that such "privileges" may be terminated but no action was taken; the District has the statutory right to adopt reasonable regulations in the governance of certain employee organization "privileges"; and no evidence was introduced to show any adverse impact on CSEA or any unit members.

While the District has the discretion to adopt reasonable regulations in the governance of employee organization

privileges, many of the so-called "privileges" enumerated in the Resolution are not privileges but rather are statutory rights accorded to employee organizations by the EERA.[15] The District offers no support for an argument that a school district has a right to rescind statutory rights nor can one reasonably be made. Even though employees or their union may be engaged in unprotected activity, an employer does not correspondingly obtain a right to act in a way which infringes on protected rights. No right should arise to commit reciprocal violations of the law. Such behavior does not promote effective employer-employee relations. If the school district believes that it has been harmed by the actions of the employee organization, it has a remedy in another forum.[16]

With respect to the section 3543.5(a) allegation, the District's misrepresentation of its authority interferes with the right of employees to participate in the activities of an

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[15]Sec. 3543.1(b) provides:

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

[16]See note 12 and accompanying text, ante.

employee organization. The false implication that the District has the unilateral authority to punish CSEA for its advocacy of a sickout or other form of work stoppage by suspending statutorily guaranteed rights tends to undermine the status of CSEA as exclusive representative and creates a chilling effect on employee activity. It instills a fear that participation in employee organization activities might lead to the lost of benefits normally enjoyed (e.g., fringe benefits). In the absence of a reasonable justification for making such a threat, it is found that the District's threat to suspend employee organization rights is unlawful and a violation of section 3543.5(a).[17]

Examining the section 3543.5(b) allegation, the facts indicate the District threatened to suspend employee organization rights but did not actually do so. Section 3543.5(b) unlike section 3543.5(a), does not make it an unfair practice to threaten to deny employee organizations rights guaranteed to them by the EERA. Consequently, no violation of section 3543.5(b) is found.

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[17]Cf. Oceanside-Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

Significantly, this case is not one in which one party during the course of discussion at the negotiating table threatens the other party with a particular course of action, but rather a situation where the school district has, by passing a resolution, taken official action.

REMEDY

Under Government Code section 3541.5(c), the Public Employment Relations Board is given:

> . . .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, . . . as will effectuate the policies of this chapter.

In the present case, the District has unilaterally disrupted the status quo, causing economic losses to employees in the unit. A remedy requiring the District to return to the status quo ante is appropriate to effectuate the policies of the EERA because it restores, to the extent possible, the positions the parties occupied prior to the unilateral change in the status quo. Plycoma Veneer Co. (1972) 196 NLRB 1009 [80 LRRM 1222]. Consequently, the District shall be ordered to restore the leave policies as they existed on March 31, 1979 unless and until the parties have exhausted the statutory impasse procedures or agree otherwise by their adoption of a negotiating agreement. In furtherance of this goal, the District shall also be ordered to make the affected employees whole by paying them the wages (i.e. sick leave) they would have received had the unilateral changes outlined in the decision not been made, plus interest at the rate of seven (7) percent per annum.[18] Notwithstanding the above, the

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[18]Cf. San Mateo County Community College District, supra.

District, pursuant to its past practice, may require verification of illness if it reasonably suspects that an individual employee has abused his sick leave.

This remedy is consistent with NLRA precedent. Section 10(c) of the NLRA is similar to section 3541.5(c) of the Government Code, and has been interpreted to provide for such a remedy. See NLRB v. Allied Products Corp. (1975) 218 NLRB 1246 [89 LRRM 1441] enforced as modified (6th Cir. 1977) 548 F.2d 644 [94 LRRM 2433] where a similar remedy was granted as a result of the employer unilaterally changing the status quo. Furthermore, the record discloses no evidence that an order restoring the status quo ante here would impose an unfair burden on the District. NLRB v. Allied Products Corp., supra.

The District will also be ordered to rescind Resolution 17 because it interferes with rights guaranteed by the EERA

CSEA's request for litigation expenses is denied. The District's arguments were not frivolous, but rather were at least "debatable." See Heck's Inc. (1974) 215 NLRB 765 [88 LRRM 1049].

It is also appropriate that the District be required to post a notice incorporating the terms of the order. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and to restore the status quo. It effectuates the purposes of the EERA that

employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code section 3541.5(c), it is hereby ordered that the Barstow Unified School District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation, as defined by section 3543.2, and specifically with respect to the alteration of leave policies.

2. Denying the California School Employees Association its right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and

negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

4. Interfering with employees because of their exercise of their right to participate in the activities of an employee organization by threatening to suspend an employee organization's rights, guaranteed to them by the EERA, if the organization advocated that its members participate in a sick-out or other form of work stoppage.

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

1. Rescind the unilateral changes in the leave policies and return to the status quo ante in effect in that area prior to the illegal unilateral change unless and until the parties exhaust the statutory impasse procedures or agree otherwise by their adoption of a negotiating agreement.

2. Subject to the right to require verification outlined earlier in this decision, make the affected employees whole by paying them the wages (i.e., sick leave) they would have received had the unilateral changes referred to above not been made, plus interest at the rate of seven (7) percent per annum.

3. Rescind Resolution No. 17, adopted April 1, 1979.

4. Within five (5) days of the date of this proposed decision becomes final, post at all school sites, and all other work locations where notices to employees customarily are

placed, copies of the notice attached as Appendix 2. Such posting shall be maintained for a period of thirty (30) consecutive work days. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by any other material.

5. At the end of the posting period, notify the Los Angeles Regional Director of the Public Employment Relations Board, in writing, of the action taken to comply with this order.

It is further ordered that the alleged violations of section 3543.5(a) and (b) which refer to the payment of increased wages to substitutes and substitute bus drivers are hereby dismissed.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on April 7, 1980 unless a party files a timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on April 7, 1980 in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. 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, part III, sections 32300 and 32305, as amended.

Dated: March 18, 1980

Bruce Barsook, Hearing Officer

APPENDIX 1

BEFORE THE BOARD OF EDUCATION
OF THE BARSTOW UNIFIED SCHOOL DISTRICT

Resolution #17 1978-79

WHEREAS, this Board finds that there is reasonable cause to believe that a substantial number of classified employees are about to become engaged in a strike, work slow down, sick in, or work stoppage against the Barstow Unified School District and that great and irreparable damage will result therefrom to the schools and pupils of said district unless the provisions of this resolution are made effective immediately;

NOW, THEREFORE, BE IT RESOLVED AS FOLLOWS:

1. Effective immediately, all classified employee absences must be substantiated by written proof of the need for the leave. Pay will not be granted for leaves of absence of any kind unless the employee worked or was validly excused from work both the work day before the absence and the work day after the absence.

a) Sick Leave - Classified employees requesting pay for sick leave must complete a signed affidavit of illness and provide a doctor's certificate of illness. Both documents must be in a form approved by the district superintendent and be presented to the district by April 11, 1979.

b) Personal Necessity Leave - Employees requesting personal necessity leave must do so in advance, in writing, and must receive permission to take the leave from their supervisor. In the event of an emergency where advance notice cannot be obtained, the employee must complete a signed affidavit in form approved by the school district superintendent and present written documentation of the personal necessity as required by him. During the period of a strike, work stoppage, work slow down, walk out or sick in, personal necessity leaves will only be allowed for emergency reasons as defined in the Education Code.

c) Other Leaves - Permission to take other leaves must be received in advance of the leave. No personal leaves will be granted except for emergency reasons, with prior approval.

d) Unauthorized Leave -

1) Unauthorized leave is defined as non-performance of those duties and responsibilities assigned by the district and its representatives including all duties and responsibilities as defined by the Education Code, rules and regulations of the State Board of Education Code, rules and regulations of the Board of Education of the Barstow Unified School District. Such unauthorized leave may include but is not limited to collective refusals to provide service, unauthorized use of sick leave, unauthorized use of other leave benefits, non-attendance at required meetings and failure to perform supervisory functions at school sponsored activities.

2) An employee is deemed to be on unauthorized leave at such time and on such occasions as the employee may absent himself from required duties.

3) Unauthorized leave shall constitute a breach of contract and, therefore, may result in the initiation of dismissal procedures, loss of salary or such disciplinary action as may be deemed appropriate.

4) Beginning on the first day of unauthorized leave, no warrant shall be drawn in favor of any employee for the days which he/she has not faithfully performed all duties prescribed.

2. Each single day of unauthorized leave is deemed to be a distinct and separate willful refusal to perform regular assignments without reasonable cause in violation of both the Education Code and Board rules and regulations.

3. Throughout the period of any strike, work slow down, sick in, work stoppage or walk-out, the district superintendent is authorized to hire such substitute classified employees in compliance with and pursuant to all applicable laws as he deems necessary and to pay them in accordance with the attached emergency substitute classified employee schedule, E-1 [not included]. The superintendent shall be authorized to pay for the cost of obtaining substitute bus drivers according to the attached schedule, E-2 [not included].

4. In the event any employee organization engages in any illegal activity against this school district or encourages its members to engage in strikes, withholding of services, unauthorized shortened days, sick-in, professional days, or any other euphemism for withholding of contract services from this school district, the rights and privileges previously extended to the organization by this Board may be terminated.

5. Suspension of Employee Organization Privileges. Any employee organization which urges its members to participate in

a work stoppage or any other activity as outlined above shall have its privileges as a verified employee organization withdrawn including but not limited to:

a) Use of school district mail service.

b) Use of school district bulletin boards.

c) Use of school district telephone facilities for employee organization purposes.

d) Use of school district premises for meeting purposes.

e) Privilege of employee organization officers and representatives to visit school sites or property other than where regularly assigned.

f) Fringe benefit payment.

g) Professional organization deduction.

6. The district superintendent or his designee shall be the only district employee authorized to close any school facility. Such facility will only be closed when in the opinion of the district superintendent or his designee the health or safety of students or staff is in jeopardy.

7. The district superintendent or his designee shall have the authority to take such immediate emergency steps as he deems necessary to insure the physical and educational well being of the students of the Barstow Unified School District. The superintendent shall also have full authority to take such steps as he deems necessary to insure and protect the physical well being of all employees of the Barstow Unified School District, as well as all properties owned by the District and supervised by this Board or its agents.

8. Employment of Legal Counsel. Following the provisions of Education Code Section 35041.5, the superintendent of schools is authorized to employ a private attorney and obtain supplementary County Counsel services for the purposes of advising the board of education and dealing with the employee strike.

9. The County Counsel of the County of San Bernardino and/or special counsel employed by the school district are hereby authorized and directed upon prior approval by the district superintendent or his designee to take all necessary legal action to prevent or terminate the withholding of contract services by employees of this school district and to

incur on behalf of the district such expenses as are necessary in pursuit thereof.

BE IT FURTHER RESOLVED AS FOLLOWS:

1. Effective immediately, all classified employees may be worked out of classification without prior approval. When a classified employee is working out of classification, the supervisor shall notify the Classified Personnel Director who shall ensure that all Personnel Commission rules and regulations are met with regards to compensation for the employees.

2. Personnel Commission form 108 shall be completed for all employees who are required to work out of their assigned classification for more than five (5) working days in any fifteen (15) calendar day period.

3. The Board hereby suspends the minimum qualifications, in compliance with and pursuant to the rules and regulations of the Personnel Commission for hiring of classified employees except in those classifications having requirements mandated by law.

BE IT FURTHER RESOLVED that the provisions of this resolution shall prevail over any pre-existing provisions of policies, rules or regulations of this school district to the contrary, and if any section, sentence, clause or phrase of this resolution is for any reason held by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remaining portions of this resolution.

BE IT FURTHER RESOLVED that this resolution is an urgency measure within the meaning of Policy # P1004 of the Policies of the Barstow Unified School District, and is necessary for the immediate welfare of the schools and the pupils thereof. Consequently, this Resolution shall become effective immediately upon the adoption hereof, and shall remain in effect until repealed except as otherwise stated herein.

Adopted this 1st day of April 1979.

BOARD OF TRUSTEES
BARSTOW UNIFIED SCHOOL DISTRICT

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APPENDIX 2

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

After a hearing in Unfair Practice Case No. LA-CE-474-78/79 in which all parties had the right to participate, it has been found that the Barstow Unified School District has violated section 3543.5(c) of the Educational Employment Relations Act (EERA) by refusing or failing to meet and negotiate with the California School Employees Association by taking unilateral action in April 1979 with respect to the alteration of leave policies.

It has also been found that this same conduct violated section 3543.5(b) of the EERA since it interfered with the right of CSEA to represent its members.

It has also been found that this same conduct interfered with negotiating unit members' right to be represented by their exclusive representative, thus constituting a violation of section 3543.5(a) of the EERA.

It has also been found that the District, by threatening to suspend an employee organization's rights, guaranteed to them by the EERA, if the organization advocated that its members participate in a sick-out or other form of work stoppage interfered with employees because of their exercise of their right to participate in the activities of an employee organization, thus constituting a violation of section 3543.5(a) of the EERA.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation, as defined by section 3543.2, and specifically with respect to the alteration of leave policies.

2. Denying the California School Employees Association its right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

4. Interfering with employees because of their exercise of their right to participate in the activities of an employee organization by threatening to suspend an employee organization's rights, guaranteed to them by the EERA, if the organization advocated that its members participate in a sick-out or other form of work stoppage.

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

1. Revoke the unilateral changes in the leave policies and return to the status quo ante in effect in that area prior to the illegal unilateral change unless and until the parties exhaust the statutory impasse procedures or agree otherwise by their adoption of a negotiating agreement.

2. Subject to the right to require verification as outlined in the hearing officer's decision, make the affected employees whole by paying them the wages (i.e., sick leave) they would have received had the unilateral changes referred to above not been made, plus interest at the rate of seven (7) percent per annum.

3. Rescind Resolution No. 17, adopted April 1, 1979.

DATED:

BARSTOW UNIFIED SCHOOL DISTRICT

By_____
Superintendent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORK DAYS FROM THE DATE OF POSTING AND MUST NOT BE DEFACED, ALTERED OR COVERED BY ANY MATERIAL.