

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



MAMMOTH EDUCATION ASSOCIATION,)	
CTA/NEA,)	
)	
Charging Party,)	Case Nos. S-CE-424
)	S-CE-487
v.)	
)	PERB Decision No. 371
MAMMOTH UNIFIED SCHOOL DISTRICT,)	
)	December 29, 1983
Respondent.)	
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Appearances; Charles R. Gustafson, Attorney for Mammoth Education Association, CTA/NEA; Carl B. A. Lange, III, (Schools Legal Service) for Mammoth Unified School District.

Before Tovar, Morgenstern and Burt, Members.

DECISION

TOVAR, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Mammoth Education Association, CTA/NEA (Association) to the attached proposed decision of a PERB administrative law judge (ALJ). The exceptions are to the ALJ's dismissal of the Association's allegation that the Mammoth Unified School District (District) violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act) by suspending one of its teacher members for refusing to carry out certain assigned duties.¹ For the reasons set forth in the

¹The EERA is codified at Government Code section 3540

discussion which follows, the Board affirms the dismissal of the allegation.

No exceptions have been filed to the remainder of the proposed decision, in which the ALJ determined that the District violated the EERA by unilaterally adopting a new policy on the assignment of co-curricular coaching duties and by denying Association representation to a bargaining unit member at a disciplinary meeting with a District administrator. On that basis, the ALJ's findings of fact, conclusions of law and order with respect to those matters are adopted as the final determination of the Board.

FACTS

No exceptions have been filed to the ALJ's findings of fact. Upon a review of the evidentiary record in this case, we find the ALJ's statement of facts to be free of prejudicial error and therefore adopt those findings as those of the Board. For convenience, a summary of the relevant facts follows.

The Association is the exclusive representative of the District's certificated employees. David Boe has been a teacher for the District since 1973. He is a member of the Association, but has never been active in organizational activities.

et seq. All statutory references herein are to the Government Code unless otherwise indicated.

In May 1981, Boe was given a mandatory assignment by school principal Joe Maruca to coach girls' junior varsity basketball in the coming fall. The mandatory nature of this assignment constituted a departure from the established method of filling co-curricular coaching positions. Teachers coming to the District since 1974 had been hired on the express understanding that coaching duties would be a required part of the job duties. But teachers who, like Boe, were hired before that year took coaching assignments only on a volunteer basis. This arrangement had in the past sufficed to fill all the assignments.

Upon being assigned the coaching duty, Boe told Maruca that he would refuse to accept it because he had coached seven seasons during his employment while other teachers had coached less or not at all. On June 9, Maruca reaffirmed to Boe that he was assigned to the coaching position, which would begin on November 16. Boe continued to refuse the assignment.

Boe sought and received Association assistance in filing a grievance under the contractually provided grievance procedure. The contract provided, inter alia:

2. The filing of a grievance shall in no way interfere with the right of the Board to proceed in carrying out its management responsibilities subject to the final decision of the grievance. In the event the alleged grievance involves an order, requirement, or other directive, the grievant shall fulfill or carry out such order, requirement, or other directive, pending the final decision of the grievance.

Boe contacted Association officials regarding his intended refusal to coach and was informed that such action might constitute insubordination. No evidence was presented to show that the Association encouraged or sanctioned Boe's decision to refuse the assignment.

In July, Association President Robert Barker mentioned to Maruca that he was considering the idea of volunteering for the coaching position assigned to Boe. Maruca responded, "don't." Barker did not take this response as a threat, but only as an expression of concern that Barker not over extend himself.

On October 20, teacher Carol Broberg formally volunteered for the coaching position. Broberg had no basketball coaching experience with the District and had been off work on medical leave during the prior semester. The request was denied by the District for both reasons.

On November 3, Maruca conducted a meeting with Boe, the Association president and Vice Principal Macateer. Maruca instructed Boe that he was still assigned to coach junior varsity girls' basketball. Boe continued to refuse the assignment.

The coaching assignment commenced on November 16. Boe received letters of reprimand for failing to perform assigned duties on November 17, 18, 19 and 20. Each letter was placed in his personnel file.

On November 30, the superintendent gave Boe written notice of the District's intention to suspend him for one day without pay for each day he refused to coach, effective December 1. The suspension was based upon Boe's insubordination for (1) failure to carry out lawful orders, and (2) failure to comply with an order pending completion of the grievance process as required by the collective bargaining agreement. The District suspended the proposed disciplinary action until the arbitrator's advisory decision was issued.

On December 3, 1981, the arbitrator issued a decision favoring the District. The arbitrator found:

1. No past practice existed wherein the District had assigned coaching duties on an involuntary basis;
2. No negotiations occurred about coaching assignments other than the amount of compensation;
3. The District rights' provision of the contract provides clear authority to assign coaching duties and no other contract provision limits such right;
4. The District has an inherent right to assign teachers to perform as paid coaches for after-school sports unless expressly limited by a contract (60 Ops. A.G. 365 (1977)).

Following a hearing, the advisory decision denying the grievance was adopted by the governing board on January 6, 1982. The board also suspended Boe for 10 days without pay for insubordination.

As of January 7, 1982, the girls' junior varsity basketball team coaching position remained vacant. The varsity coach coached both teams which, combined, consisted of 12 girls.

Collective Bargaining Agreement

The parties operated under successive collective bargaining agreements effective 1978 through July 1981 and August 1981 through 1984. The contracts are substantially similar and for purposes of this case contain identical relevant provisions.

The parties specifically negotiated wages for coaching. The contract contains an appendix which lists a separate stipend for the performance of each co-curricular activity. Co-curricular activities include coaching each individual interscholastic sport and the positions of athletic director, activities director and cheerleading director.

The contract does not mention how coaches are selected or assigned. No specific discussion of coaching assignments occurred during negotiations, nor did the District communicate to the Association, prior to the instant dispute, that the "management rights" clause in the 1978-81 and 1981-84 contracts gave the right to assign employees involuntarily to coaching duties. The "management rights" clause specifies that the District retains "the right to hire, classify, assign, transfer, evaluate, promote, suspend and terminate employees."

The agreement contains no stated causes or procedures for imposition of discipline or any reference to review of

discipline through the grievance procedure. No evidence was presented to indicate that the parties discussed discipline during negotiations.

DISCUSSION

Initially, the Association argues that the imposition of a suspension upon Boe as a method of discipline was supported by neither past practice nor contractual agreement, and that this action therefore amounted to the unilateral adoption of a new disciplinary policy in violation of EERA subsection 3543.5(c).

The management rights clause of the parties' agreement provides that the District will have "the right to . . . suspend . . . employees." The Association's position is that this provision permits the District to exercise its power to suspend only to the extent authorized by state law as embodied in the Education Code. The Education Code makes only one express provision for the suspension of certificated employees: at section 44944 it sets forth procedures for the dismissal of certificated employees and includes suspension as an interim measure during such proceedings. Clearly, argues the Association, Boe's suspension was not imposed pursuant to the dismissal provisions of Education Code section 44944; therefore, it was not authorized by the management rights provision of the contract.

A public school employer's authority to suspend its employees has previously been reviewed by this Board. In Arvin

Union School District (3/30/83) PERB Decision No. 300, we considered Education Code section 35160, which provides that:

. . . the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law which is not in conflict with the purposes for which school districts are established.

We concluded that section 35160 establishes a public school employer's "inherent right to discipline" its employees using measures short of dismissal, including, inter alia, suspension without pay.

In the instant case, the Association has acknowledged that the management rights provision of their agreement incorporates the District's authority to suspend under the Education Code. Thus, since suspension as a disciplinary measure is authorized by the Education Code, it is in turn authorized by the parties' collectively negotiated agreement. The Association has therefore failed to show that the District engaged in a unilateral change in policy.

The Association argues that, even if the District has the authority generally to suspend its employees as a disciplinary measure, the suspension of Boe in this case was a violation of EERA subsection 3543.5(a), which prohibits a public school employer from taking adverse personnel action against an employee because of his or her participation in activity protected by the Act. The Association contends that Boe's

refusal to accept the coaching assignment was a protected response to the District's attempt to impose an unlawful unilateral change in assignment policy.

The grievance provision of the contract includes the following proviso:

In the event [a] grievance involves an order, requirement or other directive, the grievant shall fulfill or carry out such order, requirement or other directive pending the final decision of the grievance.

In light of the above language, we need not decide whether, in other circumstances, an employee's refusal to obey the directive of an employer who seeks to implement an unlawful unilateral change would be protected by the Act. Boe agreed, through his exclusive representative and via the collective negotiating process, that he would obey the employer's directives, notwithstanding his objections to them, pending the final resolution of those objections via the grievance procedure. Certainly the EERA does not, absent compelling circumstances,² protect the unilateral repudiation of collectively bargained agreements. We find, therefore, that Boe's refusal to accept the coaching assignment was not protected conduct.

²We do not here foreclose the possibility that, for example, an employee's refusal to obey a directive which is based upon legitimate concerns for the collective safety of unit employees might be protected by the Act notwithstanding the existence of a "work now, grieve later" provision as in this case.

The Association argues, however, that even if Boe's insubordination was unprotected, the District's decision to impose the suspension was nevertheless unlawfully motivated by the District's desire to punish Boe for his resistance to the unlawful change in assignment policy and his recourse to Association assistance in that regard. As proof of this allegation, it maintains that two teachers independently volunteered to take the coaching assignment that was being pressed on Boe, and that the District rejected them only because of its determination to punish Boe.

The first teacher to express interest in the coaching position was Association president Robert Barker. In July, Barker mentioned to principal Maruca that he could volunteer for the assignment. Maruca responded, "don't." Barker testified that he understood Maruca's statement to be an expression of concern that Barker not over extend himself. He did not take it as a threat. The ALJ found that Barker freely chose not to pursue his idea of actually volunteering for the position. The Association argues on exception that even though Barker may not have perceived Maruca's one-word statement as a threat, it was meant as a threat, and indicates that Maruca had it in for Boe.

Beyond this mere assertion, there is no evidence to support the Association's claim. In light of the fact that Barker, the Association president, himself perceived no threat, and in

reliance upon the ALJ's determinations of witness credibility, we find a reversal of the ALJ's factual determination unwarranted.

The other teacher to whom the Association points is Carol Broberg. It is uncontested that she did in fact formally volunteer, and that the District denied the offer of her services on the grounds that she had recently taken a medical leave of absence and also had no coaching experience. The ALJ found that the District's grounds were legitimate, based upon information that Broberg was not qualified for the position, and thus that the incident failed to prove any intent on Maruca's part to punish Boe.

The Association takes exception to the ALJ's conclusion that Broberg was sufficiently unqualified for the coaching assignment to justify Maruca's rejection of her volunteered services. A review of the record, however, reveals that Broberg's experience in coaching basketball was extremely limited, consisting of a one-year stint with a junior high school intramural athletics program. This program devoted only a fraction of the year to basketball, and occurred 15 years prior to the events here at issue. In light of evidence suggesting that Maruca was under some pressure to field a successful girls' basketball team, his rejection of a volunteer who had no experience in coaching basketball at the high school level or in coaching any form of interscholastic basketball

fails to raise an inference that he continued to press Boe to accept the assignment for unlawful reasons. We therefore affirm the ALJ's dismissal of the Association's allegation that the District violated subsection 3543.5(a) when it suspended Boe.

As noted, supra, the Board has adopted the ALJ's uncontested determination that the District violated subsections 3543.5(a), (b) and (c) by unilaterally changing its policy on the assignment of co-curricular coaching duties and that it violated subsections 3543.5(a) and (b) by denying Association representation to Boe at a meeting with Principal Maruca on June 11, 1981. The Order of the Board with respect to these matters follows.

ORDER

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

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the Mammoth Education Association, CTA/NEA, as the exclusive representative of employees in the certificated unit, by taking unilateral actions on matters within the scope of representation with respect to assignment of coaching duties.

(2) Denying to the Mammoth Education Association,

CTA/NEA, rights to represent its members guaranteed by the Educational Employment Relations Act by:

(a) refusing to meet and negotiate about matters within the scope of representation; and

(b) denying the organization the right to represent a unit member in a meeting involving potential disciplinary action.

(3) Denying David Boe the right to be represented in meetings involving potential disciplinary action.

(4) Interfering with employees because of their exercise of representational rights by making changes in policy on matters within the scope of representation without first affording the opportunity to meet and negotiate to their exclusive representative.

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

(1) Upon request, immediately meet and negotiate with the Mammoth Education Association, CTA/NEA, regarding assignment of coaching duties.

(2) Within 35 days following the date of service of this Decision, prepare and post at all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this ORDER. Such posting shall be maintained for a

period of 30 consecutive workdays. Reasonable steps shall be taken to insure that such Notices are not reduced in size, altered, defaced or covered by any other material.

(3) Written notification of the actions taken to comply with this ORDER shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with her instructions.

C. All other charges are DISMISSED.

Members Morgenstern and Burt 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 Unfair Practice Case Nos. S-CE-424 and S-CE-487, Mammoth Education Association, CTA/NEA v. Mammoth Unified School District, in which all parties had the right to participate, it has been found that the District violated Government Code subsections 3543.5(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

(1) Denying the rights of the Mammoth Education Association, CTA/NEA, and the unit members it represents by changing the method by which coaching duties are assigned, or any other matter within the scope of representation affecting those employees, without first negotiating with their exclusive representative.

(2) Denying David Boe or any other unit member the right to be represented by the Mammoth Education Association, CTA/NEA, at a meeting involving potential disciplinary action.

B. TAKE THE FOLLOWING ACTION:

Upon request, immediately meet and negotiate with the Mammoth Education Association, CTA/NEA, regarding assignment of coaching duties.

Dated:

MAMMOTH UNIFIED SCHOOL DISTRICT

By: _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



MAMMOTH EDUCATION ASSOCIATION,
CTA/NEA,

Charging Party,

v.

MAMMOTH UNIFIED SCHOOL DISTRICT,

Respondent.

)
)
) Unfair Practice
) Case Nos. S-CE-424
) S-CE-487
)

) PROPOSED DECISION
) (2/9/83)
)
)

Appearances: Charles R. Gustafson, Esq., for Mammoth Education Association, CTA/NEA; Anthony Leonis, for Mammoth Unified School District.

Before Terry Filliman, Administrative Law Judge.

PROCEDURAL HISTORY

This case involves the alleged unilateral change in the past practice of seeking volunteers for coaching duties and the suspension of one teacher for refusal to accept a coaching assignment.

On July 6, 1981, the Mammoth Education Association, CTA/NEA (hereafter Association or MEA) filed unfair practice charge S-CE-424 against the Mammoth Unified School District (hereafter District or Respondent) alleging violations of Government Code sections 3543.5(a), (b) and (c). The District filed a timely answer. An informal conference was held on August 5, 1981, without success. The matter was heard on January 7 and 8, 1982, at Mammoth, California. On March 8, 1982, MEA filed

unfair practice charge S-CE-487. The charge arose from the continuation of actions heard in case S-CE-424. A stipulated record was developed and the cases were consolidated for decision. Briefs were filed and the entire matter was submitted on July 12, 1982.

FINDINGS OF FACT

A. Background

The Mammoth Unified School District is a public school employer. The District consists of one elementary school and one high school located on a single site. The Association is the exclusive representative of certificated employees within the meaning of the Educational Employment Relations Act (hereafter EERA) .¹

David Boe has been employed by the District since 1973 as a science teacher at the high school. Boe is a MEA member but is not active in organizational activities.

B. Coaching Assignment to Boe

On May 28, 1981,² Joe Maruca, high school principal, conducted a short evaluation session with Dave Boe. The principal informed Boe that he would be assigned co-curricular coaching duties the following school year. Boe indicated he

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

²All events described hereafter occurred in 1981 unless otherwise indicated.

would resist the assignment because he had coached seven seasons during his employment while other teachers had coached less or not at all.

On June 8, Maruca sent a ~~memo~~ to all high school teachers requesting volunteers for three vacant coaching positions. On June 9 the principal notified Boe by ~~memo~~ that he was assigned one of the vacant positions³—girls' assistant basketball coach. The assignment was to become effective November 16th. As described herein Boe continued to refuse the assignment in advance and refused to perform the duties in November.

C. MEA Involvement in Dispute/Other Volunteers

The subject of coaching assignments arose during a ~~May~~ faculty meeting. Maruca suggested that assignments would be made if no volunteers were available for coaching. Several faculty members approached Robert Barker, Association president, to receive MEA's position on the matter.

On ~~May~~ 28, Barker and Maruca briefly discussed the issue in the faculty lunchroom. Barker then told Maruca MEA's position was that teachers could not be involuntarily assigned to coach

³Neither of the other two coaching positions—junior varsity football and junior varsity basketball were assigned in June. The junior varsity baseball position was not filled by January 8, 1982. A volunteer for the football job was allowed to withdraw because of family hardship with a promise he would coach the following season.

Testimony indicated that the school board was unhappy with the lack of success in the girls basketball program and had directed that the program be improved.

under the current contract. Maruca responded, "if there is any teacher who doesn't coach, I'll fire his ass." Boe testified that Barker told him of the incident. No evidence was produced to show Barker told any other unit members.

On the same day the District circulated a legal opinion [60 Ops. Atty. Gen. 365 (1977)] among faculty. The opinion indicated that the District had the right to assign coaching duties.

MEA assisted Boe in preparation of written responses to Maruca's written assignment order of June 9 and in a formal grievance presented on June 19. Barker assisted Boe in presentation of his individual grievance at each authorized step of the process.

The Association filed an unfair practice charge on July 6 alleging a unilateral change in working conditions and violations of the representation rights of all unit members and specifically the rights of Boe.⁴

Boe contacted CTA officials regarding his intended refusal to coach and was informed that such actions might constitute insubordination. No evidence was presented to show that the MEA encouraged or sanctioned Boe's decision to disobey the assignment as contrasted to its support of his legal claims.

⁴Official notice is taken that no request for an injunction to prohibit implementation of the assignment to Boe was filed.

During a grievance proceeding in July or August, Barker informally suggested to Maruca that he would take the high school coaching assignment in place of Boe. Barker was an elementary school teacher. The record indicates that he later coached sixth grade basketball during 1981-82, but it is unclear whether he had already volunteered for the duty at the time of the conversation. Barker testified that Maruca informally rejected the offer by stating "don't." Barker did not take Maruca's response as a threat but rather an expression of concern that he not attempt to over extend himself. Barker never filed a formal request to volunteer.

On October 20 Carol Broberg, a high school teacher, formally volunteered for the position. The offer was made two days prior to the arbitration hearing affecting Boe's grievance. Broberg had no coaching experience with the District and had been off work on medical leave during the prior semester. The request was denied by the District for both reasons.

On November 3rd Maruca told Tom Beveridge, a teacher, that Boe was assigned the coaching position based on a "hidden agenda." Maruca did not explain what he meant. Beveridge gave his opinion that someone on the District board wanted Boe assigned to coach girls' junior varsity basketball.

MEA representatives objected to the school board's suspension of Boe in January 1982 (described later herein) on

the basis that no District policy for discipline short of discharge existed or had been negotiated prior to that date.

D. Denial of Representation

On June 11th, Boe and Barker delivered a written response to Maruca's June 8th memo assigning Boe to coach. Maruca told Boe to meet with him in his office at 1:45 p.m. Boe asked a union representative, Kathy Keller, to go with him to the office.⁵ Maruca was not present so Keller left. Boe ran into Maruca in the hallway and a five to ten-minute heated discussion ensued. Boe indicated that if the meeting related to his coaching assignment he wanted an MEA representative present.

According to Boe, Maruca indicated that Boe did not have the right to have a union representative at a meeting where his job might be in jeopardy for refusing to coach. Boe further testified that Maruca told him he would be in serious trouble for insubordination if he did not attend the meeting. Maruca testified that he told Boe his reason for refusing a representative was that the meeting was not to discuss or impose discipline but a meeting to discuss the coaching assignment. He indicated he informed Boe that his job was not in jeopardy.

⁵While the record does not reflect Keller's capacity with MEA, both witnesses indicated she was present as a MEA representative.

The credibility dispute surrounds whether Maruca affirmatively told Boe that the purpose of the meeting was not related to discipline. It is found that Maruca did not mention discipline except his remark about possible insubordination based upon his specific testimony about the incident. Most likely Boe commented himself about his job being in jeopardy.

A few minutes later Boe arrived at Maruca's office accompanied by Keller. According to Boe, a heated discussion occurred and Maruca refused to hold a meeting with Keller present. Boe then asked Keller to leave because he felt he was in enough trouble. Maruca stated he again indicated that the meeting did not involve discipline but was solely to discuss the coaching assignment. He testified that after he assured Boe of the purpose of the meeting Boe told Keller she was not needed and could leave.

Maruca then read the grievance procedure from the collective bargaining contract. The procedure prohibits either party from bringing in a representative at the first step.⁶ Boe stated that he had not filed a grievance and he did not consider the matter to be a grievance at that time. Boe indicated he would not coach until such assignments were equally distributed among staff. The meeting concluded with Maruca and Boe discussing Boe's attitude, the importance of

⁶1978-1981 Agreement, Article IX.

school athletics and why the coaching assignment was necessary. Both witnesses agree that discipline was never mentioned during the conversation.

On July 1 Maruca sent Boe a letter requesting the scheduling of another informal meeting similar to the June 11 session. The letter stated in part:

. . . our counsel had advised us that you are entitled to an informal hearing . . . in the presence of any union representative of your choosing.

Pursuant to the letter a meeting was held on July 6 with Boe being represented by Barker. Maruca and Superintendent Marvin Heinsohn both testified that the July 6 meeting was not held to substitute for the June 11 session. Nevertheless, it is apparent from the record that the District was attempting to cure any possible defects in the prior meeting based upon legal advice.

E. Assignment of Coaching Duties

1. Background

The District was an elementary school district prior to 1974. Boe was hired in 1973 as a science teacher with no contemplated coaching assignments. Upon unification and the opening of a high school in 1974 several new certificated employees were hired on the basis that they would teach and coach. Gordon Strachan was the District superintendent through 1977. Strachan indicated that during his tenure teachers filled all coaching positions either on a volunteer basis or

because of an understanding reached at the time of their hiring. Since 1977 the District developed a general practice of hiring only new teachers at the high school who indicated a willingness to coach. Those who are hired currently to coach are specifically hired as teacher/coaches.

Both elementary and high school teachers are eligible to coach co-curricular sports.

Coaching is considered a co-curricular activity. The District attempts to schedule a last period PE class or preparation period for high school coaches so that some of the duties may be performed during the regular teaching day. Such scheduling is not always feasible. Under any scheduling option, coaching requires a substantial expenditure of time beyond the end of the normal teaching day. Certain sports like varsity football require more than 100 hours of participation during a season in addition to normal teaching hours.

2. Past Practice

Prior to the Boe incident no practice existed where the District involuntarily assigned teachers to coaching positions except those who agreed when initially employed. In fact, the issue had never specifically arisen because all prior coaching needs had been satisfied by volunteers.

The District obtained volunteers either by circulating a memo of vacant coaching slots to staff or by contacting an individual directly and soliciting him or her to volunteer.

During the last three years the District had encountered increasing difficulty in securing volunteers. Since 1980 two noncredentialed persons had been employed to coach.⁷ The practice was not expanded because concerns were raised over District liability. District Superintendent Heinsohn testified that teachers have been counseled into accepting involuntary assignments during his tenure on many occasions. One example supporting the claim was offered, but no specific facts were provided. Therefore, it is found that at the time of the Boe assignment no other teacher had been ordered to coach.

F. Policy on Disciplinary Actions Short of Dismissal

1. Past Practice

No evidence was presented to indicate that the District had a policy of imposing discipline short of discharge against certificated employees or a practice of suspending teachers prior to the Boe incident.

2. Reprimands/Suspension of Boe

An advisory arbitration was held on Boe's grievance on October 22.

On November 3 Maruca conducted a meeting with Boe, Barker and Vice Principal Macateer. Maruca instructed Boe that he was assigned to coach junior varsity girls¹ basketball. Boe

⁷Administrative Code, title 5, section 5531 requires student athletics to be supervised by credentialed employees. The same section authorizes noncredentialed coaches only under limited circumstances.

refused the assignment. Maruca stated that the matter would be in the hands of the superintendent and the Board of Trustees if Boe refused to perform the assignment. A memorandum of the conference was placed in Boe's file.

In mid-November Maruca issued two reports of incidents against Boe for leaving campus early and failing to return to school upon request. During late afternoon on November 13, Maruca wanted Boe to personally receive the District's written response to his grievance. Boe had left school for home because he was scheduled for a preparation period the last hour of the workday. A common practice existed for teachers to leave when they had sixth period preparation time assigned. Maruca contacted Boe at home and requested him to return to school to receive the letter. Boe declined. Maruca placed an incident letter in Boe's personnel file. On November 23 Maruca placed another incident report in Boe's file in response to Boe's written response to the first District letter. The second report indicated that incidents like Boe's failure to return to school could cause all faculty to lose the privilege of leaving campus early. No evidence was presented regarding whether other teachers had ever been involved in a similar incident.

The coaching assignment commenced on November 16. Boe received letters of reprimand for failing to perform assigned duties on November 17, 18, 19 and 20. Each letter was placed in his personnel file.

On November 30, the superintendent gave Boe written notice of the District's intention to suspend him for one day without pay for each day he refused to coach effective December 1. The suspension was based upon Boe's insubordination for (1) failure to carry out lawful orders, and (2) failure to comply with an order pending completion of the grievance process as required by the collective bargaining agreement. The District suspended the proposed disciplinary action until the arbitrator's advisory decision was issued.

On December 3, 1981, the arbitrator issued a decision favoring the District. The arbitrator found:

1. No past practice existed wherein the District had assigned coaching duties on an involuntary basis;
2. No negotiations occurred about coaching assignments other than the amount of compensation;
3. The District rights' provision of the contract provides clear authority to assign coaching duties and no other contract provision limits such right;
4. The District has an inherent right to assign teachers to perform as paid coaches for afterschool sports unless expressly limited by a contract (60 Ops. A.G. 365 (1977)).

Following a hearing, the advisory decision denying the grievance was adopted by the governing board on January 6, 1982. The Board also suspended Boe for 10 days without pay for insubordination.

As of January 7, 1982, the girls junior varsity basketball team coaching position remained vacant. The varsity coach coached both teams which combined consisted of 12 girls.

G. Collective Bargaining Agreement

The parties operated under successive collective bargaining agreements effective 1978-July 1981 and August 1981-1984. The contracts are substantially similar and for purposes of this discussion will be described as "the contract or the agreement."

The parties specifically negotiated wages for coaching in the agreement. The contract contains an appendix which lists a separate stipend for the performance of each co-curricular activity. The stipend implies that a teacher will work the number of hours necessary to perform the task. Co-curricular activities include coaching each individual interscholastic sport and athletic director, activities director and cheerleading director.

The contract does not mention how coaches are selected or assigned. No specific discussion of coaching assignments occurred during negotiations. Dr. Wrendly, an outside negotiator, represented the District during negotiation of the contract. Robert Barker was the Association spokesperson. The testimony presented by both parties indicates that those statements which were made during negotiations about coaching assignments were vague.⁸ Association witnesses Strachan,

⁸Barker and Lynn Thee, a negotiations team member, testified as to statements reportedly made by Wrendly. Thee indicated that Wrendly implied that since coaching was not listed among the extra curricular duties in the contract which could be assigned, that it could not be assigned. Barker

Barker and Thee competently testified that the District never communicated to MEA that the "management rights" clauses in either the 1977-78 or 1978-81 contracts gave the right to involuntarily assign employees to coaching duties at any time prior to assigning Boe in 1981.

Contract provisions covering related subjects such as hours, assignment of adjunct duties, transfers, individual employment contracts, duration and management rights must be considered.

Teachers are required to be on campus seven hours per day. They are subject to assignment to adjunct duties without extra pay. These duties may extend beyond the normal workday. The parties stipulated that adjunct duties do not include coaching assignments.⁹

testified that the parties discussed the management rights clause as authorizing the District "to assign teachers to different types of teaching activities for which they were credentialed and qualified."

Because Wrendly was not a District employee and was out of the area and unavailable to testify, the District attempted to respond by introducing double hearsay testimony based upon a phone conversation with Wrendly conducted on the eve of the hearing.

The testimony of all witnesses was found to be too vague and too unreliable to support a specific interpretation of the contract.

⁹Adjunct duties (sometimes referred to as extra-curricular duties) include open house, award ceremonies, supervision of athletic events and dances. (Article X, section 5.)

The contract provides that any individual employment contract shall be subservient to conflicting provisions in the negotiated agreement.

The contract grievance procedure requires a grievant to carry out any District order or directive pending a final decision over the grievance. The grievance procedure includes advisory arbitration.

The contract contains a "management rights" clause which specifies that the District retains "the right to hire, classify, assign, transfer, evaluate, promote, suspend and terminate employees." (Emphasis added.)

The agreement contains no stated causes or procedures for imposition of discipline or any reference to review of discipline through the grievance procedure. No evidence was presented to indicate that the parties discussed discipline during negotiations.

The contract contains a zipper clause. It allows for modification only by mutual consent. MEA may reopen negotiations on one unspecified subject each year.

ISSUES

1. Did the District's assignment of coaching duties to David Boe constitute a refusal to bargain in good faith in violation of section 3543.5(c)?

2. Did the District's imposition of discipline short of discharge against Boe constitute a refusal to bargain in good faith in violation of section 3543.5(c)?

3. Did the District violate sections 3543.5 (a) and (b) by denying to David Boe the right to representation in a meeting with an administrator?

4. Did the District discriminate against Boe in violation of section 3543.5 (a) by imposing several reprimands and a suspension against him?

CONCLUSIONS OF LAW

I. PERB JURISDICTION/DEFERRAL TO GRIEVANCE PROCEDURE

Both of the employer's alleged actions affected a single employee. The District raises contract authority and its inherent authority to make assignments and to take disciplinary action as defenses. The parties initially pursued the contract grievance procedure to resolve the assignment dispute. A fundamental question arises as to whether PERB should invoke its jurisdiction in every contract dispute.¹⁰ In Grant Joint Union High School District (2/26/82) PERB Decision No. 196, PERB established that a breach of contract must amount to a change of policy, not merely default in a contractual obligation. "A change of policy has by definition, a generalized effect or continuing impact upon the terms and conditions of employment of unit members."

¹⁰See Manatee County School Board (1980) 7 FPER 12017 Florida PERB citing policy reasons to promote resolution of assignments to an individual through the grievance procedure rather than bargaining with the exclusive representative. Citing Emporium Capwell Co. Western Edition Community Organization (1975) 420 US 50 43 L.Ed. 2nd 12.

The District's alleged change in practice of assigning coaching duties combined with the threat to discipline teachers who refuse the assignment would constitute a change in policy.

Furthermore, neither deferral to the grievance procedure or to a post-arbitration decision would be appropriate. PERB does not defer to non-binding grievance procedures between the parties. No language in the contract covers the parties' dispute. San Juan Unified School District (3/31/82) PERB Decision No. 204. Finally the arbitration decision issued in this case could not be considered relevant because the arbitrator was not asked to consider EERA statutory principles in addition to interpreting the contract. Dry Creek Elementary School District (7/21/80) PERB Order No. Ad-81a citing Spielberg Mfg. Co. (1955) 112 NLRB 1080 [36 IRRM 1152].

II. UNILATERAL CHANGE IN EMPLOYMENT CONDITIONS

An employer commits an unfair practice when it unilaterally initiates a change in the terms and conditions of employment within the scope of representation without notifying and affording the employee organization an opportunity to negotiate. Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; San Mateo Community College District (6/8/79) PERB Decision No. 94; San Francisco Community College District (10/12/79) PERB Decision No. 105. The unilateral action constitutes a per se violation of the duty to bargain in

good faith pursuant to section 3543.5(c).¹¹ The District has a duty to bargain only those subjects which are within the scope of negotiations.¹²

¹¹Section 3543.5 states in pertinent part:

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.

¹²Section 3543.2 states in relevant part:

3543.2. SCOPE OF REPRESENTATION

(a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of

PERB is empowered to interpret section 3543.2 relating to scope. Rialto Unified School District (4/30/82) PERB Decision No. 209. The Board has noted that the section does not state with specificity which matters are within scope and which are beyond scope. In determining whether a subject is negotiable as a matter "related to" an expressly listed subject, the Board developed a test in Anaheim Union High School District (10/28/81) PERB Decision No. 177. The Board held that:

A subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives essential to the achievement of the District's mission.

These legal principles will be discussed separately and applied to the District's actions in assigning coaching duties and imposing discipline short of dismissal.

the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

A. Assignment of Coaching Duties

(1) Parties Contentions

The District contends that it has an inherent right to assign coaching to teachers pursuant to state statute and that assignment is within scope only to the extent of negotiated additional compensation which is also required to be paid by law. It further contends that the contract "management rights" clause reserves the right to "hire, classify, assign . . . employees" limited only by specific terms of the agreement.

It is the Association's position that the contract covers compensation for coaching, but is silent on how the duties are assigned particularly in light of expressed provisions authorizing the District to assign extra-curricular duties other than coaching. It claims the involuntary assignment to Boe is a change in the past practice of seeking volunteers.

(2) Unilateral Change

Prior to David Boe's coaching assignment, teachers were not assigned such duties without their voluntary consent. Testimony that employees were "counseled" to volunteer was not sufficient to demonstrate a past practice of assignments.

MEA demanded to bargain upon learning of the District's intended change in policy. The District refused to bargain. The action was taken unilaterally.

(3) Assignment of Coaching Duties is Negotiable

The District strenuously argues that state law grants school employers an inherent right to assign teachers to after

school coaching duties where volunteers are not available. This argument has been thoroughly considered and is rejected.¹³

The decision to assign teachers to perform co-curricular duties, including coaching, outside the normal workday affects the wages and hours of those employees.¹⁴ Even the decision to contract with employees outside the District to perform such work affects employees wages because actual or potential work is withdrawn from the negotiating unit. Thus, under the Anaheim test the assignment of work beyond the normal workday to teachers is logically and reasonably related to hours and wages.

The unilateral assignment of substantial duties outside the workday, such as coaching, obviously creates a conflict between

¹³The employer's contentions and applicable law are briefly summarized. Education Code section 35035 (c) allows a district to assign teachers "reasonable duties within the scope of their teaching credential without their consent." (Centinela Valley Union HSD (1974) 37 Cal.App.3d 35; Finot v. Pasadena Board of Education (1967) 250 Cal.App. 189; 61 Ops Ag 53.) The attorney general indicated that all teachers may be assigned coaching duties during or after school hours so long as the assignment is not discriminatory (60 OPS Ag 365). All athletic activities conducted during or after school must be held under the direct supervision of a certificated employee (Cal. Admin. Code, title 5, section 5531). Teachers who coach after school are required to receive extra compensation (Education Code section 45023.5).

¹⁴This decision does not address the assignment of coaching duties which are performed substantially within normal work hours or where normal workload is reduced to accommodate the assignment.

the employer and its employees. The employer's right to offer educational programs and staff such programs with competent licensed personnel is essential to its mission. The teachers' interest in (1) having adequate notice prior to being assigned duties requiring evening work or (2) ensuring that such after hours work is distributed evenly is equally as fundamental as their interest in being compensated when required to work such hours. The negotiation process is the best means to accommodate the interest of both the employer and employees.

In Jefferson School District (6/19/80) PERB Decision No. 133,¹⁵ the Board found negotiation proposals relating to the procedure for assignment of work impacted upon preparation time, rest breaks or time beyond the normal workday.

The interest which employees have in a fair rotation of duties as a method of assignment of tasks is obvious. . . . On the other hand, duty rotation does not illegally interfere with the employer's legitimate interest in seeing that work gets done or this proposal does not prevent the District from assigning work to the bargaining unit.

In Walnut Valley Unified School District (3/30/81) PERB Decision No. 160 PERB held that policies governing the selection of employees to work overtime was negotiable.

Under its duty to negotiate the employer may continue to unilaterally determine whether co-curricular activities should

¹⁵The decision is currently on appeal and is not cited as precedent, but it is instructive of Board views.

be offered. Negotiation of procedures for selection of employees to perform the work, combined with negotiations of the hours' of work and wages to be paid does not abridge the District's authority to direct its operations. Once it has met its bargaining obligation, the District may assign individual teachers to perform co-curricular duties consistent with contract provisions.

Other public jurisdictions have found the assignment of coaching duties subject to negotiations. Beacon City School District (1981) 14 NY 3084 (policy requiring all new PE teachers to coach up to two sports if no qualified volunteers subject to negotiations); West Hartford Education Association v. Decourcy (1972) 162 CONN 566 [295 A.2d 526] (assignment of teachers to extra-curricular activities and compensation negotiable).

(4) Contract Waiver

The District asserts that several portions of the contract authorize it to assign co-curricular duties as well as other duties to teachers.

PERB has repeatedly held that waiver of the statutory right to bargain a mandatory subject will not be lightly inferred. The relinquishment must be "clear and unmistakable" to be effective. Amador Valley Joint Union High School District (1978) PERB Decision No. 74, NLRB v. C & C Plywood (1967) 148 NLRB 414, 416 affirmed 385 US 421 [17 L.Ed.2d 486]. This same

close scrutiny applies to waiver clauses in collective bargaining agreements as to implied waivers. The NLRB closely scrutinizes contract language where it is asserted to justify unilateral action by the employer. In New York Mirror (1965) 151 NLRB 834 [58 IRRM 1465], the NLRB held that it,

. . . will not find that contract terms of themselves confer on the employer a management right to take unilateral action on a mandatory subject of bargaining unless the contract expressly or by necessary implication confers such a right.

Contract waivers are generally upheld when the language specifically refers to the subject upon which bargaining is sought, and the language is clear or bargaining history determines that the union consciously yielded the right to negotiate. See Nevada Cement Co. (1970) 181 NLRB 738 [74 IRRM 1013].

The parties clearly negotiated certain aspects of performing co-curricular activities. The contract contains an appendix which lists a separate wage schedule for the performance of each co-curricular activity. The agreement of a stipend payment implies that an employee is required to work whatever hours are necessary to successfully complete the activity. The negotiation of wages and hours does not waive the District's obligation to bargain other aspects of assignment.

The District relies on the "management rights" clause which specifies that the District retains the "right to . . .

assign . . . employees." The contract also contains a standard zipper clause.

From all of the evidence presented, it is found that the "management rights" clause is limited to authorizing the District to assign work customarily expected to be performed by teachers during their workday. The language does not indicate that the Association consciously waived its right to negotiate assignment of work on Saturdays or Sundays, for example, or for coaching duties outside the workday. This narrow interpretation of the "management rights" clause is based upon the following factors: (1) the contract was negotiated in a context where the District had never communicated any intent to assign teachers to perform co-curricular activities without seeking volunteers, and no discussion of such change occurred at the table; (2) the "hours¹ of employment" provision specifically authorizes the District to assign teachers to participate in "adjunct duties." No such authorization exists for co-curricular duties. Adjunct duties - such as supervision at open house, graduation ceremonies or athletic activities - are ad-hoc events requiring substantially less time than coaching or other co-curricular activities. The hours¹ of employment provision also lists only functions specifically related to teaching - such as parent conferences or attendance at faculty meetings - which are required to be performed even

if they occur outside the normal workday. It is reasonable to assume a specific authorization to assign co-curricular duties similar to adjunct duties is prerequisite to finding a waiver.

The contract does not waive the District's duty to negotiate procedures for assigning co-curricular activities to teachers which are required to be performed beyond the normal workday.

(5) Conclusion

The District's assignment of coaching to Dave Boe, combined with the threat that other teachers would be disciplined if they refused an assignment, is found to constitute a unilateral change of work conditions in violation of section 3543.5 (c).

The violation necessarily interferes with unit employees' rights to representation pursuant to section 3543.5 (a) and denies the employee organization the right of exclusive representation afforded by section 3543.5 (b). San Francisco Community College District (10/12/79) PERB Decision No. 105.

B. Imposition of Discipline Short of Dismissal

The school board imposed a 10-day suspension upon David Boe in January 1982 for refusing to carry out the coaching assignment. This disciplinary action combined with Maruca's threat that any teacher who refused a coaching assignment would be disciplined constitutes a policy, although disciplinary action was taken against a single employee. The record

indicates no previous imposition of discipline short of dismissal by the District against teachers.¹⁶

(1) Discipline is Negotiable

It is apparent that PERB would find the subject of discipline short of dismissal for teachers within the scope of bargaining under the Anaheim test. Anaheim Union High School District, supra. Although the board has not decided the precise issue for certificated employees, its rationale in two other cases is analogous. In Healdsburg Union High School District (6/19/80) PERB Decision No. 132, at p. 81, PERB found those aspects of discipline for classified employees not preempted by the Education Code to be negotiable. In San Bernardino City Unified School District (10/29/82) PERB Decision No. 255, rules of conduct for teachers which could result in disciplinary action were held to be mandatory subjects for bargaining. PERB found that the employer's duty to negotiate work rules did not abridge the employer's management prerogatives because the District reserved its inherent right to initiate discipline. This statement reinforces that standards and procedures for discipline are indeed negotiable.

MEA did not allege that reprimands imposed by the District constituted a unilateral change. Therefore, the decision does not address whether the District had authority to impose reprimands without prior negotiations.

Effective January 1, 1982, Chapter 1093, Statutes of 1981 (Assembly Bill 777) amended the scope of representation section of the EERA by changing section 3543.2 to section 3543.2(a) and adding subsections (b) and (c) .

Section 3543.2(b) states:

Notwithstanding section 44944 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding causes and procedures for disciplinary action, other than dismissal, affecting certificated employees. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of section 44944 of the Education Code, shall apply.¹⁷

It is irrelevant to this decision to determine the precise legislative intent of Chapter 1093, provided PERB would find that the District had a duty to bargain discipline short of dismissal both under the prior scope of representation language in section 3543.2 and following the amendment.¹⁸

¹⁷Education Code section 44944, grants a teacher who is notified of intended dismissal the right to a hearing conducted by a three-person commission on professional competence. This section provides for hearing procedures, selection of the panel and payment of costs. It specifies that the commission may determine only whether the employee should be dismissed or not dismissed. The decision is binding on the public school employer.

¹⁸See Monrovia Unified School District (12/31/82), Case No. LA-CE-1552, Proposed ALJ Decision, for an extensive interpretation of the effect of Chapter 1093 by this author. The decision is not precedential.

Although the disciplinary action was recommended prior to the effective date of Chapter 1093, the District board did not impose the suspension until January 1982. Thus, the new statute applies to determine whether an unfair practice occurred. The new legislation impliedly created an unfair practice when a school employer imposes disciplinary action short of dismissal upon teachers in the absence of a bargained for contract authorizing the action.

(2) Contract Waiver

As stated earlier herein, the waiver of the right to bargain over a subject must be "clear and unmistakable" to be effective. Amador Valley Union High School District (10/2/78) PERB Decision No. 74.

The clearest example of waiver exists whether the contract includes a specific unambiguous term covering the subject in question combined with a zipper clause prohibiting reopening of the subject. Nevada Cement Co. (1970) 181 NLRB 738 [74 IRRM 1013].

The District contends that the contract "management rights" clause expressly authorizes suspension of teachers. The clause grants the District "the right to . . . suspend and terminate employees." Suspend means ". . . to cause to withdraw temporarily from any privilege, office or function," Webster's Third New International Dictionary unabridged (1976). It is apparent that the action to relieve Dave Boe from teaching

duties for 10 days without pay was a suspension which falls within the meaning of the contract term.

The contract contains no provisions relating to grounds for suspension, procedures or other limitations which could serve to modify the "management rights" language.¹⁹

A determination of waiver is not limited to acceptance of contract terms on their face. The words must be understood in the context of the history of negotiations which gave rise to their inclusion, Steel Workers v. American Manufacturing Co. (1960) 363 U.S. 564, 567. McDonnell Douglas Corporation (1976) 224 NLRB 881, 887.

The identical language has appeared in each of three contracts negotiated by the parties between 1977 and the present. No evidence was presented regarding negotiation history for any of the contracts or regarding the meaning of the term "suspend."

In the face of a contract authorization granting the District the right to take the specific action of suspension, the burden rests with the Charging Party to demonstrate a different understanding by extrinsic evidence. This burden has not been met.

In its brief MEA briefly states "... there is no evidence that this contractual language is meant to do any more than

¹⁹Contrast the "assignment" provision which was accorded a narrow meaning because other contract terms so indicated.

restate the District's Education Code rights" (to suspend for limited purposes). Without the support of either negotiation history evidence or additional argument, this bare assertion is insufficient in the face of the specific relinquishment of the right to suspend.²⁰

Accordingly, it is found that the Association negotiated and waived its right to review or object to the imposition of suspensions during the contract duration. Although the contract authorizes MEA to reopen negotiations annually on a subject of its choice, the record does not indicate that suspension has been proposed for bargaining other than the objection to the employer's action against Boe.

The passage of Chapter 1093 effective January 1, 1982 did not overturn the District's contract authority. The amendment prohibits an employer from imposing any disciplinary action short of dismissal unless authorized by a contract. No allegation is made that actions other than suspension have been imposed after January 1, 1982. Having found MEA bargained over

²⁰A possible claim that the contract disciplinary action against Boe would not be authorized by the Education Code is not determinative of whether a waiver occurred in bargaining. In another case I have considered and adopted an argument showing that the lack of statutory authorization for disciplinary actions short of dismissal supports a limited meaning of a disciplinary language in a "management rights" clause. (See Proposed Decision Monrovia Unified School District (12/31/82) LA-CE-1552, not precedential.) No such argument was offered here.

suspension, it must be imputed that bargaining over causes and procedures for suspension were waived at the same time. Thus, no violation occurred.

III. DENIAL OF REPRESENTATION

The Association alleges that the District violated section 3543.5(a) and (b) by denying union representation to Boe at the meeting with Maruca on June 11.

Several sections of the EERA address representational rights. Section 3540 authorizes employees to be " . . . represented by such organizations in their professional and employment relationships with public school employers." Section 3543 authorizes employees to participate in unions " . . . for the purpose of representation on all matters of employer/employee relations." Similarly, section 3543.1 (a) empowers employee organizations to ". . . represent their members in their employment relations. . . . "

Both the representational rights' of employees and employee organizations are enforced as unfair practices. In enforcing the right to representation, PERB has adopted the NLRB rule enunciated in NLRB v. Weingarten (1963) 420 U.S. [88 LRRM 2689]. See Marin Community College District (11/19/80) PERB Decision No. 145. Weingarten upheld the right of an employee to union representation upon request when called to an investigative interview which the employee reasonably believes might result in discipline. Whether the interview may lead to

disciplinary action is an objective determination and is not viewed through the subjective beliefs of the affected employee. The rule has also been approved by California courts. Civil Service Association v. City and County of San Francisco (1978) 22 Cal.3d 553 [150 Cal.Rptr. 129], Robinson v. State Personnel Board (1979) 97 Cal.App.3d 994 [159 Cal.Rptr. 222] .

The following facts in the present case indicate that Boe was entitled to representation at the June 11th meeting. The meeting was called on the same day that Boe and the Association had presented a letter to the District indicating that the employee would not obey a directive to coach. Maruca had informed the Association president that any teacher who refused a coaching assignment would be fired. The meeting apparently was not one in which the principal was to announce an intent to discipline previously determined because no discipline was announced until a letter was issued from the superintendent on November 11. Although no grievance had actually been filed, the apparent purpose of the meeting was to discuss Boe's written responses to the directive to coach. Boe testified that the principal told him he would be in serious trouble for insubordination if he did not attend the meeting. Although Maruca informed Boe that the meeting was not to discuss discipline, his angry manner in the hallway confrontation combined with Boe's knowledge of the previous "firing"

statements would create a reasonable belief that discipline would be forthcoming.

The District's contention that Boe voluntarily dismissed his representative at the commencement of the meeting is not credible. Maruca refused to hold the meeting with the representative present. Boe asked Ms. Keller to leave because he felt he was in enough trouble. Relinquishing the right to representation under threat of insubordination cannot constitute a meaningful waiver.

It is therefore found that the actions of Maruca on June 11 denied David Boe his right to representation in violation of section 3543.5(a) and further denied the Association the right to represent a unit employee in violation of section 3543.5(b).²¹

IV. DISCRIMINATION BECAUSE OF PROTECTED ACTIVITY

Section 3543.5(a) protects employees from reprisals, threats of reprisal or discriminatory treatment because of their exercise of rights guaranteed by the EERA. A violation may be found only where a nexus between employee rights and employer discrimination exists. Carlsbad Unified School

²¹PERB has recently found a right to representation in a grievance proceeding although no investigation interview is conducted. Rio Hondo Community College District (12/28/82) PERB Decision No. 272. That analysis is not considered here because no grievance had been filed.

District (1/30/79) PERB Decision No. 89, Novato Unified School District (4/30/82) PERB Decision No. 210.

The Charging Party has the initial burden to demonstrate:
(1) An employee's exercise of an activity which is protected;
and (2) facts sufficient to infer a nexus between employer retaliatory action and exercise of the protected right. Motive or anti-union animus may be shown by circumstantial evidence.
Novato Unified School District, supra.

Upon a sufficient showing by the Charging Party, the burden shifts to the employer to demonstrate a legitimate reason for its conduct to prove that it would have taken a similar action despite the employee's exercise of the protected activity.

The various activities of Boe and the District are first reidentified.

Boe's Activities

(1) Boe resisted the prospective coaching assignment and raised a claim about its unreasonableness. All acts of resistance including his grievance and the MEA unfair practice charge occurred prior to the actual date of the assignment.

(2) Boe refused to perform the work assignment effective the first day performance was required and persisted in his refusal throughout the attempted assignment.

District's Actions

Between May 1981 and January 1982 the District and its agents took the following actions against Boe or MEA members

generally: (1) Principal Maruca threatened to fire any teacher who refused to coach; (2) Maruca placed incident reports in Boe's file on November 13 and 26 for his failing to return to campus as directed; (3) Maruca allegedly persisted in enforcing the assignment when other teachers volunteered; (4) Superintendent Heinsohn issued four reprimands to Boe - November 17, 18, 19 and 20 - after Boe refused to report to duty; (5) the District Board suspended Boe for 10 days without pay in January 1982, following an advisory arbitration award denying Boe's grievance and a Board hearing over the disciplinary action.

Protected Activity

The crucial preliminary issue is whether Boe's activity was "protected" by the EERA.

Section 3543 of the Act broadly describes the right of employees to participate in the activities of an employee organization for the purpose of representation on all matters of employer-employee relations. Section 3543 of the EERA is similar to the section 7 and section (9)(a) of the National Labor Relations Act except for the presence of language in the NRA authorizing private employees to engage in "concerted activities . . . or other mutual aid or protection."²²

²²Section 7 of the NRA reads:

. . . Employees shall have the right to self organization, to form, join or assist labor

Under both statutes, employees are given the right to "represent themselves individually in their employment relations" as long as they do not meet and negotiate when there is an exclusive representative. Employees are also granted the right to "present grievances . . . without the intervention of the exclusive representative."

MEA claims that although Boe was not an active union member, his protest and refusal to carry out the District's unilateral change in working conditions represented a protected activity.

The District unilaterally changed the procedure for obtaining coaches. Dave Boe was presented with the District's attempt to implement the changed working conditions upon him. Boe was not at all active in the union. He protested the order because he believed it was discriminatory and violated the collective bargaining agreement.

The right of a small group of employees to complain about alleged contract violations by the employer have been held

organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

protected. Baldwin Park Unified School District (6/30/82) PERB Decision No. 221 citing NLRB v. Washington Aluminum Company, Inc. 370 U.S. 9, 16 (1962). The NLRB has held such conduct to constitute an informal grievance attempting to enforce the contract rights of all unit employees even though the asserted claim is later found to be erroneous. The protection has been extended to the acts of a single employee by the NLRB. See Interboro Contractors, Inc. (1966) 151 NLRB 1295 [61 IRRM 1537] enfd (2nd Cir 1967 388 F.2d 495 [67 IRRM 2083]; John Sexton and Company, a Division of Beatrice Food Co. (1975) 217 NLRB 80; Duchess Furniture, a Division of National Service Industries, Inc. (1976) 222 NLRB 42.

Boe complained in the face of the employer's proposed improper action. He also filed a grievance regarding the matter. The contract required him to obey the District order during the pendency of the grievance. He had a protected right to file an unfair practice charge on his own behalf alleging a refusal to bargain by the District. South San Francisco Unified School District (1980) PERB Decision No. 112. Alfred M. Lewis, Inc. v. NLRB (9th Cir 1978) 587 F.2d 403 [99 IRRM 2841]. He did not file a charge but MEA did file an unfair practice charge on July 6, 1981 specifically alleging that the implementation of the coaching assignment policy was to be unfairly applied to Boe.²³ Each of Boe's activities in

²³The charge was filed well in advance of the action

challenging the assignment prior to its effective date were protected against reprisals by the District because he was asserting an employment claim which affected all unit members.

In contrast Boe's actual refusal to perform the assigned duty is not protected conduct. In Konocti Unified School District (6/29/82) PERB Decision No. 217, PERB found that employee activity must be in pursuit of lawful objectives and carried out in a proper manner. (Emphasis added.)

While Boe's objective in challenging the District's unilateral change was proper, his refusal to work and refusal to follow contract requirements (work and grieve) created a potential disruption²⁴ of the employer's educational program. Boe did not refuse the assignment for safety reasons.²⁵

proposed by the District to be effective in November. The charge did not allege that a subsequent PERB remedy against the District could not restore Boe to the status quo ante nor did it seek an injunction.

²⁴Actual disruption has not been required by PERB to find unprotected activities. See Palos Verdes Peninsula Unified School District (2/26/82) PERB Decision No. 195 (teachers refusal to give final exams as pressure tactic during negotiations unprotected); Santa Clara Unified School District (1979) PERB Decision No. 104 (insubordinate conduct which threatens employer's ability to maintain order is unprotected); Department of Transportation (11/16/82) PERB Decision No. 257-S (activities for purpose of humiliating supervisor not related to legitimate employee interest is unprotected) .

Also see Morris, *Developing Labor Law*, pp. 124-128, 529-535.

²⁵A refusal to obey a work order for personal safety

Boe's individual refusal to work is distinguished from certain protected union organized and sanctioned work stoppages taken in protest of an employer's unfair practices. See Mastro Plastics Corp. v. NLRB (1956) 350 U.S. 270 [137 IRRM 2587]; Modesto City Schools (1980) PERB Decision IR-12 and Fremont Unified School District (6/29/80) PERB Decision No. 136.²⁶

Boe sought advice from MEA regarding his intention to individually refuse to coach. No evidence was offered to show the organization sanctioned or supported his refusal to work in contrast to the active support of his case through legal remedies.

Union sponsored activities are subject to unfair practice charges pursuant to section 3543.6.27 PERB may ultimately

reasons is protected under the NLRA. (29 USC section 143.) NLRB v. Knight Morely Co. (CA 6195 7) 251 F.2d 753 [41 IRRM 2242] cert, denied 357 U.S. 927 [42 IRRM 2307] (1958).

²⁶Whether a work stoppage is protected under the NLRA depends upon several factors: (1) seriousness of the employer's unfair practice, (2) whether the action violates a contract no-strike clause, (3) whether the action is "wildcat or sanctioned. Dow Chemical Company (1974) 212 NLRB 333 [87 IRRM 1279]; NLRB v. Blades Mfg. Corp. (CA 8 1965) 344 F.2d 998 [59 IRRM 2210].

²⁷Government Code section 3543.6.

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

review both the employer's illegal conduct and the union's responsive activity and impose remedial sanctions on both parties if necessary. In contrast no unfair practice may lie against an individual employee who takes retaliatory action into his own hands against an employer because of an alleged unfair practice. Such individual conduct is unprotected because it (1) undermines the relationship between the exclusive representative and the employer by circumventing the normal processes for resolution of disputes, (2) violates the contract obligation to grieve first, and (3) creates a severe threat to the employer's ability to operate the educational program.

Disciplinary Action By the District

While an employer may discipline an employee engaged in unprotected activity, a violation occurs where the motivation is based upon anti-union animus. Palos Verdes Peninsula Unified School District (2/26/82) PERB Decision No. 195. Here

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).

Boe engaged in both protected and unprotected activities. Several actions were taken by the District prior to Boe's actual refusal to coach. It is also necessary to determine whether the discipline ultimately imposed was motivated solely based upon his unprotected conduct or based upon his prior protected actions. Each district action is reviewed to determine whether a violation of section 3543.5 (a) occurred.

1. Maruca's Statements

Principal Maruca made two statements which may evidence anti-union animus.

Maruca told MEA president Barker that he would fire any teacher who refused to coach. The statement was an informal response to Barker's statement of MEA's position during a lunch room conversation.

The statement if viewed in isolation could constitute a threat of retaliation for any unit member's exercise of the protected right to protest an assignment. The record does not indicate that Barker told anyone other than Boe about the statement. In fact, MEA actively assisted in activities to protest the new ad hoc assignment policy. The record also indicates that Maruca did not threaten Boe individually with discipline for protesting the assignment nor was the general threat ever raised again after the brief lunch room exchange. No evidence showed that any other unit member was threatened. Certificated employees may be terminated only for cause and

pursuant to Education Code procedures. Maruca's statement, in the context of his limited authority and the lack of follow-up discipline, must be construed as an advance warning that an actual refusal to carry out an order in the future could result in disciplinary action. A threat imposed against unprotected conduct with no showing of animus does not constitute a violation of section 3543.5(a).

On November 3rd Maruca told Tom Beveridge, a teacher, that Boe was initially assigned because of a "hidden agenda." No anti-union animus was found from that statement. Beveridge believed it meant that a school board member wanted Boe assigned in May. At the time of the assignment Boe had participated in no union activities. The motive for the assignment was non-union related.

2. Reprimands for Leaving Campus

Maruca reprimanded Boe on November 13 for refusing to report to the principal's office in the late afternoon. MEA attempted to show that Maruca had a discriminatory motive by proving that Boe's departure from campus during the last period was consistent with the current practice. The reprimand was not issued for leaving campus, but for failing to return upon request. No proof was offered to show Maruca's discipline was inconsistent with the treatment to other teachers who refused a directive. Nor was any showing made that the incident report was too severe or unjustified under the circumstances. MEA has

failed to raise the inference that protected activity was a motivating factor in the reprimand. Therefore, no violation is found.

3. Volunteers

MEA contends that Maruca persisted in forcing the assignment against Boe when two other teachers volunteered. If proven, such conduct could demonstrate a motivation to "set up" Boe for contesting the validity of the original assignment. The findings do not sustain the allegation. This determination assumes the District has a right to screen volunteers based upon their qualifications and ability to coach.

Rob Barker suggested to Maruca he would volunteer for the assignment in July. Relying on Barker's testimony that Maruca's discouragement was for Barker's own benefit, it is found that Barker did not pursue his own suggestion. Barker never actually applied for the coaching position.

Carol Broberg filed a written request to volunteer in late October. Broberg indicated she volunteered because of the problem with Dave Boe. The request was denied on the basis that she had recently taken a medical leave of absence and also had no coaching experience. The school board had recently indicated its displeasure with the lack of success of the girls' basketball program. It is reasonable to infer that a successful team was a priority. Broberg's lack of experience and illness formed a reasonable basis for denial of the request.

The fact that no one was assigned to coach to replace Boe must be considered. Because of the small size of the junior varsity team, the varsity coach handled both teams. Given the late date of Broberg's request, that a grievance over the assignment had proceeded to arbitration and the valid reasons for the District's denial, the incident does not constitute a violation of section 3543.5(a).

4. Reprimands for Failing to Report for Coaching Duty

Reprimands were placed in Boe's personnel file on November 17, 18, 19 and 20 for failing to report for coaching duty on those days. Having found that Boe's refusal to perform the assignment was unprotected, the discipline was related to a legitimate purpose. Based upon the findings above, there is nothing in the record to indicate that Boe was reprimanded for any reason other than his refusal to perform the coaching duties when assigned.

5. Suspension

On November 30, Superintendent Heinsohn notified Boe that he would be suspended one day without pay for each day he refused to report for coaching. Boe appealed the decision. After a hearing the board suspended Boe for a total of 10 days without pay. No evidence was presented to show that the school board harbored anti-union animus against Boe or imposed the discipline because of his protected activity in protesting the assignment.

Even assuming that Maruca's comments and actions described herein were discriminatory, such motivation could not be automatically imputed to the school board who imposed the suspension. Konocti Unified School District (6/29/82) PERB Decision No. 217. The Trustees determined that the assignment was proper based upon an arbitrator's decision. A hearing was held regarding the propriety of the discipline and the Board voted to sustain the suspension.

The charge related to imposition of disciplinary action taken against Boe is dismissed.

In summary, the record as a whole indicates a conflict between a principal who believed a district directive should be carried out and a teacher who believed the assignment was unfair. The teacher was not an active MEA member but the Association became involved because the dispute potentially affected the negotiated contract and other unit members. Both the District and the Association pursued legal remedies in good faith, but Boe independently refused the directive prior to resolution of the dispute, interim reprimands given to Boe were unrelated to his lawful challenge to the District. After Boe refused to perform the duties and after the District won the grievance dispute, Boe was disciplined for conduct found to be unprotected.

The theory that an individual employee should be able to challenge a potential employer unfair practice at his peril has

been considered and rejected (see protected activity discussion). A school employer must be allowed to direct its workforce subject to legal review by the courts, PERB or grievance awards. The EERA empowers PERB to prevent employer irreparable harm by orderly procedures. Stable labor relations will exist only if such orderly procedures are used.

REMEDY

Section 3541.5(c) gives PERB the power to:

Issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action . . . as will effectuate the policies of this chapter .

In this case, the District violated section 3543.5(c) by unilaterally implementing a procedure assigning coaching to teachers. This action interfered with the Association's right to represent its members in violation of section 3543.5(b), as well as with employee rights in violation of section 3543.5(a). The District additionally violated section 3543.5(a) and (b) by denying representation to David Boe at a meeting held on June 11, 1981.

It is therefore appropriate to order the District to cease and desist from such activity.

The District should be ordered to negotiate working conditions upon request. The remedy for unilateral changes in working conditions should be to "restore, as far as possible, the status quo which would have obtained but for the wrongful

act." Santa Clara Unified School District (9/26/79) PERB Decision No. 104_f citing NLRB v. Rutter Rex Mfg. Co., Inc. (1969) 396 US 258, re-hearing denied, 397 US 929.

It has been found that the unlawful assignment policy adopted by the District was implemented directly against David Boe. No individual remedy lies for the unilateral assignment of coaching duties because Boe did not comply with the assignment.

It is also appropriate that the District post a notice incorporating the terms of the order. Posting of such notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity and will comply with this order. It effectuates the purposes of the EERA, that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. PERB has authorized the posting of notices in similar cases. Davis Unified School District, et al (2/22/80), PERB Decision No. 116, Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB & UFW (1979) 98 Cal.App. 3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 US 426 [8 ~~IRM~~ 415].

PROPOSED ORDER

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

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the Mammoth Education Association, CTA/NEA, as the exclusive representative of employees in the certificated unit, by taking unilateral actions on matters within the scope of representation with respect to assignment of coaching duties.

(2) Denying to the Mammoth Education Association, CTA/NEA, rights to represent its members guaranteed by the Educational Employment Relations Act by

(a) refusing to meet and negotiate about matters within the scope of representation,

(b) denying the organization the right to represent a unit member in a meeting involving potential disciplinary action.

(3) Denying David Boe the right to be represented in meetings involving potential disciplinary action.

(4) Interfering with employees because of their exercise of representational rights by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

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

(1) Upon request, immediately meet and negotiate with the Mammoth Education Association, CTA/NEA, regarding assignment of coaching duties.

(2) Within five (5) workdays after this decision becomes final, prepare and post at all school sites and all other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this ORDER. Such posting shall be maintained for a period of thirty (30) workdays. Reasonable steps shall be taken to insure that such notices are not reduced in size, altered, defaced or covered by any other material.

(3) Within twenty (20) workdays from service of the final decision herein, give written notification to the Sacramento Regional Director of the Public Employment Relations Board of the actions taken to comply with this ORDER. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the Charging Party herein.

C. ALL OTHER CHARGES ARE DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall

become final on March 1, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on March 1, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305,

Dated: February 9, 1983

TERRY, FILLIMAN
Administrative Law Judge