STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ASSOCIATED ADMINISTRATORS OF LOS ANGELES AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 99,	)	
Charging Parties,	)	Case No. LA-CE-3336
v.	)	PERB Decision No. 1079
LOS ANGELES UNIFIED SCHOOL DISTRICT,	)	January 4, 1995
Respondent;	)	
UNITED TEACHERS LOS ANGELES,	)	
Joined Party.	)	

Appearances: Posner & Rosen by Howard Z. Rosen, Attorney, for Associated Administrators of Los Angeles and Service Employees International Union, Local 99; O'Melveny & Myers by Steven M. Cooper, Attorney, for Los Angeles Unified School District; Taylor, Roth, Bush & Geffner by Jesus E. Quinonez, Attorney, for United Teachers Los Angeles.

Before Caffrey, Carlyle and Garcia, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Los Angeles Unified School District (District) to a proposed decision (attached) by an administrative law judge (ALJ) in which the ALJ found that the District had violated section 3543.5(b) and (c) of the Educational Employment Relations Act (EERA).[1] After

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3543.5 provides, in pertinent part:

reviewing the entire record, including the parties' exceptions and responses, the Board affirms the ALJ's proposed decision.

JURISDICTION

PERB has jurisdiction over this case for the following reasons: The District is a public school employer under EERA. The Associated Administrators of Los Angeles (AALA) at all times relevant has been the exclusive representative of a bargaining unit of approximately 1,900 certificated supervisory employees. Service Employees International Union, Local 99 (SEIU) at all times relevant has been the exclusive representative of three units of the District's classified employees.[2] The joined party, United Teachers Los Angeles (UTLA) at all times relevant has been the exclusive representative of a 31,000-member unit of teachers

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> It shall be unlawful for a public school employer to do any of the following:
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> (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.
>
> For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

[2]These are an 8,000-member unit of instructional aides, an 8,000-member unit of operations, support employees and a 9,400-member unit of teaching assistants.

and other certificated employees.[3] Also, the matter in dispute was not subject to any grievance agreement between any of the unions (AALA, SEIU or UTLA) and the District. Charges were timely filed.

BACKGROUND

AALA and SEIU claim that the collective bargaining agreement (CBA) between the District and UTLA contains an illegal provision that prevents the District from engaging in good faith bargaining with their unions. The disputed provision is a bonus clause which reads:

> "Me-Too" and "Equitable Treatment" Agreements: The District agrees that if it enters into a "me-too", "most-favored nations" or "equitable treatment" provision with any other District bargaining unit for the 1994-95 school year, UTLA bargaining unit members shall receiver lump sum bonus equivalent to 10% of the employees' 1994-95 annual salary. The parties, in the interpretation and application of this provision as to a "me-too", "most-favored nations" or "equitable treatment" provisions are referring to the substance of such provisions that have been negotiated between the District and other District bargaining units for the 1992-94 school years. (1992-1994 CBA between UTLA and District, Art. XIV, section 1.0(e).)

[3]UTLA joined this case as a respondent.

The bonus clause[4] requires the District to pay a 10 percent salary bonus[5] to employees represented by UTLA in the event the District enters into "me-too" clauses with any other bargaining unit. AALA and SEIU filed charges only against the District and alleged that the bonus clause operates to violate EERA section 3543.5(a), (b) and (c).

ALJ'S PROPOSED DECISION

The ALJ began his analysis by noting that EERA does not specifically prohibit the type of bonus clause at issue here. If the effect of such a clause is repugnant to EERA, however, a violation may be found. Using Banning Unified School District (1985) PERB Decision No. 536 (Banning)[6] for guidance, the ALJ recited a "flexibility" test:

> Specifically, the question is whether the disputed clause restricts the employer's "flexibility" to negotiate with other exclusive representatives.

Applying that standard to the facts before him, the ALJ found overwhelming evidence that the clause would prevent good

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[4]In the proposed decision, the ALJ refers to the disputed clause as an "anti-me-too" clause, since it enforces a high penalty should the employer again agree to a "me-too" clause with any other union. Throughout the record, this type of clause is also referred to as a "most-favored nation," "equitable treatment" or "parity" provision.

[5]The estimated cost, should the District ever have to pay the 10 percent bonus, ranges from $112 million (UTLA's estimate) to $127 million (District's and AALA and SEIU's estimate). The variation depends on the number of members in the unit when the penalty is calculated.

[6]Affirmed in Banning Teachers Assn. v. Public Employment Relations Bd. (1988) 44 Cal.3d 799 [244 Cal.Rptr. 671].

faith negotiations and stated that it "seems likely that such was exactly the intended effect." He concluded that the huge size of the bonus makes it "inconceivable" that the District would agree to otherwise legal "me-too" clauses with the other units, and therefore found violations of EERA section 3543.5(b) and (c); however, the ALJ found no violation of 3543.5(a), since there was no evidence that the failure to negotiate in good faith also denied to individual employees rights protected by EERA. The remedy ordered in the proposed decision was to void and nullify the clause and require the District to post a notice of the violation.

DISTRICT'S EXCEPTIONS

The District excepts to the ALJ's proposed decision on several grounds. First, the District claims that the ALJ omitted a finding that District policy is to treat all unions equitably during 1994-95 school year negotiations; the policy expressed intent to negotiate with each unit on its own merits.[7]

Second, the District argues that the bonus clause does not violate Banning, and that "flexibility" was the wrong test.

UTLA'S EXCEPTIONS

UTLA objects to the ALJ's characterization of the weight of evidence as "overwhelming." Likewise, UTLA objects to the ALJ's conclusion that "the huge size of the bonus makes it

[7]Since we find that this policy is only be one of the many factors that bear on the legality of the District's motive, it did not change the conclusion reached by the ALJ.

inconceivable" that the District would agree to otherwise legal clauses with the other units.

DISCUSSION

The District argues that the ALJ misstated the holding in Banning because "flexibility" is the wrong test for measuring the legality of a bonus clause. We agree with the District on that point, but we still find that the District has committed a violation of EERA for the reasons explained below.

A review of Banning and the unanimous decision of the California Supreme Court affirming Banning leads to the conclusion that restricted flexibility is not the test for legality of a bonus clause. To the contrary; those cases merely recognize that restricted flexibility is a natural consequence of favored clauses.

In Banning, the issue was whether a proposed parity clause in an agreement between a classified unit and the Banning Unified School District was a per se violation of EERA. In the parity agreement at issue, classified employees' subsequent salary increases would be tied to those achieved on behalf of the certified unit employees. The parity clause was alleged to violate EERA's mandate of separate unit negotiation.

In Banning, the Board also held that parity clauses are not per se illegal, since negotiators have a right to bargain for a goal. To find such clauses illegal per se might interfere with labor peace and enhanced communications. Therefore, the legality of parity clauses is to be decided on a case-by-case basis.

Since there was no evidence of bad faith bargaining in that case, PERB found that the clause did not restrict the district's flexibility to negotiate with the other unit. "Flexibility" was not adopted as a test; rather, it was just one indicator of whether a particular clause directly prohibited another bargaining unit from achieving a legitimate goal in negotiations. Looking at all the facts, the Board found no violation of EERA.

Affirming Banning, the California Supreme Court, in Banning Teachers Assn. v. Public Employment Relations Bd., supra, 44 Cal.3d 799, also rejected a "flexibility" test to determine the legality of parity agreements, noting that:

> Parity agreements no more restrict the District's bargaining position than do the confines of a limited budget which exist absent such agreement. Each employee bargaining unit necessarily has an impact on the negotiations of every other unit, regardless of the order in which contracts are negotiated or whether the District enters into parity agreements.
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> . . . . . .
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> A parity agreement, which is a contractual budgetary restriction, is no more a disincentive to bargain than is a finite budget absent such agreement. [Id. at 807-808.]

Declining to hold that parity agreements constitute a per se violation of the statutory duty to negotiate in good faith, the California Supreme Court supported deferral to administrative

agencies to decide, on a case-by-case basis, whether a given parity agreement violates labor laws. [Id. at 808.][8]

Although there is little PERB precedent interpreting the Banning view, federal labor law provides guidance to determine the legality of conduct. Sheet Metal Workers Local 80 (Limbach Co.) 305 NLRB 312 [138 LRRM 1468] (Limbach), affirmed in relevant part by the U.S. Court of Appeals, examined the union's motive to determine whether its conduct[9] amounted to an illegal secondary boycott, in violation of the National Labor Relations Act (NLRA), which provides that it is an unfair labor practice for a union to:

> . . . engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services . . . ." [NLRA section 8(b)(4), 29 U.S.C. section 158(b)(4).]

The Limbach court agreed with the National Labor Relations Board (NLRB) that the union had a motive to achieve an illegal objective, citing Gottfried v. Sheet Metal Workers (1989)

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[8]The California Supreme Court thus expressly left open the possibility that "under different circumstances an employer might violate the EERA by entering into a parity agreement." [Id. at 809.]

[9]The union had disclaimed representation of members who stayed with Limbach, followed by various other acts such as distributing letters to the membership encouraging them to walk off the job; speaking to various employees to convince them to leave Limbach; announcing to union members that employees staying on with Limbach as nonunion labor would be subject to a loss of pension benefits, among other tactics.

876 F.2d 1245 [131 LRRM 2488] (Gottfried) for the proposition that "an action normally lawful may be unlawful if undertaken to accomplish a forbidden objective." The Limbach court had "no doubt" that the union's otherwise lawful conduct was "intended" to achieve an illegal objective.[10]

In Kenrich Petrochemicals v. NLRB (1990) 893 F.2d 1468 [133 LRRM 2417] (Kenrich), the U.S. Court of Appeals applied the NLRB rule that an otherwise legal act becomes illegal if the objective is to achieve an unfair labor practice. In Kenrich, the employer had discharged a supervisor, normally an unfettered right of an employer since supervisors are not protected employees under the NLRA. However, it was alleged that the firing had an illegal objective: to send a message and retaliate against protected employees. The court held:

> Once a prima facie case [of a violation] is established the burden shifts to the employer [respondent] to prove by a preponderance of the evidence that it would have [acted as it did] even absent its unlawful motivation. (Kenrich, supra, at 1479.)

Similarly, in NLRB v. Transportation Management Corp. (1983) 462 U.S. 393 [113 LRRM 2857] (Transportation Management), the U.S. Supreme Court provides a detailed discussion of the evidence rules in a "repugnancy" case under the NLRA. After reviewing all the evidence[11] in this case, and employing the tests of Kenrich

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[10]Limbach at 313, citing Gottfried, 876 F.2d 1245 at 1247.

[11]For example, Board President Leticia Quezada testified that "the implementation of this ten percent . . . was never foreseen." (R.T. p. 23, lines 18-19.) Later, "The prospect of paying a ten percent [penalty], however dim that prospect might

and Transportation Management, we conclude that the District acquiesced in the goal of UTLA, and had little or no intention of negotiating me-too clauses in the future with other unions. Despite UTLA's exceptions on this point, testimony shows that the ALJ correctly characterized the weight of evidence as "overwhelming." Likewise, we are not persuaded by UTLA's objection to the ALJ's conclusion that "the huge size of the bonus makes it inconceivable" that the District would agree to otherwise legal clauses with the other units.

CONCLUSIONS

Although the ALJ correctly ruled that the District has committed a violation of EERA section 3543.5(b) and (c), the proper test is not "restricted flexibility." Under Banning and federal precedent, the legality of a contract provision should be measured by the particular facts and motives that exist in a given case using the rules employed in Kenrich and Transportation Management.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, the Board finds that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code

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be, I think would put us back into the deficit column." (R.T. p. 29, lines 2-4.) Similarly, another District representative (Mark Shrager), responding to questions regarding the impact on the District if it had to pay a penalty under the bonus clause, testified that it "would be a very difficult task . . . I don't want to say it would be impossible, but it would be close to it." (R.T. p. 94, lines 25-26 and p. 95, lines 3-4.)

section 3543.5 (b) and (c) . The District violated EERA by agreeing to an illegal bonus provision in its contract with the United Teachers Los Angeles (UTLA). The provision would require the District to pay a 10 percent bonus to members of the UTLA-represented unit if the District agrees to a "me-too" clause with any other bargaining unit in 1994-95. Because this action had the additional effect of interfering with the right of the Associated Administrators of Los Angeles and Service Employees International Union, Local 99 to represent their members, the agreement to the illegal clause also was a violation of EERA section 3543.5(b).

The allegation that the District's conduct violated section 3543.5(a) and all other allegations are hereby DISMISSED.

Pursuant to EERA section 3541.5(c), it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Agreeing in negotiations with UTLA to any provision which by specific wording or effect would preclude the District from negotiating about any lawful subject with the exclusive representatives of other bargaining units.

2. Giving any present or prospective effect to Article XIV, section 1.0(e) of the 1992-1994 agreement between the District and UTLA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Within thirty-five (35) days following the date this decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto. 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other 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 accord with the director's instructions.

Member Carlyle joined in this Decision.

Member Caffrey's concurrence begins on page 13.

CAFFREY, Member, concurring: I concur in the finding that the Los Angeles Unified School District (District) violated sections 3543.5(b) and (c) of the Educational Employment Relations Act (EERA) when it agreed to a bonus clause in its 1992-1994 collective bargaining agreement (CBA) with United Teachers Los Angeles (UTLA). I write separately to distance myself from the unfortunate analysis included in the majority opinion.

As noted by the administrative law judge (ALJ), the Public Employment Relations Board (PERB or Board) has held that agreeing to a CBA provision such as a "me-too" clause, or the bonus clause at issue in this case, does not constitute a per se violation of EERA. (Banning Unified School District (1985) PERB Decision No. 536.) Instead, the Board will review these provisions on a case-by-case basis to determine whether they have the effect of precluding good faith negotiations with other parties. (Ibid.) Where a "me-too" or bonus clause has that effect, it will be found to violate EERA.

The ALJ properly found that the effect of the bonus clause in this case is clear and unmistakable. Under the clause, the District would be required to pay a bonus to UTLA members of at least $110 million if it negotiated a "me-too" provision with any other District bargaining unit. The obvious result was that the District was effectively barred from negotiating in good faith with the Associated Administrators of Los Angeles and Service Employees International Union, Local 99 (AALA and SEIU) over the

subject of "me-too" clauses, a lawful subject of bargaining. Accordingly, the District violated EERA when it agreed to the bonus clause with UTLA.

For reasons that are not clear, the majority eschews the straightforward analysis employed by the ALJ, preferring a discussion of secondary boycott and employer discrimination cases considered by the National Labor Relations Board (NLRB), and an assessment of the motives of the District and UTLA in agreeing to the bonus clause. Regardless of its motives, the District's action was unlawful because it had the effect of preventing good faith bargaining with AALA and SEIU. The majority's reliance on unrelated NLRB cases to reach the sweeping conclusion that the legality of a contract provision should be measured by the motives of the parties seriously distorts both the cited legal precedent and the issue presented by this case. I reject this unsupported and incorrect view.

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-3336, Associated Administrators of Los Angeles and Service Employees International Union. Local 99 v. Los Angeles Unified School District, in which all parties, including the United Teachers Los Angeles (UTLA), had the right to participate, it has been found that the Los Angeles Unified School District (District) has violated section 3543.5(b) and (c) of the Educational Employment Relations Act (EERA). The District violated EERA by agreeing to an illegal bonus provision in its contract with the UTLA. The provision would require the District to pay a 10 percent bonus to members of the UTLA-represented unit if the District agrees to a "me-too" clause with any other bargaining unit in 1994-95. This action amounted to a failure to negotiate in good faith with the Associated Administrators of Los Angeles and Service Employees International Union, Local 99 and it interfered with the right of these parties to represent their members.

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

CEASE AND DESIST FROM:

1. Agreeing in negotiations with UTLA to any provision which by specific wording or effect would preclude the District from negotiating about any lawful subject with the exclusive representatives of other bargaining units.

2. Giving any present or prospective effect to Article XIV, section 1.0(e) of the 1992-1994 agreement between the District and UTLA.

Dated:_____ LOS ANGELES UNIFIED SCHOOL DISTRICT

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

ASSOCIATED ADMINISTRATORS OF LOS ANGELES AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 99, Charging Parties, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent, UNITED TEACHERS LOS ANGELES, Joined Party.	Unfair Practice Case No. LA-CE-3336 PROPOSED DECISION (6/6/94)

Appearances: Posner & Rosen by Howard Z. Rosen, Esq., for Associated Administrators of Los Angeles and Service Employees International Union, Local 99; O'Melveny & Meyers by Steven Cooper, Esq., for the Los Angeles Unified School District; Taylor, Roth, Bush & Geffner by Jesús E. Quiñonez, Esq., for United Teachers Los Angeles.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

Two unions here attack a contract provision which a public school employer has entered with a third union. The disputed provision might best be described as an "anti-me-too clause" for it enforces a high penalty should the employer again agree to a "me-too" clause with any other union. The unions that are challenging the provision have "me-too" clauses in their current agreements with the employer. They contend that the effect of the disputed clause effectively will be to remove a lawful, negotiable subject from future negotiations.

The employer argues that the disputed clause will not prevent it from negotiating in good faith. It argues that the clause does not on its face preclude it from entering a "me-too" clause with other unions. In addition, the employer continues, the clause will have the beneficial effect of encouraging each union to bargain for its own unit solely on the merits. The teachers' union says the disputed clause was written because of the negative effects of the "me-too" clauses secured earlier by other unions, including the charging parties. The teachers' union joins the employer in arguing that the clause does not actually prohibit the employer from entering "me-too" clauses with the other unions. It is, therefore, a lawful provision.

The Associated Administrators of Los Angeles (AALA) and the Service Employees International Union, Local 99 (SEIU or Local 99), commenced this action on August 18, 1993, by filing an unfair practice charge against the Los Angeles Unified School District (District). The Office of the General Counsel of the Public Employment Relations Board (PERB or Board) followed on September 28, 1993, with a complaint against the District.

The complaint alleges that the District committed an unfair practice by writing a conditional 10 percent lump sum bonus provision into its agreement with the United Teachers Los Angeles (UTLA). That provision would require the District to pay the bonus if, in the 1994-95 school year, the District enters into a "me-too," "most favored nation" or "equitable treatment" provision with any other bargaining unit. The complaint alleges

that by entering the agreement with UTLA, the District failed to negotiate in good faith, denied the charging parties the right to represent their members and interfered with employee rights. This conduct was alleged to have been in violation of Educational Employment Relations Act (EERA) section 3543.5(a), (b) and (c).[1]

The District answered the complaint on October 28, 1993, denying that it had committed an unfair practice. On November 3, 1993, the UTLA was granted its request to join the case as a party. A hearing was conducted in Los Angeles on March 23 and 24, 1994. With the filing of briefs, the matter was submitted for decision on May 23, 1994.

FINDINGS OF FACT

The District is a public school employer under the EERA. The charging party AALA at all times relevant has been the

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at Government Code section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

exclusive representative of a bargaining unit of approximately 1,900 certificated supervisory employees. Charging party SEIU at all times relevant has been the exclusive representative of three units of the District's classified employees. These are an 8>000-member unit of instructional aides, an 8,000-member unit of operations, support employees and a 9,400-member unit of teaching assistants. The joined party UTLA at all times relevant has been the exclusive representative of a 31,000-member unit of teachers and other certificated employees.

The disputed clause is found at Article XIV, section 1.0(e) of the 1992-94 agreement between UTLA and the District. That section reads as follows:

> "Me-Too" and "Equitable Treatment" Agreements: The District agrees that if it enters into a "me-too", "most-favored nations" or "equitable treatment" provision with any other District bargaining unit for the 1994-95 school year, UTLA bargaining unit members shall receive a lump sum bonus equivalent to 10% of the employees' 1994-95 annual salary. The parties, in the interpretation and application of this provision as to a "me-too", "most favored nations" or "equitable treatment" provisions are referring to the substance of such provisions that have been negotiated between the District and other District bargaining units for the 1992-94 school years.

This clause (hereafter "bonus clause") was agreed upon at the conclusion of a contentious round of bargaining that started in early 1992 with a District announcement that it had a $400 million budget deficit. The UTLA was the last of the unions representing District employees to reach an agreement. A deal finally was made with the assistance of California Assembly

Speaker Willie L. Brown, Jr. who served as a mediator at the joint request of the District and UTLA.

The bonus clause followed a series of "me-too," "equitable treatment" and "mutual protection" agreements which the District had entered with various unions. "Me-too" clauses[2] had become an established feature of contracts between the District and its classified employee unions over several rounds of negotiations. But the provisions that the District entered into with the charging parties and other unions in 1992 were unusual even for these parties. They were the product of suspicions and animosities that developed between the UTLA and the other unions during a protracted series of budget crises.

Although the District has encountered budgetary shortfalls for some time, the situation deteriorated markedly in the 1991-92 school year. In the fall of 1991, the District projected a $126 million deficit. This followed a year in which, according to a factfinding report, the SEIU units already had been severely impacted by layoffs and the furlough of employees. The budget reductions for 1991-92 resulted in still more pay reductions, furloughs and layoffs for the SEIU units. Attendant with these reductions was a workload increase for the employees who remained. It was the view of SEIU negotiators that their units had suffered a disproportionate share of the 1990-91 and 1991-92

[2]A "me too" clause is a contractual provision wherein an employer promises a union that it will receive the benefit of any better deal that the employer might later reach with another union. Such provisions also are known as "most favored nation" and "parity" clauses.

reductions relative to those incurred by the UTLA bargaining unit.

As noted, the 1992-93 negotiations began in an even worse crisis, the projected deficit of $400 million. SEIU negotiator Tom Newbery testified that SEIU entered the 1992 bargaining convinced that the $400 million deficit was real and perhaps underestimated. Nonetheless, he testified, the objectives of Local 99 were to avoid layoffs at all costs, preserve the salary structure and protect the working poor in the SEIU units. He said the union proposed to accomplish this by pressing the District to enact a graduated pay reduction plan whereby the most poorly paid employees would receive the smallest percentage pay reduction.

Initially, all of the unions representing District employees joined together in what they called the Unity Coalition. This group was to work toward common objectives in the face of the District's financial crisis. They staged some joint activities including demonstrations at meetings of the District school board, a rally at the State Capitol and a joint press conference about the District's problems.

But in mid-June of 1992, the Unity Coalition, in Mr. Newbery's words, "blew apart." The cause of the eruption was the preparation and release by the UTLA of what the UTLA called the Restructuring Plan. The Restructuring Plan was a UTLA plan for reorganization of the District. Several of its proposals affected employees in other bargaining units. Among these was a

proposal to seek a transfer of all school police functions from the District police force to the Los Angeles Police Department. The UTLA also proposed a one-year freeze on the hiring of all aides and teacher assistants except for special education and bilingual aides. Another proposal called for a one-year reduction of all non school based classified employees by 25 percent to be accomplished through attrition or reassignment. Another proposal was to reorganize student transportation to send all students to the closest sites.

Mr. Newbery testified that even though the plan affected employees in SEIU-represented units, no one from UTLA had discussed the proposals with Local 99. He said SEIU first learned of the plan from representatives of the news media. At that point, Mr. Newbery testified, the Unity Coalition "was over." "We were supposed to be in a coalition and we were . . . double crossed," he said.

All other organizations except for UTLA then formed the Alliance for Education (Alliance). Its purpose, Mr. Newbery said, "was basically to counter-balance UTLA's influence with the Board and try to protect our interest." In addition to SEIU, the Alliance for Education was composed of AALA, the California School Employees Association (CSEA), the Los Angeles County Building Trades Council and the Los Angeles Unified School District Peace Officers Association.

All unions except for UTLA progressed rapidly in negotiations with the District. By September, SEIU and the

District were sufficiently close that SEIU could send the District a short list of items needed to reach agreement. Among these was a most favored nation clause under which the District would agree that the SEIU units would not receive a cut in pay greater than that negotiated with or imposed upon any other unit. In the event a more favorable compensation package was given to another unit, SEIU demanded that the District would promise to extend that benefit to the Local 99 units.

A report of a factfinding panel on September 10, 1992, supported SEIU's demand for a most favored nation clause. The report commented that two of the SEIU-represented units "have already incurred substantial layoffs and furloughs and felt the direct impact of the budget crisis earlier than some other bargaining units, especially the certificated teachers unit." The panel found valid SEIU's concern that if it reached an agreement prior to UTLA the SEIU-represented units might once again suffer a disproportionate share of the reductions. The District did not immediately accede to the demand but after SEIU pressed its demand in conversations with school board members, the District ultimately agreed.

Meanwhile, CSEA was pressing the District for what it called a "no-subsidy" clause. District negotiator Richard Fisher testified[3] that CSEA told the District that as a result of the

[3]The parties stipulated to the admission of testimony given by Richard Fisher at the hearing in consolidated unfair practice cases LA-CE-3227 and LA-CO-604. Mr. Fisher's testimony is found in Volumes VI, VII and VIII of that record.

UTLA restructuring plan a traditional "me-too" or most favored nation clause would not be sufficient to secure an agreement. In addition, CSEA demanded language to the effect that the cost of a settlement in another bargaining unit could not be financed by reductions in the CSEA unit. Again, the District initially-opposed the proposal but ultimately changed its position after appeals by CSEA to school board members. By late September, the District was willing to meet CSEA's demand.

SEIU was unaware that the District was about to agree to CSEA's demand for the no-subsidy clause until a negotiating session that took place on or about October 1. At the meeting, Mr. Newbery asked District negotiator Framroze Virjee if any union was going to get a better deal. Mr. Virjee told him of his belief that the school board would grant CSEA's demand for a no-subsidy clause. At that point, Mr. Newbery replied that SEIU would not enter an agreement with the District unless it contained a no-subsidy clause. On October 2, the District unilaterally implemented conditions of employment, including pay cuts, for most employees.

SEIU and the other unions continued to meet with the District in an effort to reach an agreement. By mid-October representatives of UTLA started making public comments about the possibility of a strike by teachers. This prospect troubled the leadership of SEIU and some of the other unions.

On behalf of the Alliance, Connie Moreno of CSEA invited District negotiator Fisher to meet with representatives of the

various unions to discuss the impact of the threatened strike. All unions in the Alliance attended the meeting with Mr. Fisher. Mr. Fisher told the union representatives that if student attendance fell at the same rate as occurred in a May 1989 teacher strike, the District would lose about $1 million a day in state support. He said he had no idea how those lost funds would be made up.

One of the union representatives then asked Mr. Fisher if in his view the CSEA-negotiated no-subsidy clause would protect the other unions from losses caused by a UTLA strike. Mr. Fisher said he did not believe it would, observing that the no-subsidy clause was written to deal with the effects of a settlement or imposition of working conditions by the District. He said the no-subsidy clause would not be applicable to protect other unions from strike losses. Mr. Newbery testified that the answer produced "panic in the room."

The various union representatives then insisted that the District agree that if they honored their contracts during a strike that they would not be harmed. Mr. Fisher quoted the union representatives as saying they were "not going to end up paying the freight to make up for the District's losses during the strike." Out of this conversation was born what came to be known as the "mutual protection clause." Proposals containing the clause were presented to the District shortly thereafter.

SEIU and the District reached an agreement on October 22, 1992. The agreement contains an "equitable treatment" provision

comprised of a "me-too" clause and a "no-subsidy" clause. It also contains a "mutual protection clause." The "equitable treatment" clause for bargaining unit C, operations support, is representative.[4] It reads as follows:

> The District and Local 99 agree that Unit C shall receive the benefit of any more favorable compensation package (salary adjustments including but not limited to adjustments resulting from revenue sharing, incentive plans, etc., and/or work year adjustments) which the District grants to, or unilaterally implements upon, any other bargaining unit or unrepresented group on a group-wide basis, with respect to the 1992-93 and 1993-94 school years. For the purposes of this clause, comparison shall not be based upon a comparison of applicable salary bands from Unit C with non-equivalent salary bands from any other unit.[5]
>
> If, during the life of this Agreement, but after October 2, 1992, the District enters into an agreement with any other Unit which triggers the above described equitable treatment clause, no Unit C employee will suffer a layoff, reduction in hours, reduction in assignment basis or furlough in order to subsidize and/or recover the costs directly associated with implementing the more favorable agreement. This prohibition is not applicable to layoffs, or reductions in hours or basis, or furloughs caused by other factors.[6]

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[4]See Charging Party Exhibit 10 at Appendix C, article 5.

[5]This portion of the article is the "me too" or "most favored nation" clause.

[6]This portion of the article is the "no-subsidy" clause.

The "mutual protection" clause for bargaining unit C, operations support, is similarly representative.[7] It reads:

> As to Unit C, the Los Angeles Unified School District (the "District") and the Los Angeles City and County School Employees Union, Local 99, ("Local 99"), herein agree as follows for the 1992-93 and 1993-94 school years:
>
> 1. Any revenues which are lost to the District or costs which are incurred by the District as a result of a strike or other concerted activity by the District employees in a bargaining unit not represented by Local 99 shall not be recouped by means of layoffs, reductions in hours, reductions in assignment basis or furloughs for Unit C employees. This prohibition is not applicable to any layoffs, reductions in hours or basis, or furloughs caused by factors unrelated to a strike or other concerted activity.
>
> 2. This agreement is expressly subject to the condition that Local 99 and its represented employees comply with all terms and conditions of the parties' collective bargaining Agreement including, but not limited to, all obligations under Article VI, Work Stoppage.

With its agreement to accept the three clauses, the District soon secured agreements from all the unions representing classified employees and AALA. District negotiator Fisher testified that the District was willing to accept these provisions to get agreements and to improve its ability to operate in the event of a strike by teachers.

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[7]See Charging Party Exhibit 10 at p. 102. The disputed bonus clause in the UTLA agreement makes no reference to this provision. Apparently, the District would not be required to pay the 10 percent bonus if it entered into another mutual protection agreement with the charging parties in 1994-95.

Negotiations between the District and UTLA continued for several months after the District reached agreements with its other unions. Throughout these negotiations, UTLA continued to press for a reduction in the amount of the pay cut which the District had imposed on October 2. UTLA also complained about the "me-too," no-subsidy and mutual protection clauses which the District had agreed to with the other unions.[8] Ultimately, through the assistance of Speaker Brown, the District and UTLA reached an agreement. The term of the agreement is "to and including June 30, 1994, and thereafter extended on a day-to-day basis until terminated by either party upon ten (10) calendar days' written notice."

The parties are in dispute about what it would cost should the District ever have to pay the 10 percent bonus. District calculations put at $1.269 billion the portion of the 1993-94 budget attributable to pay and benefits for the UTLA-represented unit. The District thus calculates the cost of a 10 percent bonus for the UTLA-represented unit at about $127 million.

UTLA witness Sam Kresner testified that the District has never given the union a consistent figure for the number of positions in the UTLA-represented unit. He said the figures provided by the District have varied by up to 3,000 employees.

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[8]These clauses were challenged by UTLA in unfair practice case LA-CE-3227. After UTLA and the District reached agreement on the 1992-94 contract, UTLA withdrew the portion of the unfair practice charge pertaining to the three clauses. The legality of the me-too, no-subsidy and mutual protection clauses contained in the contracts between the District and the charging parties is not an issue here.

Obviously, if the unit has fewer members than the number used in the District's calculations, the cost of a 10 percent bonus would be smaller than $127 million. If the unit were 3,000 employees fewer than the number used in District calculations, the cost of a 10 percent bonus would be $112 million, not $127 million.[9]

Charging parties contend that the disputed clause can be interpreted to mean that UTLA-represented employees could receive multiples of the 10 percent bonus if "me-too" clauses were written into more than one agreement. UTLA President Helen Bernstein testified that UTLA never envisioned such a possibility. She said UTLA negotiators assumed a maximum bonus of 10 percent regardless of how many "me-too" clauses were agreed to by the District.

Leticia Quezada, president of the District board of education, testified that the board never had a discussion about whether the bonus would be 10 percent or up to 70 percent. "I think in effect the reason why we never even got to discussing that is because, if in fact there was no possibility that we would sign a 'me-too' clause given the financial circumstances of the District," she testified. "So, it was not foreseen, the

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[9]This number is calculated as follows: Mr. Kresner testified that the District puts at $50,000 the cost per year of each position in the UTLA-represented unit. Multiplication of 3,000 positions by an annual cost of $50,000 per position yields $150 million as the amount of the possible overestimation of costs for the UTLA unit. Subtraction of the $150 million from the District's calculated total of $1.269 billion reduces the current annual cost of salaries and benefits for the UTLA unit to $1.119 billion. A 10 percent increase in a $1.119 billion expenditure would be approximately $112 million.

implementation of this 10 percent whether to one or to seven, was never foreseen."

The charging parties have not yet attempted to bargain with the District about "me-too," no-subsidy or mutual protection clauses for a successor agreement. Consequentially, there is no evidence that the clauses have yet had an impact.

LEGAL ISSUES

Did the District violate section 3543.5 (c) and/or (a) and (b) by agreeing to pay a bonus to UTLA-represented employees if the District in 1994-95 enters into a "me-too" clause with the charging parties?

CONCLUSIONS OF LAW

It is axiomatic under collective bargaining laws that both employer and union have the right and obligation to negotiate during a time of bargaining about any lawful subject. A party commits a per se failure to negotiate in good faith if it flatly refuses to negotiate about any subject within the scope of representation. (Sierra Joint Community College District (1981) PERB Decision No. 179.)

AALA and Local 99 argue that the District, by entering into the bonus clause with UTLA, effectively has precluded itself from agreeing in 1994-95 to "me-too" clauses with them. This is because the size of the bonus would make it "impossible" for the District to negotiate in good faith about "me-too" or equitable treatment clauses. The charging parties put the amount of the bonus at a minimum of $127 million. If the District were

to enter "me-too" clauses with multiple units, charging parties continue, UTLA-represented employees would be entitled to $127 million multiple times. Such a prospect, they observe, caused the president of the school board to concede that the District would not agree to "me-too" clauses with any other unions in the 1994 negotiations. Since a "me-too" or parity clause is a lawful subject of bargaining[10] the charging parties contend that the bonus clause must be illegal because it precludes the District from negotiating in good faith with them.

The District argues that a "me-too" clause becomes unlawful only if it dictates the terms of agreement for another unit or prohibits the employer from negotiating in good faith with other unions. Applying that rule to the bonus clause, the District contends that the provision makes no intrusion into the wall of separation that must exist between certificated and classified employees. Conceding that the bonus clause would cause a substantial financial impact if implemented, the District contends this is simply an acknowledgment of reality for any multiple-unit employer.

UTLA argues that by its plain language, the bonus clause does not prohibit the District from granting to the charging parties the same or better economic terms than what might be

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[10]This conclusion is implicit in Banning Unified School District (1985) PERB Decision No. 536. (See also, Teamsters, Local 126 (Inland Steel) (1969) 176 NLRB 406 [71 LRRM 1661].) A "me-too" clause that requires an employer to provide a union with any better benefits later given to another union would be within the scope of representation as "wages" if it involved the size of a pay increase or decrease. See section 3543.2.

granted to UTLA in the 1994 bargaining. Nor, UTLA continues, does the bonus clause prohibit the District from bargaining with the charging parties over the subjects of equitable treatment or a "me-too" clause. UTLA acknowledges that the clause creates a potential burden on the District. However, UTLA continues, the evidence fails to establish that the amount of the bonus is so great that it would preclude District agreement to a "me too" clause with charging parties.

As the various briefs make apparent, this case turns on the legality of a contract provision. It thus raises a scope of representation question in a novel manner. National Labor Relations Board (NLRB) decisions long have divided bargaining subjects into three classifications: mandatory, permissive and illegal. Illegal subjects, as the name implies, are subjects about which the parties may not negotiate and, if they do, may not include lawfully in a collective bargaining agreement.[11]

Federal decisions identify two types of illegal subjects: those prohibited by specific provisions of the National Labor Relations Act (NLRA) or other laws[12] and those which by their

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[11]Honolulu Star-Bulletin (1959) 123 NLRB 395 [43 LRRM 1449], enf. denied on other grounds, Honolulu Star-Bulletin v. NLRB (D.C. Cir. 1959) 274 F.2d 567 [45 LRRM 2184].

[12]Such as "closed shop" clauses that would violate section 8(a)(3) and 8(b)(2) of the NLRA or "hot cargo" clauses prohibited by section 8(e) or clauses that violate anti-trust laws. (See United Mine Workers of America v. Pennington et al. (1965) 381 U.S. 657 [59 LRRM 2369.)

effect are "repugnant" to the basic purpose of the NLRA.[13] In an oft-quoted passage, the NLRB explained:

> [W]hat the Act does not permit is the insistence, as a condition precedent to entering into a collective bargaining agreement, that the other party to the negotiations agree to a provision or take some action which is unlawful or inconsistent with the basic policy of the Act. Compliance with the Act's requirement of collective bargaining cannot be made dependent upon the acceptance of provisions in the agreement which, by their terms or in their effectuation, are repugnant to the Act's specific language or basic policy.[14] [Footnote omitted.]

In analyzing scope of representation questions, the PERB generally has adopted the NLRB distinction between mandatory and permissive subjects. (See Chula Vista City School District (1990) PERB Decision No. 834.) The Board also has acknowledged that certain subjects can be illegal although it has yet to consider illegality in the context of an existing contract provision. In its single case on illegality, the PERB focused upon whether a proposed contract term violated a specific statutory proscription. (See San Benito Joint Union High School District (1984) PERB Decision No. 406.) Finding that the

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[13]Such as an employer demand for superseniority for nonstrikers (Great Lakes Carbon Corp. v. NLRB (4th Cir. 1966) 360 F.2d 19 [62 LRRM 2088]). See generally, Hardin, The Developing Labor Law at pp. 949-954.

[14]National Maritime Union (Texas Co.) (1948) 78 NLRB 971, 981-982 [22 LRRM 1289] enf. NLRB v. National Maritime Union (2nd Cir., 1949) 175 F.2d 686 [24 LRRM 2268].

proposed language did not violate the statute either in wording or effect, the Board affirmed the dismissal of the charge.

Obviously, there is no statutory provision prohibiting a clause that would require an employer to pay a bonus to a union if it agrees to a "me-too" clause with another union. Therefore, the question here is whether by its effect the bonus clause in the District-UTLA contract is repugnant to the basic policy of the EERA.

Although this case involves a bonus clause and not a "me-too" clause, its validity can be measured by the test set out in Banning Unified School District, supra, PERB Decision No. 536.[15] There, the Board held that the validity of a "me-too" clause would be reviewed on a case-by-case basis to determine whether the clause might cause the employer to engage in bad faith bargaining. Specifically, the question is whether the disputed clause restricts the employer's "flexibility" to negotiate with other exclusive representatives.

By overwhelming weight, the evidence here is persuasive that the bonus clause will have the result of barring the District from negotiating "me-too" clauses with charging parties in 1994. Given UTLA's irritation about the clauses, it seems likely that such was exactly the intended effect. Although there is some conflicting evidence about the precise cost of a 10 percent bonus for the UTLA-represented unit, it clearly would be $110 million

[15]Affirmed, Banning Teachers Assn. v. Public Employment Relations Board (1988) 44 Cal.3d 799 [244 Cal.Rptr. 671].

or more. Indeed, 10 percent is exactly the amount of the pay cut which the District insisted that the UTLA bargaining unit accept in the 1993-94 school year to keep the District out of bankruptcy.

Despite UTLA's contention that the bonus clause does not bar the District from agreeing to "me-too" clauses with the other units, the huge size of the bonus makes it inconceivable that the District would do so. Board of Education President Leticia Quezada conceded this point. She testified that the school board never discussed the potential cost of the bonus clause because "there was no possibility that we would sign a 'me-too' clause given the financial circumstances of the District." If there is no possibility that the District will sign a "me-too" clause, the effect of the bonus clause is clear. It removes the possibility that the District will bargain with other unions about a lawful subject. The bonus clause is, therefore, "repugnant" to the basic policy of the EERA.

UTLA argues that such a finding is premature because the bonus clause as yet has had no effect on bargaining between the charging parties and the District. The parties have not been in bargaining and there is no evidence that the predicted bad effects will ever come to pass. Thus, UTLA reasons, a fundamental requirement of Banning, a negative effect on bargaining, has not been demonstrated.

This argument is not persuasive. The harm that occurs from the negotiation of an illegal contract provision takes place at

the time the provision is negotiated. The violation is immediate and is due to the nature of the provision itself. An illegal clause is illegal at the moment it is entered into and there is no need to establish a further impact.[16] Whether the charging parties have yet tried to negotiate a "me-too" clause is irrelevant. Such violations as may have occurred took place when the District acceded to UTLA's demand for the bonus clause.

Accordingly, I conclude that the District failed to negotiate in good faith and thereby violated EERA section 3543.5(c) by agreeing to the bonus clause with UTLA. The District's failure to negotiate in good faith also had the effect of denying the charging parties the right to represent its members in violation of EERA section 3543.5 (b) . However, there is no evidence that the failure to negotiate in good faith also denied to individual employees rights protected by the EERA. Accordingly, the allegation that the District violated section 3543.5(a) must be dismissed. (See Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.)

REMEDY

The PERB in section 3541.5 (c) is given:

> . . . the power to issue a decision and order directing an offending party to cease and

[16]Suppose for purpose of illustration, that the District had agreed to a contractual clause with one of its unions that it would not grant a pay increase in the next year to another union. There would be no need for the aggrieved union to wait until the next year to see whether the District actually would refuse to negotiate with it about a pay increase. Such a provision would be illegal from its inception and the aggrieved union would not have to wait for an adverse impact to challenge it.

> desist from the unfair practice and to take such affirmative action, including but not limited to the reimbursement of employees with or without back pay, as will effectuate the policies of this chapter.

Here, the District agreed to insert an illegal provision into its contract with UTLA. The appropriate remedy in cases where illegal provisions have been written into a contractual agreement is that respondent cease giving any present or prospective effect to the illegal clause. (Newspaper Agency Corp. (1973) 201 NLRB 480, 494 [82 LRRM 1509].)

It further is appropriate that the District be directed to post a notice incorporating the terms of the 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 this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Los Angeles Unified School District (District) violated section 3543.5(c) of the Educational Employment Relations Act (Act). The District violated the Act by agreeing to an illegal bonus provision in its contract with the United Teachers Los Angeles

(UTLA). The provision would require the District to pay a 10 percent bonus to members of the UTLA-represented unit if the District agrees to a "me-too" clause with any other bargaining unit in 1994-95. Because this action had the additional effect of interfering with the right of the charging parties to represent their members, the agreement to the illegal clause also was a violation of section 3543.5(b). The allegation that the District's conduct violated section 3543.5(a) and all other allegations are hereby DISMISSED.

Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Agreeing in negotiations with the UTLA to any provision which by specific wording or effect would preclude the District from negotiating about any lawful subject with the exclusive representatives of other bargaining units.

2. Giving any present or prospective effect to Article XIV, section 1.0(e) of the 1992-1994 agreement between the District and the UTLA.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees customarily are posted, 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 ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Pursuant to California Code of Regulations, 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 Cal. Code of Regs., tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 32135; Code of Civ. Pro. sec. 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 Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Ronald E. Blubaugh
Administrative Law Judge