**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| LOS ANGELES UNIFIED SCHOOL DISTRICT, | ) | |
| Charging Party, | ) | Case No. LA-CO-462 |
| v. | ) | PERB Decision No. 803 |
| UNITED TEACHERS-LOS ANGELES, | ) | March 30, 1990 |
| Respondent. | ) | |

Appearances: O'Melveny & Myers by Katherine Koyanagi, Attorney, for Los Angeles Unified School District; Taylor, Roth, Bush & Geffner by Hope J. Singer, Attorney, for United Teachers-Los Angeles.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by United Teachers-Los Angeles (UTLA or Association) and the Los Angeles Unified School District (District) to a PERB administrative law judge's (ALJ) proposed decision (attached hereto). The ALJ found that a boycott of certain job duties authorized and encouraged by UTLA during negotiations and impasse proceedings violated the Educational Employment Relations Act (EERA) section 3543.6(c) and (d).[1]

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.6 provides, in pertinent part:

> It shall be unlawful for an employee organization to:

The Association made 11 factual and legal exceptions to the ALJ's proposed decision, generally asserting, as it did during the administrative hearing, that the boycotted duties were not customarily required, and that UTLA was not aware that the boycotted duties were required of bargaining unit employees. The Association also excepted to the ALJ's refusal to analogize its actions as a unilateral-change-in-policy violation.

The District filed exceptions on two grounds. First, it argued that the ALJ incorrectly concluded that the record does not support a finding that UTLA boycotted state-required standardized testing with the motive to influence the District's bargaining position. Second, the District maintained that UTLA should have been ordered to publish a cease-and-desist order in its newsletter sent to all members, as that was the means utilized by UTLA to communicate its boycotting strategy to members in the first instance.

We have carefully reviewed the entire record, including the proposed decision, transcript, exceptions and responses, and finding the ALJ's findings of fact and conclusions of law to be

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

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

free of prejudicial error, we adopt the ALJ's proposed decision as the decision of the Board itself consistent with the discussion below.[2]

DISCUSSION

There is no dispute that UTLA authorized and encouraged its members to cease performing nine enumerated activities, as set forth in the proposed decision. The primary issue, therefore, is whether those activities were required duties of the certificated employees in the bargaining unit or were simply the type of activities that the employees voluntarily undertook.

The Board has held that the partial withholding of services or a partial strike by employees is unprotected activity. In Palos Verdes Peninsula Unified School District (1982) PERB Decision No. 195, page 10, the Board found that "[e]mployees may not pick and choose the work they wish to do even though their action is in support of legitimate negotiating interests." In that case, during the course of negotiations, teachers failed to give required examinations as a "slow down" tactic. The Board distinguished between those employee activities that are mandatory, discretionary and voluntary. Work is voluntary when employees are free to engage or not engage in activities, without any limitation on their choice. While the withholding of "voluntary" activities is not by itself unprotected, the same

[2]Chairperson Hesse disagrees with the ALJ's dismissal of the boycott of standardized tests based on his finding that the evidence was inconclusive regarding UTLA's motive on that specific subject. (See fn. 4 at p. 12 of the proposed decision.)

cannot be said for those activities that are mandatory or discretionary. In Modesto City Schools (1983) PERB Decision No. 291, at page 14, the Board appropriately summarized the Palos Verde decision, stating:

> . . . the refusal to perform normally required duties is unprotected conduct "tantamount to a partial work stoppage or slowdown." This is so even where the assigned duty is discretionary, if the refusal is "for reasons other than their professional judgment, namely, as a pressure tactic during the course of negotiations."

In the case before the Board, the ALJ correctly determined that all of the boycotted activities had been customarily required.

Both parties agree that the boycott activities began in September 1988, approximating the same time the District had submitted its first salary proposal for a successor collective bargaining agreement. The various activities were boycotted through negotiations, including a period of time that the parties were involved in impasse proceedings and prior to completion thereof. The Board held in Modesto City Schools, supra. at pages 62-63:

> . . . a strike prior to the completion of impasse "create[s] something similar to a rebuttable presumption" of an unlawful refusal to negotiate and/or participate in impasse. The presumption of illegality is rebuttable, however, by proof that the strike was provoked by employer conduct and that, further, the employee organization in fact negotiated and participated in impasse in good faith. Absent such evidence, the presumption stands and a violation is established.

In El Dorado Union High School District (1985) PERB Decision No. 537, the Board concluded that a partial work stoppage or slow down is not only unprotected, but also unlawful. There, the Board found that the association's instigation and encouragement of employees to picket during work hours was unlawful. A boycott of required extracurricular duties before impasse was to be declared a violation of section 3546.6(c); and such activity, subsequent to the declaration of impasse, was a violation of section 3543.6(d).[3]

During the hearing, UTLA did not contend that the District failed to negotiate in good faith and that its initiation of the boycott activities was in response to the District's actions. Therefore, we find that UTLA, in authorizing, encouraging and advocating employees in the unit to boycott required duties, has engaged in unlawful conduct violative of EERA.[4]

ORDER

Based on the entire record in this case, the Public Employment Relations Board ORDERS that the United Teachers-Los Angeles and its representatives shall:

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[3]See also El Dorado Union High School District (1986) PERB Decision Nos. 537a and 537b.

[4]The ALJ correctly refused to analogize UTLA's activities to a unilateral change in policy charge. Since Modesto City Schools, supra, and El Dorado Union High School District, supra, clearly established that such activity is unlawful, we need not discuss the Association's novel theory.

A. CEASE AND DESIST FROM:

1. Failing to meet and negotiate in good faith with the Los Angeles Unified School District (District) by authorizing, encouraging or advocating an employee boycott of any of the following job duties of unit employees, and thereby engaging in the illegal pressure tactic of a partial strike:

a. Completing progress reports (five-week, ten-week and fifteen-week grades) and final semester grades on the District's forms and submitting them to administrators;

b. Attending before-school and after-school faculty meetings of any kind and those during conference or preparation periods, and period-by-period faculty meetings at secondary schools;

c. Attending after-school activities, including back-to-school events and parent conferences;

d. Supervising students before and after the school day, during recess, nutrition and lunch periods, and during preparation periods at the secondary schools;

e. Submitting any completed registers or attendance reports with totals filled in;

f. Providing class coverage for other employees unavailable due to emergencies, class preparation, special assignments, or collective bargaining negotiations unless paid at an hourly rate;

g. Submitting lesson plans, course outlines and rollbooks or allowing administrators to inspect them; and

h. Participating in the elementary progress quality review process.

2. By that same conduct, during the course of impasse procedures, failing to participate in impasse procedures in good faith.

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

1. Within thirty-five (35) days following the date the 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 United Teachers-Los Angeles. Such posting shall be maintained for a period of thirty (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.

2. 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 her instructions.

It is further ORDERED that all other allegations in the charge and complaint are hereby DISMISSED.

Member Shank joined in this Decision.

Member Craib's concurrence begins on page 8.

Craib, Member, concurring: I agree with my colleagues that the Public Employment Relations (PERB or Board) should affirm the administrative law judge (ALJ). I write separately to address several of the exceptions raised by the parties which are not adequately dealt with in either the majority's decision or ALJ's proposed decision.

The Los Angeles Unified School District (District) excepts to the ALJ's finding that the evidence presented was inconclusive as to the motivation of the United Teachers-Los Angeles (Union or UTLA) in urging the boycott of the administration of the standardized tests.[1] The appropriate focus of our inquiry is whether the evidence presented by the District supported its allegation that the teachers' motive in boycotting the administration of standardized tests was the same as its motive for the general boycott, that is, to further the Union's position at the bargaining table. As the charging party, the District had the burden of proving its allegation by a preponderance of the evidence. (PERB Regulation 32178.)

The District contends that the boycott of the administration of the standardized tests was part of the Union's overall boycott aimed at influencing the bargaining process. To support this argument, the District relied on UTLA's publications which listed the administration of standardized tests, along with other boycotted activities. To rebut the District's argument, the

[1]See footnote 4 at page 12 of the proposed decision. Chairperson Hesse disagrees with the majority of the panel on this issue. (See Majority opinion at fn. 2.)

Union presented Sam Kresner's testimony that the boycott of the standardized test administration "was completely separate" from the other boycott activities. This testimony was not rebutted by the District. Kresner also testified that the boycott of administration of standardized tests was lifted as soon as the parties reached agreement on the appropriate test administration procedures. The agreement on standardized test administration and the lifting of the boycott occurred prior to the end of the general boycott. This is additional evidence that the boycott was not aimed primarily at the bargaining process. Furthermore, District Deputy Superintendent Thompson testified that the agreement reached by the parties on test administration arose out of disputes over alleged improper handling of the tests by teachers.

I agree with the ALJ that the evidence was inconclusive. Since the District had the burden to prove by a preponderance of the evidence that the boycott of the standardized test administration was instigated for the purpose of influencing negotiations and since it failed to present sufficient evidence to rebut the Union's evidence of its motivation, its allegation on this issue must be dismissed.

The Union excepts to the ALJ's overall conclusion that the duties which it boycotted were either required by the contract or customary practices within the District. The Union argues that none of the boycotted activities were within the contract's provisions, and, thus, their boycott was unlawful only if those

activities were required on a consistent District-wide basis. The majority takes the position that the boycotted activities were "customarily required" by the District. (Majority opinion at p. 4.)

UTLA argues that if the boycotted activity is not expressly enumerated in the contract as a required duty, then the Board should require that there be a District-wide policy before determining that the unit members' boycotted activities were mandatory.[2] In so arguing, UTLA relies on Modesto City Schools and High School District (1984) PERB Decision No. 414. In Modesto, the union sought to prove that the district had made a unilateral change in the length of duty-free lunch periods. (Id. at pp. 1-2.) Specific lunch period times and duties were not enumerated in the contract. The Board, relying on Grant Joint Union High School District (1982) PERB Decision No. 196 and Pajaro Valley Unified School District (1978) PERB Decision No. 51, analyzed the case as a change in past practice. (Modesto,

[2]The majority, in discussing Palos Verdes Peninsula Unified School District (1982) PERB Decision No. 195, indicates that activities can be mandatory, discretionary, or voluntary. The discussion of "discretionary" duties is somewhat misleading under the facts currently before the Board. (Majority opinion at pp. 3-4.) Palos Verdes involved the refusal of teachers to give final examinations. Even though teachers were not expressly required to give final examinations, i.e., they had the discretion to give them or not, the Board held that the teachers could only choose not to give examinations for legitimate educational reasons. (Palos Verdes Peninsula Unified School District, supra. PERB Decision No. 195, at pp. 9-10.) Nothing in the record currently before the Board indicates that the boycotted activities required the type of professional discretion discussed in Palos Verdes. It is, therefore, more appropriate to focus on whether the boycotted activities were mandatory or voluntary.

supra, PERB Decision No. 414, at p. 13.) It found that, because the lunch period varied from school to school within the district, the union had failed to show that the district departed from past practice when it altered the lunch period. (Id. at p. 14.)

As noted, UTLA, in the case currently before the Board, argues that a particular duty must be required District wide before that particular duty can be considered mandatory. While UTLA seems to believe that none of the boycotted activities were within the contract's provisions, and, thus, their boycott was unlawful only if those activities were required on a consistent District-wide basis, I would find that all of the boycotted activities related to professional duties described in the contract. We need not reach the issue of whether the boycotted duties were required District wide because all of the boycotted activities directly related to professional duties specifically required by the contract. The following is a list of the stipulated boycotted activities and the sections of the contract which I believe mandate performance of those activities.

1. **Progress reports and final grades:** required by Art. IX, 4.0 (reviewing and evaluating the work of pupils; maintaining the appropriate records.)

2. **Attending faculty meetings:** required by Art. IX, 4.0 (attending faculty, departmental, grade level and other meetings called or approved by the immediate administrator.)

3. **Attending after-school activities including back-to-school events and parent conferences:** required by Art. IX, 4.0 (communicating and conferring with pupils, parents, staff, and administrators; cooperating in parent, community, and open house activities.)

**4. Supervising students outside the classroom:** required by Art. IX, 4.0 (supervising students both within and outside the classroom.)

5. **Submitting any completed registers or attendance reports with totals filled in:** required by Art. IX, 4.0 (maintaining appropriate records.)

6. **Providing class coverage for other employees unavailable due to emergencies, class preparation or special assignments unless paid at an hourly rate:** required by Art. IX, 6.0 & 7.0 (secondary preparation periods shall be used for professional duties and teachers shall not be expected to perform classroom teaching functions "except as reasonably needed to provide such services during school related activities, during emergencies, or when replacement or auxiliary pay is received" and elementary preparation periods shall be used for professional duties and shall not be used for classroom teaching functions except "as reasonably needed.")

7. **Submitting lesson plans, course outlines and roll books or allowing administrators to inspect them:** required by Art. IX, 4.0 (instructional planning, preparing lesson plans in a format appropriate to the teacher's assignment; communicating and conferring with pupils, parents, staff, and administrators; maintaining appropriate records.)

8. **Participating in the Elementary Progress Quality Review process:** required by Art. IX, 4.0 (participating in staff development programs, professional activities related to their assignment, etc.)

Thus, all of the boycotted activities were expressly required by the contract. Therefore, the Union's argument, that the Board should apply an analysis similar to that employed in Modesto City Schools and High School District, supra. PERB Decision No. 414 to ascertain whether or not the boycotted activities were required, must be rejected.

For these reasons and those of the ALJ, the proposed decision must be affirmed.

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-CO-462, Los Angeles Unified School District v. United Teachers-Los Angeles, in which all parties had the right to participate, it has been found that the United Teachers-Los Angeles violated Educational Employment Relations Act, Government Code section 3543.6(c) and (d).

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

A. CEASE AND DESIST FROM:

1. Failing to meet and negotiate in good faith with the Los Angeles Unified School District (District) by authorizing, encouraging or advocating an employee boycott of any of the following job duties of unit employees, and thereby engaging in the illegal pressure tactic of a partial strike:

a. Completing progress reports (five-week, ten-week and fifteen-week grades) and final semester grades on the District's forms and submitting them to administrators;

b. Attending before-school and after-school faculty meetings of any kind and those during conference or preparation periods, and period-by-period faculty meetings at secondary schools;

c. Attending after-school activities, including back-to-school events and parent conferences;

d. Supervising students before and after the school day, during recess, nutrition and lunch periods, and during preparation periods at the secondary schools;

e. Submitting any completed registers or attendance reports with totals filled in;

f. Providing class coverage for other employees unavailable due to emergencies, class preparation, special assignments, or collective bargaining negotiations unless paid at an hourly rate;

g. Submitting lesson plans, course outlines and rollbooks or allowing administrators to inspect them; and

h. Participating in the elementary progress quality review process.

2. By that same conduct, during the course of impasse procedures, failing to participate in impasse procedures in good faith.

Date: _____ UNITED TEACHERS-LOS ANGELES

By _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

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| LOS ANGELES UNIFIED SCHOOL DISTRICT, | ) | |
| Charging Party, | ) | Unfair Practice Case No. LA-CO-462 |
| V. | ) | PROPOSED DECISION (8/1/89) |
| UNITED TEACHERS - LOS ANGELES, | ) | |
| Respondent. | ) | |

Appearances: O'Melveny & Myers by Curt F. Kirschner for Los Angeles Unified School District; Taylor, Roth, Bush & Geffner by Jesus E. Quinonez for United Teachers - Los Angeles.

Before Douglas Gallop, Administrative Law Judge.

PROCEDURAL HISTORY

On October 31, 1988, Los Angeles Unified School District (hereinafter District) filed an unfair practice charge alleging that United Teachers - Los Angeles (hereinafter Respondent) violated section 3543.6(c) and (d) of the Educational Employment Relations Act (hereinafter EERA).[1] Subsequently, certain allegations in the charge were withdrawn or dismissed. On December 5, 1986, the General Counsel of the Public Employment Relations Board (PERB) issued a complaint, alleging that Respondent violated section 3543.6(c) and (d) by authorizing, advocating and encouraging a partial strike during contract negotiations and impasse proceedings. On December 23, 1988,

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

Respondent filed an answer to complaint denying the commission of unfair practices, and alleging various affirmative defenses. Thereafter, the parties met in an informal settlement conference, but were unable to resolve the case. On April 25, 26 and 27, 1989, a hearing was conducted before the undersigned on the complaint allegations, as amended pursuant to Respondent's motion. The parties filed post-hearing briefs, and the matter was submitted for decision on July 21, 1989.

## FINDINGS OF FACT

The District is a "public school employer" within the meaning of section 3540.1(k) of the EERA, and the Association is an "employee organization" within the meaning of section 3540.1(d). The District operates about 650 regular primary and secondary schools, serving an estimated 594,000 students and employing about 32,000 teachers. Respondent is the exclusive representative of the District's certificated employees, and has about 24,000 members in the unit. Since 1978, the parties have entered into a series of collective bargaining agreements.

The 1985-1988 agreement, as amended, (hereinafter Agreement) contained an expiration date of June 30, 1988, subject to reopeners. The Agreement, however, contained a day-to-day evergreen clause (e.g., that it would continue in effect), subject to notice of termination by either party. It is undisputed that neither party had terminated the Agreement as of the hearing.

The Agreement contained a grievance procedure, culminating in binding arbitration. The grievance/arbitration provisions, however, defined a grievance as a claim by Respondent or an employee that the District had violated the Agreement, and did not provide for grievances by the District. The Agreement further contained a District rights clause, but specified that said clause did not bestow any rights on Respondent or the unit employees, and was not subject to the grievance procedure.

While several other portions of the Agreement are also relevant to this case, the following are particularly noteworthy:

ARTICLE IX

HOURS, DUTIES, AND WORK YEAR

> 1.0 General Workday Provisions: It is agreed that the professional workday of a full-time regular employee requires no fewer than eight hours of on-site and off-site work, and that the varying nature of professional duties does not lend itself to a total maximum daily work time of definite or uniform length. The work day for part-time employees shall be proportionate, or governed by the employee's individual employment contract.
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> * * *
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> 4.0 Other Professional Duties: Each employee is responsible not only for classroom duties (or, in the case of non-classroom teachers, scheduled duties) for which properly credentialed, but also for all related professional duties. Such professional duties include the following examples: instructional planning; preparing lesson plans in a format appropriate to the teacher's assignment; preparing and selecting instructional materials; reviewing and evaluating the work of pupils; communicating and conferring with pupils, parents, staff, and administrators; maintaining appropriate

records; providing leadership and supervision of student activities and organizations; supervising pupils both within and outside the classroom; supervising teacher aides when assigned; cooperating in parent, community, and open house activities; participating in staff development programs, professional activities related to their assignment, independent study and otherwise keeping current with developments within their areas or subjects of assignment; assuming reasonable responsibility for the proper use and control of District property, equipment, material, and supplies; and attending faculty, departmental, grade level and other meetings called or approved by the immediate administrator.

4.1 All duties required of each employee shall meet the test of reasonableness, and shall be assigned and distributed by the site administrator in a reasonable and equitable manner among the employees at the school or center.

4.2 Faculty, Departmental, Grade Level, Staff Development and Committee Meetings: No employee shall be expected to attend more than five (5) such meetings per school month, except as provided herein. Exempt from this limitation are administrative conferences with individual employees, meetings on released time, community meetings, voluntary meetings and meetings necessitated by special circumstances or emergencies. These meetings should not, except in special circumstances or emergencies, exceed one hour in duration. Agendas for faculty meetings are to be distributed at least one day in advance, and employees shall be permitted to propose agenda items. Employees shall be permitted to participate in discussions during the meetings. If a meeting is scheduled after school, it should be started as soon as practicable after the student day is completed.

The parties commenced negotiations for a new agreement in about February, 1988. The District made its first salary

proposals in mid- to late August, 1988, and Respondent submitted its first salary proposal on or about September 10, 1988. Subsequent to the District's first salary proposal, the parties met in negotiations approximately twice each week. In November or December 1988, impasse was declared, and as of the hearing, the parties were in factfinding. While tentative agreement had been reached on several issues as of the hearing, some 50 unresolved issues remained at that time. Official notice is taken that subsequent to the hearing, the parties reached agreement for a new contract.

At the hearing, the parties entered into the following stipulation:

> 1. Beginning on or about September 13, 1988, UTLA, acting through its officers, agents and employees, authorized, encouraged and advocated employees in the bargaining unit to refrain from:
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> a) Completing progress reports (five-week, ten-week and fifteen-week grades) and final semester grades on the District's forms and submitting them to administrators;
>
> (b) Attending before-school and after-school faculty meetings of any kind and those during conference or preparation periods, and period-by-period faculty meetings at secondary schools;
>
> (c) Attending after-school activities including, back-to-school events and parent conferences, except those for which extra compensation was received;
>
> (d) Supervising students before and after the school day, during recess, nutrition and lunch periods, and during preparation periods at the secondary schools;
>
> (e) Submitting any completed

registers or attendance reports with totals filled in;

(f) Administering, scoring and handling standardized tests, including but not limited to the California Test of Basic Skills and Write tests;

(g) Providing class coverage for other employees unavailable due to emergencies, class preparation or special assignments unless paid at an hourly rate;

(h) Submitting lesson plans, course outlines and rollbooks or allowing administrators to inspect them; and

(i) Participating in the elementary Progress Quality Review Process.

2. Employees in the bargaining unit represented by UTLA have refrained from the activities described in the above paragraph 1.

According to Respondent's newsletter of November 4, 1988, the boycott began on September 13, with a boycott of after-school meetings, and was escalated thereafter to include the other activities listed above. The primary evidence as to the motive for the boycott is also contained in Respondent's publications, including articles by Respondent's president. The publications, with one exception, very clearly show that the boycott was urged as a means to pressure the District to accept Respondent's contract demands, some of which called for the elimination of, or extra pay for some of the boycotted duties. While some of Respondent's literature, including the November 4 newsletter, accused the District of bad faith bargaining tactics, many other articles simply stated that the boycott would force the District

to accept Respondent's contract demands. Respondent has not, in this proceeding, contended that the District failed to negotiate in good faith, and the evidence does not establish such conduct.

The one subject of the boycott which Respondent seriously disputes, with respect to its motivation, is the boycott of standardized test duties. Sam Kresner, Respondent's Director of Organizational Services and one of the planners of the boycott, testified that the boycott of standardized testing resulted entirely from accusations that teachers were mishandling the tests, and that once the parties met and reached agreement on the issue, the boycott of those duties was lifted. The remainder of the boycott remained in effect as of the hearing. Kresner's testimony, to an extent, is corroborated by Respondent's newsletter of October 21, 1988, which states that accusations of tampering with the tests led to the boycott of their administration by unit employees. Respondent's November 4 newsletter, however, in addition to urging a boycott of administering the tests for that reason, also urged a boycott because such work is purportedly "not professional," disrupts instruction and because of the alleged "negative" effect of such testing on American education. Other newsletters simply listed the boycott of the testing duties, and the success of that boycott, along with the other duties under boycott, with the possible implication that the standardized tests were part of the package of services to be withheld to attain Respondent's contract demands. It is found, however, that the evidence, as a

whole, is inconclusive as to whether the boycott of standardized test administration was directed toward Respondent's bargaining position.

Respondent contends that some or all of the boycotted job duties were voluntary, or not performed at all by certificated employees. Kresner testified that the boycott was directed toward activities conducted outside normal school hours for which no extra pay was received, and duties not specifically required by the Agreement. It is undisputed that some of the boycotted duties were not performed by all of the certificated employees, and that the District's regional administrations and school site supervisors have adopted varying job requirements. Furthermore, the manner in which some of these job duties are performed has been left to the discretion of the unit employees.

The credible evidence,[2] however, amply establishes that for

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[2]This finding is based on the credible testimony of Sidney A. Thompson, Deputy Superintendent; Richard Fisher, Attorney; Shirley Woo, Assistant Superintendent; Robert Collins, Principal; and Barbara Kamon, Principal, in addition to a plethora of documentary evidence.

Respondent's witnesses, at best, established that some of the job duties are not required for all of the employees, and that enforcement of a few of the duties may be lax at some schools. Respondent contends that it only urged a boycott of totalling attendance statistics, and that this was not a required duty. While some of Respondent's literature was ambiguous as to what should be boycotted, the credible evidence establishes that some teachers have totalled attendance statistics, an activity admittedly boycotted. It is also concluded that the unit employees reasonably understood Respondent's literature to call for a total refusal to complete attendance forms, an activity that some participated in. Respondent's participation in this conduct is exemplified by a statement in its November 10, 1988 "Update", which reads, "UTLA boycotted elementary [attendance] registers - 90% of teachers handed in blank registers - an

many years, all of the boycotted duties have customarily been required of at least some of the certificated employees. It is clear that while the Agreement listed examples of required duties, such job functions were not limited to those set forth therein,[3] but also included policies established by District bulletins, employee handbooks, administrative manuals and unwritten directives. It is also clear that while Respondent objected to the appropriateness of some of these duties, and the lack of extra pay for the performance thereof, it was aware that these duties were required of unit employees.

ANALYSIS AND CONCLUSIONS OF LAW

Respondent argues that the charge should be deferred to arbitration because the issue of whether the boycotted duties are required is one of contract interpretation which could be decided by an arbitrator. During the investigation of the charge, a PERB regional attorney rejected this argument because the contract did not provide for grievances filed by the District. That rationale is adopted herein. Also, in agreement with the District, deferral would be inappropriate because Respondent's conduct amounted to a partial strike or slowdown, and Article VI of the

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incredible show of strength!" (Emphasis added.) Finally, it is extremely unlikely that Respondent would have urged a boycott of duties that none of the unit members were performing, and the record establishes that those who performed such duties were required to do so.

Respondent's contention, that Fisher's testimony establishes that the Agreement provided an exclusive list of job duties, or that said testimony can be interpreted in such a manner, is rejected.

Agreement expressly excluded strikes, slowdowns and other work stoppages from the grievance/arbitration procedure. Finally, most of the District's rights clause was excluded from the grievance/arbitration article, and thus, a significant aspect of the District's argument in a grievance concerning job duties could not be heard by an arbitrator. Accordingly, since the subject of the dispute is not grievable by the District, and hence not subject to binding arbitration, deferral is not appropriate herein.

It is well established that an employee organization engages in an unlawful bargaining tactic by urging unit employees to refuse to perform required duties in order to advance its position in contract negotiations. Said conduct is tantamount to urging a partial strike or work slowdown. Palos Verdes Peninsula Unified School District (1982) PERB Decision No. 195; Modesto City Schools, et al. (1983) PERB Decision No. 291; El Dorado Union High School District Faculty Association (1985) PERB Decision No. 537. See also San Ramon Valley Education Association, CTA/NEA (1984) PERB Order No. IR-46.

The parties have stipulated that Respondent authorized, encouraged and advocated employees to refrain from the duties set forth in the complaint. With one exception, the administration of standardized tests, the record establishes that the expressed reason for advocating a boycott of those duties was to further Respondent's position at the bargaining table. As noted above, Respondent has not contended, as a defense, that the boycott was

in response to a failure by the District to bargain in good faith, and no conclusion is reached as to whether such a defense, if established, would be valid.

Contrary to Respondent's assertions, it has been concluded that all of the boycotted activities customarily have been required of at least some of the District's certificated employees, and that extra payment for such services is not determinative as to the required nature of such duties. The above-cited PERB cases have already found several of the job duties boycotted by Respondent to be required, under similar factual circumstances. Respondent's argument, which would make any job duty not expressly set forth in the Agreement voluntary, is without merit. Furthermore, to the extent that the District has granted certificated employees discretion in the manner in which they perform some of their job duties, Respondent still engaged in an unlawful bargaining tactic because, with the one possible exception, it urged employees to cease performing those duties based on bargaining tactics, and not professional judgment. Palos Verdes Peninsula Unified School District, supra; Modesto City Schools, supra. Finally, contrary to Respondent's position, the District is not required to show that the boycotted duties were performed by all of the unit employees. Respondent's attempt to analogize the herein charge to a unilateral change in policy is erroneous. The gravamen of the alleged violation is urging unit members to withhold portions of their services, not advocating a change in existing policies. It is clear that

Respondent advocated unit employees to refrain from performing job duties customarily performed by them.

Accordingly, it is concluded that by authorizing, encouraging and advocating certificated employees to refuse to perform their customary and required job duties, both during pre-impasse negotiations and during the course of impasse proceedings, Respondent violated section 3543.6(c) and (d) of the **EERA.**[4] See El Dorado Union High School District Faculty Association (1986) PERB Decision No. 537a.

THE REMEDY

In the charge, the District, in addition to cease and desist order and notice posting remedies, requested a make-whole remedy for "all measurable damages," costs and losses, including its costs for hiring additional personnel to perform the boycotted duties. In El Dorado, supra, the only PERB decision issuing a remedy for this type of violation, no award for costs or other monetary losses was made.

The PERB has adopted the National Labor Relations Board's standard for the award of litigation costs and attorney fees[5]

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[4]**Based** on the inconclusive evidence presented as to the expressed motive for the boycott of the standardized tests, the allegation concerning that boycott will be dismissed. It is concluded, however, that said duties were required, and could not be lawfully boycotted on the basis of bargaining considerations. Furthermore, no finding is made as to whether that boycott, even if based on the motivation alleged by the Respondent, was lawful, inasmuch as the parties neither raised nor litigated that issue.

[5]Respondent did not specifically request attorney fees, but it appears that this is a remedy that it seeks.

against respondents. That standard requires that the conduct complained of be repetitive and that the defenses raised be without arguable merit. King City High School District Association, et al. (1982) PERB Decision No. 197; Fresno Unified School District, et al. (1982) PERB Decision No. 208; Modesto City and High School Districts, et al. (1986) PERB Decision No. 566. It is concluded that while Respondent engaged in this unlawful conduct over a period of several months, it has not been shown that the conduct was repetitive in the sense that Respondent had engaged in similar conduct prior to the instant dispute, and that by the term, "repetitive conduct," the cases are referring to recidivism. It is also concluded that while Respondent's defenses are largely without merit, they are not frivolous, and that Respondent is entitled to reasonably contest allegations against it without being penalized with a litigation costs award. Therefore, no litigation costs or attorney fees remedy will be proposed.

The PERB has declined, in the absence of proof as to monetary losses, to reimburse employers for such losses arising from unlawful strike conduct. Westminster School District, et al. (1982) PERB Decision No. 277. See Fresno Unified School District v. National Education Association, et al. (1981) 125 Cal.App.3d 259 [177 Cal.Rptr. 888]. In Fresno Unified School District (1982) PERB Decision No. 208, the PERB decided, irrespective of its authority to award monetary damages for such

conduct, that if a district failed to mitigate its damages by seeking injunctive relief, no monetary damages would be ordered.[6]

The District did not present any direct testimonial evidence with respect to boycott-related monetary losses, and the record as a whole is virtually silent on the issue.[7] Inasmuch as the PERB has yet to adopt such a remedy, and since there is little evidence to support such an order, the proposed remedy in this case will be limited to a cease and desist order and a 30-day notice posting. The order shall be subject to any changes in job duties or compensation therefore negotiated in the current agreement. The notice shall be subscribed by an authorized agent of Respondent indicating that it will comply with the terms thereof, and shall be posted at all school sites and other work locations throughout the District where notices to unit members customarily are placed.[8] The notices shall not be reduced in

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[6]Official notice is hereby taken that the District, in PERB Case Nos. IR-287 and IR-288, requested injunctive relief in this matter. The District withdrew Case No. IR-287, and the PERB, by letter dated November 16, 1988, denied the request in Case No. IR-288.

[7]The District, in its brief, incorrectly asserts that it was requested to defer proof of "specific" monetary losses to compliance proceedings. Irrespective of whether the District believes this to have been the case, the District was in no way precluded from introducing evidence that at least some monetary losses resulted from Respondent's conduct.

[8]The District, in its brief, requests that the order direct Respondent to publish the notice in its newsletter. Inasmuch as it appears that Respondent maintains bulletin boards at most, if not all of the school sites, postings at these numerous locations will adequately inform unit members of the outcome of this case. In addition, the District is free to post and distribute the notice in order to inform unit members thereof.

size, and reasonable efforts made to insure that they are not defaced, replacing them, if necessary.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to EERA section 3541.5(c), it is hereby ordered that United Teachers - Los Angeles and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing to meet and negotiate in good faith with Los Angeles Unified School District by authorizing, encouraging or advocating an employee boycott of any of the following job duties of unit employees, and thereby engaging in the illegal pressure tactic of a partial strike:

(a) Completing progress reports (five-week, ten-week and fifteen-week grades) and final semester grades on the District's forms and submitting them to administrators;

(b) Attending before-school and after-school faculty meetings of any kind and those during conference or preparation periods, and period-by-period faculty meetings at secondary schools;

(c) Attending after-school activities, including back-to-school events and parent conferences;

(d) Supervising students before and after the school day, during recess, nutrition and lunch periods, and during preparation periods at the secondary schools;

(e) Submitting any completed registers or attendance reports with totals filled in;

(f) Providing class coverage for other employees unavailable due to emergencies, class preparation or special assignments unless paid at an hourly rate;

(g) Submitting lesson plans, course outlines and rollbooks or allowing administrators to inspect them; and

(h) Participating in the elementary Progress Quality Review process.

2. By that same conduct, during the course of impasse procedures, failing to participate in impasse procedures in good faith.

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

1. Within ten (10) workdays from service of the final decision in this matter, post at all school sites and other locations utilized by Respondent to communicate with employees of Los Angeles Unified School District copies of the Notice attached as an Appendix hereto, signed by an authorized agent of Respondent. Such posting shall be maintained for a period of thirty (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.

2. Upon issuance of this Decision, 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 her instructions.

It is further ordered that all other allegations in the charge and complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. See California Administrative Code, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) *on* the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing. . . ." See California Administrative Code, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, sections 32300, 32305 and 32140.

Dated: August 1, 1989

Douglas Gallop
Administrative Law Judge