

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MODESTO CITY SCHOOLS,)	
)	
Charging Party,)	Case No. S-CO-48
)	
v.)	PERB Decision No. 291
)	
MODESTO TEACHERS ASSOCIATION, CTA/NEA)	March 8, 1983
)	
Respondent.)	
)	
<hr/>		Case Nos. S-CE-318
MODESTO TEACHERS ASSOCIATION, CTA/NEA)	S-CE-319
)	S-CE-320
Charging Party,)	S-CE-323
)	S-CE-324
)	S-CE-325
v.)	S-CE-326
)	S-CE-328
MODESTO CITY SCHOOLS,)	S-CE-329
)	S-CE-341
Respondent.)	
)	
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Appearances: Kirsten L. Zerger, Attorney for Modesto Teachers Association, CTA/NEA; Keith V. Breon and Patricia W. Mills, Attorneys (Breon, Galgani & Godino) for Modesto City Schools.

Pursuant to PERB rule 32210 (Title 8, California Administrative Code), petition to file an informational brief was granted to Christian M. Keiner, Attorney (Biddle, Waters & Bukey) for California School Boards Association.

Before Tovar, Jaeger and Morgenstern, Members.*

DECISION

MORGENSTERN, Member: The present case is before the Public Employment Relations Board (PERB or Board) on exceptions to the hearing officer's proposed decision filed by both parties, the Modesto City Schools (District) and the Modesto Teachers Association, CTA/NEA (MTA or Association).

*Chairperson Gluck and Member Burt did not participate in the determination of this matter.

PROCEDURAL HISTORY

Following is a summary of charges filed by the parties.

District Charges

On March 4, 1980, the District filed an unfair practice charge (S-CO-48) against MTA alleging violations of subsections 3543.6(a), (b), (c) and (d) of the Educational Employment Relations Act (EERA or Act)¹ by engaging in "illegal pressure tactics and a strike against charging party."

It amended its charge on June 4, 1980, to include allegations that striking employees threatened and otherwise

¹EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless specified otherwise.

Section 3543.6 reads as follows:

It shall be unlawful for an employee organization to:

(a) Cause or attempt to cause a public school employer to violate Section 3543.5.

(b) 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.

(c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

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

interfered with substitutes and non-striking employees, and that MTA illegally encouraged employees to refuse to participate in evaluation procedures, extra-duty assignments and other assigned tasks. Pursuant to MTA's request, the District was ordered by a PERB hearing officer to particularize its amended charge. The District complied with this order on June 23, 1980, and submitted a detailed account of the alleged misconduct.

On June 25, 1980, MTA sought dismissal of the District's amended charge to the extent that it referred to and alleged unlawful acts which occurred prior to December 4, 1979, more than six months before the filing of the amended charge. Subsection 3541.5(a)(1);² and see San Dieguito Union High School District (2/25/82) PERB Decision No. 194.

During the formal hearing on July 7, 1980, the hearing officer granted MTA's motion and dismissed that portion of the District's amended unfair practice charge referring to alleged unlawful activities occurring prior to December 4, 1979.

²Subsection 3541.5(a) reads in pertinent part:

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not . . . (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; . . .

MTA Charges

On March 6, 1980, MTA filed a charge (S-CE-318) against the District alleging violations of subsections 3543.5(a) and (b) of EERA.³ The charge alleged that the District had hired substitutes at rates, and with benefits, in excess of those being granted unit members, employed armed guards who harassed, intimidated and coerced unit members, issued newsletters designed to intimidate and coerce individuals, blatantly attempted to bargain with individuals by presenting offers not made at the bargaining table, and instituted unilateral changes.

³Section 3543.5 of EERA states:

It shall be unlawful for a public school employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(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.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

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

Also on March 6, 1980, MTA filed a second charge (S-CE-319) against the District alleging violations of subsections 3543.5(b) and (c) of EERA. The charge alleged that the District advised MTA on February 4, 1980, that it would no longer negotiate with MTA but would meet and discuss issues. MTA also contested the District's refusal to grant released time for meetings which occurred subsequent to February 4. In its answer, the District argued that it was under no obligation to resume negotiations since impasse procedures, including factfinding, had been completed.

MTA filed a third charge (S-CE-320) against the District on March 6, 1980, alleging violations of subsections 3543.5(b), (c) and (e) of EERA. The conduct complained of involved the District's decision on September 6, 1979, to unilaterally eliminate preparation periods provided for teachers of grades 4-6.

On March 24, 1980, MTA filed four additional charges (S-CE-323, 324, 325 and 326) against the District.

In S-CE-323, MTA alleged that the District violated subsections 3543.5(a), (b) and (d) of EERA by threatening MTA members with reprimands, by coercing members, contrary to past practice, to surrender school keys and lesson plans, and by reprimanding teachers, again contrary to past practice, for failing to attend a faculty meeting.

The Association also argued at the hearing and in the post-hearing briefs that letters of commendation given to non-strikers were an additional violation of subsection 3543.5(a). It, however, made no specific reference to the letters of commendation in the charges.

The second charge that MTA filed on March 24, 1980, (S-CE-324) was withdrawn with prejudice, by stipulation of the parties, on July 15, 1980.

In the third charge (S-CE-325) filed on March 24, 1980, MTA charged that the District violated section 3543.3⁴ and subsections 3543.5(c) and 3547(d).⁵ The conduct complained of consisted of regressive bargaining; reopening bargaining on

⁴Section 3543.3 provides:

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

⁵Subsection 3547(d) provides:

New subjects of meeting and negotiating arising after the presentation of initial proposals shall be made public within 24 hours. If a vote is taken on such subject by the public school employer, the vote thereon by each member voting shall also be made public within 24 hours.

an item previously agreed to by the parties on June 16 and August 12, 1979; making a new demand at the table regarding preparation periods which provided for less time than was the past practice; contrary to prior tentative agreement, insisting that MTA waive its right to represent employees at the first informal step of the grievance process; and, as a reprisal against MTA for engaging in protected activity, unequivocally conditioning settlement on MTA's acceptance of a no-strike clause and a change in preparation periods.

In S-CE-326, MTA alleged that the District violated subsection 3543.5(c). The charge referred to the District's position in Superior Court on March 12 opposing MTA's request for a 24-hour transition period before implementation of the court's temporary restraining order directing the resumption of bargaining and termination of the work stoppage. MTA alleged that, notwithstanding the District's opposition to the 24-hour period, the District failed to bargain with MTA immediately following the court proceeding and subsequently excused its conduct by claiming in a communication to its management staff that it understood the court to have authorized a 24-hour review period.

On April 14, 1980, MTA filed S-CE-341 alleging that the District violated subsections 3543.5(a), (b) and (c) of EERA by reprimanding teachers at Mark Twain School who failed to perform evaluation procedures. MTA asserted that the

employees' refusal to perform such tasks was protected activity, and that multiple discipline imposed had the effect of chilling the exercise of rights by employees and MTA.

Board Actions

In conjunction with MTA's three charges filed on March 6, 1980, (S-CE-318, 319 and 320) and the District's charge (S-CO-48), PERB entertained requests from both parties for injunctive relief. At the time the requests were received, MTA was engaged in a work stoppage. The District, having perceived the impasse procedure to be exhausted, refused to resume negotiations and allegedly implemented unilateral changes in the terms and conditions of employment. On March 10, 1980, the Board initially concluded that insufficient grounds existed for seeking injunctive relief against either party. (Modesto City Schools (3/10/80) PERB Order No. IR-11.) It retained jurisdiction over the unfair practice charges filed with the Board and directed the general counsel to supplement his earlier investigation.

Thereafter, on March 12, 1980, the Board issued Modesto City Schools, PERB Order No. IR-12. Based on the general counsel's further investigation, the Board concluded it was probable that the District had violated subsection 3543.5(c) of EERA by refusing to meet and negotiate with MTA over concessions and new proposals offered by MTA after the exhaustion of impasse procedures and by unilaterally changing

some terms and conditions of employment beyond the District's prerogative arising after impasse was exhausted. The Board concluded that MTA's work stoppage was conducted to protest the employer's action and was not per se prohibited by EERA.

In fashioning its injunctive relief, the Board adopted the private sector rule prohibiting the employer from making unilateral changes inconsistent with proposals offered to and negotiated with the exclusive representative. The Board ordered the District to rescind unilateral changes which were inconsistent with its last best offer. This directive of the Board was conditioned on MTA's reciprocal obligation to end its work stoppage.⁶

Following 17 days of hearing, the hearing officer's proposed decision issued on May 5, 1981. Here, we address those issues which were excepted to by the parties.

EXCEPTIONS

The District excepts to the hearing officer's findings that:

1. The District violated subsection 3543.5(c) and concurrently subsections 3543.5(a) and (b) of EERA when it

⁶Pursuant to the Board's Order, and on its behalf, the Superior Court of Stanislaus County enjoined the District to resume bargaining and to refrain from instituting certain unilateral changes conditioned on MTA's cessation of its work stoppage. This order was upheld in its entirety in Public Employment Relations Board v. Modesto City Schools (1982) 136 Cal.App.3d 881.

unilaterally eliminated preparation periods for teachers of grades 4-6.

2. The District violated subsections 3543.5(a) and (b) by reprimanding teachers at Mark Twain School for refusing to participate in the development of the goals and objectives phase of teacher evaluations.

3. Subsections 3543.5(a) and (b) were violated when the District reprimanded teachers for refusing to surrender school keys and lesson plans prior to the strike and for failing to attend a faculty meeting on the Friday before the strike started.

4. The District's action of issuing letters of commendation to employees who did not go on strike was a violation of subsection 3543.5(a).

5. The District's refusal to negotiate and grant released time after factfinding but before the injunction issued on March 12 violated subsection 3543.5(c) and concurrently subsections 3543.5(a) and (b).

6. The District's unilateral implementation of policies on February 25, 1980, inconsistent with its last best offer, violated subsection 3543.5(c) and concurrently subsections 3543.5(a) and (b).

7. The District's newsletter of February 14, 1980 unlawfully misrepresented its bargaining position, and the March 3, 1980, "Staff Update" constituted an illegal threat to employees in violation of subsection 3543.5(a).

8. The District's bargaining position improperly conditioned agreement on MTA's waiver of its right to represent employees at the informal level of the grievance procedure in violation of subsection 3543.5(c).

9. MTA's work stoppage was protected activity and did not violate EERA.

MTA excepts to the hearing officer's findings that:

1. MTA failed to raise objections to the District's issuance of letters of reprimand to employees who participated in MTA's "work-to-rule program."

2. It is inappropriate to order back pay for those certificated employees whose preparation periods were unilaterally eliminated.

3. The District's insistence upon including a no-strike clause and excluding a binding arbitration clause in the final agreement was not a refusal to bargain.

After considering the entire record in this matter, the Board adopts the hearing officer's findings of fact except as specifically modified herein. We affirm in part and reverse in part the hearing officer's conclusions of law, as discussed below.

DISCUSSION

Because of the complexity of the facts and the numerous charges, we consider the charges and the parties' exceptions thereto as they arose within the collective bargaining process, during the pre-impasse, impasse and post-impasse stages.

Pre-impasse

Elimination of Preparation Periods, September 6, 1979 (Case No. S-CE-320)

We reverse the hearing officer's finding that the District violated subsection 3543.5(c) when it unilaterally eliminated preparation periods for teachers of grades 4-6. In so concluding, we do not depart from past decisions where the Board has followed the federal rule,⁷ as stated in NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177], that a unilateral change of a condition of employment within the scope of representation without bargaining in good faith is a per se violation of the Act. Davis Unified School District et al. (2/22/80) PERB Decision No. 116; San Francisco Community College District (10/12/79) PERB Decision No. 105.

The threshold question here is whether the elimination of preparation periods was a change affecting a matter within the scope of representation. The Board determined in San Mateo City School District (5/20/80) PERB Decision No. 129, at p. 19, that preparation periods are within the scope of representation⁸

⁷It is appropriate for the Board to take guidance from federal labor law precedent when applicable to public sector labor relations issues. Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; Los Angeles County Civil Service Commission v. Superior Court (1978) 23 Cal.3d 65 [151 Cal.Rptr. 547].

⁸Subsection 3543.2 provides, in part:

(a) The scope of representation shall be limited to matters relating to wages, hours

"to the extent that changes in available preparation time affect the length of the employees' workday or duty-free time."

However, in that case, the Board found that preparation time was clearly an obligation imposed by the District, that the unilateral elimination of preparation time did not eliminate the need nor the expectation that teachers would use time to prepare and, hence, that the workday was extended. Thus, the unilateral elimination of preparation periods is a violation when the evidence introduced by the charging party demonstrates an actual increase in workload (i.e., that the teachers did in fact extend their working hours for class preparation).

We reject the hearing officer's conclusion that MTA established an unlawful unilateral change but failed to justify lost compensation based on a lengthened workday. To the contrary, we find that, because MTA failed to demonstrate that the altered preparation period in fact extended the workday, it did not, therefore, meet its burden of proof. The allegation regarding preparation time is dismissed.

Work-to-Rule Program

In September, MTA initiated a "work-to-rule" strategy and advised its members to "do only those things which the law absolutely requires." After this recommendation, members took

of employment, and other terms and
conditions of employment. . . .

a series of individual actions in which they refused to perform a variety of duties. These included refusal to participate in teacher evaluations, refusal to turn in keys and lesson plans, refusal to attend a faculty meeting, and refusal to perform certain other activities. Teachers subsequently received reprimands for refusing to perform these activities, and allege that such reprimands constituted illegal interference with, and reprisal for, participation in protected Association activity.

In Palos Verdes Peninsula Unified School District (2/26/82) PERB Decision No. 195, at p. 10, the Board found that the refusal to perform normally required duties is unprotected conduct "tantamount to a partial work stoppage or slowdown." This is so even where the assigned duty is discretionary, if the refusal is "for reasons other than their professional judgment, namely, as a pressure tactic during the course of negotiations." As the Board stated:

Employees may not pick and choose the work they wish to do even though their action is in support of legitimate negotiating interests.

Similarly, the National Labor Relations Board (NLRB) and the courts have held that employees may not "continue to work and remain at their positions, accept the wages paid them, and at the same time select what part of their allotted tasks they cared to perform of their own volition, or refuse openly or secretly, to the employer's damage, to do other work." NLRB v.

Montgomery Ward (8th Cir. 1946) 157 F.2d 486 [19 LRRM 2008]; Elk Lumber Co. (1950) 91 NLRB 333 [26 LRRM 1493]. It follows that an employer does not violate the Act by disciplining employees for participation in unprotected conduct unless that discipline is motivated by anti-union animus. Palos Verdes, supra, p. 11; Hammermill Paper Co. v. NLRB (3d Cir. 1981) 658 F.2d 155 [108 LRRM 2001].

Thus, as to each activity which employees refused to perform, it is necessary to determine first whether the activity was a required duty or a purely voluntary one. Where the refusal to perform an activity is found to be protected conduct (i.e., the activity is purely voluntary), it is then necessary to determine whether discipline imposed for that conduct constitutes unlawful interference or discrimination under the Act. Where the refusal to perform an activity is found to be unprotected, further inquiry may be required, nonetheless, where it is alleged that the nature or severity of the discipline evidences improper motivation.

The hearing officer applied the test set forth in Carlsbad Unified School District (1/30/79) PERB Decision No. 89.⁹

⁹In Carlsbad, the Board stated, at pp. 10-11:

Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights

In Novato Unified School District (4/30/82) PERB Decision No. 210, decided subsequent to the hearing officer's proposed decision, the Board clarified the "but for" test set forth in Carlsbad, supra. Under the Novato test, where an unfair practice charge alleges that an employer discriminated or retaliated against an employee for participation in protected activity, the charging party has the initial burden of raising the inference that the employee's protected conduct was a motivating factor in the employer's decision to discipline the employee. Since motivation is a state of mind which is often difficult to prove by direct evidence, a charging party may establish unlawful motivation by circumstantial evidence and

granted under the EERA, a prima facie case shall be deemed to exist;

Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;

Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;

Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

inference from the entire record. Carlsbad, supra; Republic Aviation Corp. (1945) 324 U.S. 793 [16 LRRM 620]. If the charging party makes such a showing, then the burden of proof shifts to the employer to demonstrate that it would have taken the same action in the absence of the employee's protected activity. Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].

Refusal to Participate in Teacher Evaluations (Case No. S-CE-341)

In the 1979-80 school year, 13 teachers at Mark Twain School refused to participate in the development of the goals and objectives phase of teacher evaluations. The hearing officer found that this conduct was protected because it was essentially permissive activity and had no impact on students and concluded that the District violated subsections 3543.5(a) and (b) by issuing reprimands for this conduct. We disagree.

The Stull Act¹⁰ requires that school districts throughout the state establish uniform systems of teacher evaluation. The

¹⁰The Stull Act is codified at Education Code section 44660 et seq. Section 44660 provides:

It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of

record indicates that the procedure in the Modesto City Schools had been in place for ten years. In their previous collective bargaining agreement, the parties had negotiated and agreed to incorporate an evaluation policy and procedure sufficient to meet the requirements of the Stull Act. Thus, participation in the evaluation procedure was a normal and required duty in the District.

In 1978, disagreements over the evaluation procedure had arisen and were submitted to the grievance procedure. In 1980, however, 13 teachers at Mark Twain School flatly refused to participate. The teachers signed a letter in which they stated they "decline any further participation in the 'Stull Process'." The letter ends: "All of the above is subject to change upon the signing of a binding contract between the District and the Modesto Teachers Association." The intent was clearly to put pressure on the District in contract negotiations.

In the instant set of circumstances, the refusal to participate in the evaluation procedure was unprotected

objective evaluation and assessment guidelines which may, at the discretion of the governing board, be uniform throughout the district or, for compelling reasons, be individually developed for territories or schools within the district, provided that all certificated personnel of the district shall be subject to a system of evaluation and assessment adopted pursuant to this article.

conduct in the nature of a partial work stoppage or slowdown. Palos Verdes, supra. The District did not violate subsection 3543.5(a) or (b) by disciplining employees for this unprotected activity.

The argument made by the Association that its members would have performed the duty had they been ordered to do so has no merit. The lack of a new directive does not change the nature of an activity from a required duty to a voluntary exercise. There is no evidence to indicate that the District revoked existing evaluation requirements or in any way gave teachers leave to absent themselves from their contractual obligation.

The Association argues that the District's issuance of successive letters of reprimand for the same incident raises an inference of discriminatory motivation. In Marin Community College District (11/19/80) PERB Decision No. 145, the Board stated, at p. 11:

. . . illegal purpose harbored by the
discriminating employer may be inferred from
the circumstances surrounding the
discipline

While the record shows that a letter of reprimand and a follow-up memo were placed in personnel files, this evidence is insufficient to raise an inference that the actions taken were discriminatory.

We have already found that the refusal to participate in required duties is not protected organizational activity. We,

therefore, dismiss the charge of a violation of subsections 3543.5(a) and (b).

The Association also alleged a violation of subsection 3543.5(d). We find no evidence to support the allegation that the District's activity was an attempt to dominate or interfere with the employee organization, nor did it amount to an encouragement to join one organization as opposed to another. We, therefore, dismiss the alleged violation of subsection 3543.5(d).

Refusal to Turn in School Keys (Case No. S-CE-323)

The hearing officer determined that the District violated subsections 3543.5(a) and (b) by issuing letters of reprimand to teachers for failing to turn in school keys prior to the strike.

Again, we disagree with the hearing officer's conclusion. A District policy called for "dismissal if there was persistent refusal to turn in keys." Thus, turning in keys on request was a normal requirement, and employees knew that discipline could result from a refusal to do so. Consequently, we find that the refusal to turn in keys was not protected conduct. Even though the request to turn in keys was made in response to protected strike activity (see discussion, infra), the keys belonged to the District, and it had every legitimate right to require their return as a security precaution. Being required to turn in keys in no way interfered with the strike. Neither was the

requirement imposed in a discriminatory manner against strikers, since the request was made of all teachers before the strike began.

The Association's argument that a person would have to have received a previous oral or written warning to get a reprimand has no merit. While the District's policy required "persistent" refusal to warrant dismissal, a lesser penalty was imposed here. Moreover, the absence of penalties in prior routine situations need not dictate the District's response to an imminent strike, an unprecedented and dire circumstance. The District took appropriate security measures which did not violate subsection 3543.5(a) or (b) of the Act.

Refusal to Submit Lesson Plans (Case No. S-CE-323)

Preparation of lesson plans for substitute teachers was a common and generally followed practice prior to the strike. The day before an absence was the usual time for lesson plans to be turned in, and reprimands for failing to turn in lesson plans were not out of the ordinary. One principal testified that reprimands were not used very often because teachers rarely failed to turn in lesson plans. Thus, we find that the refusal to turn in lesson plans was not protected conduct.

Additionally, the District's justification for the lesson plan policy was to provide continuity of instruction for the students, a legitimate concern. The hearing officer maintains that, if the District was so concerned about its educational

responsibilities, it would have taken steps sooner to notify teachers concerning lesson plans. Yet, the record indicates that the strike vote was taken on Wednesday, February 27; memos concerning keys and lesson plans were issued on Thursday, February 28; and principals asked for the lesson plans on Monday, March 3, the day before the strike. The District could hardly have communicated its expectations more quickly.

We find no persuasive evidence that the District's motivation was to harass or retaliate against the teachers for participation in protected activity rather than to provide for continuity of education. Thus, contrary to the hearing officer, we find no violation of subsection 3543.5(a) or (b) in the issuance of reprimands for failure to comply with the District's order to prepare lesson plans.

Refusal to Attend Faculty Meeting (Case No. S-CE-323)

The District also issued letters of reprimand to teachers who did not attend a March 3 faculty meeting, the last faculty meeting before the strike. The record demonstrates that faculty meetings were part of certificated employees' duties, and that teachers were expected to attend. Therefore, teachers' refusal to attend the faculty meeting is not a protected activity.

Here, MTA argues that the normal procedure of merely informing the missing teachers at the time of the next faculty meeting could have been followed, and alleges that the

reprimands were motivated by an unlawful retaliatory purpose. The record does not support this allegation. To the contrary, the District claims that the faculty meeting was necessary to its preparations to continue classes and to retrieve school keys. We find this justification sufficient to uphold the issuing of reprimands and dismiss the violation of subsections 3543.5(a) and (b) charged by the Association.

Refusal to Perform Other Activities

MTA excepts to the hearing officer's failure to decide the disposition of letters of reprimand placed in personnel files for nonparticipation in other activities in the work-to-rule program. In a footnote, the hearing officer stated that MTA raised no objection to the reprimands, other than those issued for failing to turn in keys and lesson plans and attend a faculty meeting, all of which were filed as separate charges. He, therefore, would not consider those reprimands.

MTA argues that the language of Charge No. S-CE-318, which alleged violations of subsections 3543.5(a) and (b) for acts which were discriminatory to teachers engaged in concerted activities, was sufficiently broad to include consideration of the work-to-rule reprimands. It further argues that the issue was raised at every step of the proceeding and fully litigated.

In Santa Clara Unified School District (9/26/79) PERB Decision No. 104, the Board decided to follow NLRB precedent concerning unalleged violations. Unalleged violations will be

examined where they are intimately related to the subject matter of the complaint, where the issues have been fully litigated, and where the parties have had a chance to examine and cross-examine witnesses. Southwestern Bell Telephone Co. (1978) 237 NLRB 110 [99 LRRM 1012]; Holly Manor Nursing Home (1978) 235 NLRB 426 [98 LRRM 1291]. Such is the case here. The parties have clearly considered the reprimands an issue in contention. Witnesses were examined and cross-examined in detail, and the issue has been thoroughly briefed. Therefore, we find no reason to refuse to consider the issue.

Here, teachers were reprimanded for refusing to perform a variety of duties. The past practice in the District, as established in the record, was that some of these duties were purely voluntary while others were assigned. Period substitution, extra sixth-period assignments and taking a student teacher were voluntary activities. Reading and math continua, in-service faculty training and bulletin board preparation were assigned duties. Certain other assigned tasks were called adjunct duties and had a preliminary voluntary stage. That is, principals would ask for volunteers, but if no volunteers were forthcoming, they would make assignments to insure that the activity was performed. After-school activities, such as selling tickets at sporting events, chaperoning dances and assemblies and advising student clubs were of this type.

The refusal to do voluntary activities is protected conduct, while the refusal to do normally required assigned and assigned adjunct duties is not. Palos Verdes, supra. The District's issuance of letters of reprimand for refusal to do the aforementioned assigned and assigned adjunct duties is not a violation of the Act. However, letters of reprimand for failure to do purely voluntary activities violate subsection 3543.5(a).

Applying the Carlsbad test,¹¹ we note that letters of reprimand for such protected activity would cause at least slight harm to the organizational rights of the employees by interfering with and discouraging employees in the exercise of rights guaranteed by the Act. The District provides insufficient justification to counterbalance the harm. Indeed, the District advised schools not to give reprimands for failure to participate in voluntary activities. In past slowdowns, reprimands were not issued for the same tactics. We, therefore, hold that the placing of letters of reprimand in the personnel files of teachers for refusing to do period substitution, extra sixth-period assignments or to accept a student teacher violated subsections 3543.5(a) and (b), and all such letters shall be removed from the files and destroyed.

¹¹When the alleged violation of subsection 3543.5(a) is in the nature of unlawful interference with employee rights, the Board continues to use the test as articulated in Carlsbad, supra, at footnote 9.

Conditioning Agreement on Abandonment of Association
Representation at the "Informal" Level of the Grievance
Procedure (Case No. S-CE-325)

In their prior agreement, the District and the Association had negotiated a grievance procedure which included a preliminary step that encouraged "useful and necessary private meetings between supervisors and employees."¹² In the past, this language did not preclude the presence of an Association representative at this informal level of the grievance procedure. However, in the 1979-80 negotiations, the District

¹²The parties' collective bargaining agreement provides, in pertinent part:

ARTICLE III: CONTRACTUAL GRIEVANCE PROCEDURE

Section A. Purpose

The purpose of this procedure is to secure, at the lowest possible administrative level, equitable solutions to the problems which may from time to time arise concerning the interpretation or application of this agreement. Both parties agree that these proceedings will be kept as informal and confidential as may be appropriate at any level of the procedure. Useful and necessary private meetings between supervisors and employees they supervise are encouraged. It is intended that this grievance procedure shall be utilized only after other means to satisfactorily resolve problems have been unproductive. At least one private conference between employee and supervisor shall take place prior to initiation of this grievance procedure. Ideally, there would be a number of informal discussions and a continuing interchange of views between employee and supervisor before filing a formal grievance.

went to impasse maintaining the position that this language must henceforth be interpreted to preclude the Association from representing employees at the informal level.

The language of the contract makes it clear that settlement of a grievance at the informal step is possible and indeed encouraged. It also mandates that "At least one private conference between employee and supervisor shall take place prior to initiation of this grievance procedure." Even though the procedure is described as informal, it is an integral and mandatory part of the dispute resolution process agreed upon by the parties.

Section 3543.1¹³ of EERA provides that "Employee organizations shall have the right to represent their members

¹³Section 3543.1 provides, in pertinent part:

(a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. . . .

.

(c) 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.

in their employment relations with public school employers." The grievance procedure is perhaps the most important point at which employee organizations represent their members in their day-to-day employment relations. EERA also provides that a grievance may be settled between the employer and an individual employee, but is carefully drawn so as not to diminish an employee organization's right to fulfill its representational duties under the Act.¹⁴

¹⁴Section 3543 provides, in pertinent part:

Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in

In Mount Diablo Unified School District et al. (12/30/77) EERB Decision No. 44,¹⁵ the Board held that the grievance process is an "employment relation" within the meaning of subsection 3543.1(a) and, therefore, employee organizations have a statutory right to represent employees in the presentation of their grievances. Indeed, the statutory right of unions to represent employees in grievances is of such significance that it includes not only negotiated grievance procedures but non-negotiated ones as well. See also Santa Monica Community College District (9/21/79) PERB Decision No. 103. We have recently held that this right extends to the informal stage of the grievance procedure. Rio Hondo Community College District (12/28/82) PERB Decision No. 272.

EERA foresees employee organization involvement in all phases of the grievance procedure, even those procedures in which an employee may seek individual representation. While the District's interpretation of the contract may be correct, and while the District may negotiate over every aspect of the grievance procedure, it may not demand to impasse that the Association

effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

¹⁵Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

abandon rights guaranteed under section 3543. To do so is a violation of the duty to bargain as to that item and evidence of the District's general unwillingness to bargain in good faith. As the NLRB stated in Bethlehem Steel Company (1950) 89 NLRB 341 [25 LRRM 1564]:

True, a grievance procedure is bargainable, but it does not therefore follow that the Respondents were privileged to exercise control over the Union's statutory right to attend grievance adjustments by withholding agreement, even in good faith, unless the Union waived this right. Nor do we perceive any statutory policy that will be served by recognizing such control in the Employer.

We find, therefore, that the District violated subsections 3543.5 (a), (b) and (c) by conditioning agreement on the Association's abandonment of its right of representation at the informal level of the grievance procedure.

Conditioning Agreement on Inclusion of a No-Strike Clause and Exclusion of a Binding Arbitration Clause (Case No. S-CE-325)

MTA excepts to the hearing officer's conclusion that the District did not per se refuse to bargain by insisting on a no-strike clause in the contract while at the same time resisting the inclusion of a binding arbitration clause in the grievance procedure. MTA cites the Supreme Court's holding in Textile Workers Union v. Lincoln Mills (1957) 353 U.S. 448, 455 [40 LRRM 2113] that "the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike." The Association's position is that this decision, in light of

later NLRB decisions (Abingdon Nursing Center (1972) 197 NLRB 781 [80 LRRM 1470] and Alba Waldensian, Inc. (1967) 167 NLRB 695 [66 LRRM 1145]), requires a finding of a per se violation when an employer insists to impose on a no-strike clause, yet refuses to agree to binding arbitration of grievances.

We find, however, that the cases cited do not support the Association's position. In Textile Workers Union, supra, the contract between the parties included an arbitration clause which the union sought to enforce in federal court. The court concluded that, if it could enforce a no-strike agreement against a union, it could enforce an arbitration clause against the employer by virtue of section 301 of the Labor-Management Relations Act.

In NLRB v. Cummer-Graham (5th Cir. 1960) 279 F.2d 757 [46 LRRM 2374], the court held that the Textile Workers decision does not require a finding that failure to agree to a no-strike/arbitration combination constitutes a per se refusal to bargain. See also Drake Bakeries v. Bakery Workers (1962) 370 U.S. 254 [50 LRRM 2440, 2443]. Nor do the cases cited by MTA require that conclusion. Both hold that failure to agree, or conditioning agreement on such a combination, may be an indication of bad faith if the intent of the adamant position is to avoid a contract or weaken the union.

The evidence here does not indicate that the District's position was taken only to avoid a contract. In fact, the

previous contract had contained a no-strike clause and did not provide for arbitration.

We find that the District's position was neither a per se refusal to bargain nor evidence of bad faith and, accordingly, affirm the hearing officer's dismissal of this allegation.

Impasse

Refusal to Negotiate After Factfinding (Case No. S-CE-319)

The District excepts to the hearing officer's conclusion that its refusal to negotiate, after publication of the factfinder's report on January 30 and prior to the court order to negotiate, constituted a violation of subsection 3543.5(c) and derivative violations of subsections (a) and (b). The District maintains that its duty to negotiate dissolved with the completion of the impasse procedure, that impasse automatically follows the publishing of the factfinder's report and, further, that EERA differs from the National Labor Relations Act (NLRA) in that, once reached, a deadlock under EERA cannot be broken by concessions.

We disagree. As discussed herein, we find that the statutory impasse procedures are exhausted only when the factfinder's report has been considered in good faith, and then only if it fails to change the circumstances and provides no basis for settlement or movement that could lead to settlement. At that point, impasse under EERA is identical to impasse under the NLRA; either party may decline further

requests to bargain, and the employer may implement policies reasonably comprehended within previous offers made and negotiated between the parties. If the factfinding report, and/or new proposals made after the report, change circumstances and bargaining is subsequently resumed but again deadlocks, the Board cannot recertify impasse or reimpose the already exhausted impasse procedures.

We find this result compelled by the clear language of Article 9 of the Act and the legislative intent manifested therein. In addition, our holding is consistent with that of the Fifth Appellate District Court in PERB v. Modesto City Schools, supra.

Impasse has been described as that "point at which the parties have exhausted the prospects of concluding an agreement and further discussions would be fruitless. Robert A. Gorman, Labor Law (1976), p. 448.

Under the NLRA:

Whether bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. Taft Broadcasting Co. (1967) 163 NLRB 475 enf'd sub AFTRA v. NLRB 395 F.2d 622 (D.C. Cir. 1968).

Impasse is significant in that once it is reached, either party may refuse to negotiate further, and the employer is free to implement changes already offered the union. See Hi-Way Billboards, Inc. (1973) 206 NLRB No. 1 [84 LRRM 1161] and Fine Organics, Inc. (1974) 214 NLRB No. 2 [88 LRRM 1130].

However, under NLRB precedent, impasse suspends the bargaining obligation only until "changed circumstances" indicate an agreement may be possible. Hi-Way Billboards, Inc., supra, and Providence Medical Center (1979) 243 NLRB No. 61 [102 LRRM 1099]. "Changed circumstances" are those movements or conditions which have a significant impact on the bargaining equation. Among the circumstances which will restore the obligation to negotiate is a concession or series of concessions by one of the parties. See NLRB v. Sharon Hats, Inc. (5th Cir. 1961) 289 F.2d 628 [48 LRRM 2098] enf. (1960) 127 NLRB 947 [46 LRRM 1128]. The concessions need only "indicate that further face-to-face bargaining might be fruitful." R. James Span (1971) 189 NLRB 219 [76 LRRM 1671]. The courts have looked to the NLRB to establish whether concessions were substantial enough to "open a ray of hope with a real potentiality for agreement if explored in good faith in bargaining sessions." NLRB v. Webb Furniture (4th Cir. 1966) 366 F.2d 315 [63 LRRM 2163].

These decisions of the NLRB spring from the heart of the NLRA's purpose:

. . . to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of their employment. . . . (29 U.S.C. section 151.)

The NLRB encourages, through face-to-face bargaining, the exploration of new proposals which may provide avenues to resolve differences and arrive at a final agreement.

EERA was enacted by the Legislature "to promote the improvement of personnel management and employer-employee relations within the public school system." (Section 3540.) EERA, no less than the NLRA, is designed to promote and encourage the resolution of disputes through the give and take of collective bargaining. Under EERA, the impetus to keep the parties bargaining is so strong that an extensive impasse procedure was written into the Act (Article 9, section 3548 et seq.) and failure "to participate in good faith in the impasse procedures" was made an independent unfair practice under the Act (subsections 3543.5(d) and 3543.6(e)). Under Article 9, initial impasse is determined by the Board after a request by either party. The declaration of impasse serves to prohibit unilateral actions while the parties go through mandatory procedures designed to facilitate agreement. The California Supreme Court has indicated that the impasse procedure was enacted for the purpose of heading off strikes at least until the completion of the procedure. San Diego

Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 8
[154 Cal.Rptr. 893].

The impasse procedure of EERA contemplates a continuation of the bargaining process with the aid of neutral third parties. Moreno Valley Unified School District (4/30/82) PERB Decision No. 206. Mediation is an instrument designed to advance the parties' efforts to reach agreement; factfinding is a second such tool required by the law when mediation fails to bring about agreement. The statute allows for up to ten days to pass before the factfinding report is made public¹⁶ and also allows mediation efforts to continue after the findings of fact and recommended terms of settlement.¹⁷ These provisions allow the parties an opportunity to reach an accommodation based on the report after it is issued. Thus, while EERA requires that the recommended terms of settlement "shall be advisory only", and neither side is obligated to accept them, the factfinder's recommendations are a crucial element in the legislative process structured to bring about peacefully negotiated agreements.

¹⁶Subsection 3548.3(a) is set forth at footnote 4.

¹⁷Section 3548.4 reads as follows:

Nothing in this article shall be construed to prohibit the mediator appointed pursuant to Section 3548 from continuing mediation efforts on the basis of the findings of fact and recommended terms of settlement made pursuant to Section 3548.3.

Indeed, a clear purpose of the factfinding report is to change the circumstances of bargaining by providing an impetus for settlement of the parties' dispute. We, therefore, conclude that the factfinder's recommendations must be given good faith consideration by the parties before they determine that impasse persists.¹⁸

Therefore, the first obligation of the parties, after the recommendations of the factfinder are made, is to examine the recommendations to see if they can find in them a basis for settlement, or for such accommodations, concessions, or compromises that might lead to settlement.

As a result of this process, both parties may decide in good faith that the report does not provide a basis for settlement or movement that could lead to settlement. The statutory procedures have then failed to break the deadlock;

¹⁸The testimony of the District's legal representative, Keith Breon, indicates that he reached a similar conclusion and so advised the District.

. . . . I certainly told them [the District] that they have an obligation to send me back to the table, or someone representing them, to discuss that factfinding report. There would be no logic to the legislation if the parties didn't get together and seriously discuss, exchange whatever information they could to determine whether or not an agreement could be reached based on that factfinding report

Reporter's Transcript (R.T.) Vol. XIV,
pp. 45-46

the parties remain at impasse. At this point, after the statutory impasse procedures have been completed, impasse under EERA is analogous to impasse under the NLRA. The employer may decline further requests to bargain and may implement policies reasonably comprehended within previous offers made and negotiated between the parties.

If, on the other hand, both parties find a basis for settlement or movements towards settlement in the factfinder's recommendations, impasse is broken, and the parties must return to the bargaining table until they reach agreement or again reach impasse. As the Fifth Appellate District Court stated in PERB v. Modesto, supra, 136 Cal.App.3d 881, 899:

Under District's rationale, as soon as mediation and factfinding are completed, the duty to negotiate in good faith evaporates. We find no authority supporting this contention nor do we find any authority which would compel us to implement section 3549 giving District the right to refuse to bargain after post-factfinding concessions made by Association.

. . . [S]ince collective bargaining is at the heart of the EERA scheme, it is necessary that PERB embrace the concept of the duty to bargain which revives when impasse is broken. (Emphasis added.)

However, once the statute's impasse procedures have been concluded, PERB has no authority to recertify impasse or reinvoke impasse procedures, nor is any purpose likely to be served by the reimposition of procedures which have already failed.

In the instant case, one party believed that the factfinder's report provided the basis for agreement or concessions leading to agreement and the other did not. Such a situation requires that, where concessions are made by one party, they must be given consideration by the other. New proposals must be examined in good faith to determine their acceptability. Even if not fully acceptable, a good faith effort must be made to determine if the new proposals are significant enough to "relieve the impasse and open a ray of hope with a real potentiality for agreement if explored in good faith bargaining sessions." NLRB v. Webb Furniture, supra. Having already gone through an extended period of negotiations and impasse proceedings, either party is free to conclude that it has made all the concessions it can and further negotiations are futile. Where this determination is reached in good faith, NLRA-type impasse exists. The parties may decline further requests to bargain and may implement policies reasonably comprehended within previous offers made and negotiated. As already noted, once exhausted, the impasse procedures may not be reimposed.

Here, MTA was prepared to continue negotiations and willing to make concessions and compromise toward that end. The factfinder's report was published on January 30 and, at the Association's request, a meeting was held on February 4. The record indicates that MTA came to the meeting ready to make

significant concessions. These included acceptance of the one-year duration proposal that the District had considered vital and acceptance of the District's pre-factfinding position on class size and transfers, though both of these were less favorable than the status quo. MTA was willing to accept the entire factfinder's report plus amnesty as a final settlement and to perhaps make even further accommodations; they did in fact make more accommodations in the meetings of March 2 and March 4.

The District maintained that it did not have to examine the recommendations of the factfinder or the Association's concessions to see if these provided a basis for settlement or opened a ray of hope. It insisted that impasse was automatic when the factfinding report issued, that the obligation of good faith negotiations had ended. The District refused to characterize the February 4 meeting as negotiations, defining it as a "meet and discuss session." Before meeting, it refused to give Association negotiators released time, testifying that the granting of released time would be evidence the parties were back in negotiations instead of at impasse. It told the Association that there would be no negotiating and no District proposals, that the Association had the option of accepting the District's position or having it imposed as a post-impasse unilateral change. In short, the District made no effort to

examine all the circumstances to determine whether or not there was hope of reaching agreement.

Notwithstanding its position that the bargaining obligation had already ended, the District maintained at hearing that it nonetheless did bargain with the Association. In direct testimony, the District's chief spokesperson, Mr. Breon, stated, "We postured the position of not formally negotiating in order to protect the legal right" to implement unilateral changes.¹⁹ Elsewhere in the record, he indicated that he was negotiating but not calling it that and, still elsewhere, he testified that, from a practical point of view, "We negotiated every day I was at the table."²⁰ The District's attempt, at hearing, to characterize its post-factfinding conduct as negotiating does not alter the fact that its flat insistence at the table that it would not bargain was clearly incompatible with good faith.

Not only did the District allege that it bargained after factfinding, it further stated that it saw a possibility of progress in those talks. The record indicates that the District's representative felt agreement was possible if the Association would show movement on the key issues of agency shop and arbitration of grievances and acceptance of certain

¹⁹R.T. Vol. XIV, 48:19-20.

²⁰R.T. Vol. XIV, 53:3-5.

basic points put forth by the District.²¹ Finally, the District expressed its intent, based in part upon the neutral recommendations, to increase driving instructors' salaries.

In all, it is clear that circumstances had changed significantly and impasse was broken. The Association offered to make substantial concessions and indicated a willingness to negotiate and try to reach agreement. The District was ready to accept at least one recommendation of the factfinder that favored the Association and, according to Mr. Breon, more District concessions and, indeed, agreement was possible. Despite all this, the District refused to consider whether or not the factfinder's report provided a basis for ending impasse and refused to bargain over the Association's proposals. Rather, the District declared that the obligation to bargain had expired and that unilateral changes were the only course it would follow. Thus, the District ended bargaining prematurely, without negotiating in good faith, though it reasonably appeared that such negotiations were warranted.

Further, the District stated its intention to implement driving instructors' salaries better than its previous negotiating position, but this was put forth unilaterally and accompanied by an insistence that it was not negotiating. A party has the

²¹R.T. Vol. XVII, 33:11-17.

right to maintain, while in a negotiating posture, that its best offer has been made, and that it will make no more concessions. It is quite another matter to insist, as the District did here, that the bilateral process has ended and to offer only the option of acquiescence to a unilateral fait accompli. This had the effect of derogating the Association's stature as an exclusive representative in the eyes of its members.

The District defends its recalcitrance and its admitted posturing after the issuance of the factfinder's report by pointing out that neither the statute nor decisions of the Board had yet clarified the path they would have to follow. District representatives maintain that they feared reimposition of statutory impasse procedures. They add that, in order to avoid such inordinate delay, it was necessary to insist that impasse was present, even while they were actually trying to reach agreement. The fact that no precedential case of this nature had yet been decided by PERB is no defense. A party takes unilateral action at the risk of having it found unlawful. While the uncertain state of the law may have contributed to the District's decision not to bargain after the factfinder's report was issued, its decision also indicates that the District was more concerned with its ability to implement unilateral changes than it was with its obligation to

attempt to reach agreement. In its eagerness to protect its own rights, it violated the Association's.

If, as the District argues, the combined requirements of the statutory impasse procedures and NLRB precedent place a greater burden on the parties, it is so because the Legislature has put extra emphasis on reaching agreement in educational labor disputes, indicating the importance it places on the peaceful resolution of these matters. Nor are these requirements likely to lead to stalling tactics, since delay is at least as much the enemy of the employees, whose desire to receive an improvement in wages and working conditions it forestalls, as it is management's foe.

The District's failure to consider the factfinder's report or the Association's post-factfinding concessions constitutes a refusal to bargain in good faith in violation of subsection 3543.5(c) and concurrently violates subsections 3543.5(a) and (b). In addition, the District's failure to consider the factfinder's report also constitutes a refusal to participate in good faith in the impasse procedures in violation of subsection 3543.5(d).

Refusal to Grant Released Time (Case No. S-CE-319)

Because the District erroneously maintained that negotiations had effectively ended on publication of the factfinder's report, it thereafter refused to grant released time to Association negotiators.

Subsection 3543.1(c) of the Act provides for reasonable released time for representatives of the exclusive representative to participate in the bargaining process.²² An inflexible refusal to grant released time is a refusal to bargain and a denial of rights guaranteed to the employee organization. Magnolia School District (6/27/77) EERB Decision No. 19. Therefore, we find that the District's attempt to remove the indicia of bargaining by refusing released time while under an obligation to bargain constitutes both a refusal to bargain, in violation of subsection 3543.5(c), and a denial of employee organization rights, in violation of subsection 3543.5(b).

Unilateral Implementation of Policies (Case No. S-CE-318)

After publication of the factfinder's report, the District refused to negotiate and instead implemented certain unilateral changes in conditions of employment, including changes in the grievance procedure, class size policy and driving instructors' salaries. We have concluded that impasse did not exist at this time, and that the District was still under an obligation to negotiate. An employer is precluded from making unilateral

²²Subsection 3543.1(c) provides:

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.

changes on items within the scope of representation while the bargaining obligation exists. NLRB v. Katz, supra; San Francisco Community College District, supra; and Davis Unified School District et al., supra. Even if the District and the Association had been at impasse, the action taken by the District on February 25, 1980 exceeded its authority under the Act and violated its bargaining obligation.

NLRB precedent has wisely limited post-impasse unilateral changes to the confines of pre-impasse offers rejected by the union. See Morris, The Developing Labor Law, p. 330; NLRB v. Crompton-Highland Mills (1948) 337 U.S. 217, 69 S.Ct. 960; and Hi-Way Billboards, Inc., supra. The changes implemented need not be exactly those offered during negotiations, but must be reasonably "comprehended within the impasse proposals." Taft Broadcasting Co., supra, 64 LRRM 1386, 1388.

This freedom, which the employer has after, but not before, impasse, springs from the fact that, having bargained in good faith, it has satisfied its statutory duty. Bi-Rite Foods, Inc. (1964) 147 NLRB 59, 65 [56 LRRM 1150]. However, the freedom to unilaterally implement policies pertains only to those issues which the District has actually had on the table and has previously bargained in good faith.

. . . [I]t is perhaps more precise to say
. . . no impasse can be said to have been
reached when the reference is to changes
never introduced into the collective
bargaining arena. Bi-Rite Foods, Inc.,
supra, 147 NLRB 59, 65.

Thus, matters reasonably comprehended within pre-impasse negotiations include neither proposals better than the last best offer nor proposals less than the status quo which were not previously discussed at the table. Without offering proposals or bargaining at the table, an employer provides no notice that it is contemplating changes or positions less than the status quo. Implementation of such unilateral changes, therefore, constitutes a refusal to negotiate and circumvents the bargaining process "as much as does a flat refusal" to negotiate. NLRB v. Katz, supra, 50 LRRM 2177, 2180.

On February 25, 1980, the District unilaterally implemented a variety of policies, one of which was taken from the factfinder's recommendations and others which were less than the status quo and had never previously been proposed to the Association.

The District increased driving instructors' salaries by \$1,000 without ever offering this increase at the bargaining table. It implemented a grievance procedure which had never been discussed at the table (in fact, it was less than the District's bargaining position) and which substantially reduced Association and member rights when compared to the status quo.²³ Finally, the District implemented a class size policy

²³As the Court of Appeals noted in PERB v. Modesto, supra, 137 Cal.App.3d 881, 901:

Before us, District concedes that the
"grievance procedure adopted by the district

which, in part, had never been proposed and which was less than the status quo. The District made these changes despite the fact that they could not be comprehended within its last best offer.

The implementation of changes not offered at the table "shows that the respondent was not using good faith during negotiations and is manifestly inconsistent with the principles of collective bargaining." Crompton-Highland Mills, supra. Such activity constitutes a refusal to bargain and has the predictable effect of undermining both the exclusive representative and the collective bargaining relationship. See Atlas Tack (1976) 226 NLRB 222 [93 LRRM 1236]. Therefore, we find that the District's February 25 implementation of policies not comprehended within its last best offer is a violation of subsection 3543.5(c) and concurrently violates subsections 3543.5(a) and (b).

Post-Impasse

"Staff Update", February 14 (Case No. S-CE-318)

The District excepts to the hearing officer's decision that

on February 25, 1980, does contain variations from the procedure embodied in the previous contract, which had been the district's 'last-best offer'." District's contention that the differences concern "form" rather than "substance" is without merit.

a "Staff Update"²⁴ distributed to all bargaining unit members on February 14 was a misrepresentation and an attempt by the District to bargain directly with the employees and bypass the exclusive representative.

In Muroc Unified School District (12/15/78) PERB Decision No. 80, the Board addressed the issue of communications or memoranda directed at employees as follows:

The EERA imposes on the public school employer an obligation to meet and negotiate with the exclusive representative, and embodies the principle enunciated in federal decisions that the employer is subject to a concomitant obligation to meet and negotiate with no others, including the employees themselves. (See Medo Photo Supply Corp. v. NLRB (1944) 321 U.S. 678 [14 LRRM 581]).

Consequently, . . . actions of a public school employer which are in derogation of the authority of the exclusive representative are evidence of a refusal to negotiate in good faith. (NLRB v. Goodyear Aerospace Corp. (6th Cir. 1974) 497 F.2d 747 [86 LRRM 2763])

²⁴The February 14, 1980 "Staff Update," placed in teachers' mailboxes, provided in part:

The Board of Education has had an opportunity to thoroughly review the recommendations and dissents of the factfinding panel. As a result, the Board would like to inform you directly as to its offer to the Modesto Teachers Association. If accepted by the Modesto Teachers Association, we would have a contract covering the 1979-80 school year.

The Board offers to include the following improvements in a new contract over the previous 1977-79 contract:

Thus, we determine the propriety of an employer's direct communication with employees by its effect on the authority of the exclusive representative.

From February 4, the District made it clear that it was no longer negotiating with the Association. The District made no written proposals but informed MTA that agreement could be reached only if MTA acquiesced to the changes it intended to implement. Yet, on February 14, it published a newsletter which represented that an "offer" had been made to the Association. In fact, this "offer" amounted to no more than an oral ultimatum. Thus, the District presented to the employees an "offer" which it had not presented to the Association. The publication of the "offer" in the "Staff Update" created the illusion that the employees had greater negotiating power and flexibility in dealing with the District's ultimatum than did the Association.

The District refused to negotiate with MTA, yet it maintained a posture of negotiating with the employees. It attempted to negotiate with MTA through the employees rather than with the Association as representative of the employees. See NLRB v. General Electric Co. (2nd Cir. 1969) 418 F.2d 736, 759 [72 LRRM 2530]. The effect of this tactic could only be a derogation of the exclusive representative.

Though there was only one communication of this nature, it came at a critical juncture and misrepresented the positions of

the parties by alleging that an offer had been made to the Association and rejected by it. For these reasons, we find that the February 14 letter was an attempt to derogate the authority of the exclusive bargaining agent and evidence of bad faith bargaining in violation of subsections 3543.5(a), (b) and (c).

"Staff Update", March 3 (Case No. S-CE-318)

After the employees voted to go on strike on February 27, a March 3, 1980 "Staff Update" advised employees that those who participated in the work stoppage faced possible dismissal. Though clearly intended to discourage the teachers from going on strike, the fact that the statement would have a discouraging effect does not make it unlawful. The issue, rather, is whether the statement misrepresents the law and thus constitutes an illegal threat. Superior Tool and Die Co. (1961) 132 NLRB 1373 [48 LRRM 1536].

This leaflet stated that striking employees faced possible dismissal. This message was consistent with the employer's interpretation of the law. The District maintained that strikes are clearly illegal or that, at best, employees were taking their chances on the ultimate legal determination of the strike. The law in this area is not easily stated because public sector strike doctrine is complicated and evolving. Appellate courts have found some public employee strikes in this state to be illegal, and some strikers have lost their

jobs. No determination had been made by PERB as to whether or not the intended strike would or could violate EERA. We do not find that the District's interpretation so misrepresented the law as to constitute an illegal threat. It represented the District's position, a position that could, at that time, reasonably be held. We dismiss the violation of subsection 3543.5(a) charged by the Association and found by the hearing officer.

The Strike (Case No. S-CO-48)

Finally, the District takes exception to the hearing officer's conclusion that "[A] strike, provoked by the District's bad faith conduct, is not a violation of the EERA." The District characterizes this finding as an improper determination that public school employees under EERA have a right to strike, and it excepts to such a finding on the basis that " . . . the case law, the EERA and the Constitution of California all . . . establish that public school employees do not have the right to strike."

At the outset, we consider but must reject the District's constitutionally-based arguments. Its contention that Article IX of the Constitution gives the Legislature direct control over the establishment and supervision of the schools and, thus, bars school employee strikes, is unpersuasive. As the District fails to cite a single instance of any California court upholding this theory, we leave this constitutional

contention to a higher judicial body for determination.

Richmond Unified School District/Simi Valley Unified School District (8/1/79) PERB Decision No. 99.

The District's second constitutional argument is that the power to legislate remains exclusively with the Legislature, which has not and cannot delegate to PERB the authority to "declare public employee strikes legal." PERB claims neither the authority to legislate nor any delegated power to alter or improve upon the work of the Legislature. We are mandated, however, to interpret and enforce the provisions of EERA. As discussed more fully herein, our finding that this strike is protected under EERA is based on the language of the statute and the legislative intent manifested therein.

The District next cites a number of appellate court cases which, it is generally agreed, indicate that absent legislative authorization, public employees have no right to strike.²⁵ Moreover, it argues that EERA does not authorize strikes because:

The legislature, in enacting Gov. Code
Section 3549 excluding public school

²⁵Los Angeles Unified School District v. United Teachers (1972) 24 Cal.App.3d 142 [100 Cal.Rptr. 806]; Pasadena Unified School District v. Pasadena Federation of Teachers (1977) 72 Cal.App.3d 100 [140 Cal.Rptr. 41]; City of San Diego v. American Federation of State, County and Municipal Employees (1970) 8 Cal.App.3d 308 [87 Cal.Rptr. 258]; Stationary Engineers, Local 39 v. San Juan Suburban Water District (1979) 90 Cal.App.3d 796 [153 Cal.Rptr. 666] and City and County of San Francisco v. Evankovich (1977) 69 Cal.App.3d 41 [137 Cal.Rptr. 883]; Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen (1960) 54 Cal.2d 684 [8 Cal.Rptr. 1].

employees from the protections of Labor Code Section 923, was presumably aware of prior interpretations of identical language in prior statutory enactments as prohibiting strikes.

The District is correct when it points out that the language of section 3549²⁶ is identical to that found in prior legislative enactments, and that it was this very language which resulted in the appellate court decisions that held public employee strikes illegal. Nonetheless, we reject the District's argument for the following reasons.

First, the Supreme Court has now firmly rejected the contention that section 3549 makes strikes per se unlawful under EERA. In San Diego Teachers Association, supra, the Court, in precise and unmistakable language, states:

. . . section 3549 does not prohibit strikes but simply excludes the applicability of Labor Code section 923's protection of concerted activities. (Emphasis added.)

²⁶Section 3549 provides:

The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to public school employees and shall not be construed as prohibiting a public school employer from making the final decision with regard to all matters specified in Section 3543.2.

Nothing in this section shall cause any court or the board to hold invalid any negotiated agreement between public school employers and the exclusive representative entered into in accordance with the provisions of this chapter.

Thus, section 3549 means simply that EERA's statutory scheme, not section 923 of the Labor Code, dictates the state's labor policy as to public school employees.

Secondly, these appellate court cases were rendered under statutory schemes which create different rights and are less comprehensive than EERA. Los Angeles Unified School District v. United Teachers, supra, and Pasadena Unified School District v. Pasadena Federation of Teachers, supra, arose under the Winton Act;²⁷ City of San Diego v. American Federation of State, County and Municipal Employees, supra, arose under the George Brown Act.²⁸ These statutes stop short of providing the collective bargaining rights found in EERA; neither allows for exclusive representation, good faith negotiations or labor-management contracts. Stationary Engineers Local 39 v. San Juan Suburban Water District, supra, and City and County of San Francisco v. Evankovich, supra, arose under the

²⁷The Winton Act, enacted in 1965, was codified at section 13080 et seq. of the Education Code. Prior to the passage of EERA, the Winton Act governed employer-employee relations in California's public schools.

²⁸The George Brown Act, enacted in 1961, is codified at section 3525 et seq. of the Government Code and governs employer-employee relations for certain professional, managerial and confidential State employees. The Brown Act governed employer-employee relations in local government agencies until the Meyers-Miliias-Brown Act passed in 1969. Prior to the passage of the State Employer-Employee Relations Act (SEERA), Government Code section 3512 et seq., and the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq., all State and higher education labor relations were governed by the Brown Act.

Meyers-Miliias-Brown Act.²⁹ This law does permit exclusive representation and negotiated agreements but, like the above-cited laws, it does not establish an administrative agency charged with the responsibility of enforcing, interpreting and administering the act. Under all of these statutes, these functions are left in the hands of the courts.

These appellate decisions have held that, where the Legislature has refused to "enact a comprehensive scheme and an administrative apparatus for the regulation of labor relations in the public sector," legislative authorization to strike cannot be inferred. City and County of San Francisco v. Evankovich, supra, 69 Cal.App.3d 41, 52.

In contrast, EERA is a comprehensive statutory scheme. In San Diego Teachers Association, supra, at p. 12, the Supreme Court noted "the comprehensiveness of the EERA scheme" and the "marked similarities between EERA and NLRA." The Court observed that both EERA and NLRA are administered by full-time boards which have authority over questions of representation, employ general counsels, and can investigate, adjudicate and remedy unfair practices. Judicial review of both boards' orders must hold the findings conclusive if supported by substantial evidence.

²⁹The Meyers-Miliias-Brown Act is codified at section 3500 et seq. of the Government Code, and governs local government employer-employee relations.

Consequently, in San Diego Teachers Association, supra, the Court concluded that the preemption doctrine, which has long been applied to the NLRB, applies similarly to PERB.³⁰ The Court stated that PERB has exclusive initial jurisdiction to determine whether a strike is an unfair practice and what, if any, remedies should be pursued. The Court delineated the rationale for preemption, quoting from Motor Coach Employees v. Lockridge (1971) 403 U.S. 274, 286-288 [91 S.Ct. 1909].

The rationale for pre-emption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system.

PERB, then, has been given the responsibility of using its labor expertise to interpret EERA. While perhaps "an

³⁰See San Diego Building Trades Council et al. v. Garmon (1959) 359 U.S. 236 [79 S.Ct. 773]; Garner v. Teamsters Union (1953) 346 U.S. 485 [74 S.Ct. 161].

The Court also notes section 3541.5 which provides, in pertinent part, as follows:

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. . . .

unremarkable application of standard collective bargaining concepts,"³¹ EERA is the first such statute applying to California school employees and, thus, for these employees, it represents an effort to "restructure fundamentally" prevailing law. Motor Coach Employees v. Lockridge, supra. Decisions reached under substantially different statutes representing, as they do, fundamentally different approaches to labor-management relations, can have only limited significance in the interpretation of EERA.

In addition, in San Diego Teachers Association, supra, the Supreme Court not only asserted PERB's right to withhold a strike injunction, it also found that harsh automatic sanctions have not prevented strikes in the past and may be counterproductive, as may be rigid rules as to the legality of public employee strikes. It concluded that, in order for PERB to perform its mission of fostering constructive employment relations (which surely includes the long-range minimization of work stoppages), PERB may refrain from intervention in a

³¹In San Lorenzo Education Association, CTA/NEA v. Wilson (1982) 32 Cal.3d 841, the Court stated that:

. . . [I]n enacting the EERA, the Legislature did not purport to invent anew the law of labor relations. Much of the act is no more than an unremarkable application of standard collective bargaining concepts well established in other private and public sector contexts to public education employment.

particular strike. And, as it had twice before, the Court refused to uphold the appellate court findings that public employee strikes were per se illegal.³²

Similarly, in upholding PERB's handling of the injunction request in this case, the appellate court in PERB v. Modesto, supra, departed significantly from these earlier appellate court decisions.

As already noted, there is general agreement that pre-EERA appellate court decisions stand for the proposition that strikes are illegal unless authorized by statute. Thus, a finding of the legality of the work stoppage in the instant case does not require reconsideration of the pre-EERA decisions but, rather, requires only a determination of the applicability of those cases to the new governing statute, EERA. When considered in light of the decisions in San Diego Teachers Association, supra, and PERB v. Modesto, supra, and the structure of EERA, it is clear that the pre-EERA appellate court decisions holding public employee strikes to be illegal do not compel the same conclusion under EERA. Nor does the language of EERA compel such a conclusion.

There is no language in EERA which explicitly proclaims strikes to be illegal. When the Legislature sought to insure

³²In re Berry (1968) 68 Cal.2d 137, 151 [65 Cal.Rptr. 273]; City and County of San Francisco v. Cooper (1975) 13 Cal.3d 898, 912 [120 Cal.Rptr. 707].

that firefighters would not have the right to strike, it enacted Labor Code section 1962, which expressly provides that employees "shall not have the right to strike or to recognize a picket line of a labor organization while in the course of the performance of their official duties." The Legislature did not include this or similarly direct language in EERA.

The absence of an express strike ban is significant given the fact that, shortly before passing EERA in 1975, the Legislature had considered but refused to enact several bills which would have barred or restricted public sector strikes.³³ Further, we take administrative notice of two extensive studies prepared by the Legislature on the rights of public employees to bargain collectively and to strike, "To Meet and Confer" by Senator Dills in 1972, and "The Final Report of the Assembly Advisory Council on Public Employee Relations" in 1973. These reports deal with most of the concepts and include much of the actual language found in EERA.

Thus, when considering EERA, the Legislature had available and utilized extensively these proposed bills and reports, but it rejected language in them that would have definitively outlawed strikes. This would seem to belie the assertion that

³³Senate Bill 1440 (Dills) would have subjected school employees to language similar to, but stronger than, the clear strike bar language found in section 1962 of the Labor Code. The Dills-Berman bill would have mandated the courts to enjoin a strike where any citizen could successfully argue that the strike violated community health or safety.

the Legislature intended that EERA should serve as a legal bar to all public school employee strikes.

Even though EERA does not prohibit strikes, the Board cannot hold that a work stoppage is protected unless there is language in EERA which actually authorizes such a decision. We find that there is.

Neither the NLRA or section 923 of the Labor Code contain plain and explicit language permitting strikes, yet the right of employees covered by these statutes to strike is protected. As the Court points out in San Diego Teachers Association, supra, at p. 6, and as the U.S. Supreme Court has held pursuant to the NLRA, a legislative "declaration that workers are to be free from employer interference in 'concerted activities . . . or other mutual aid or protection' is generally understood to confer a right to strike." See, e.g., NLRB v. Mackay Radio & Telegraph Co. (1938) 304 U.S. 333 [2 LRRM 610]; NLRB v. Thayer Co. (1st Cir. 1954) 213 F.2d 748 [34 LRRM 2250], cert. denied (1954) 348 U.S. 883 [35 LRRM 2100].

EERA contains no reference to concerted activities. It does, however, in section 3543, guarantee public school employees the right, free from employer interference, "to form, join, and participate in the activities of employee organizations of their own choosing. . . ."34

³⁴See footnote 12 supra.

The only difference we find between the right to engage in concerted action for mutual aid and protection and the right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process. Membership drives, meetings, bargaining, leafletting and informational picketing are activities which are, without question, authorized by section 3543. Similarly, work stoppages must also qualify as collective actions traditionally related to collective bargaining. Thus, except as limited by other provisions of EERA, section 3543 authorizes work stoppages.

However, while EERA does not prohibit strikes per se, it does contain restrictions such as the impasse procedures not found in the NLRA or section 923 of the Labor Code.

PERB has already considered work stoppages under EERA in Fremont Unified School District (6/19/80) PERB Decision No. 136, Fresno Unified School District (4/30/82) PERB Decision No. 208, and Westminster School District (12/31/82) PERB Decision No. 277. These cases establish that, while not all strikes are violative of EERA, a strike prior to the completion of impasse "create[s] something similar to a rebuttable presumption" of an unlawful refusal to negotiate and/or participate in impasse. The presumption of illegality is

rebuttable, however, by proof that the strike was provoked by employer conduct and that, further, the employee organization in fact negotiated and participated in impasse in good faith. Absent such evidence, the presumption stands, and a violation is established.

Fremont, Fresno and Westminster, supra, are all cases in which a strike occurred before the completion of impasse. Where, as in Fremont, an employer has upset the bargaining process by engaging in provocative conduct, then a strike in response to, and in protest of, that conduct does not conclusively demonstrate bad faith on the part of the union. Rather, it is then necessary to consider the totality of the union's conduct to determine the union's subjective good or bad faith.

However, where, as in Fresno and Westminster, no employer provocation is shown and a strike is motivated solely by economic considerations to gain concessions in bargaining, then the strike is a refusal to negotiate. An independent investigation into overall good faith is unnecessary. If undertaken during impasse, such a strike also violates the duty to participate in good faith in the impasse procedures.

Here, we find that the Association has met the dual burden established in these cases. The record shows that the strike was provoked by a series of unfair practices by the District. The District refused to bargain in good faith by engaging in

surface bargaining, conditioning agreement on abandonment of representation rights, bypassing the exclusive representative and attempting to negotiate directly with the employees, and by refusing to grant released time and to bargain after publication of the factfinder's report. The District refused to participate in good faith in the impasse procedure by refusing to consider the factfinder's report. The strike finally resulted when the District implemented illegal unilateral changes. The District's conduct was more than sufficient to provoke a direct response by the Association. That this strike occurred after impasse does not alter the fact that it was provoked.³⁵ We, therefore, look to the second prong of the test to determine if the Association had acted in good faith in the bargaining process. We find that it did. It made concessions from the beginning of bargaining; it agreed to work without a contract while continuing to seek agreement; it participated in good faith in the mediation and factfinding procedures; and it made additional concessions after publication of the factfinder's report.

We have noted that some teachers engaged in unprotected activity and that the District was justified in reprimanding those teachers. However, there is no indication that the

³⁵Inasmuch as we find that this strike was provoked by the District's unfair practices, it is not necessary and we expressly decline to decide whether a purely economic strike after impasse would contravene the requirements of the Act.

unprotected activity was taken to short-circuit the bargaining process, nor did it have that effect. We, therefore, find from the totality of the circumstances that the Association had the serious intent to adjust differences and "entered into discussion with a fair mind and sincere purpose to find a basis of agreement." Globe Cotton Mills v. NLRB (5th Cir. 1939) 103 F.2d 91, 94 [4 LRRM 621]; NLRB v. Herman Sausage Co. (5th Cir. 1960) 277 F.2d 793 [45 LRRM 3072].

We conclude that the strike engaged in by the Association was provoked by the District, and that the Association had participated in the collective bargaining process in good faith. We, therefore, hold that the strike by the Association was not in violation of EERA but was protected conduct. The alleged violations of subsections 3543.6(a), (b), (c) and (d) which relate to the Association's conduct are therefore dismissed.

Letters of Commendation to Non-Strikers

After the work stoppage, letters of commendation were sent to some faculty members who crossed picket lines to teach during the strike. The Association did not formally charge that this conduct was a violation of the Act. However, the Association argued in its briefs that the letters of commendation constituted a violation of subsection 3543.5(a) of the Act. Witnesses were examined and cross-examined on the issue, and both parties extensively discussed the question in

post-hearing briefs. The hearing officer examined the allegation and made a determination on the merits. Therefore, it is proper here to examine this unalleged violation which is intimately related to the subject matter of the complaint and which has been fully litigated. Santa Clara Unified School District, supra.

It has long been held that providing certain benefits to non-strikers constitutes unlawful interference with employees in the exercise of protected activities. San Diego Unified School District (6/19/80) PERB Decision No. 137; Rubatex Corp. (1978) 235 NLRB 833 [97 LRRM 1534]; Aero-Motive Mfg. Co. (1972) 195 NLRB 790 [79 LRRM 1496] (cash bonus); and Swedish Hospital Medical Center (1977) 232 NLRB 16 [97 LRRM 1173] aff. 238 NLRB 1087 [99 LRRM 1467] (extra day off). This strike has been found to be protected conduct. The District's action of granting the benefit of letters of commendation only to those who refrained from participation in protected organizational activity tends to discourage employees from engaging in protected activity in the future.

While there is no conclusive evidence that the letters of commendation will be used for promotions, transfers, evaluations or future job references, the existence of these letters in the personnel files constitutes a continuing threat that they will be employed for such uses. Such a threat has a chilling effect on employee participation in future

organizational activity, thereby causing at least slight harm to employee rights.

The District's argument that the letters of commendation were issued because the employees continued to perform their jobs under adverse conditions does not alter the fact that a benefit was conferred on non-strikers and denied to strikers. Neither can the District's explanation for its conduct reasonably be construed as operational necessity sufficient to outweigh the harm to employee rights. The fact that the District provoked the strike by its own unfair practices also weighs the balance against it. We, therefore, conclude that the letters of commendation constitute an interference with employee rights in violation of subsection 3543.5(a) of the Act.

REMEDY

The Board has broad remedial power to effectuate the purposes of the Act. Subsection 3541.5(c) of EERA sets forth PERB's remedial authority in unfair practice cases. It provides:

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.

A properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have

obtained but for the unfair labor practice. Santa Clara Unified School District, supra; Phelps Dodge v. NLRB (1941) 313 U.S. 177 [61 S.Ct. 845].

The Board must remedy any discriminatory action taken against Association members for participating in this strike. The strike in this case does not constitute an unfair practice because it was both provoked by management and occurred after good faith participation in bargaining and impasse procedures. We have further rejected the charge that this strike violated California common law and thus reject the argument that it was unlawful/unprotected.³⁶

³⁶Even if it had been determined that the conduct of the Association was unprotected, we would still have power to remedy discrimination against these strikers. NLRB v. Thayer Co., supra; Rockwell v. Board of Education (1975) 20 CCH 357; AFSCME, Local 481 v. Town of Sanford (1980) 37 CCH 615.

In Thayer Co., supra, 34 LRRM 2250, 2253, the U.S. Court of Appeal stated:

. . . [W]here, as in the instant case, the strike was caused by an unfair labor practice, the power of the Board to order reinstatement is not necessarily dependent upon a determination that the strike activity was a "concerted activity" within the protection of section 7. Even if it was not, the National Labor Relations Board has power under section 10(c) to order reinstatement if the discharges were not "for cause" and if such an order would effectuate the purposes of the Act

The point is that where collective action is precipitated by an unfair labor practice, a finding that that action is not protected under section 7 does not, ipso facto,

In order to remedy the unfair practices of the District and to prevent it from benefiting from its unfair labor practices, and in order to restore the status quo so as to effectuate the purposes of EERA, we order the District to remove from employee personnel files all letters of commendation issued to non-strikers.

We further find that an appropriate remedy to the District's unilateral changes is to order the reinstitution of

preclude an order reinstating employees who have been discharged because of their participation in the unprotected activity.

The same reasoning has been applied to two state public employment relations statutes. Michigan's Public Employment Relations Act expressly prohibits strikes. Nonetheless, the Supreme Court of Michigan held that the Michigan Employment Relations Commission could, despite the illegality of a teachers' strike, order reinstatement of strikers where the school district committed an unfair labor practice which provoked the strike. The Court found that such remedy would effectuate the policies of the Act for two reasons:

First, the employer's antecedent unfair labor practices may have been so blatant that they provoked the employees to resort to unprotected action. Second, reinstatement is the only sanction which prevents an employer from benefitting from his unfair labor practices through discharges which may weaken or destroy a union. Rockwell v. Board of Education, supra, 20 CCH 357, 362.

In Town of Sanford, supra, the Maine Superior Judicial Court upheld the order of the Maine Labor Relations Board (MLRB) requiring the reinstatement of municipal employees who had engaged in an illegal strike in response to an employer's unlawful bad faith bargaining. The Court found reinstatement to be a proper exercise of the MLRB's remedial power to restore the status quo.

the status quo prior to the changes and to order the District to bargain over those changes. The District shall bargain over policies unilaterally implemented on February 25, 1980.

We also find it appropriate that the District be ordered to destroy those letters of reprimand which relate to the refusal to do voluntary duties.

We also find it appropriate to order the District to cease and desist from: refusing to negotiate in good faith, refusing to participate in good faith in the impasse procedure, denying the Association its right to represent unit members and interfering with employees because of their exercise of rights guaranteed by the Educational Employment Relations Act.

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 of the parties' readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. ALRB and UFW (1979) Cal.App.3d 580, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

Where the parties have entered into a negotiated agreement which relates to any of the remedies ordered by this Board, the parties may stipulate that the pertinent language of the agreement fulfills the requirements of this Decision or, in the event of a failure to agree, the negotiated instrument may be submitted as a relevant document in a compliance hearing.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record of this case, it is hereby ORDERED that the Modesto City Schools and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing and failing to meet and negotiate in good faith with the Modesto Teachers Association.
2. Denying the Modesto Teachers Association its right to represent unit members.
3. In any manner restraining, discriminating against or otherwise interfering with the rights of employees because of the exercise of their rights under the Educational Employment Relations Act.
4. Refusing to participate in good faith in the impasse procedure.

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

1. Upon request, bargain with the Modesto Teachers Association, as the exclusive representative of all employees in the appropriate unit.

2. Upon request, provide the Modesto Teachers Association reasonable amounts of released time to participate in negotiations.

3. Rescind the policy on class size and the policy on grievance adopted on February 25, 1980, and restore the procedures reflecting the status quo as of the prior school year.

4. Remove and destroy all letters of reprimand issued for refusal to participate in voluntary duties.

5. Remove and destroy all letters of commendation, or any reference thereto, issued to those teachers who did not participate in the strike.

Within ten (10) workdays after the date of service of this Decision, prepare and post copies of the Notice to Employees, attached as an appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for at least thirty (30) consecutive workdays at all school sites and all other work locations where notices to certificated employees customarily are placed. Such Notice must not be reduced in size and reasonable steps shall be taken to ensure that it is not defaced, altered or covered by any material.

Within thirty (30) workdays following service of this Decision, notify the Sacramento regional director of the Public Employment Relations Board, in writing, of what steps the employer has taken to comply with the terms of this Order.

Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

IT IS FURTHER ORDERED THAT:

1. Charge S-CO-48, filed by the Modesto City Schools, is DISMISSED.
2. Charges S-CE-320 and 341, filed by the Modesto Teachers Association, are DISMISSED in their entirety.
3. That portion of Charge S-CE-318, filed by the Modesto Teachers Association, referring to the March 3 "Staff Update" is DISMISSED.
4. Those portions of Charge S-CE-323, filed by the Modesto Teachers Association, referring to reprimands for the refusal to surrender school keys and lesson plans and to attend a faculty meeting are DISMISSED.
5. That portion of Charge S-CE-325, filed by the Modesto Teachers Association, referring to conditioning agreement on acceptance of a no-strike clause is DISMISSED.

Members Tovar and Jaeger joined in this Decision.

APPENDIX

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

After a hearing in Case Nos. S-CO-48, S-CE-318, 319, 320, 323, 324, 325, 326, 328, 329, 341, Modesto City Schools, in which all parties had the right to participate, it has been found that the Modesto City Schools violated the Educational Employment Relations Act by failing and refusing to meet and negotiate in good faith with its employees' exclusive representative, the Modesto Teachers Association. These violations occurred when the District:

1. Refused to consider in good faith the factfinder's report and concessions made by the Modesto Teachers Association after factfinding;
2. Denied the bargaining representatives of Modesto Teachers Association released time contrary to the requirements of the Educational Employment Relations Act;
3. Conditioned agreement on the Association's abandonment of its representative capacity at the informal step of the grievance procedure;
4. Bypassed the exclusive representative and attempted to negotiate directly with members of the bargaining unit through the "Staff Update" of February 14, 1980; and
5. Unilaterally adopted a grievance policy and a class size policy without providing the exclusive representative with notice and an opportunity to negotiate.

It has further been found that by this same conduct the District denied the exclusive representative its right to represent unit members in their employment relations with the District.

It has further been found that the District interfered with employees because of their exercise of rights protected by the Educational Employment Relations Act by:

1. Refusing and failing to meet and negotiate in good faith with the exclusive representative selected by the employees to meet and negotiate on their behalf;
2. Issuing letters of reprimand for participation in the work-to-rule program of the Modesto Teachers Association in which teachers refused to participate in voluntary duties; and

3. Issuing letters of commendation to those teachers who did not participate in the strike of March 4 through March 12, 1980.

It has further been found that the District refused to participate in good faith in the impasse procedure by failing to give good faith consideration to the factfinding report.

As a result of this conduct, we have been ordered to post this notice, and WE WILL:

A. CEASE AND DESIST FROM:

1. Refusing and failing to meet and negotiate in good faith with the Modesto Teachers Association.

2. Denying the Modesto Teachers Association its right to represent unit members in their employment relations with the District.

3. Interfering with employees because of their exercise of rights guaranteed by the Educational Employment Relations Act.

4. Refusing to participate in good faith in the impasse procedure.

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

1. Rescind the policy on class size and the policy on grievance adopted on February 25, 1980, and restore the procedures reflecting the status quo as of the prior school year.

2. Remove and destroy all letters of reprimand, or any reference thereto, issued to teachers for failing to perform voluntary duties.

3. Remove and destroy all letters of commendation, or any reference thereto, issued to those teachers who did not participate in the strike.

DATED:

MODESTO CITY SCHOOLS

By: _____

Authorized Agent

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

