STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO TEACHERS ASSOCIATION, Charging Party, v. MODESTO CITY SCHOOLS AND HIGH SCHOOL DISTRICT, Respondent.	)	Case No. S-CE-498 PERB Decision No. 479 January 10, 1985

Appearances: Ken Burt, Attorney, for Modesto Teachers Association; Breon, Galgani, Godino & O'Donnell by Mark Goodson for Modesto City Schools and High School District.

Before: Hesse, Chairperson; Tovar and Burt, Members.

DECISION

TOVAR, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the above-captioned parties to the attached proposed decision of an Administrative Law Judge (ALJ). The ALJ found that the Modesto City Schools and High School District (District) violated sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)[1] by refusing to furnish to the

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

Section 3543.5 provides as follows:

> It shall be unlawful for a public school

Modesto Teachers Association (Association) certain documentary information which, the ALJ found, was relevant to and necessary for the Association's prosecution of certain grievances. For the reasons which follow, we affirm the ALJ's determination.

FACTS

Upon review of the findings of fact set forth in the proposed decision, the parties' exceptions thereto and the entire record in this case, we find the ALJ's statement of facts to be free from prejudicial error and on that basis adopt those findings as the findings of the Board itself.

DISCUSSION

The collectively negotiated contract between the parties in this case includes a provision which sets forth a procedure to be used by the District in selecting among competing applicants when more than one District employee has applied to transfer

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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.

. . . . . .

into a particular vacant employment position. That provision, at Article XIII, states as follows:

> SELECTION OF EXISTING EMPLOYEES
>
> The job related selection criteria shall be established by the District prior to the initiation of the selection process. These criteria shall be reasonably related to the expected performance for the position. Each candidate is to be rated in writing in terms of the selection criteria during the selection process.
>
> Employees not selected, upon written request shall receive an explanation of why they were not selected.

As more fully described in the attached proposed decision of the ALJ, District employees Gladys Ahart and Merle Benneche filed grievances through their exclusive representative charging that the District departed from the contractually prescribed selection procedure when it selected their competitors for transfer to a number of vacant positions. In an effort to secure materials in support of these charges, the Association requested that the District produce the "rating sheets" completed by the members of the selection committees. The committees used these forms to evaluate each applicant for transfer, including Ahart and Benneche.

The Association specified that the District could delete the names of both the applicant and the rater on each sheet in order to protect the confidentiality of these persons. The District, however, refused to comply with the Association's request for the documents and the Association filed charges

with this agency alleging that the District's refusal constitutes a violation of the Association's EERA right to represent its members. After a hearing, the ALJ issued the attached proposed decision finding that the District violated the EERA by refusing to produce the information. In his proposed decision, the ALJ found, in reliance on precedential decisions of both this Board and the National Labor Relations Board, that the duty to bargain in good faith requires an employer to furnish information that the bargaining representative needs for the proper performance of its duties. In particular, he found, an employer subject to the EERA must, as a general rule, provide to an exclusive representative information and documents which are relevant to a pending grievance and needed by the organization to pursue the grievance. He further found that, in the instant circumstances, the information sought by the Association was relevant to the grievances filed on behalf of Benneche and Ahart.[2]

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[2]The ALJ explained his reasoning on this point as follows:

> By examining the ratings of the grievants, in light of known information about the applicant and his or her background, and in light of the ratings given to other applicants, the Association, or a third party, would be able to analyze (at least to some degree) the fairness of the ratings given to the grievants. This comparison would require use of the ratings of all the

On exceptions, the District does not dispute the ALJ's statement of the general rule, nor does it dispute his finding that the information sought by the Association is relevant. It argues, however, that in the circumstances of this case both contract language and constitutional considerations limit the right of the Association to obtain the information it seeks and justifies the District's refusal to furnish that information.

Initially, we consider the District's claim that the Association voluntarily negotiated a limitation on its right to necessary and relevant information when it executed the collectively bargained agreement out of which the instant dispute arises. This argument relies on the last sentence of Article XIII of the contract, set forth above, which provides that "[e]mployees not selected, upon written request shall receive an explanation of why they were not selected." Based on this sentence, the District argues that its only obligation when an employee contests the District's failure to select him

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> applicants (not only those of the grievant and of the person eventually chosen for the position). Examination of the ratings of other unsuccessful applicants might well illuminate standards used by the raters, which might not be discernible if the only rating sheets available were those of the grievant and of the successful applicant.

We add that federal precedent interpreting the National Labor Relations Act appears to support the ALJ's analysis. The NLRB observes the standard that requested information "must be disclosed unless it plainly appears irrelevant." NLRB v. Yawman & Erbe Co. (CA 2 1951) 187 F.2d 947, 949 [27 LRRM 2524].

or her for transfer is to give the employee "an explanation of why they were not selected."

As noted above, the District acknowledges that the EERA protects the right of an exclusive representative to information which is relevant to and necessary for the prosecution of a grievance. It argues, however, that here the Association yielded, or "waived" that right, agreeing to the contractually-provided "explanation" procedure in its place. Under well-established Board precedent, a finding of waiver will be made only upon evidence of "clear and unmistakable" language or conduct. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74; Davis Unified School District, et al. (2/22/80) PERB Decision No. 116.

In our view, neither the contract language on its face, nor any evidence in the record, supports the District's assertion that the Association voluntarily surrendered its right to relevant information which is needed to grieve an alleged violation of the transfer selection procedure. While the contract provision relied on by the District does provide a means by which grievants can obtain some information about the selection process, there is nothing to suggest that this limited and informal procedure was agreed to by the District in exchange for a waiver by the Association of its EERA right. Rather, it seems at least as likely that the parties perceived mutual benefit in making available an informal means of

responding to transfer applicants' questions short of a formal grievance proceeding. In the absence of any evidence clearly establishing that the Association waived all or part of its EERA rights to represent its members in grievance matters, then, the language relied on by the District can only be read to provide an alternative procedure which exists in addition to, not in place of, the formal grievance procedure set out in Article III of the contract. Anaheim City School District (12/14/83) PERB Decision No. 364.

The District's primary basis for its position that the EERA does not mandate the production of the information sought by the Association is its argument that constitutional rights of privacy here countervail the general rule requiring production of relevant information. Decisions of both the state and federal courts indeed support the premise that constitutional rights of personal privacy may limit otherwise lawfully authorized demands for the production of personal information which has been held in confidence.[3] As noted by the

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[3]Evidence that the information which is sought by a party to litigation was given to its custodian under prior assurances of confidentiality may in some circumstances be of critical significance in resolving conflicts between the right to needed information and the right to privacy. Here, the ALJ found that the record evidence failed to prove that such assurances of confidentiality were given either to raters or to applicants for transfer. The District has excepted to this finding. We need not resolve this factual matter because, as explained infra, even assuming such assurances were given, the District had an obligation to provide the information requested by the Association.

District, the California Constitution makes express reference to the right of privacy at Article I, section 1. While the United States Constitution has no parallel reference, the Supreme Court has interpreted it to provide similar protection. See, Katz v. United States, 389 U.S. 347 [19 L.Ed.2d 576, 88 S.Ct. 507]; Griswold v. Connecticut, 381 U.S. 479 [14 L.Ed.2d 510, 85 S.Ct. 1678].

The U.S. Supreme Court has determined that where a union seeks relevant information about a mandatory subject of bargaining, the disclosure of which may infringe upon constitutionally protected privacy interests, the National Labor Relations Board must undertake to balance the conflicting rights. Detroit Edison Company v. NLRB (1979) 440 U.S. 301 [100 LRRM 2728]. The California courts have endorsed much the same approach in reconciling the state constitution's protection of privacy with the "strong public policy in favor of discovery." Board of Trustees v. Superior Court (1981) 119 Cal.App.3d 516, 522.

> And even when discovery of private information is found directly relevant to the issues of ongoing litigation . . . there must then be a "careful balancing" of the "compelling public need" for discovery against the "fundamental right of privacy." [Citations omitted.] Board of Trustees v. Superior Court, supra, at 525.

In support of its constitutional argument, the District cites a number of California cases in which the court, upon application of the above-noted balancing approach, has denied

or limited a plaintiff's effort to discover relevant information which infringed upon privacy interests. In Board of Medical Quality Assurance v. Gherardini (1979) 93 Cal.App.3d 669, the court of appeal reversed the order of a superior court granting the plaintiff medical board's petition directing a hospital to produce the medical records of five patients in connection with an ongoing investigation of their common doctor. Applying the balancing approach, the court found on the one hand that "a person's medical profile is an area of privacy infinitely more intimate, more personal in quality and nature than many areas already judicially recognized and protected." On the other hand, the board's petition for discovery included "no showing of relevance or materiality of the medical records . . . to the general charge [against] the doctor." The court therefore denied the petition. (Gherardini, supra, at p. 681.) In Board of Trustees v. Superior Court, supra, the court of appeal substantially limited a broad discovery order issued by the underlying superior court. The court found that most of the documentation identified in the superior court's discovery order was simply not relevant to the plaintiff's defamation action. With regard to the plaintiff's own employment, tenure and promotion files, however, the court found relevancy and, therefore, did not flatly bar discovery. Rather, it held that the order should be tailored to preserve the privacy interests of confidential

personnel evaluations contained in those files in the form of letters of recommendation or otherwise. This could be accomplished, said the court, by deletion of names or other markings which would reveal the identity of the author.

The ALJ noted that, where a union has established the relevance and need for particular information, the burden of proof is on the party holding the information to show that disclosure would compromise the right of privacy. Minnesota Mining and Manufacturing Company (1982) 261 NLRB No. 2 [109 LRRM 1345]; Press Democrat Publishing Company v. NLRB (9th Cir. 1980) 629 F.2d 1320 [105 LRRM 3046]; Johnson v. Winter (1982) 127 Cal.App.3d 435. He found that the District failed to introduce evidence establishing that the production of the information requested by the Association would substantially compromise the privacy of those individuals.

The District has strenuously excepted to this finding, relying on Detroit Edison, supra, in which the Court found that the private nature of information regarding a person's "basic competence is sufficiently well known to be an appropriate subject of judicial notice." Similarly, the District relies on Board of Trustees, supra, in which the court found that discovery of confidential letters of reference and peer evaluations was also limited by "the communicators' constitutional right of privacy."

As noted by the ALJ, the practice of accommodating privacy rights and discovery needs by ordering disclosure of confidential documentation conditioned on deletion of the identities of persons associated with the information is now commonplace. See, e.g. Johnson v. Winter, supra, 127 Cal.App.3d 435. Indeed, in Detroit Edison, supra, the employer had already voluntarily disclosed the raw data sought by the union; the issue in that case was limited to the production of the identifying names of the job applicants who were tested.

In the instant case, the Association has specifically limited its request for the rating sheets by agreeing that identification of both the rater and the applicant may be deleted. The significance of this voluntary limitation, however, appears to have been ignored by the District. Indeed, the District places its reliance most heavily on cases which order production of information consistent with this limitation. Thus, in Board of Trustees, supra, the court stated

> Here, no compelling state purpose is seen in the maintenance of confidentiality of the contents of the letters of reference at issue. The privacy rights of our instant concern will be fully respected by the withholding of the names and other identification of the confidential communications' authors." [Emphasis in the original.]

We thus affirm the ALJ's finding that the District failed to show how the disclosure of the contents of the rating sheets, without identification of raters and applicants, would

violate the privacy rights of those individuals. It follows, then, that because no protected privacy interest has been demonstrated in the contents of the rating sheets, it is unnecessary to apply the "balancing test" prescribed in the state and federal cases. That test is required only where a request for information brings into conflict the interests of privacy on the one hand and discovery on the other. Where names are not part of the requested information, however, "the privacy rights . . . will be fully respected." Board of Trustees, supra. We therefore affirm the ALJ's holding that

> By thus limiting its own request for information, the Association prevented the development of any conflict between its right to obtain information and the applicants' [and raters'] interest in maintaining the "privacy" of their own respective ratings. [Proposed Decision, p. 40.]

There is one situation presented in this case, however, to which the above rationale cannot apply. In one or more cases, the District has indicated, only two applicants applied for a particular position: the grievant (who was not selected) and the successful applicant. Because the grievant is entitled to know which is his or her rating sheet, the remaining rating sheet will necessarily be linked with the successful applicant, whose identity is readily determined because of incumbency in the position at issue. We agree with the District that, because the anonymity of such an applicant cannot be preserved, the privacy interest of that individual in his or her rating

sheet is apparent. Thus a balancing of that person's privacy interest against the Association's need for discovery is required.

On balance, we conclude that even here, disclosure of the rating sheet is required. Certainly a comparison between the rating sheets of the grievant and the successful applicant is essential if the grievants are to prove their claims. Without such a specific comparison no such proof is possible. The successful applicants, on the other hand, must fairly expect that the award of the hotly-contested positions may be subject to scrutiny to ensure that the award is fair and proper. The interest of the grievants, the Association and state itself in ensuring that the selection procedure was implemented properly in these circumstances compells disclosure.

THE REMEDY

The District argues that, even if it has an obligation to disclose the information sought by the Association, the ALJ should have permitted it the option of preparing and turning over to the Association a comprehensive summary of the information recorded on the rating sheets. The District relies on Board of Trustees, supra, in which the court permitted this alternative to the production of the original documents with names deleted.

The particular form in which information must be produced to meet the employer's bargaining obligation under the EERA, or to meet a party's discovery obligation in litigation, is a

matter which necessarily turns on the specific facts of each case. Here, where the District was obligated by contract to make its selections in transfer cases based largely on detailed objective criteria rated on the basis of numerical scores, a high level of precision and accuracy in communicating about the subject is essential.

The ALJ carefully articulated exactly this point in the proposed decision at pp. 33-34. We therefore affirm the ALJ's refusal to permit the District to satisfy its bargaining obligation by preparing merely a summary of the information recorded on the rating sheets.

The Association excepts to the ALJ's denial of its request for an award of costs, damages and attorney's fees. The request for damages is based on a claim that the Association has suffered "refusal of recognition, potential loss of membership and injury to the Association's reputation as to being able to represent its members." However, no evidence is pointed to which would prove the truth of the above assertions. We therefore find no basis for reversing the ALJ's determination. So, too, we affirm the ALJ's refusal to award costs and attorney's fees. On its face, the District's concern for the privacy of the individuals involved is not without arguable merit. Chula Vista City School District (11/8/82) PERB Decision No. 256; Central Union High School District (6/30/83) PERB Decision No. 324.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541(c), it is hereby ORDERED that the Modesto City Schools and High School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to provide the Modesto Teachers Association with all relevant information and documents needed by the Association to prosecute contract grievances on behalf of certificated employees of the District.

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

(a) Upon request by the Modesto Teachers Association, provide to the Association the rating sheets of all applicants for the positions to which Merle Benneche and Gladys Ahart applied to transfer in the 1981-82 academic year, provided that: the District may delete the names and any other identifying markings of the raters; and provided also that for the rating sheets of applicants other than Benneche and Ahart, the District may conceal the names and other identifying markings of the applicants before disclosing the rating sheets to the Association.

(b) If the Modesto Teachers Association seeks to re-open one or more of the grievances filed by Merle Benneche and Gladys Ahart, or seeks to reopen the arbitration proceeding concerning those grievances, refrain from interposing any

procedural objection (timeliness, res judicata or the like) to the reopening sought by the Association.

(c) Within 35 days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

(d) Written notification of the actions taken to comply with this Order shall be made to the Regional Director of the Public Employment Relations Board in accordance with his/her instructions.

IT IS FURTHER ORDERED that all other allegations of violation in Case No. S-CE-498 are hereby DISMISSED.

Member Burt joined in this Decision.

Chairperson Hesse's concurrence and dissent begin on page 17.

Hesse, Chairperson, concurring and dissenting: I concur with the majority insofar as it concludes that the Association is entitled to receive the rating sheets of the grievants and of the successful candidates, though I do so for the reasons set forth below as opposed to the majority's rationale. I dissent, however, as to the finding that the District must provide the Association with the rating sheets of all of the applicants for the positions.

The various parties to a job interview - the employer, the interviewer or reference writer,[1] the successful applicant, the unsuccessful applicant, and the association (when contractual obligations are involved in the application process) - all have a right to privacy. In each case, that right to privacy may be waived voluntarily by the holder of the right, or the right itself may be overridden because the need to disclose outweighs the need for privacy.

In this case, the majority would "protect" all of the applicants' privacy merely by deleting the applicants' names from the released rating sheets. By doing so, it disregards the District's statements that the individuality of each applicant is revealed by the rating sheets, thus denying the applicants' privacy. But there is no need to invade the

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[1]The majority does not address the right to privacy of the interviewers, but I believe that it is outweighed by the grievants' need to know, possibly coupled with contractual rights, to know the reasons why they were not selected.

privacy of all applicants. Rather, the competing interests of the parties can be protected in a less invasive manner by application of the balancing test, referred to by the majority but never fully explained.

In the instant case, the Association claims it needs all the rating sheets to enable it to represent various employees who have filed grievances against the District. These grievances are presumably based upon a claim of exclusion of the grievants for "illegal" reasons, i.e., grounds in violation of the contract. Assuming there is such a need for the rating sheets, the Association's "compelling" need must be balanced against all the involved employees' fundamental rights of privacy.

Provisions of state law demonstrate a consistent public policy that individuals have access to records that contain information about themselves, subject to certain limited exceptions and with the protection of confidential sources. (See, i.e., Information Practices Act of 1977 [Civ. Code sec. 1798.3(b) and 1798.38]; Gov. Code sec. 31011; and Labor Code sec. 1198.5.) The grievants' wishes are to see their rating sheets and to provide their union with copies. Here, the grievants can and do waive the right to privacy of their <u>own</u> rating sheets. The Association can then use those rating sheets to determine if the grievances have merit and should be pursued.

In order for a full evaluation of the selection process, the Association would need to see the rating sheets not only of the grievants, but also of the successful applicant. Does a compelling reason exist to override the right of privacy of that individual? I think it does.

The successful applicant, although competent enough to be rated the highest, may have some deficiencies that the employee would not want disclosed. This interest in privacy, however, must be balanced against the grievants' right to know that the evaluation process was correctly concluded, and that the failure to select the grievants was not for reasons prohibited by the contract. Thus, while the successful candidate has an interest in keeping the rating sheets confidential, the grievants' and the Association's right of disclosure is overriding. The successful applicants' rating sheets must be disclosed to the Association.

The majority would also disclose the ratings of the non-grievant, unsuccessful applicants. These employees, however, have not waived any right to privacy. Nor do the public policy considerations that apply to an individual's right to review his own records apply to a third person's record.

The other unsuccessful applicants' rating sheets undoubtedly contain less positive information than that of the successful applicant. These employees have a protectable

privacy interest, even if their names are deleted, because the information in the rating sheets can itself identify the persons.

The Association's need to have these other unsuccessful applicants' rating sheets is not obvious. The grievants want to know why someone else was picked for the position over themselves. There is little or no reason to know why someone else also was not chosen. Thus, whatever interest the Association has in disclosure does not override the other unsuccessful applicants' right of privacy.

In sum, the majority fails to distinguish between the competing interests of all applicants and does not balance their varying interests against the need to disclose. Although I agree that limited disclosure is necessary to preserve the integrity of the collective bargaining agreement, I disagree that sweeping disclosure of extraneous information is called for.

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 No. S-CE-498, Modesto Teachers Association v. Modesto City Schools and High School District, in which all parties had the right to participate, it has been found that the Modesto City Schools and High School District violated Government Code sections 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:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to provide the Modesto Teachers Association with all relevant information and documents needed by the Association to prosecute contract grievances on behalf of certificated employees of the District.

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

(a) Upon request by the Modesto Teachers Association, provide to the Association the rating sheets of all applicants for the positions to which Merle Benneche and Gladys Ahart applied to transfer in the 1981-82 academic year, provided that: the District may delete the names of the raters; and provided also that for the rating sheets of applicants other than Benneche and Ahart, the District may conceal the names of the applicants before disclosing the rating sheets to the Association.

(b) If the Modesto Teachers Association seeks to reopen one or more of the grievances filed by Merle Benneche and Gladys Ahart, or seeks to reopen the arbitration proceeding concerning those grievances, refrain from interposing any procedural objection (timeliness, res judicata or the like) to the reopening sought by the Association.

Dated: _____

MODESTO CITY SCHOOLS AND HIGH SCHOOL DISTRICT

By: _____
Authorized Agent

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 WITH ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

MODESTO TEACHERS ASSOCIATION, Charging Party, v. MODESTO CITY SCHOOLS AND HIGH SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. S-CE-498 PROPOSED DECISION (5/3/83)

Appearances: Kenneth W. Burt, attorney, for the charging party Modesto Teachers Association; Keith V. Breon and Mark Goodson (Breon, Galgani, Godino & O'Donnell) for the respondent Modesto City Schools and High School District.

Before: Martin Fassler, Administrative Law Judge.

PROCEDURAL HISTORY

On April 30, 1982, the Modesto Teachers Association (hereafter MTA or Association) filed this unfair practice charge against the Modesto City Schools and High School District (hereafter District). The charge alleged that the District had violated section 3543.5 subsections (a) through (e) of the Educational Employment Relations Act (hereafter EERA or Act)[1] by refusing to provide the MTA with information and documents relating to grievances in which the MTA was representing its members. Each of the grievances concerned the

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[1]The EERA is codified at Government Code section 3540 et seq. and is administered by the Public Employment Relations

selection of a teacher to fill a vacant position in a District school. In each grievance, the Association was acting on behalf of an Association member who had applied for but who had not been appointed to the vacant teaching position.[2]

Board (hereafter PERB or Board). Unless otherwise indicated, all statutory references are to the Government Code. Pertinent portions of section 3543.5 are set out below:

> 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).

[2]The charge also alleged that the District had violated the EERA by refusing to negotiate with the Association about certain changes of District policy. However, those allegations were resolved by a settlement reached by the District and the Association during the hearing. They are no longer pending before the Public Employment Relations Board (PERB or Board) and will not be referred to hereafter.

On June 9, 1982, a complaint was issued. On June 30, 1982, the District filed its answer, admitting certain allegations of the charge, denying others, and raising affirmative defenses with respect to the allegedly illegal withholding of information and documents sought by the Association. These defenses, including the principal claim that the information sought was confidential, will be considered below.

An informal settlement conference was held on July 22, 1982, but the dispute was not resolved.

The formal hearing on the charge took place in Modesto on November 8, 1982. Post-hearing briefs were submitted by each party on January 31, 1983. On March 11, 1983, by order of the chief administrative law judge, this case was reassigned to the undersigned for decision.[3]

At the request of the charging party, the parties were permitted to submit reply briefs on April 11, 1983, and the matter was submitted at that time.

FINDINGS OF FACT

The Modesto Teachers Association is the exclusive representative of the certificated employees of the District. On May 4, 1981, the Association and the District entered into a collective bargaining agreement to be in effect from that date until June 30, 1982.

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[3]See California Administrative Code, title 8, part III, section 32168(b).

Article XIII of the agreement is entitled "Transfers." It includes provisions for transfers initiated by the District, because of declining enrollment or for other reasons; and for transfers sought by District employees to vacancies announced by the District. The section concerning employee-initiated transfers sets out certain priorities (e.g., employees currently assigned to the school in which the vacancy occurs have high priority; probationary employees have low priority). It also includes the following two paragraphs describing the procedures to be followed when the District is called on to choose among competing applicants with equal priority rights:

> SELECTION OF EXISTING EMPLOYEES
>
> The job related selection criteria shall be established by the District prior to the initiation of the selection process. These criteria shall be reasonably related to the expected performance for the position. Each candidate is to be rated in writing in terms of the selection criteria during the selection process.
>
> Employees not selected, upon written request shall receive an explanation of why they were not selected.

The portion of Article XIII quoted above (as well as several other provisions of the agreement which are not relevant here) was drafted by a four-person sub-committee of the District and MTA negotiating teams. This working group was established by the District and the Association after two years of negotiations to resolve issues on which the parties were not yet in agreement. The sub-committee consisted of

Frank Vandervort and John Walther of the MTA, and Superintendent Robert Otto and Vice-principal Don Champlin of the District.

Vandervort, whose testimony is the basis of the findings regarding the sub-committee's work, was chief negotiator for the MTA for the three-and-one-half years preceding his testimony, and had been a member of the Association's negotiating team since 1969. Walther was president of the MTA.

According to Vandervort, the MTA believed that the District had, in previous years, transferred unqualified teachers into teaching vacancies. For that reason, he said, the MTA wanted to include in the new contract transfer provisions which would require the District to use job-related criteria for selection of teachers competing to fill a vacant position.

The two paragraphs quoted above (beginning with the reference to "job related selection criteria"), were developed by the two-on-two working group to achieve that purpose, Vandervort said.

Vandervort testified that during the discussions among the four-person subcommittee, there was no discussion of "confidentiality" of the ratings for applicants seeking to transfer from one school to another within the District (hearing transcript, pp. 114, 117).[4] He testified that he

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[4]References to the transcript of the hearing cited in this decision will hereinafter take the form "TR:___, with the page number(s) following the abbreviation "TR."

did not remember any statement being made during those sessions about whether the sole explanation to be given to an unsuccessful transfer applicant (explaining why he or she was not chosen to fill the vacancy) would be given in writing.

After the members of the "two-on-two" committee reached agreement on the provisions of the "Transfer" article (and on other provisions), the agreed-upon language was presented to the larger negotiating teams for the Association and the District. This larger group included the District's Attorney Keith Breon (counsel for the District during this hearing) and Personnel Director Melvin Jennings; Association Executive Director Kenneth Burt (and its counsel during this hearing) and another Association member not identified. Vandervort testified that the question of the confidentiality of the written ratings of transfer applicants was not discussed within this larger group prior to agreement on the full contract (TR:118).

Vandervort testified that Jennings was not present for any of the "two-on-two" meetings (TR: 118).

Jennings, who was called as the District's only witness, testified that it was the intention of the parties, in agreeing to the pertinent provision of the transfer article, that the written ratings of the applicants be kept confidential. He testified his belief was based on five factors: (1) the absence of any provision in the contract calling for written disclosure

of the ratings; (2) statements made to him by Superintendent Otto about events at negotiating sessions (presumably, the "two-on-two" meetings) at which Otto, but not Jennings, was a participant; (3) "twenty years of personnel experience;" (4) statements made to him by Otto, after the signing of the contract, about the District's plans for implementation of the transfer provisions; and (5), other conversations "prior to, during, and after the signing of this contract in 1980." (TR:79, 87, 90-92, 95-96.)

Jennings was unable to identify with any particularity the dates, places of, or any of the participants in, any of the latter conversations on which he said he relied. Also, Jennings did not explain his reference to "twenty years of personnel experience."

Jennings acknowledged that he did not recall whether he was present for any bargaining sessions at which the negotiators discussed contract language regarding explanations to be given to unsuccessful transfer applicants. Nor was he able to testify about whether he was present at any negotiating session at which the "confidentiality" of written ratings was discussed (TR:89, 92).

Jennings testified that the purpose of the contract provision which provides that an unsuccessful applicant may receive an explanation of why he or she was not chosen for the open position was to give the applicant information about the

areas in which he or she was found deficient, and to encourage the applicant to improve in those areas of weakness.

Jennings' testimony about this subject might conceivably be helpful in a determination of the District's plans as it began to implement the language of the contract. However, since Jennings was not present for any of the meetings at which the contract language was developed, his testimony is of no value in determining the common intent of the parties in agreeing on the relevant contract language.

Jennings did not contradict any of Vandervort's straightforward factual testimony about the development of the transfer language at issue here. Vandervort's testimony is fully credited on this point.

The District, in its post-hearing brief, notes that several other portions of Article XIII require the District to provide to employees written explanations of District decisions to implement involuntary teacher assignment changes. One such provision refers to involuntary transfer of an employee from one school to another. The other refers to an involuntary reassignment in which a teacher is assigned to work at a new grade level (for elementary school teachers) or to a different department or teaching assignment (for teachers in grades 7-12).

The District argues that references in the contract to written explanations or statements of reasons by the District in other contexts support the conclusion that, in the

provisions at issue here, the Association agreed to accept something less than written statements of reasons.

That evidence, however, is insufficient to support the finding suggested. Inclusion of a contract provision in one context, and its exclusion in another, does not itself support a finding that the exclusion in the second instance was intentional, or equivalent to a waiver of a right. To support such a conclusion, a contract must have an express statement, or the conclusion must be the necessary implication of contract provisions. Los Angeles Community College District (10/18/82) PERB Decision No. 252.

More importantly, the District had available to it evidence which might have been far more persuasive on this point, and chose not to present that evidence. The District could have presented testimony by either of the two District representatives on the "two-on-two" subcommittee: superintendent Otto and vice-principal Champlin. The District chose to call neither as a witness.[5] In view of the District's failure to present this stronger evidence, it would be inappropriate to make the finding urged by the District. Evidence Code section 412.

Additionally, the contract calls for a written response by the District at the first and second steps of the grievance

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[5]The District did not indicate that either person was unavailable to testify.

procedure. Since a dispute about application of the transfer procedure is a grievable subject (according to the contract's grievance article), the inclusion of those provisions supports an inference that documentation at these stages would be a reasonable expectation of an unsuccessful transfer applicant. The grievance procedure is described on pp. 20-21 below.

The Transfer Applications of Merle Benneche and Gladys Ahart.

At various times prior to October 1981, Merle Benneche, a teacher employed by the District, applied for seven different teaching positions at five schools within the District.[6] He was interviewed by committees at four of the five schools, but was not offered any of the jobs for which he applied.

During the same period of time, Gladys Ahart, a teacher employed by the District for 14 years, applied for vacant positions at 5 schools.[7] She was interviewed for each of the five positions, but was not offered any of the positions for which she had applied.[8]

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[6]Benneche applied for the following positions: Bret Harte School (3rd/4th grade combination, 4th/5th grade combination); Burbank School (5th/6th grade combination); Mark Twain Junior High School (Reading/English/Math/Social Science instructor); Franklin School (5th/6th grade combination and 3rd grade); and Fairview School (4th-6th grade combination).

[7]Ahart applied for the following positions: Elihu Beard School (3rd/4th grade combination); John Muir School (1st grade); Catherine Evert School (1st grade); Lakewood School (1st/2nd grade combination); and El Vista School (6th grade).

[8]The MTA charge also alleges District violations of the

The Selection Process for the Vacancies.

The contract itself says nothing about the selection process, aside from its reference to "job-related selection criteria." There is only sketchy evidence about the procedures which were used to select teachers to fill the 12 positions for which Benneche and Ahart applied.

Based on the limited evidence available, it is found that the procedures were the following. The principal of each school with a vacancy prepared a series of criteria to be used for each position, and (for each candidate), a rating sheet listing each of the criteria. The criteria for the 5th/6th grade combination position at the Burbank School, for which Benneche applied, is typical. The criteria listed were:

1. A well-balanced staff (gender, age, experiences, etc.).

2. Past service to school (traffic, chorus, assistant principal, school and District committees).

3. Past service in building community relations (parent group activities, school and P.T.A. newsletter).

4. Attitude toward professional development (attendance to and implementation of curriculum).

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duty to provide information to the Association in connection with the transfer application of Debbie Chaplin. However, the Association offered no evidence with respect to Chaplin's application or grievance. Insofar as the charge alleges violations of the EERA by the District's conduct in connection with a grievance filed regarding Chaplin's transfer, that portion of the charge will be dismissed.

5. Knowledge and implementation skills of instructional practices (diagnostic/ prescriptive teacher).

6. Ability to manage a classroom (organization, student discipline, classroom control, assertive discipline).

7. Ability to communicate professionally with administration, teachers, and parents.

8. Willingness to mainstream Special Education students.

9. School seniority.

10. District seniority.

The form used indicated that different weight would be given to the ratings in the different categories. A weight factor, of 9, for example, was to be given to "knowledge and implementation skills of instructional practices," while a weight of 4 was to be given to "past service to school" and a weight of 1 each was to be given to school seniority and district seniority.

Rating sheets used at other schools had different rating categories and different weights.[9]

None of the rating sheets includes any reference to "confidentiality" of the ratings to be given. Nor, for that matter, do any of the rating sheets include any statement at all about the use to which the rating sheets will be put.

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[9]One rating sheet called for ratings on "learning environment" and "classroom control." Another had categories "demonstrates ability to follow chain of command" and "good recommendations from prior employers."

The rating sheets were apparently used by committees created to conduct interviews of applicants for each position. Not every applicant was interviewed. The personnel office of the District, which received all applications, "screened" certain applicants, and sent to the principal of the school in which there was a vacancy the applicatons of those persons considered suitably qualified. The principal could then decide which of these applicants to interview for the vacant position.

Each principal selected a committee to conduct an interview, to rate applicants in the various job-related criteria, and to then make a hiring recommendation to the principal. The committee members then assigned numerical or other ratings to each applicant for each criteria. The principal rejected or accepted this recommendation as he or she desired, and then made a hiring recommendation to Personnel Director Jennings. In each of the transfers which underlie these charges, the principals accepted the recommendations of the raters (TR:110).

There is almost no evidence about the composition or the workings of the rating committees.[10] Specifically, there is an absence of evidence regarding: the qualifications required of committee members; the number of persons on each committee;

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[10]Neither party called as a witness a principal or any person who had participated in the rating process as a committee member.

whether each committee was limited to District employees, or to certificated District employees, or to District employees employed in the school which had the vacancy. Nor was there any evidence of whether there was any effort to exclude, or to include, persons who were familiar with the work history of the applicants; nor evidence of what instructions were given to the committee members prior to their participation in the rating process.[11] There was no evidence regarding the length of the interviews, or the questions asked of any applicant. There was no evidence about whether the committee members had any information about the applicants other than the answers given by the applicants during the interviews.[12]

The only evidence offered by the District regarding the purported "confidentiality" of the ratings given by the committee members was the following testimony by Jennings:

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[11]According to Personnel Director Jennings, the District had "guidelines" which required the principal to select for the committee at least three persons who were knowledgeable about the position to be filled. But, he said, a principal could depart from those "guidelines" if three people familiar with the position were not available. No "guidelines" were offered into evidence, and there was no other testimony about them. The contract itself does not refer to "guidelines" for the selection process.

[12]As a specific example, there was no evidence about how the raters at the Burbank School determined what ratings to give to applicants on criteria like: "ability to manage a classroom," or "ability to communicate professionally with administration, teachers and parents." Both of these are criteria used to rate applicants for the 5th/6th grade combination position.

> After negotiating this contract, we had to make sure that the administrators did, in fact, understand the intent of it. So, whenever we went through and showed them how to develop criteria based on the functions of that job, we spent a great deal of time trying to insure that they did get input from the teachers. And as a part of gaining that input, we wanted them to make sure that they let the teachers know that participating in the selection committee, that anything that was said in the committee, anything that was written down was highly confidential and that would be protected (TR: 77).

Accepting this testimony as accurate, it is insufficient factual basis for a finding that as a general policy, the participants in the selection process--either applicants or raters--were informed or promised that comments made in the interviews, or written comments based on statements made in the interviews, would be treated as "confidential" or privileged in any way.

The testimony is insufficient for a number of reasons. First, it says nothing of any assurances which might have been given to applicants. Second, insofar as the testimony applies to "confidentiality" of statements written by raters, Jennings describes only what somebody from the District administrative staff told school administrators to tell raters. As noted above, the District chose not to present any testimony by either a school principal or a committee member/rater. Thus, there is no evidence that any principal or other District agent complied with these District guidelines; much less that in any

single instance there was a promise to raters of "confidentiality" with respect to ratings or comments on rating sheets. That is, there is no evidence about whether, or how, the District's instructions to its principals were carried out.

Requests by Benneche and Ahart for Information.

On October 15, 1981, Benneche and Ahart sent letters to the principals of the schools to which each, respectively, had sought to transfer. Benneche sent four letters, Ahart sent five. Except for the names of the principals, the schools, and descriptions of the jobs sought, the letters were identical. Each letter referred to Article XIII of the collective bargaining agreement, and to the provision giving unsuccessful transfer applicants the right to receive an explanation of why they were not selected. In addition, each letter included the following request:

> Please consider this letter my written request to receive an explanation why I was not selected for the position at [position and school identified].
>
> Please provide me with the specific written reasons why I was not selected.
>
> In addition, the Collective Bargaining Agreement requires that a job related selection criteria be established prior to the selection process and that each candidate be rated in writing on this selection criteria. Please provide me with a copy of the rating for each candidate.

On November 10 and November 30, Benneche sent letters with essentially identical requests to principals of two additional

schools to which he had applied, unsuccessfully, for transfer. These letters also asked for certain additional information, none of which is relevant here.

In the last week of October, all but one of the school principals to whom letters were sent on October 15 sent letters to Benneche and Ahart setting dates and times for apppointments at which the principal would provide an explanation to Ahart or Benneche (as appropriate) of why she or he was not selected for the position in question. All of these eight appointments were scheduled for the afternoon of November 2, beginning at 3:00 p.m., at (30-minute intervals for Ahart, and at 45-minute intervals for Benneche.[13] Each was scheduled to take place at the school in question, in various parts of Modesto.

Neither Ahart nor Benneche attended any of the meetings offered for November 2. The MTA informed the District that the scheduling made attendance of the two teachers and the MTA representative impossible. Ahart, however, did meet with each of the five principals of the schools to which she applied, on November 19.[14]

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[13]Jennings testified that one letter, which purports to schedule an interview for Ahart with the Elihu Beard School principal for 3:00 p.m. on November 3, was intended to schedule an appointment for 3:00 p.m. on November 2.

[14]It is not clear from the evidence whether this meeting was the District's response to Ahart's letters, or whether it was intended to be Step I of the grievance procedure. The grievance procedure is described in the text, infra.

At this meeting, Kathleen Hackett, chairperson of the Association's grievance committee, acting as Ahart's representative, asked each of the five principals for the rating sheets for each applicant for the positions for which Ahart had applied. Each of the principals refused to turn over the rating sheets to Hackett and Ahart. Some of the principals cited "confidentiality" of the sheets as their reason, while other principals gave no reason for their refusals, according to the uncontradicted testimony of Ahart and Hackett (TR: 42, 59).

The Grievances.

At various times in November 1981, Benneche and Ahart each filed a series of grievances against the District. Each grievance concerned one school to which Ahart or Benneche had applied.[15] The grievances were identical in substance, except for minor variations in the wording of a few grievances to refer to specific events at certain schools.

Each grievance alleged that the District had violated Article XIII of the agreement, regarding transfers of certificated employees. Specifically, the grievances alleged that:

> The job criteria was not established properly in writing prior to the initiation

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[15]The grievance filed by Benneche concerning the Bret Harte School referred to both school vacancies to which Benneche had applied, neither of which he was chosen for.

process. The criteria is (sic) not reasonably related to the expected performance. All candidates were not properly rated in writing. The interview procedure was improper and discriminatory. The same is true for the selection process.

Each grievance also included the following:

> The following information is requested in writing:
>
> 1. Who was selected for the position? What is this person's status (permanent, probationary, temporary)?
>
> 2. Please provide a copy of the job related criteria. When was this criteria placed in writing? How was it arrived at? Who participated in development of the criteria?
>
> 3. Please provide the rating sheet(s) for each candidate.
>
> 4. In addition, please provide the following in writing:
>
>   What were the questions and procedures used for the interviews? Who conducted the interviews, who was interviewed? How were the persons rated? Who rated the persons interviewed? What was the rating each person received? What was the experience and qualifications for each person interviewed? When (time and date) did each interview take place?
>
> 5. What is the basis for not transferring the grievant to the position requested?

The contract creates a four-step grievance procedure. Step I consists of submission of a written grievance to the appropriate building administrator. The building administrator is required to present a written decision to the grievant within 10 days after receipt of the written grievance. Step II

consists of an appeal to the superintendent of schools from the decision by the building administrator. Again, a written response to the grievance is required. Step III consists of a hearing before an arbitrator, and issuance of an advisory opinion by the arbitrator. If the advisory decision is adverse to the District, the superintendent of schools may then appeal the decision to the District board of education, which has authority to issue a decision which is "final and binding upon the District, the Association and the grievant."

If a grievance is not settled in Steps I or II, the determination of whether to seek a hearing before an arbitrator is in the hands of the Association (Article III, section C).

Under the grievance-arbitration article, an employee's assertion that the District has improperly applied the transfer article of the contract, or any portion of it, is a proper subject of a grievance.

There is no provision of the contract which defines the rights of the Association, or the obligation of the District, with respect to disclosure of information or documents known to or available to the District, which the Association seeks to aid it in its prosecution of the grievance.

At various times in November and December 1981, MTA Executive Director Burt and Hackett met with the principals of the schools to which Benneche had applied, as Step I of the grievance procedure. The MTA representatives asked each

principal for the rating sheets for all applicants for the position for which Benneche had applied. These requests were uniformly rejected.

Step II of the grievance procedure, for both grievants, took place on February 19, 1982, when Burt, Hackett, Benneche and Ahart met with Jennings, Breon and Jim Enochs, assistant superintendent of schools. (Enochs was acting on behalf of Superintendent Otto, who was ill.) Burt, acting on behalf of both Ahart and Benneche, asked for the rating sheets for all applicants for the positions for which Benneche and Ahart had applied. He was told by the District representatives that these documents were confidential, and for that reason would not be made available to him.

Burt indicated that he would have no objection if the District were to conceal the names of the applicants and the raters, thus protecting the "confidentiality" of the documents, and thereafter identify the rating sheets only by numbers, before turning these over to him. He also indicated that he would assure the District that he would be the only person to examine the sheets, if the District sought that protection of the "confidentiality" of the documents.

The District refused to turn the rating sheets over to Burt under the conditions described, and made no alternative suggestions to accommodate the union's need for information and

the District's desire to protect "confidentiality" of ratings. Jennings testified that he did not consider Burt's offer to accept the documents under the conditions described to be a "sincere request." He did not testify about the reason for this belief. Aside from his doubts about Burt's sincerity, Jennings offered this explanation of why the District was unwilling to allow the Association to examine the rating sheets:

> Well, the basic problem with providing this in any fashion is that at times there were only two individuals applying for the job, so it was rather obvious that that confidentiality would have been broken in this situation. And that the criteria form as it was designed is a working form for the individual member and some of them are very prolific in their writing and they write down names and quotes and it violated the confidentiality that we started off with that individual teacher or member of that committee. (TR:81)

However, during the grievance process, the District gave the Association limited information about the filling of the vacancies. The District gave the Association "blank" copies of the rating sheets which were used to evaluate applicants for the jobs for which Benneche and Ahart applied (with no ratings or comments written on the sheets). Also, at some point, probably at the February 19 meeting, the District disclosed the particular rating criteria in which Ahart was considered, by the raters, to be "deficient." Ahart testified that at the February grievance meeting,

> . . . they pointed out two points, it seems, on each criteria sheet where they said I fell down. (TR: 50)

The testimony about Benneche in this respect was less exact. Jennings was asked:

> Q. Did the principals testify [at the arbitration hearing] that they, in fact, did offer to meet and in some cases did meet and discuss the deficiencies of the grievants?
>
> A. They met with the individual, both Ahart and Benneche were met and they did, in fact, receive an explanation as to where they did poorly. (TR: 83)

Jennings did not clarify whether only <u>some</u> of the principals met with Benneche and Ahart (as the question suggests), or whether all principals gave the information to the grievants.

On the same point, Benneche was asked:

> Q. Was it ever brought to your attention by the employer, anyone representing the employer, that on that job related selection criteria 8-A through 8-G, that there were certain areas within that in which you were deficient or less qualified than the others you were being compared with?
>
> A. It was touched upon at a meeting with Mr. Jennings there, but not dealt with in any real sense. (TR: 35)

Jennings acknowledged that the District is unwilling to disclose to the applicants or to the Association any of the grievants' numerical scores on any of the criteria, or their total score on any application (TR: 101-102). He also acknowledged that the District is unwilling to allow the Association to examine any of the rating sheets of the other

applicants or to disclose to the Association any of their scores (TR: 78).[16]

Benneche and Ahart were asked why they wanted the rating sheets (their own, and those of other applicants) in connection with their grievances. Benneche's explanation was the following:

> Because I felt that I was more qualified than some of the parties that were selected. And I felt that I was unjustly rated as concerns them. I had more experience . . . in the District than any of these other parties. . . . [The District] said I was not qualified. . . . And I wanted to determine just what they meant by not being qualified, in what areas was I not qualified and how I was rated in these areas. . . . I felt that the whole thing was a charade because they had come up with the same excuses, if I may say so, in all of the interviews, I was not qualified. (TR: 25)

Ahart's explanation of her desire to obtain copies of the rating sheets was the following:

> Because I have never been convinced that I was not one of the more qualified candidates on some of those positions anyhow, and it was indicated at my arbitration hearing that I was number two and I think in most cases number two, and I find that a little bit

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[16]There was testimony regarding additional information given by the District to the Association by means of testimony during an arbitration hearing. That evidence is not credited here because it is hearsay, and because it was too vague and imprecise to be helpful. In addition, the right at issue here is the right of the Association to obtain information prior to an arbitration hearing.

> hard to believe, that I was always number two and never number one on any of these. (TR: 46-47)

Ahart also indicated she believed that in the past other applicants had won jobs sought by Ahart because of personal favoritism exercised by school employees or administrators.

Hackett, of the Association's grievance committee, testified that the Association needed the information available on the rating sheets to determine whether there was sufficient factual basis for the Association to pursue the grievances. She said that both Benneche and Ahart had indicated they were willing to drop their grievances if the rating sheets indicated they had scored lower than other candidates (TR: 62).

The grievances filed by Benneche and Ahart in the fall of 1981 asked for considerably more information than that available on the rating sheets. Similarly, the charge filed by the Association accuses the District of violating the EERA by refusing to provide all the information sought in those grievance forms. However, during the hearing, the Association presented no evidence to indicate whether the District provided or refused to provide any of the information sought, other than the rating sheets. Nor did the Association present any evidence indicating that it had made any efforts of its own to solicit that information from the District after Benneche and Ahart first described the information sought on the grievance submissions.

Some time after February 19, 1982, the grievances were heard by an arbitrator. However, no evidence was submitted to indicate whether the arbitrator has submitted a decision, or, if a decision has been submitted, its contents.

CONCLUSIONS OF LAW

The charge filed by the Association alleges that the District violated section 3543.5(a), (b), (c), (d) and (e) by its refusal to give to the Association information and documents sought by the Association to aid in the prosecution of grievances filed by District employees Benneche, Ahart and Debbie Chaplin. As indicated on p. 11 above, allegations regarding District conduct with respect to the grievance of Debbie Chaplin will be dismissed because the Association presented no evidence in support of these allegations. Similarly, the Association presented no evidence regarding the District's refusal to give to the Association information or documents other than the rating sheets used by the committee. For that reason, allegations of unlawful conduct by the District, concerning information or documents other than the ratings or rating sheets will be dismissed.

The MTA charge alleges, inter alia, violations of section 3543.5(d) and (e). Subsection (d) prohibits employer action to dominate an employee organization, or to favor one employee organization over another. Subsection (e) makes it

unlawful for an employer to refuse to participate in good faith in the statutory impasse proceedings. There was no evidence presented to support either allegation. Those portions of the charge which allege violations of those two subsections will be dismissed.

Further, the Association has presented no evidence that the District's conduct constituted an "independent" discrimination or interference violation of section 3543.5(a).

The only questions which remain to be decided are whether the District violated section 3543.5(b) or 3543.5(c) by refusing to make available to the Association the rating sheets of the two transfer applicants. If the District did violate either of these sections, then a concurrent violation of section 3543.5(a) may also be found. Stockton Unified School District (11/3/80) PERB Decision No. 143; San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230.

A. The Contentions of the Parties.

The Association argues that the information which it sought from the District was needed for the Association's determination of whether and how to pursue the grievances filed by Benneche and Ahart. The District's refusal to provide the rating sheets, the Association argues, violates the District's duty to negotiate in good faith with the Association (the exclusive representative of the certificated employees); and

denies to the Association its statutory rights to represent its members; and thus violates sections 3543.5(b) and (c).[17]

The Association denies that it waived, by either contract language or conduct during negotiations, the right to obtain the needed information.

With respect to confidentiality, the Association argues that no such assertion can justify the District's withholding of the numerical scores given to the grievants. The grievants stated plainly, both during the grievance procedure and during the PERB hearing, that they wanted their numerical scores to be disclosed. With respect to the scores of the other applicants, the Association acknowledges that the interests of the individuals in preventing disclosure of their numerical ratings must be balanced with the need of the Association to obtain the information. The Association argues that the arrangements it proposed during the grievance procedure (substitution of numbers for the names of the applicants, and limitation of their examination to a single Association grievance representative) was sufficient accommodation of the competing interests.

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[17]In Mount Diablo Unified School District (12/30/77) PERB Decision No. 44, the Board held that an employee organization's participation in the contractual grievance procedure is among the "employment relations" described in section 3543.1(a), and that, therefore, employee organizations have a statutory right to participate in grievance procedures on behalf of employees they represent.

The District argues, first, that the Association has not demonstrated a need for the information, over and above similar information in a form in which the District is willing to provide (that is, by oral disclosure to the transfer applicants of the rating areas in which they were believed to be deficient).

Next, the District argues that it has a duty and a right to refuse to disclose the applicants' ratings, based on three identifiable interests. The first of these is the right of all applicants for the vacant positions to prevent disclosure of information of the kind recorded on the rating sheets. This right, the District argues, is grounded in Article I, section 1 of the California Constitution.[18]

The second of these rights, according to the District, is the right of the persons who rated the applicants to prevent disclosure of their ratings, given under "assurances of confidentiality." In addition, the District argues that it has its own right to maintain the "integrity of its negotiated (transfer) procedure."

Next, the District argues that in view of the interests of the applicants, the "raters," and the District in preventing

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[18]Article I, section 1 reads:

> All people are by nature free and independent and have inalienable rights. Among these are . . . pursuing and obtaining safety, happiness and privacy.

disclosure of the ratings given to the applicants, the Association must establish a "compelling state interest" to justify an order by PERB requiring disclosure of the information sought. The Association has not presented evidence which would establish a compelling state interest, the District argues, and therefore PERB should not require the District to disclose the rating sheets.

In addition, in its Answer to the Complaint, the District raised the following affirmative defenses which it did not argue in its brief: (1) the charging party had failed to exhaust the contractual grievance machinery; (2) the District and the Association had reached agreement during contract negotiations on the manner of providing information of the kind sought by the Association, and the District had complied with the terms of the contract; and (3) the Association waived, by its agreement to contract terms, its right to obtain copies of the documents in question.

These conflicting contentions will be examined in order.

B. The Association's Need for the Information Contained in the Rating Sheets.

Under the National Labor Relations Act (NLRA), the duty to bargain in good faith requires an employer to furnish information that the bargaining representative needs for the proper performance of its duties. A failure to provide needed information constitutes a refusal to bargain in violation of the NLRA. This obligation extends to the union's need for

information during the administering and policing of the contract, as well as during contract negotiation. NLRB v. Acme Industrial Company (1967) 385 U.S. 432 [64 LRRM 2069]; Procter & Gamble Manufacting Company v. NLRB (8th Cir. 1979) 603 F.2d 1310 [102 LRRM 2128].[19] To refuse to furnish such relevant information violates the NLRA, because it conflicts with the statutory policy to faciliate effective collective bargaining, and dispute resolution, through the collective bargaining framework.

In Stockton Unified School District (11/3/80) PERB Decision No. 143, PERB applied NLRA precedent concerning an employer's obligation to provide information to a union during contract negotiations and held that the duty to provide relevant information is encompassed within an employers' good faith negotiating obligations under EERA. The same analysis led PERB to hold, in Mt. San Antonio Community College District (6/30/82) PERB Decision No. 224, that an employer was obligated to provide to an exclusive representative of its employees the

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[19]The construction of similar or identical provisions of the National Labor Relations Act 29 U.S.C. section 150 et seq. may be used to aid interpretation of the EERA. San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 618.

Section 3543.5(c) of the EERA is similar to section 8(a)(5) of the NLRA; and section 3540.1(h) of the EERA, which defines "meeting and negotiating" is similar to section 8(d) of the NLRA, which defines the collective bargaining obligation of employers and unions subject to the provisions of the NLRA.

names of disciplined employees, so that the organization representing the employees might represent them in opposing or appealing the discipline. The employer and the exclusive representative in that case were not operating under a collective bargaining agreement at the time of the events underlying the PERB decision.

There has been no PERB decision considering an employer's obligation to provide information to the exclusive representative of the employees in the precise factual context provided here: that is, during the prosecution of a grievance initiated pursuant to the provisions of a collective bargaining agreement. However, in view of PERB's adoption, in Stockton Unified School District, supra, and in Mt. San Antonio Community College District, supra, of NLRA precedent in this general area, it is concluded that NLRA precedent is applicable here. The EERA, like the NLRA, includes provisions which encourage the settlement of disputes within the collective bargaining framework. See, e.g., sections 3541.5(a), 3543, 3548-3548.3, 3548.5, 3548.7 and 3548.8. Therefore, to fulfill its statutory "meeting and negotiating" obligation, an employer subject to the EERA must, as a general rule, provide to an employee organization which is the exclusive representative of its employees information and documents which are relevant to a pending grievance, and needed by the organization to pursue the grievance.

If, then, the MTA has established that the information provided by the rating sheets used by the District is relevant to the grievances filed, and needed by the Association to pursue those grievances, the Association has established a presumptive right to obtain the information it seeks.

The evidence presented here is sufficient to prove that the information sought by the Association is both relevant to the grievances, and needed by the Association to determine whether, and how, to pursue the Benneche and Ahart grievances. The crux of each of the grievances is the assertion by the grievant that he or she was unfairly rated on one or more criteria, both in absolute terms, and as compared to other applicants for the positions; and that those incorrectly low ratings prevented him or her from gaining a transfer to another school.

Given these assertions, the precise ratings of the grievants, and of the other applicants, are not only relevant but are the <u>most</u> relevant information available. Many of the criteria on which the applicants were to be rated called for analysis of ascertainable, objective facts about the applicant, or about the applicant's work history. For example, among the 10 criteria which were listed by the Burbank School for its 5th/6th combination opening, at least 3 and possibly 5 rating areas are in this category: (1) "A well-balanced staff (gender, age, experience);" (2) past service to school (traffic, chorus, assistant principal, school and District committees); (3) past

service in building community relations; (4) school seniority; and (5) District seniority.

By examining the ratings of the grievants, in light of known information about the applicant and his or her background, and in light of the ratings given to other applicants, the Association, or a third party, would be able to analyze (at least to some degree) the fairness of the ratings given to the grievants. This comparison would require use of the ratings of all the applicants (not only those of the grievant and of the person eventually chosen for the position). Examination of the ratings of other unsuccessful applicants might well illuminate standards used by the raters, which might not be discernible if the only rating sheets available were those of the grievant and of the successful applicant.

Further, even for those ratings which are more dependent on subjective judgments (for example, in categories such as "ability to manage a classroom"), examination of the numerical ratings given to various applicants is the most relevant starting point for an analysis of whether the ratings given to a grievant were fair, in themselves, or as compared to ratings given to other applicants.

This analysis establishes not only that the ratings are relevant, but also that the ratings are needed by the Association for its initial determination of whether to pursue

the grievance, and for the Association's (possible) successful prosecution of the grievance.[20]

There appears to be no information other than the specific ratings in each criteria which would serve the Association in a comparable way.

The District's contention that the information which it provided to the Association (the blank rating forms, and a listing of specific areas on which each grievant was believed by the District to be deficient) was adequate for the Association's purposes, is unpersuasive. With no more information than that, it would be impossible for the Association to determine whether there was any merit in the assertions that the grievants were unfairly rated, in absolute terms, or in comparison with other applicants. And, with only that limited information, the Association would be forced to struggle in the dark in its presentation of evidence at each step of the grievance procedure.

The District's Assertion of Confidentiality.

Under section 8(a)(5) of the NLRA, if an employer's refusal to provide to a union relevant information about a mandatory subject of bargaining is based on a legitimate assertion of

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[20]The Association has not shown here that it needs to learn which committee member/rater gave which ratings. That is, it appears from the evidence presented that the Association's needs would be met if it were to be permitted to examine the rating sheets with the names of the raters disguised.

confidentiality of the information, the NLRB must balance the competing interests of the employer and the union to determine if the employer has acted unlawfully. Detroit Edison Company v. NLRB (1979) 440 U.S. 301 [100 LRRM 2733]; Johns-Manville Sales Corporation (1980) 252 NLRB No. 56 [105 LRRM 1379]; Kroger Company v. NLRB (6th Cir. 1968) 399 F.2d 455 [68 LRRM 2731]. Once a union establishes that the information it seeks is relevant and needed, the burden is on the employer to prove that it enjoys a right of confidentiality, with respect to the information sought, which allows it to refuse to disclose the information despite the union's need for it.

> It should be noted, however, that to warrant upholding the defense of confidentiality, the employer must demonstrate that there is a legitimate business need, that it has been bargaining in good faith and making efforts to accommodate the union's request by alternative arrangements and, apparently, that the union demand has been overbroad or its bargaining position inflexible. (Gorman, Basic Text on Labor Law (1976).)

While Detroit Edison gave renewed recognition to the use of a "confidentiality" defense, it did not alter this allocation of the burden of proof. Since Detroit Edison, the NLRB and the courts have continued to place the burden of proof in this regard on the employer who asserts a defense of confidentiality. That is, the employer must make a satisfactory factual showing of a need for confidentiality of specific information before the Board will undertake to balance the conflicting rights of the union and the employer.

In Minnesota Mining and Manufacturing Company (1982) 261 NLRB No. 2 [109 LRRM 1345], the Board followed this approach in recognizing the employer's confidentiality defense with respect to certain information, but rejecting it with respect to other information (at pp. 1349-1350).

In Press Democrat Publishing Company v. NLRB (9th Cir. 1980) 629 F.2d 1320 [105 LRRM 3046], the Court of Appeal remanded a case to the Board for specific findings regarding the employer's claim of confidentiality preventing disclosure of certain information. The court noted:

> Upon a clear showing of need for confidentiality, courts have found less than complete disclosure justified. (105 LRRM at 3050).

The PERB has not yet considered an employer's assertion of confidentiality as a defense to an allegation that it has acted unlawfully by withholding information from the exclusive representative of its employees.[21] However, it is concluded, in view of PERB's adoption of NLRA precedent in this general area, that it is appropriate to adopt the balance-of-interests analysis for similar cases arising under the EERA.

The District argues that balancing of interests is required in the instant case and that there are three distinct interests

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[21]The District's post-hearing brief quotes at length from a decision on this subject by a PERB hearing officer. Although such decisions are not precedent, the specific arguments offered by the employer, based on that decision, will be considered below, to the extent they are appropriate to this case.

to balance against the interest of the MTA in obtaining the information: the interest of the applicants in maintaining the relative privacy surrounding the ratings assigned to them; the interest of the raters in maintaining the relative privacy, or confidentiality, of the ratings which they have given; and the interest of the District in operating the rating system as it was designed.[22]

However, it is concluded that, in the factual circumstances here, there is no actual conflict between the Association's interest in obtaining the information which it is seeking and any cognizable interest of the applicants, the raters or the District. This conclusion is based primarily on the absence of factual support for the District's threshold assertions that such privacy interests were an established element of the rating process.

The easiest case to consider is the asserted privacy interest of the grievants themselves. It cannot be said that the two grievants here, Benneche and Ahart, have an interest in preventing the Association from learning the ratings they were given by the interviewing committees. Each grievant asked for

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[22]The applicants and the raters enjoy a "relative privacy" surrounding the ratings, but not complete privacy. From the testimony about the rating procedure, it appears likely that there is some discussion among raters and the school principal concerning the ratings given to various applicants. In addition, it appears likely that at least some of the raters are certificated employees of the District, and thus peers of the applicants.

his/her own ratings in the letters which each sent to principals in October and November 1981, before the filing of the grievances. Each grievant asked again for disclosure of all ratings, including his/her own, in the grievances that were filed.

Also, each grievant was present at meetings with principals or higher-level school administrators after the filing of the grievances, at which MTA representatives asked for disclosure of the ratings, including those of the grievants. Each grievant joined in the request for his/her own ratings. Finally, each grievant testified at the PERB hearing that he or she wanted the District to disclose to the Association the ratings given to them.

The District cannot assert that the ratings given to the grievants must be withheld from the MTA because of the grievants' right to privacy.

The next interest to consider is the interest of the other applicants in the privacy of their ratings. The District has presented no evidence that applicants sought assurances of confidentiality; or that their participation in the interview process was contingent on promises of non-disclosure; or that the District promised applicants their ratings would not be disclosed.

Even assuming (as the District assumes, and despite the lack of evidence) that the applicants have an interest in

preventing disclosure of their own ratings, the conclusion urged by the District does not follow.[23] The Association is seeking disclosure of ratings without simultaneous disclosure of the individuals to whom the ratings were assigned. By thus limiting its own request for information, the Association prevented the development of any conflict between its right to obtain information and the applicants' interest in maintaining the "privacy" of their own respective ratings.

The District has presented neither evidence nor argument to support a conclusion that disclosure of the ratings under the conditions specified by the Association would conflict with a privacy interest of the applicants.

A number of recent court decisions, called on to balance individuals' interests in privacy against a litigant's right to discovery of relevant information, have concluded that disclosure of information, while personal identification is

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[23]The Supreme Court may have made a similar assumption in the Detroit Edison case. The court notes:

> The sensitivity of any human being to disclosure of information that may be taken to bear on his or her basic competence is sufficiently well known to be an appropriate subject of judicial notice.

The District has not asked that PERB take judicial notice of the "sensitivity" of the applicants in this regard. See Antelope Valley Community College District (7/8/79) PERB Decision No. 97, regarding proper procedure for requesting that official notice be taken by PERB.

withheld, is the appropriate resolution of the conflict of interests. In Valley Bank of Nevada v. Superior Court (1975) 15 Cal.3d 652, decided after adoption of the "privacy" provision of Article I, section 1 of the State Constitution, the court gave this direction to lower courts seeking to balance such conflicting interests:

> Where it is possible to do so, the courts should impose partial limitations rather than outright denial of discovery. (15 Cal.3d at p. 658.)

Since then, appellate courts have approved the practice of disclosing information while withholding the identities of individuals associated with the information, in Board of Trustees v. Superior Court (1981) 119 Cal.App.3d 516 and in Johnson v. Winter (1982) 127 Cal.App.3d 435, both of which were cited by the District in its post-hearing brief. In addition, in 1981 the Legislature recognized the wisdom of this approach when it added to the Public Records Act, Government Code sections 6250 et seq., the following provision, which is included in section 6257:

> Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt by law.

It is concluded, then, that disclosure of the ratings of the applicants (other than the grievants) under the conditions which the Association itself proposed (with the names of the

applicants undisclosed) does not infringe on any cognizable privacy right of the applicants.[24]

The District next contends that the Association's need for the information sought must be balanced against the asserted privacy interests of the committee members/raters. The District cites Johnson v. Winters, supra, and Board of Trustees v. Superior Court, supra, as decisions which recognize the legitimacy of this privacy interest.

The conclusion and analysis of the Board of Trustees decision supports the District's position in this case only in part. In that case, the Court of Appeal ordered the trial court to allow a Stanford University faculty member to examine letters of reference submitted to the University, letters which the University sought to withhold from the faculty member.[25]

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[24]District Personnel Director Jennings testified that for some open positions there were only two applicants (including, presumably, the grievant). In those cases, he said, masking the names would not protect the identity of the other applicant. However, Jennings' testimony did not go beyond this bare assertion. He did not identify the schools or positions for which that was the case. In those cases in which there were only two applicants, some modification of the remedy ordered in this decision may be appropriate. The matter may be taken up in a compliance proceeding, if the parties do not agree on a way of solving any such problem.

[25]To that extent the holding of the court supports the conclusion above, that the District in this case is not entitled to withhold from the grievants the ratings given to them by the committee members. The court came to its conclusion despite a provision of Labor Code section 1198.5 which exempts letters of reference from a requirement that employees be permitted to examine their own personnel files.

But, the court held that the University could properly withhold from the faculty member identification of the writers of the letters of reference. To that extent, the Board of Trustees decision recognizes in a limited way the interest which the District urges here--the right of the writer of comments regarding a job applicant to prevent disclosure of his/her written statements about the applicant.

However, the Board of Trustees case is distinguishable from the instant case on its facts. In that case, the Court of Appeal noted that Stanford had made a factual showing that the letters had been "tendered under a guaranty of confidentiality"(at p. 527) and "obtained under expectation of confidence" (at p. 528). The Court decision quotes some of the evidence which underlies these findings.

In the instant case, there is no such evidence. There is no evidence that the District promised the raters that their ratings would not be disclosed; and no evidence that the raters required assurances of secrecy or non-disclosure before providing their ratings or comments. In a proper case, the reasoning of the Stanford case might well be applicable. However, the factual basis for application of the confidentiality analysis is lacking here.

Johnson v. Winters, supra, is similarly distinguishable. The holding of the court in that case was that if information (about a job applicant) is obtained with the explicit or

implicit understanding that the information will be kept confidential, it is correct for a court to prevent its disclosure. The court noted that the burden of demonstrating a need for confidentiality rests on the agency claiming the privilege. The District has not carried that burden in this case. The contention that the raters' interest in maintaining the "privacy" of their ratings is sufficient to prevent disclosure of the ratings is rejected.[26]

Aside from the asserted rights of the applicants and of the committee members, the District contends it has an independent right to prevent disclosure of the ratings, to "maintain the integrity of its negotiated procedure for voluntary transfer selection."

As is true of the similar contentions regarding the privacy interests of the applicants and of the raters, the District's evidence does not support its argument. The District presented no evidence to support its contention that it had reached

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[26]The lack of evidence about how raters determined the ratings to give applicants makes it particularly difficult to decide that the raters had a protectable privacy interest in their ratings. At the Burbank School, as noted above, raters were called on to rate the applicants in areas which appear to require detailed knowledge of the applicants' work histories and habits. Among the categories of this nature were: (6) ability to manage a classroom; and (7) ability to communicate professionally with administrators, teachers, and parents. If a committee member had no personal knowledge of the applicant's abilities in this area and based his ratings of the applicant only on second-hand knowledge or rumor, there would be little reason to attach great weight to the rater's interest in maintaining the privacy surrounding the ratings.

agreement, through negotiation, on a transfer selection procedure which prevents disclosure of the information sought. Aside from the contractual provision that the District use job-related selection criteria, there is no evidence that the procedure to choose among competing applicants was the subject of any negotiations. There was no substantial evidence that "confidentiality" of the ratings was the subject of negotiations. Personnel Director Jennings' vague hearsay testimony was not credited on this point, and the District offered no other evidence about the negotiations. Neither the committee system nor the "confidentiality" of ratings is mentioned in the contract.

In support of its argument on this point, the District cites Board of Trustees v. Superior Court, supra, and San Marino Unified School District, Case No. LA-CE-1372, a 1982 proposed decision by an administrative law judge.

The factual differences between the instant case and the Board of Trustees case have been noted. In Board of Trustees, the university made a specific factual showing that it had assured writers of letters of reference of confidentiality of their written statements. The court's analysis of the discoverability of the documents turned on that factual circumstance, to a great degree. In the instant case, the District has made no showing that its selection process is dependent on promises of confidentiality to committee members.

This factual difference leads to a conclusion contrary to the conclusion of the Court of Appeal in the Board of Trustees case.

In the San Marino case, the hearing officer concluded that the teachers association was not entitled to obtain from the district information identifying employees who had been classified by the District as "master teachers," and disclosing the salary paid to each master teacher.

There are several important factual differences between that case and this one. First, the district in that case provided the employee organization with extensive, detailed information, including information about salaries, withholding only the names of individuals, which the association continued to seek. Second, in San Marino, the association negotiator could not explain, during the hearing, to what use the association would put the additional information. Third, the association and the district had agreed, explicitly, in the previous collective bargaining agreement, that the master teacher evaluation process was to be confidential.

All of these facts were of significance in the analysis by the administrative law judge in San Marino. There are no similar circumstances here. Therefore, the decision in the San Marino case cannot serve as a useful precedent in this case. The District's contention that its own interest in preventing disclosure is sufficient to outweigh the interest of the Association in obtaining the information is rejected.

The District in its post-hearing brief urges another, related argument: as a public entity, the District, under California law, has an "affirmative duty" to refuse to disclose materials obtained in confidence. Assuming the general validity of the argument, it falls short in this case because the District has failed to show that it possesses, and is seeking to protect, any information which is both sought by the Association and was obtained by the District on a promise of non-disclosure.

The District raised in its answer to the complaint several affirmative defenses which it did not argue in its post-hearing brief.

As its first such defense, the District notes:

> Charging Party has failed to exhaust the contractually agreed upon grievance machinery.

PERB is not required, by statute or otherwise, to defer to a contractual grievance procedure which, like the one agreed to by the District and the Association, does not include a provision for binding arbitration by a neutral third party. Section 3541.5(a); Pittsburg Unified School District (3/15/82) PERB Decision No. 199.

Second, the District asserts that it and the Association reached agreement on,

> . . . how information will be provided on the reasons for non-selection of an employee for a voluntary transfer. Respondent has complied with the negotiated procedure.

There is no such agreement explicit in the contract, and the District has failed to prove with any other evidence that such an agreement was reached. The defense is rejected.

Finally, the District contends that:

> MTA has waived any alleged right to obtain copies of the rating sheets by negotiating an alternate procedure for provision of this information.

Again, the District was unable to present any evidence in support of its waiver argument. An employer which asserts that an employee organization has waived its statutory rights to meet and negotiate has the burden of proof with respect to this assertion. Amador Valley Joint Union School District (10/2/78) PERB Decision No. 74. The District was unable to present competent evidence about any such waiver by the Association during negotiations, and there is no explicit waiver in the contract. The defense is rejected.

VIOLATIONS

Based on the findings and analysis set forth above, it is concluded that the District violated section 3543.5(c) of the EERA by refusing to provide to the Association the information which the Association sought, to aid it in the prosecution of contract grievances: the rating sheets of the applicants for positions for which Ahart and Benneche applied. Further, it is concluded that the District, by the same conduct, violated section 3543.5(b) by denying to the Association its statutory right as an exclusive representative of the certificated

employees of the District to represent unit members in their employment relations with the District. San Francisco Community College District (10/12/79) PERB Decision No. 105. Finally, it is concluded that, by the same conduct, the District violated the rights of at least some employees of the District, and thus violated section 3543.5(a). San Francisco Community College District, supra.

REMEDY

Section 3541.5(c) of the EERA states:

> 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 customary remedy in a case in which it is found that an employer violates section 3543.5(c) is the issuance of a cease-and-desist order, and an order to the respondent to restore the status quo ante. In Stockton Unified School District (11/3/80) PERB Decision No. 143, and in Mt. San Antonio Community College District (6/30/82) PERB Decision No. 224 (each of which concerned an employer's refusal to provide information to the exclusive representative of the respondent's employees), PERB ordered the respondent to provide to the exclusive representative, upon request, the information previously withheld.

Accordingly, and in consistency with those decisions, the District will be ordered to cease and desist from its unlawful conduct, and to provide to the Association, upon request, the rating sheets of the applicants, including Benneche and Ahart, who sought the positions for which Benneche and Ahart applied, with two provisions. First, for the rating sheets of applicants other than Benneche and Ahart, the District may conceal the names of the applicants before disclosing the rating sheets to the Association. Second, the District may also disguise the names of the raters, unless and until the Association shows that it needs these names for its determination of whether and how to proceed in the grievance procedure. This remedy is consistent with NLRA precedent in this area. See, e.g. Teleprompter Corporation v. NLRB (1st Cir. 1977) 570 F.2d 4 [97 LRRM 2455]; Latimer Brothers (1979) 242 NLRB No. 23 [101 LRRM 1088]; G. J. Aigner Company (1981) 257 NLRB No. 93 [107 LRRM 1586].

However, disclosure at this time of the information sought by the MTA in the fall and winter of 1981-82 may not be adequate to restore the status quo ante. Prior to the PERB hearing in this case, a hearing on the underlying grievances took place before an arbitrator. It has been concluded herein that the MTA was disadvantaged in that arbitration proceeding, and in the two steps of the grievance procedure which preceded the hearing, by the District's withholding of the information

sought by the Association. To remedy these consequences of the District's unlawful action, the following will be ordered. If, after the MTA receives the required information from the District, the MTA seeks to reopen the grievance procedures or the arbitration proceeding on one or more of the underlying grievances, for the presentation as evidence of information newly disclosed to it pursuant to the order in the instant case, the District shall not interpose procedural objections (timeliness, res judicata or the like) to that Association request. It is not the intent of the order to preclude the District from opposing the introduction of evidence on relevance or other substantive grounds.

This aspect of the order is needed to restore the MTA to the position in which it would have been had the District not acted unlawfully. Without inclusion of this provision, the District may be able to benefit by its unlawful conduct.

In several decisions, PERB has recognized that in cases of violations of an employer's duty to meet and negotiate with an employee organization, an order requiring the employer to cease and desist from its unlawful conduct, and to comply with its statutory obligation, may not be sufficient to remedy the wrong that was done.

In Oakland Unified School District (4/23/80) PERB Decision No. 126, aff'd., Oakland Unified School District v. Public Employment Relations Board (1981) 120 Cal.App.3d 1007, PERB

ordered the respondent district to undo its unilateral change (by withdrawing from its agreement with one medical plan administrator, and renewing its agreement with the initial administrator). In addition, however, PERB ordered the District to compensate individual employees who had suffered specific losses as a result of the illegal change of the plan administrator.

In Rialto Unified School District (4/30/82) PERB Decision No. 209, PERB ordered the respondent school district to negotiate with the exclusive representative of the district's certificated employees about the effects of the district's decision to transfer work out of the bargaining unit. The Board also ordered the district to reimburse certificated employees who were adversely affected by the unilateral decision.

Similarly, in Solano Unified School District (6/30/82) PERB Decision No. 219, the Board recognized that,

> Under the present circumstances, however, a bargaining order alone cannot serve as an adequate remedy. (Solano Unified School District, supra, at p. 17.)

Again the Board ordered the District to compensate classified employees who were adversely affected by the district's decision to transfer work out of the classified employees unit.

In this case, there is no certainty that any particular employee suffered financial losses as a result of the District's unlawful conduct. (There is no certainty that the

MTA would have been successful in a grievance or arbitration proceeding if the District had submitted to the Association the information at issue.) However, the Association was without doubt adversely affected; it was unable to use the withheld information in the grievance processing, or in the eventual arbitration proceeding. For that reason, the MTA must now be given the opportunity to use the withheld information in the grievance procedure, or in an arbitration hearing, if it chooses to do so. The proposed remedy is intended to make that possible.

This aspect of the proposed remedial order is also consistent with NLRA precedent in cases in which an employer is found to have withheld needed information from a union which is the exclusive representative of the employees. In a number of such cases, the NLRA has included in its remedial order a provision granting to the union which had been deprived of needed information additional rights in its relationship with the employer. In John S. Swift Company, Inc. (1961) 133 NLRB 185 [48 LRRM 1601] enf. 302 F.2d 342 [50 LRRM 2017], the NLRB ordered that the union's "certification year" be extended, and begin to run only after the employer had provided the needed information. In G. J. Aigner Company (1981) 257 NLRB No. 93 [107 LRRM 1586], the Board ordered the certification period to be extended "a reasonable time" beyond the original year. In each case, the Board's rationale was

that without the withheld information the union in question had been unable to fulfill its statutory bargaining duty, and had not enjoyed its full statutory rights. Simiarly, in this case the MTA was unable to carry out fully its statutory duty to represent the employees in its bargaining unit, and was unable to fully enjoy its statutory rights to represent these employees, without the withheld information.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the Modesto City Schools and High School District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the Modesto City Schools and High School District has acted in an unlawful manner and is being required to cease and desist from this activity and to compensate the Association for losses incurred as a consequence of its unlawful action. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the Modesto City Schools and High School District's's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541(c), it is hereby ordered that the Modesto City Schools and High School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to provide the Modesto Teachers Association with all relevant information and documents needed by the Association to prosecute contract grievances on behalf of certificated employees of the District.

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

(a) Upon request by the Modesto Teachers Association, provide to the Association the rating sheets of all applicants for the position to which Merle Benneche and Gladys Ahart applied to transfer in the 1981-82 academic year; provided that the District may disguise the names of the raters; and provided also that for the rating sheets of applicants other than Benneche and Ahart, the District may conceal the names of the applicants before disclosing the rating sheets to the Association.

(b) If the Modesto Teachers Association seeks to reopen one or more of the grievances filed by Merle Benneche and Gladys Ahart, or seeks to reopen the arbitration proceeding concerning those grievances, refrain from interposing any

procedural objection (timeliness, res judicata or the like) to the reopening sought by the Association.

(c) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty (30) workdays at its headquarters offices and in conspicuous places at the location where notices to employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(b) Within twenty (20) workdays from service of the final decision herein, give written notification to the San Francisco 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.

IT IS FURTHER ORDERED all other violations are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on May 23, 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 at its headquarters office in Sacramento before the close of business (5:00 p.m.) on May 23, 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, sections 32300 and 32305.

Dated: May 3, 1983

Martin Fassler

MARTIN FASSLER
Administrative Law Judge