STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ELSINORE VALLEY EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-2076
v.	)	PERB Decision No. 603
LAKE ELSINORE SCHOOL DISTRICT,	)	December 30, 1986
Respondent.	)	

Appearances; A. Eugene Huguenin, Jr., Attorney for Elsinore Valley Education Association, CTA/NEA; Parham & Associates, Inc. by James C. Whitlock for Lake Elsinore School District.

Before Hesse, Chairperson; Porter and Craib, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the Lake Elsinore School District (District) and the Elsinore Valley Education Association, CTA/NEA (EVEA or Association) to the attached proposed decision of an administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act)[1] by insisting to impasse on the withdrawal

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3543.5 states, in pertinent part:

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

of pending grievances and unfair practice charges - a nonmandatory subject of bargaining - as a condition of settlement of the mandatory subjects of bargaining included in the parties' reopener negotiations.

The Elsinore Valley Education Association excepts to the ALJ's dismissal of a charged violation of section 3543.5(e). EVEA alleged that the District unlawfully insisted on withdrawal of pending grievances and unfair practice charges in exchange for an agreement during the mediation process, thereby not participating in good faith in the mediation process.[2]

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

[2]In addition, EVEA sought fees and a make-whole remedy in the form of punitive damages. We adopt the ALJ's reasons for rejecting these requests.

We find the ALJ's findings of fact free from prejudicial error and adopt them as our own. We affirm the ALJ's conclusions of law consistent with the discussion below.

FACTS

On August 16, 1984, the District and EVEA met to commence reopener negotiations. At this first meeting, the District made an initial offer which it characterized as a "settlement" offer. The District proposed salary and fringe benefit improvements, changes in hours and work year, new language concerning evaluations and the withdrawal of specified unfair practice charges and grievances. The District described its proposals as a "total package" and explained that in order for it to come into effect, the unfair practice charges and grievances would have to be settled. When asked by Tom Brown, EVEA's negotiator, whether withdrawal was a condition to a contract, James Whitlock, the District's negotiator, said only that withdrawal was his concept of what it would take to normalize relations.

That same day EVEA orally countered the District's proposal, except for the proposal that EVEA withdraw grievances and pending unfair practice charges. Brown indicated that EVEA would not counter the District's proposal on this item and if the District persisted in raising the matter it would be courting an unfair practice charge.

The parties next met on September 25, 1984. After explaining the District's financial situation, Whitlock then asked EVEA when it would counter the District's August 16 proposal. Brown reminded Whitlock that EVEA had already-countered, whereupon Whitlock said that the District would stick with its August 16 proposal, that in his view the parties were at impasse and he would prepare the necessary papers. In a memo to the board of trustees, dated September 25, 1984, Whitlock said the parties were at apparent impasse and reaffirmed that he had "renewed" the August offer. As of September 25, EVEA sought an approximately 17-percent wage increase and the District offered 8 percent.

On or about September 28, Walter McCarthy, a school principal and member of the District's bargaining team, proposed to members of EVEA's bargaining team that the parties meet informally, without their professional negotiators, to exchange information. The informal meeting was held the first week in October. In the morning, the District's business manager explained the District's financial position. Superintendent Ronald Flora, who was not on the District's bargaining team, was present for parts of the meeting. In the afternoon, Flora offered an additional one percent and when questioned whether this was linked to withdrawal of pending unfair practice charges stated that it was not. The EVEA members present told Flora that they understood the meeting was

informational only and consequently were surprised that a proposal had been made. However, they agreed to take the offer back to Brown. Sometime later, in early October, EVEA President Pat Perkins told Flora that EVEA could not reach a decision on the 1984-85 reopener offer until the 1983-84 salary matter was resolved. At that time the 1983-84 salary matter was awaiting the issuance of the factfinding panel's report.

The District's request for impasse is dated October 1, 1984 and was filed by Whitlock with PERB on October 9. Whitlock withdrew the request on October 19 and indicated that he hoped to "mediate" the matter after release of the factfinding panel's report concerning the 1983-84 negotiations. That report was issued on November 5, 1984, but the parties were unsuccessful at arranging post-factfinding mediation. Whitlock refiled the District's request for impasse on November 15. PERB declared impasse on November 30, 1984. The request for impasse described the parties as deadlocked over salaries.

On January 14, 1985, pursuant to the declaration of impasse, the parties met with a State mediator. The District again proposed a "settlement offer" which included withdrawal of unfair practice charges and grievances. No settlement was reached.

DISCUSSION

PERB has generally affirmed the principle that conditioning mandatory subjects of bargaining on resolution of nonmandatory subjects, ie., insisting to impasse on such nonmandatory

subjects, is a per se unfair practice. Modesto City Schools (1983) PERB Decision No. 291. Ross School District Board of Trustees (1978) PERB Decision No. 48. PERB thus follows National Labor Relations Board (NLRB) precedent. (See NLRB v. Wooster Div. of the Borg-Warner Corp. (1958) 356 U.S. 342 [42 LRRM 2034].) Although the PERB has not specifically decided whether insisting to impasse on the withdrawal of unfair practice charges is a per se refusal to bargain, we have held that insistence to impasse on the union's abandonment of rights guaranteed under section 3543 violates the Act. Modesto City Schools, supra. As the Association has a statutory right to prosecute unfair practice charges, forcing it to abandon this right is an unfair practice. This rationale is consistent with the NLRB's which also holds a decision to maintain an unfair labor practice charge is a nonmandatory subject of bargaining. Kit Manufacturing Co., Inc. (1963) 142 NLRB 957 [53 LRRM 1178], enfd 9th Cir. 1963, 335 F.2d 166 [56 LRRM 2988].

It is established NLRB precedent that a respondent is initially entitled to propose such conditions, but cannot legally insist upon their acceptance "in the face of a clear and express refusal by the union to bargain . . . ." Laredo Packing Company (1981) 254 NLRB 1 [106 LRRM 1350] citing Union

Carbide Corp. (1967) 165 NLRB 254 [65 LRRM 1262], enfd sub nom Oil, Chemical and Atomic Worker, Local 3-89 v. NLRB (D.C. Cir. 1968) 405 F.2d 1111 [69 LRRM 2838]. In Good GMC, Inc. (1983) 267 NLRB 583-584 [114 LRRM 1033], the NLRB noted that although

> [i]t was clear that a party could not lawfully insist upon the inclusion in a collective bargaining agreement of proposals which were nonmandatory in nature . . . nonmandatory subjects of bargaining could, as a function of cost, bear upon a party's mandatory subjects of bargaining. Thus, to say that the proponent of the nonmandatory proposal could not insist upon the inclusion of such a proposal meant just that, and no more.

That savings may result from settling litigation no doubt bears upon the District's salary proposal. However, after the Association clearly indicated it would not negotiate withdrawal of unfair practice charges and grievances on August 16, the District renewed its proposal on September 25 and then declared impasse.

In its request for declaration of impasse, the District states that the difference in salary proposals was the major sticking point. However,

> [I]t is settled that insistence on a nonmandatory item need not be the sole or primary reason for an impasse to be unlawful, but must be a reason for the impasse. Patrick and Company (1980) 248 NLRB 392, 393, fn. 5 [103 LRRM 1457] enfd sub nom v. NLRB (9th cir. 1981) 644 F.2d 889 [108 LRRM 2175].

Although salaries may have been the main issue, the District's insistence on withdrawal of unfair practice charges

in the face of the Association's indication that it did not want to negotiate the matter was an obstacle to securing agreement.

We do not regard Flora's proposal made at the October informational meeting as curing the District's earlier bargaining conduct. Rather, a thorough review of the various impasse files[3] leads us to believe that in his request for an impasse declaration, the District's chief negotiator was proceeding on the basis of the last offer he made on the District's behalf. The initial declaration of impasse was filed prior to the meeting at which Flora made an offer. Whitlock withdrew the request for declaration of impasse on October 19 saying that the District would attempt to enter post-factfinding mediation after release of the factfinding panel's report regarding the 1983-84 negotiations. At this point it appears that EVEA had already rejected Flora's offer. The District reactivated its request for declaration of impasse when a tentative November 14 mediation date fell through and it seems that the renewed request for impasse was prompted by the breakdown in efforts to agree upon post-factfinding mediation. There is no mention of Flora's "offer" in any of the impasse requests and no mention of it in the District's own motion to

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[3]The ALJ took official notice of the PERB impasse files related to this case, hence, they are part of the record.

dismiss this charge which it made prior to the hearing. Flora's offer was never renewed. Thus, the District's request for impasse, withdrawal of that request, and subsequent reactivation of that request do not appear connected to Flora's offer or rejection of that offer by EVEA.

In short, Flora's offer was made outside of the normal bargaining context, Flora was not a member of the bargaining team, Flora's proposal did not fully address all the issues, Flora's proposal was never followed up by the District, and the chronology of events suggests that Flora's offer was unconnected to the impasse requests. Flora's proposal, therefore, did not cure the District's prior conditioning of a mandatory subject on resolution of a nonmandatory subject. For these reasons, we affirm the ALJ's finding and conclusion that the District violated section 3543.5(a), (b) and (c).

We also affirm the ALJ's decision to dismiss the Association's allegation that the District violated section 3543.5(e) when it again proposed, during mediation, that the Association withdraw certain unfair practice charges and grievances. Although the January 14 proposal was presented as a "settlement offer," it does not, by itself, reflect how insistent the District was on this proposal. Moreover, by the

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[4]The District argues that its actions should be judged on the totality of circumstances. In this case, we hold that insisting to impasse on the withdrawal of pending unfair practice charges and grievances is a per se violation of EERA.

time mediation took place, the factfinding panel's report on the 1983-84 impasse had been issued. EVEA was admittedly hesitant about resolving some issues until the panel's report came out. Under these circumstances, the District may have reasonably believed that conditions were altered sufficiently so that a renewed offer, which included withdrawing an unfair practice charge, would meet with a better reception than its earlier similar proposals. Because merely proposing that the Association drop unfairs is not unlawful, we agree with the ALJ that, without more, the Association failed to prove that the District did not participate in the impasse procedure in good faith. We therefore affirm the ALJ's dismissal of this charge.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case and pursuant to subsection 3541.5(c) of the Educational Employment Relations Act, it is hereby ORDERED that the Lake Elsinore School District, its board of trustees, superintendent and its agents shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Elsinore Valley Education Association, CTA/NEA concerning hours, wages and other terms and conditions within the mandatory scope of representation affecting bargaining unit members represented by the Elsinore Valley Education Association, CTA/NEA.

2. Denying the Elsinore Valley Education Association, CTA/NEA rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

3. Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act, including the right to be represented by their chosen representative.

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

1. Upon request, meet and negotiate in good faith with the Elsinore Valley Education Association, CTA/NEA, concerning hours, wages and other terms and conditions within the mandatory scope of representation affecting bargaining unit members represented by Elsinore Valley Education Association, CTA/NEA.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to certificated employees are customarily placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

3. Written notification of the actions taken to comply with this order shall be made to the Los Angeles regional director of the Public Employment Relations Board in accordance with the director's instructions. Where the parties have entered into a negotiated agreement which relates to any of the remedies ordered by this Board, the parties may stipulate that the pertinent language of the agreement fulfills the requirement of this Order or that the negotiated agreement shall be relevant in any compliance hearing.

IT IS FURTHER ORDERED that the allegations of the charge and the complaint which charge a violation of subsection 3543.5(e) of the Act are DISMISSED.

This order shall take effect immediately upon service of a true copy thereof upon the Lake Elsinore School District.

Chairperson Hesse and Member Porter joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-2076, Elsinore Valley Education Association, CTA/NEA v. Lake Elsinore School District, in which all parties had the right to participate, it has been found that the Lake Elsinore School District violated Government Code section 3543.5(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith by insisting to impasse that the Elsinore Valley Education Association, CTA/NEA (EVEA) abandon pending unfair practice charges and grievances.

2. Denying EVEA its right to represent unit members by insisting to impasse that EVEA abandon pending unfair practice charges and grievances.

3. Interfering with the right of employees to select an exclusive representative by insisting to impasse that EVEA abandon pending unfair practice charges and grievances.

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

1. Upon the request of EVEA, meet and negotiate in good faith with the Elsinore Valley Education Association, CTA/NEA concerning hours, wages and other terms and conditions within the mandatory scope of representation affecting bargaining unit members represented by EVEA.

Dated: _____ LAKE ELSINORE 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 DEFACED, ALTERED, REDUCED IN SIZE OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ELSINORE VALLEY EDUCATION ASSOCIATION. CTA/NEA,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-2076
v.	)	PROPOSED DECISION (1/29/86)
LAKE ELSINORE SCHOOL DISTRICT.	)	
Respondent.	)	

Appearances: A. Eugene Huguenin, Jr. (California Teachers Association), Attorney for Elsinore Valley Education Association, CTA/NEA; James C. Whitlock (Parham & Associates, Inc.) for the Lake Elsinore School District.

Before: W. Jean Thomas. Administrative Law Judge.

PROCEDURAL HISTORY

On October 22, 1984, the Elsinore Valley Education Association, CTA/NEA (hereafter EVEA or Charging Party) filed an unfair practice charge against the Lake Elsinore School District (hereafter District or Respondent). The charge alleged that the District violated subsections 3543.5(a). (b), (c) and (e) of the Educational Employment Relations Act (hereafter EERA or Act)[1] by failing and refusing to bargain

[1]The Educational Employment Relations Act is codified at Government Code section 3540 et seq. All future references are to the Government Code unless otherwise noted.

Section 3543.5 states, in pertinent part, as follows:

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

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

in good faith during negotiations conducted pursuant to a contract reopener provision. The District allegedly insisted to impasse on a non-mandatory subject of bargaining, namely, the withdrawal of pending grievances and unfair practice charges as a condition of settlement of the mandatory subjects included in the parties' negotiations.

On October 29, 1984, Respondent filed a Motion to Dismiss the charge on five separate grounds, to which the Charging Party filed an Opposition on November 14, 1984.

On October 30, 1984, a consolidated pre-hearing conference was held to review the nine separate cases that involved EVEA and the District that were then pending before the PERB. At the conference it was decided that the instant case would be heard separately from the others. Additionally, the parties agreed to waive the right to an informal settlement conference in this matter.

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

On November 8, 1984. the Office of the General Counsel of the Public Employment Relations Board (hereafter PERB or Board) issued a Complaint which incorporated by reference, as though fully set forth, the allegations set forth in the statement of the charge.[2] 2

The Respondent filed an answer to the Complaint on December 6, 1984. denying all conduct alleged to constitute an unfair practice, and raising no affirmative defenses.

A formal hearing was conducted in this matter on February 7. 1985. Post-hearing briefs were filed and the case was submitted on May 1. 1985.

FINDINGS OF FACT

A. Background

The parties have stipulated to the following jurisdictional facts: that the Charging Party is an employee organization and the exclusive representative of an appropriate unit of certificated employees of the District and the Respondent is a public school employer as these terms are defined by the EERA.

The certificated unit consists of approximately 116 employees. The District has four school sites and an enrollment of approximately 2600 pupils in grades K-6.

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[2]Although the Regional Attorney who issued the Complaint did not specifically rule on Respondent's Motion to Dismiss which was before him at the time the Charge was processed, the subsequent issuance of the Complaint was viewed by this Administrative Law Judge as a denial of the Motion.

At the time of the events giving rise to this charge, the parties were signatories to a collective bargaining agreement (hereafter CBA or Agreement) in effect for the period from July 1. 1982 to June 30. 1985. Article 25.0 of the CBA contained the Term of Agreement provisions. Section 25.1. of the article stated in pertinent part, as follows:

> . . . the parties agree to reopen negotiations not prior to April 15, 1984, limited to 1984-85 salary, fringe benefits and any three (3) articles selected by either party.

Pursuant to this provision, the EVEA elected to make proposals only for changes in salaries and fringe benefits. The District elected to make proposals for revisions in salaries, fringe benefits, and the articles covering working hours and work year, evaluations, and District rights.

In accord with the public notice requirements of section 3547, the District's initial proposals were presented to the public on April 5, 1984, and EVEA's initial proposals were "sunshined" on July 5. 1984.

B. The August 16, 1984 Negotiating Session

The 1984-85 EVEA negotiating team consisted of three members of the bargaining unit — Pat Perkins, EVEA President, Suzanne Moore and Cindy Brouwer, and Thomas Brown, California Teachers Association bargaining specialist and chapter consultant. Mr. Brown was the chief negotiator for EVEA.

The District's 1984-85 negotiating team included

Walter (Keith) McCarthy, who in the fall of 1984 was a school principal, the District's business manager and James Whitlock. the District's labor relations consultant. Mr. Whitlock was the chief negotiator for the District.

The parties met for the first negotiating session on August 16, 1984. At the beginning of this meeting. EVEA presented the District team with the following proposals regarding wages and fringe benefits.

EVEA CONTRACT PROPOSAL FOR WAGES AND FRINGE BENEFITS
1984-85 SCHOOL YEAR

Wages

EVEA proposes that a) minimum wage and the b) wage on the schedule at AB + 60, 10 years be in the upper ten per cent of all districts within a fifty mile radius of Elsimore which employ elementary grade teachers. All other wages on the schedule would be adjusted around these two benchmarks.

EVEA also proposes that the M.A. requirement be eliminated as a requirement of columns "E" and "F" on the salary schedule.

EVEA proposes that column "F" be extended downward to include steps 13, 14, and 15.

EVEA wishes to explore the Classroom Teacher Grant, E.C. 44700.

EVEA also proposes that any agreed to extension of time worked and/or taught shall be paid for at each members' regular hourly rate of pay.

Fringe Benefits

EVEA proposes that the present fringe benefit program be continued.

> EVEA also proposes that disability insurance be provided for members with less than five years experience in California that would offer them financial protection in case of mental disorders of a lasting nature.
>
> EVEA proposes that the insurance coverage of personal problems be changed to make it usable, allowing visits to professional personnel to be treated in the same manner as a visit to any physician.
>
> EVEA also proposes that members who desire, be allowed to participate in an H.M.O. program.
>
> EVEA is aware of the continuing rising costs of insurance and welcomes a joint effort to explore ways of holding premiums at their present levels or reducing costs to the District.

The parties have stipulated that during this same negotiation session the District made its initial proposal to EVEA which the District called a "settlement proposal." That proposal, which was presented at the beginning of the afternoon session, stated, among other things, that it was being "offered as an attempt to resolve the many issues that have been in dispute between parties for the last twelve months. . . ." The specific terms of this proposal were as follows:

Salary:

83/84 Increase from 82/83 schedule: -0- Cost -0-

84/85 Increase from 82/23 schedule,

effective 10/1/84: 8% Cost $230,400

Fringe Benefits:

83/84 increased 12.3%

Cost covered by District

84/85 Increased cost to maintain current coverages will be $208,257 (equivalent to over 4% in salary increase).

District would like to work with employees to reduce the fringe benefit cost increase and "roll over" any savings to salary increase.

Calendar/Hours:

Calendar as proposed by District 8/16/84.

Article 7.0

7.1 Current contract.

7.2 Kindergarten teachers to assist other primary teachers (per District's initial proposal).

7.3 Current contract.

7.4 184 work days returning unit members; 185 for new employees.

7.5 No staff meeting prior to 7:30. nor later than 5:00 pm.

7.6 1984/85 instructional minutes shall not exceed:

K	36.000 annual minutes
1-3	46,500 annual minutes
4-6	54,400 annual minutes

Minimum days per 83/84 practice.

7.8 Current contract

7.9 Current contract

EVEA agrees to withdraw charge 3e. LA-CE-1827 and grievance(s) concerning spring conferences 82/83 and 83/84.

Salary. Article 22:

22.1 8% effective 10/1/84

22.2 Current contract

22.3 Current contract

22.4 Current contract

22.5 Annual stipend positions:

Learning Specialist $1,500
RBI Coach $500
Bilingual F acilitrator $1,500*
Approve Reising request for leave conditions as side letter.

Association withdraws charge 3c. LA-CE-1827; 3f, LA-CE-1827; any new charge re. Reising work year.

22.6 Hourly rate for all extra duty assignments determined by average per diem as of 9/1 divided by 7.5.

Association withdraws charge 3b, LA-CE-1827.

22.7 All unit members work years consistant (sic) with Article 7.4 except for extra duty assignments at rate established by 22.6 above.

Association withdraws unfair re Speech Therapists' work year.

Fringe Benefits. Article 21:

Delete 21.3. Association agrees to withdraw grievance re TSA.

Board Policy:

The District agrees to not change any terms and condition of employment unless negotiated. The parties agree to review all adopted policies and determine which have bargaining implications.

EVEA agrees to withdraw LA-CE-1976.

Evaluation as proposed by District 8/16/84. Current K 14.10-14.12 added but numbered as appropriate.

District Rights - Current contract.

This tentative agreement was reached August 16. 1984.

After reviewing this "settlement proposal." Mr. Brown requested clarification from Mr. Whitlock. Mr. Whitlock described the proposal as his concept of what it would take to "normalize relations" between the parties. However, upon direct questioning by Brown. Whitlock refused to state whether settlement on such topics as salary, fringe benefits and hours was conditioned upon EVEA's agreement to withdraw the unfair practice charges and pending grievances referred to under each of these items in the settlement proposal.

During the hearing, Keith McCarthy, the District's sole witness regarding the events of the August 16 bargaining session, admitted during cross-examination that the offers made in the settlement proposal were conditioned upon the EVEA's withdrawal of the referenced unfair practice charges and grievances. Mr. McCarthy's exact testimony was:

> The total package that is offered here [District Exhibit 3], in order for it to come into effect as it is printed and placed within evidence here, it would involve settlements at the table, agreements. After those agreements had been reached those [unfair practice] charges that were listed down below them should have been settled.

> Therefore, the request was go ahead and pull them from currently being charges. (sic) Then, the 8 percent [salary] offer was available. This is a total document, a total package.

McCarthy further explained that the 8 percent salary offer by the District was contingent, at least in part, upon the EVEA's willingness to drop the three separate unfair practice charges and the subject grievances identified in the District's August 16 proposal.

The same day that it received proposal, EVEA made oral counterproposals to all the items on the table, except for the offers dealing with the withdrawal of the unfair practice charges and grievances. The specifics of the counterproposals were not revealed in the record. Mr. Brown did state, at the table, that the EVEA was unwilling to counter the proposals regarding the unfairs and the grievances and that if the District persisted in its position, it was laying the ground work for another unfair practice charge. The August 16 session ended on that note.

C. The September 25. 1984 Negotiating Session

The parties held a second negotiating session on September 25. 1984. Brown and Whitlock were both present as the chief spokespersons for their respective bargaining teams.

The morning session was spent in discussion of the District's budget and management's perception of the District's gloomy financial picture for the 1984-85 school year. At the

beginning of the afternoon session Mr. Whitlock asked EVEA for a counterproposal to the District's August 16 settlement proposal. Mr. Brown responded that EVEA had made its counterproposals on August 16 and was awaiting counterproposals from the District.

After EVEA orally reiterated its August 16 counterproposals, the District team caucused. When the District team returned. Mr. Whitlock stated that the District was going to stay with its "August 16 position." Mr. Whitlock then stated that it seemed to him that the parties were at an apparent impasse. Mr. Brown protested, arguing that he felt that it was inappropriate at that juncture to go to impasse. However. Whitlock stated that he would prepare the necessary paper work to request that PERB declare impasse.

No tentative agreements were reached on any bargaining topic on September 25.

Later in a confidential memo to Superintendent Ronald Flora, dated September 25, 1984. Mr. Whitlock summarized the status of bargaining with EVEA. He reported that negotiations with EVEA are "already at an apparent stalemate." He further stated that "EVEA rejected our offer regarding each grievance and unfair practice charge. . . ." The memo went on to state:

> . . . we renewed our August offer and added an agreement to change all recently adopted policies affecting EVEA unit members so as to conform to existing contract and/or practice.

> EVEA did not modify its August position and stated that, absent an increase in our salary offer they would not reach an agreement with us. I told them that we could not increase our offer and the parties agreed that we were at impasse. . . .

At the conclusion of the September 25 negotiation session, the District salary proposal remained at 8 percent, effective October 1. 1984. and the EVEA's salary position remained at approximately 17 percent.

Following the September 25 meeting, the parties had no further formal negotiating sessions until January 14. 1985. when they met in mediation.

The Early October Informational Meeting

On or about September 28, 1984, all teachers attended a District-wide in-service program at the school site where Mr. McCarthy was then assigned as principal. During the program. Mr. McCarthy approached the unit members of the EVEA negotiating team about the possibility of meeting informally with the District in an attempt to resolve the salary issue. McCarthy wanted the EVEA team to review the District's financial records with new business manager. Patricia Matthews, to see what funds were actually available for salary purposes. Although Ms. Matthews had attended the September 25 negotiation session. McCarthy and the superintendent felt that meeting with her might be more productive provided that the teams met without their "professional" negotiators. An agreement was made to meet without either Brown or Whitlock present.

Sometime during the first week of October 1984 the parties met at the District administrative office. All the EVEA negotiating team members were present except Mr. Brown. Mr. McCarthy, Ms. Matthews and Superintendent Flora were present on behalf of the District.

The meeting, which started at 9:30 a.m., began with Matthews making a detailed presentation to the EVEA representatives about the District's budget. Superintendent Flora was in and out during the morning session, but attended the entire afternoon session which lasted approximately one and one-half hours. During this part of the meeting the superintendent proposed to increase the District's salary offer to approximately 8.8 or 9 percent effective November 1, 1984.

Suzanne Moore, who testified as an EVEA witness about this meeting, stated that at all times relevant, EVEA regarded this meeting as an "informal informational meeting" rather than a formal bargaining session, especially since Mr. Brown was not present and the EVEA representatives had no authority to enter into an agreement with the District. She further testified that she was somewhat surprised when the superintendent made his salary offer because she had not regarded this meeting as a bargaining session.

In response to questions posed by the EVEA representatives about the District's position. Superintendent Flora stated that

the unfair practice charges would not be a part of the deal if that is what it would take to reach an agreement on the salary issue.

The only other item discussed during the afternoon session was the relationship between the fringe benefits items and the salary issue.

At the conclusion of the meeting, the EVEA representatives agreed to take the District's offer to Mr. Brown for his consideration. Sometime later in October Ms. Perkins called the superintendent stating that EVEA could not reach a decision on the 1984-85 salary issue until the 1983-84 salary matter was resolved.

District Request for Impasse

On October 9 Mr. Whitlock, on behalf of the District, filed a request for impasse determination by the Los Angeles Regional PERB office.

During the PERB investigation of this request. Mr. Brown disputed the appropriateness of impasse on the grounds that he did not believe that the parties had fully exhausted their direct bargaining efforts at the time that the request was filed.

On October 19 Mr. Whitlock withdrew the October 9 request for impasse determination, stating in his letter that the parties would attempt to resolve their dispute through

post-factfinding mediation that was anticipated in connection with the parties[1] 1983-84 negotiations.[3]

The report of the factfinding panel was released to the parties on November 5. 1984. Shortly thereafter they made an unsuccessful attempt to arrange a post-factfinding mediation session on November 14. 1984. with a state mediator. No further efforts were made by either side to continue bargaining over the 1983-84 issues.

On November 15. 1984, Mr. Whitlock refiled the District's earlier request for impasse determination of the 1984-85 negotiations. PERB declared the existence of an impasse on November 30, 1984.

Respondent contends that the October meeting with EVEA amounted to a bargaining session during which the District modified its negotiating position of September 25, 1984. It proposed a salary increase that was not contingent upon EVEA's agreement to withdraw certain grievances and unfair practice charges. EVEA vigorously disputes this contention, maintaining that if the October meeting was anything more than an informational session, it could amount to an attempt by the

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[3]Official notice is taken of Lake Elsinore School District impasse file number LA-M-1248, (F-224) which concerns the 1983-84 negotiations, and numbers LA-M-1351 and LA-M-1390 which concern the 1984-85 negotiations.

District to bypass the regular negotiating process established by the parties.

Both sides agree that the manner in which the October meeting was conducted, i.e., without the presence of either chief negotiator, was a departure from their normal bargaining procedure.

After considering the testimony of McCarthy and Moore, who both participated in the October meeting and were credible witnesses, it is determined that the meeting was not a regular bargaining session between the parties. Instead the meeting was arranged for the purpose of informally exploring resolution of the salary issue which was a major area of disagreement during the 1984-85 negotiations. Although the District proposed a salary increase that was not contingent upon the EVEA's withdrawal of specifically referenced grievances and unfair practice charges, these proposals were made informally or "off the record." They were never formalized by the District in writing or orally in a subsequent formal negotiating session between the parties.

Finally, the EVEA representatives indicated to the District at the meeting that any proposals made would have to be discussed with its chief negotiator Mr. Brown, before the EVEA would even respond. Clearly, the October meeting was not a bona fide negotiating session as were the August 16 and the September 25 meetings.

D. January 14. 1985 Mediation Session

After the appointment of a state mediator, the parties met for their first mediation session on January 14. 1985. During the afternoon session, the District again proposed a "settlement offer" which the parties have stipulated was the District's last, best and final offer regarding the 1984-85 negotiations up to the time of the hearing. The terms of that proposal were as follows:

District Settlement Offer
3:00 p.m.. 1-14-85

Salary		COST
1. COLA	5.72%	$165.880
2. Longer Year (2.78%) plus Longer Day (0.50%)		95.120
3. Wed. Min. Day Plan	0.50%	14.500
Fringe Benefits		
4. Assume increased cost of maintaining 83/84 fringe benefit package for 1984/85		116.000
5. TSA Settlement		8.250
Total	13.33%	$386,650

Contract Language

Maintain current contract language except as necessary to: implement above and District's Rights as TA ed. (attached)

Explanations

1. COLA - On schedule increase effective 7/01/84

2. 3.28% represents incentive for 1984/85 longer day/longer year incentive.

District also agrees to automatically increase the salary schedule by 1% effective 7/01/85 and an additional 1% effective 7/01/86 provided the District qualifies for longer year/longer day incentives for 84/85. 85/86. and 86/87. EVEA agrees to drop challenges to 84/85 calendar and/or hours. (LA-CE-2028 Unfair and Kindergarten grievance both withdrawn w/prejudice)

3. District will increase schedule by one-half percent effective 7/01/84 in return for agreement to implement Wednesday minimum day plan effective 2/01/85.
1-6 instructional day increased by 1/4 hour on Monday, Tues. Thurs., and Fridays.
1-6 Instructional day on Wednesdays to be reduced 1 hour to allow for site/District in-service and planning.

4. District cost of fringe benefits increased 10/01/84 the equivalent of 4% increase in salaries.

5. As full and complete settlement of TSA grievance, the District agrees to pay unit members who qualified for TSA contributions in lieu of fringe benefits in 1983/84 and 1984/85 a cash payment of $750. The parties agree to delete the TSA option from the contract upon ratification of this agreement.

The District again proposed withdrawal of a pending grievance and an unfair practice charge in connection with the salary proposal. No settlement was reached at the January 14 session.[4]

[4]Impasse file LA-M-1390 shows that the issues in dispute during the 1984-85 negotiations were successfully resolved through mediation in late February 1985.

ISSUE

Whether the District made an offer of a wage increase and other proposals during contract negotiations which it conditioned upon withdrawal by the Charging Party of pending grievances and unfair practice charges and further, whether the District insisted to impasse on these proposals and thereby, violated subsection 3543.5(c) and concurrently subsections 3543.5(a) and (b).

CONCLUSIONS OF LAW

A. Positions of the Parties

EVEA takes the position that the District acted unlawfully on August 16, 1984, when it conditioned an offer of a salary increase and other bargaining proposals upon EVEA's agreement to withdraw certain grievances and unfair practice charges that were pending at the time of the reopener negotiations between the parties. The grievances and unfair practice charges referenced in the District's proposal were related to specific subjects of the reopener negotiations. EVEA argues that such an offer by an employer, which EVEA characterizes as a "take-it-or-leave-it" proposal, amounts to a refusal to meet and negotiate and is a per se violation of the Act. It cites as support for this position a decision by the National Labor Relations Board (hereafter NLRB) that an employer violated section 8(a)(5) and (1) of the National Labor Relations Act (hereafter NLRA) by conditioning, during bargaining, an offer

of a wage increase upon the union's withdrawal of an unfair labor practice charge involving the discharge of the union's president. (Butcher Boy Refrigerator Door Co. (1960) 127 NLRB 1360 [46 LRRM 1192], enfd. (7th Cir. 1961) 290 F.2d 22 [48 LRRM 2058].)

EVEA further contends that the District's insistence to impasse at the second bargaining session on September 25 on conditioning terms for an agreement on non-mandatory subjects of bargaining, namely, the withdrawal of grievances and unfair practice charges, amounted to an additional per se violation of the District's statutory duty to bargain in good faith.

The Charging Party asserts that the gravamen of the District's conduct on both occasions was the improper attempt to deny EVEA its right to pursue unfair practice charges and grievances in their proper forums.

As a final argument, EVEA charges that the District took a "bulwaristic approach" to the 1984-85 negotiations by making a single proposal which was offered on a "take-it-or-leave-it basis" that was maintained during the entire course of the negotiations between the parties.

The Respondent does not deny that it submitted a bargaining proposal to EVEA which included terms calling for the withdrawal of certain grievances and unfair practice charges. However. Respondent does deny that it "conditioned" agreement of its salary offer upon withdrawal of the subject grievances

and unfair practice charges or that it maintained a "take-it-or-leave-it" bargaining position during the course of the 1984-85 negotiations.

Instead. Respondent characterizes its settlement offer of August 16 as a "reasonable trade" offered in exchange for EVEA's discontinuance of certain litigation and that this offer was the District's way of saving considerable anticipated litigation expenses that could then be used in making up the District's 8 percent salary offer to EVEA.

Respondent further denies that it insisted to impasse on non-mandatory subjects of bargaining because the grievances and unfair practice charges at issue were related to mandatory subjects over which the parties were bargaining at the time that the offers were made. In support of this argument. Respondent maintains that in its final proposal to EVEA during the parties' meeting in early October 1984, Respondent changed its bargaining position on the salary issue to include an increase in the salary offer that was not contingent upon the Charging Party's withdrawal of any pending grievances or unfair practice charges.

Finally. Respondent urges that the PERB apply the "totality of conduct," rather than the "per se." test to the issues raised by this case. This argument is grounded on the premise that the totality of the circumstances surrounding the parties' negotiations must be considered in analyzing the good faith

nature of Respondent's settlement efforts during the disputed negotiations.

B. Refusal to Bargain and Applicable Test of Conduct

Section 3543.3 of the Act imposes a duty on a public school employer to "meet and negotiate with . . . exclusive representatives . . . with regard to matters within the scope of representation." Section 3543.2 sets forth the scope of mandatory bargaining under the EERA and provides for consultation on matters outside the scope of representation. "Terms and conditions of employment," as enumerated in subsection 3543.2(a).[5] include among other things.

[5]Subsection 3543.2(a) defines the scope of representation, in pertinent part, as follows:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7. and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. . . . All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

"procedures for processing grievances . . ."

The National Labor Relations Act (NLRA), after which the EERA was fashioned, requires the parties to "confer in good faith with respect to wages, hours and other terms and conditions of employment." The courts, in determining the scope of the bargaining obligation under this language, have interpreted the statute as distinguishing between mandatory and non-mandatory, or permissive subjects, of negotiations. In NLRB v. Wooster Division of the Borg-Warner Corp. (1958) 356 U.S. 342 [42 LRRM 2034], the Supreme Court affirmed and adopted this distinction. It observed that the duty to bargain over the mandatory subjects created by Sections 8(a)(5) and 8(d) of the NLRA is "limited to those subjects enumerated in those sections, and within that area neither party is legally obligated to yield." Ibid, at p. 349. With respect to the non-mandatory or permissive bargaining subjects, the Court noted that "as to [such] other matters, however, each party is free to bargain or not to bargain and to agree or not to agree."[6]

The proposals at issue in Borg-Warner were a "recognition" clause and a "ballot" clause, both of which had been insisted upon by the employer during collective bargaining. The NLRB found that the employer had not bargained in bad faith; but the insistence upon inclusion of both clauses in any agreement

[6]Ibid.. citing NLRB v. American Nat'1 Insurance Co. (1952) 343 U.S. 395 [30 LRRM 2147].

signed by the employer was held to be a per se violation of section 8(a)(5) of the NLRA. Agreeing with the NLRB's analysis, the Supreme Court declared:

> [G]ood faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining . . . [S]uch conduct is. in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it may lawfully insist upon them as a condition to any agreement. Ibid, at p. 349.

Thus. Borg-Warner instructs that regardless of a party's good faith in bargaining, that party commits an unfair labor practice by insisting to impasse upon incorporation of non-mandatory or permissive subjects in the collective bargaining agreement.

The decision to maintain a lawsuit or an unfair labor practice charge and the settlement of such proceedings has been held to be a non-mandatory subject of bargaining. See Kit Mfg. CO., Inc. (1963) 142 NLRB 957. 971 [51 LRRM 1224], enfd. (9th Cir. 1963) 335 F.2d 166 [53 LRRM 3010]. Thus, an employer's insistence to impasse that a union withdraw a lawsuit and withdraw or settle pending unfair labor practice charges as a condition to the employer's signing of a contract is a per se

violation of section 8(a)(5) of the NLRA.[7]

PERB has also considered the question of an employer's right to condition contract agreement upon the employee organization's abandonment of the right to represent its members through the grievance process. In Modesto City Schools (1983) PERB Decision No. 291, the Board stated as follows:

> . . . while the District may negotiate over every aspect of the grievance procedure, it may not demand to impasse that the Association abandon rights guaranteed under section 3543. To do so is a violation of the duty to bargain as to that item and evidence of the District's general unwillingness to bargain in good faith. As the NLRB stated in Bethlehem Steel Co. (1950) 89 NLRB 341 [25 LRRM 1564]: "True a grievance procedure is bargainable, but it does not therefore follow that the Respondents were privileged to exercise control over the Unions statutory right to attend to grievance adjustments by withholding agreement, even in good faith, unless the Union waives its rights. Nor do we perceive any statutory policy that will be served by recognizing such control in the Employer." Ibid.. citing Bethlehem Steel Co.. supra at p. 30.

Thus, the Board found in Modesto that the District violated

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[7] See Morris, The Developing Labor Law (2d ed., 1st Supp., 1982-84) p. 150, fn. 29, citing Laredo Packing Co. 254 NLRB 1 [106 LRRM 1350]. See also Zenith Radio Corp.. Rauland Division (1971) 187 NLRB 785 [76 LRRM 1115] and Ramada Inn South (1973) 206 NLRB 210 [84 LRRM 1378]. Both of these cases have held that the withdrawal or settlement of pending unfair labor practice charges cannot lawfully be insisted upon as a prerequisite to the employer's fulfilling of its bargaining obligation. Thus, the pendency of an unfair labor practice charge does not relieve the employer of its duty to bargain with the union filing those charges, and a refusal to bargain because of a pending charge constitutes bad faith bargaining in violation of section 8(a)(5) and (1) of the NLRA.

subsection 3543.5(a), (b) and (c) by conditioning agreement on the Association's abandonment of its right of representation at the informal level of the grievance procedure.[8]

The PERB utilizes both the "per se" and the "totality of the conduct" test to ascertain whether a party's negotiating conduct constitutes an unfair practice. Stockton Unified School District (1980) PERB Decision No. 143. The Board described both tests in Pajaro Valley Unified School District (1978) PERB Decision No. 51, where the Board stated:

> The National Labor Relations Board (hereafter NLRB) has long held that [a duty to bargain in good faith] requires that the employer negotiate with a bona fide intent to reach an agreement. In re Atlas Mills, Inc. (1937) 3 NLRB 10 [1 LRRM 60]. The standard generally applied to determine whether good faith bargaining has occurred has been called the "totality of conduct" test. See NLRB v. Stevenson, Brick and Block Co. (4th Cir. 1968) 393 F.2d 234 [68 LRRM 2086] modifying 1966 160 NLRB [62 LRRM 1605]. This test looks to the entire course of negotiations to determine whether the employer has negotiated with the requisite subjective intention of reaching an agreement.
>
> There are certain acts, however, which have such a potential to frustrate negotiations and to undermine the exclusivity of the bargaining agent that they are held unlawful without any determination of subjective bad faith on the part of the employer.

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[8]In San Mateo County Community College District (1979) PERB Decision No. 94, it is noted that the Board stated, without making an express finding to that effect, that the District in its negotiations with the exclusive representative concerning salary ". . . improperly coupled its [salary] negotiating offer with a condition that CSEA dismiss its unfair practice charge. This proposed condition casts another shadow of illegality over the District's conduct." See Fn. 16. p. 23.

> The latter violations are considered per se violations. NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177]. An outright refusal to bargain or an unilateral change in the terms and conditions of employment are two examples of per se violations of the duty to negotiate. Stockton Unified School District, supra, at p. 22. citing Pajaro. supra, and NLRB v. Katz, supra.

Considering the principles set forth above and applying them to the specific facts of this case, it is first concluded that the proper test to apply is the "per se" test. When using this test the subjective intent of the District with respect to the purpose of its settlement proposals is irrelevant in determining whether its negotiating conduct amounted to a violation of the Act.

Second, it is concluded that the settlement proposal presented by the District to EVEA on August 16. 1984. conditioned an offer of a salary increase and other substantive terms and conditions of employment upon the withdrawal by EVEA of several pending grievances and unfair practice charges. Both of the latter subjects were non-mandatory subjects of bargaining. However, the mere proposing of these terms for settlement on August 16 was not per se unlawful or in violation of the District's duty to bargain in good faith. (See Laredo Packing Co.. supra, citing Kent Engineering. Inc. (1969) 180 NLRB 86. 89 [72 LRRM 1639].

But, on the same date that the District presented this initial settlement offer to EVEA. EVEA clearly placed the

District on notice that it would not bargain over the non-mandatory subjects, i.e.. the withdrawal of the pending grievances and unfair practice charges. Mr. Brown even went further by stating to the District that if it persisted in its position regarding the non-mandatory subjects. EVEA considered that the District was "laying the groundwork for an unfair practice charge." Hence, even though the District was entitled to propose terms for settlement, which it hoped would finally resolve the numerous disputed matters between the parties and included non-mandatory bargaining subjects, it could not legally insist upon EVEA's acceptance of the "total package" in the face of a clear and express refusal by the EVEA to bargain over the non-mandatory aspects of the settlement proposal. Laredo Packing Co.. supra and Modesto City Schools, supra.

Even though the District was fully aware on August 16 of EVEA's opposition to its proposals about the withdrawal of grievances and unfair practice charges as they related to the mandatory items on the negotiating table, at the September 25 negotiation session the District persisted in remaining with its August 16 bargaining posture.

On September 25 it was the District who first mentioned that it considered the parties to be at an apparent impasse in their negotiations. In spite of Mr. Brown's objection to agreeing that the parties were truly at impasse on September 25. the District refused to modify any part of the

August 16 settlement proposal. At the time that the District insisted on seeking a declaration of impasse from PERB, the parties had engaged in limited substance bargaining on the mandatory items before them and no tentative agreements had been reached.

Although the Respondent now contends that it did not make its salary offers of August 16 and September 25 contingent upon the Charging Party's agreement to withdraw the specific grievances and unfair practice charges referenced in its proposal, this contention is not supported by the facts. The District's main witness, Keith McCarthy, testified that the August 16 settlement proposal was a "total package." Mr. Whitlock's confidential memo of September 25 to the superintendent reported that at the September 25 negotiations the District renewed its August offer which EVEA rejected, including the District's offer "regarding each grievance and unfair practice charge." He further reported that negotiations were at "an apparent stalemate . . . at impasse." Since it has already been found that the early October 1984 meeting between the parties was not a bona fide collective bargaining session with respect to any subsequent negotiating offer that the District may have made, as of September 25, 1984, the District's terms for contract settlement on all mandatory subjects, including salary, were contingent on EVEA's agreement to forego the pursuit of specific pending grievances and unfair practice charges.

Even after the statutory impasse procedure was invoked, the District maintained its pre-impasse posture of conditioning its terms for agreement on salary and mandatory subjects on the same non-mandatory items to which the EVEA had earlier objected. When the parties negotiated during mediation on January 15, 1985. the District again proposed a "settlement offer." which included in its terms, an agreement by EVEA to withdraw a pending unfair practice charge.

Since it is clear under NLRB precedent that proposals for contract settlement contingent upon the withdrawal of grievances and unfair practice charges are a per se violation of the NLRA, and that under PERB precedent, it is a violation of the duty to bargain in good faith to insist to impasse that an Association abandon its rights of representation through the grievance process, it is concluded that the District, in this case, engaged in unlawful conduct during its 1984-85 contract negotiations with EVEA. By insisting to impasse on September 25, 1984, that the EVEA agree to withdraw certain grievances and unfair practice charges as a condition for settlement on the District's salary proposal and other substantive proposals, the District committed a per se violation of the duty to bargain in good faith required by subsection 3543.5(c) of the Act. This same conduct concurrently violated subsections 3543.5(a) and (b) of the Act. San Francisco Community College District (1979) PERB Decision No. 105.

C. Alleged Violation of Subsection 3543.5(e)

Subsection 3543.5(e) makes it an independent unfair practice for an employer to "refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with section 3548)."

In this case the Charging Party alleges that the Respondent also violated subsection 3543.5(e) by the same conduct during the 1984-85 negotiations that formed the basis for the subsection 3543.5(c) violation.

The only evidence presented about Respondent's conduct during the statutory impasse procedure was the "settlement offer" Respondent submitted to Charging Party at their first mediation session on January 14, 1985. As discussed supra, the parties have stipulated that the "settlement offer" was the most current negotiating proposal up to the time of the hearing. An analysis of this proposal has already been discussed in connection with the conclusions reached about the subsection 3543.5(c) violation. This proposal, absent any other evidence about Respondent's conduct during mediation, is insufficient to make a finding of an independent violation of subsection 3543.5(e) Therefore, this part of the charge and complaint must be dismissed.

REMEDY

Section 3541.5(c) authorizes the PERB to:

> . . . issue a decision and order directing an offending party to cease and desist from the unfair practice and 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 cease and desist order is the customary and appropriate remedy for the failure to bargain in good faith as required by the EERA. In addition to a cease and desist order, the EVEA has requested an award of reasonable attorney fees and a make whole remedy in the form of punitive damages to compensate the Charging Party for the harm suffered as a result of the Respondent's unlawful conduct in this case and several other unfair practice cases that EVEA has recently litigated against the District.

EVEA has offered no statutory or other legal justification in support of its request for punitive damages. The PERB has no authority under the EERA to order a make whole remedy in the form of punitive damages. Therefore, this request is denied.

The PERB has decided that it has the authority under EERA to order the payment of attorney fees and related litigation costs, however, this authority is strictly limited. In considering requests for attorney fees, the Board has applied a standard utilized by the NLRB and the federal courts. In King City Union High School District (1982) PERB Decision No. 197 [Cumero v. Public Employment Relations Board (1985) 167 Cal.App.3d 131 (hg. granted 7/11/85)]. the Board adopted the

NLRB's standard for determining when fees should be awarded in unfair practice cases.

> [a]ttorney's fees will not be awarded to a Charging Party unless there is a showing that the Respondent's unlawful conduct has been repetitive and that its defenses are without arguable merit. Ibid. p. 26

More recently, in Modesto City Schools and High School District (1985) PERB Decision No. 518. at p. 3. citing Heck's. Inc. (1974) 215 NLRB 765 [88 LRRM 1049], the Board held that fees are not appropriate where defenses are at least "debatable."

In this case there has been no showing that Respondent's defenses are "without arguable merit or at least "nondebatable." Since PERB's standard has not been met. EVEA's request for attorney fees must also be denied.

It is also appropriate that the District be required to post a notice incorporating the terms of this order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. Davis Unified School District et al. (1980) PERB Decision No. 116; see also Placerville Union School District (1978) PERB Decision No. 69.

Finally, official notice is taken of the fact that through the process of mediation conducted in February 1985 by the PERB appointed state mediator, the parties were able to successfully resolve their disputed 1984-85 negotiations issues. Therefore, if the parties have previously entered into a negotiated agreement which relates to any of the remedies ordered by this proposed decision for compliance purposes, they may stipulate that the pertinent language of the agreement fulfills the requirements of this decision or that the negotiated instrument will be submitted as a relevant document in a compliance hearing. (See Modesto City Schools (1983) PERB Decision No. 291. at p. 71.)

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case and pursuant to subsection 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Lake Elsinore School District, its board of trustees, superintendent and its agents shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Elsinore Valley Education Association, CTA/NEA concerning hours, wages and other terms and conditions within the mandatory scope of representation affecting bargaining unit members represented by the Elsinore Valley Education Association. CTA/NEA.

2. Denying the Elsinore Valley Education Association, CTA/NEA rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

3. Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act, including the right to be represented by their chosen representative.

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

1. Upon request, meet and negotiate in good faith with the Elsinore Valley Education Association, CTA/NEA, concerning hours, wages and other terms and conditions within the mandatory scope of representation affecting bargaining unit members represented by Elsinore Valley Education Association, CTA/NEA.

2. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to certificated employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with the order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

IT IS FURTHER ORDERED that the allegations of the charge and the complaint which charge a violation of subsection 3543.5(e) of the Act are DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305. this Proposed Decision and Order shall become final on February 18, 1986, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on February 18, 1986, or sent by telegraph, certified or Express United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this

proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III. section 32300 and 32305.

Dated: January 29. 1986

W. JEAN THOMAS
Administrative Law Judge