STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BURBANK UNIFIED SCHOOL DISTRICT, Charging Party, v. BURBANK TEACHERS ASSOCIATION, Respondent.	)	Case No. LA-CO-125 PERB Order No. IR-15 April 4 , 1980

Appearances; Susan I. Covey and William F. Kay, Attorneys (Whitmore & Kay) for Burbank Unified School District; A. Eugene Huguenin, Jr., Attorney for Burbank Teachers Association.

Before Gluck, Chairperson; Gonzales and Moore, Members.

DECISION AND ORDER

On March 27, 1980, the Burbank Unified School District (hereafter District) filed an unfair practice charge against the Burbank Teachers Association (hereafter Association) in which it alleged that the Association violated sections 3543.6(c) and (d) of the Educational Employment Relations Act[1] by

[1]The Educational Employment Relations Act (hereafter EERA) is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

Section 3543.6(c) and (d) provide:

> It shall be unlawful for an employee organization to:
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> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of

engaging in work stoppages. In addition, the District requested relief in accordance with the PERB rule 38100 et seq. as codified in 8 Cal. Admin. Code.[2]

In reviewing the District's injunctive relief request, the Board has examined the unfair practice charge which forms the basis for that request as well as the documents offered in support thereof. The question raised in the instant injunctive relief request currently before the Board must be considered in light of PERB rule 38105 which governs injunctive relief requests which include a charge, as does the instant case, that the employee organization's conduct violated section 3543.6(d) of the EERA. That rule requires that such requests be in writing and "shall include a copy of the unfair practice charge and shall conform in substance to pleadings required by the superior court in similar cases." (Emphasis added.) Based on this requirement, the District's failure to include sufficient

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> any of the employees of which it is the exclusive representative.
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> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).
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> . . . . . .

[2]On March 26, 1980, the Association also filed an unfair practice charge including, among the remedies requested, that PERB issue appropriate cease and desist orders against the District's alleged unfair practice conduct. While the Association may have intended that the Board consider their unfair practice charge as an injunctive relief request, PERB's rules, noted above, establish a separate and specific procedure for the initiation of such requests to which the Association failed to comply. We therefore do not consider the unfair practice allegation as such a request and make no comment on the substance of that charge.

facts in support of its request for injunctive relief is critically deficient and therefore precludes our finding that the injunctive relief requested rests on an unfair practice likely to succeed on the merits.

Based on the foregoing, the Board ORDERS that the District's request for injunctive relief is DENIED.

By: Barb Barbara D. Moore, Member

Harry Gluck, Chairperson

Raymond J. Gonzales, Member, concurring:

The majority decision to deny the District's request to seek injunctive relief, and at the same time refuse to relinquish jurisdiction over the strike, should be recognized as an ill-disguised attempt to allow the strike to continue. It would be more forthright for my colleagues to simply state that they approve of the strike or sanction it as a negotiating pressure tactic. However, they contrive to achieve this result by simply refusing to seek injunctive relief while at the same time refusing to decide whether PERB has jurisdiction, thereby blocking the District's access to superior court. The transparency of this design is evidenced by the flimsy,

unprecedented reason offered for denying the District's request: that the injunction request did not fully comply with section (c) of PERB rule 38105. This is tantamount to stating that the request was not submitted in proper form.[1]

The decision fails to indicate in any way how the District's request failed to comply with section 38105(c), referring vaguely only to some unspecified "failure to include facts in support of its request," and concluding that this "failure" was "critically deficient." Furthermore, the majority conveniently forgets that pursuant to its own rules the decision on whether to seek injunctive relief, and whether the charge is likely to succeed on the merits, is to be made based on the general counsel's investigation provided for by PERB rule 38110. In adopting these rules we painstakingly took care to establish a method of gathering information about the circumstances of work stoppages. We also provided the investigating Board agent with the power to call and question such persons as the agent deems necessary to effectuate the investigation. The general counsel then prepares a written

[1]Given the fact that the injunctive relief request was submitted by the District on March 27, 1980, and that the report of PERB's investigation of the request was filed on March 28, and that PERB deliberated this request on April 1, one can only wonder why it has taken until today for the majority to render a decision indicating that the injunction request must be denied for insufficient pleadings.

report detailing facts related to whether there is reasonable cause to believe that the EERA is being violated. This report was in fact submitted to the Board, although the majority apparently seems not to have considered it.

As if the majority's effort to expediently avoid making a decision on whether it has jurisdiction in this case and yet allow the strike to continue were not obvious enough, one need only compare the District's injunction request in this case with requests in other cases in which the majority has sought injunctive relief in order to understand the result-oriented reasoning applied here. In none of the other cases were the pleadings any more complete or in conformance with court requirements. In comparison, the District's request here was quite complete. It contains an unfair practice charge alleging violations by the Association of sections 3543.6(c) and (d), and includes a detailed statement of factual allegations of the conduct alleged to constitute an unfair practice in accordance with section 6(d) of PERB's unfair practice form. The request for injunctive relief is seven pages in length and is accompanied by a memorandum of points and authorities in support thereof. In its substance, the request states that there is a likelihood that the unfair practice charge will prevail on the merits, that irreparable harm will result if an injunction is not issued, and the legal remedy is inadequate under the circumstances to recompense the District for the harm

which would result if the conduct complained of was not enjoined. The request was accompanied by a declaration under penalty of perjury in support of the injunctive relief from the District superintendent alleging pertinent facts supporting the District's claims.

I believe it is proper to seek an injunction against the strike in this case. Based on the facts alleged by the District and developed in the PERB investigation,[2] the District has stated a prima facie case of bad faith negotiations by the Association, that there is reasonable cause to believe that the charge will prevail on the merits, that the strike will cause irreparable harm, and that no adequate remedy at law exists.

I would also seek an injunction against the District to prohibit it from insisting to negotiate a no-strike clause. I believe as a matter of law that this is not within the scope of representation and therefore it is illegal to insist on negotiating it. The Association's charge and our own investigation both indicate that it is very likely that such insistence is standing in the way of agreement between the District and the Association. Although the Association

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2our investigation was conducted pursuant to PERB Rule 38110. The written investigation report provided for in PERB rule 38115 was submitted on March 28 and March 30. No recommendation was submitted.

requested only a "cease and desist" order against the District, I believe PERB on its own motion should seek extraordinary relief in order to bring an end to the strike and effectuate the purposes of the EERA as indicated by EERA section 3540,[3] in a way that will further the public interest in maintaining the continuity and quality of educational services. (See San Diego Teachers Assn. v. Superior Court of San Diego County, 24 Cal.3d 1.)

PERB's investigative report and declaration submitted by the District indicate numerous relevant facts regarding the negotiating status between the parties in the strike. Negotiations between the District and the Association began on June 15, 1979, for a successor contract to the one expiring September 1, 1979. There were a number of negotiating sessions, and impasse was declared on September 13, 1979. Approximately nine mediation sessions were held. On December 3, 1979, the mediator certified the dispute for factfinding. On February 7, 1980, the factfinder issued recommendations to the parties regarding a contract. The parties engaged in a number of post-factfinding mediation sessions. At these sessions, each side made various new

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[3]The authority for PERB to seek injunctive relief on its own motion is amply implied in EERA sections 3541.3 (i) and (j). See San Diego Teachers Assn. v. Superior Court of San Diego County, 24 Cal.3d 1, p. 15.

proposals. Among the proposals, two of the most troublesome seemed to be the Association's request for binding arbitration and the District's proposal for a no-strike agreement. On March 17, 1980, the Association proposed accepting advisory arbitration in place of binding arbitration and requested the District to drop its proposal of a no-strike agreement. It contended, as it did all along, that the no-strike clause was outside the scope of representation. The District did not agree to this proposal. On March 26, 1980, the Association filed a charge with PERB alleging the District had committed an unfair practice for having negotiated to impasse on an out-of-scope subject. The investigation report indicates that as of March 28, 1980, although no new meetings to negotiate were presently scheduled between the parties, they are willing to continue negotiations and may meet during the week of March 31, 1980.

Approximately 75 to 80 percent of the District's secondary teachers are observing the strike, while approximately 50 percent of the elementary teachers are observing it. In addition, approximately 80 percent of the secondary students have failed to report to class. The elementary students apparently continue to report to school as usual.

The District's declarations also indicate a variety of picket line conduct by the Association.

It is well settled that the EERA requires parties to negotiate and participate in impasse procedures in good faith regarding matters within the scope of representation. The Association's proposal for binding arbitration of grievances is clearly within scope. The District's charge, which is attached hereto, alleges that the Association violated sections 3543.6(c) and (d) of the EERA by striking "in the midst of progressive collective bargaining between the parties which was being facilitated by means of the post-factfinding mediation process." This "constituted a failure to negotiate and participate in impasse procedures in good faith."

I believe that under the circumstances of this case, the facts alleged by the District indicate that the Association had an obligation to negotiate and participate in good faith in impasse procedures. While I do not believe that post-factfinding negotiation is obligatory for exclusive representatives, or employers, and cannot be resurrected merely by a gesture from one side or the other, it clearly appears that the parties in this case have themselves voluntarily reentered negotiations in the impasse procedures with the mediator pursuant to EERA section 3548.4.4 Thus, with

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[4]Section 3548.4 states:

> Nothing in this article shall be construed to prohibit the mediator appointed pursuant to Section 3548 from continuing mediation

progressive negotiations under way, it is inconsistent with the legislative intent of the impasse procedures to strike at this time. Indeed, in San Diego Teachers Assn. v. Superior Court of San Diego County, 1979, 24 Cal.3d 1, the court stated "the impasse procedures almost certainly were included in the EERA for the purpose of heading off strikes. Since they assume deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in impasse procedures in good faith and thus an unfair practice under section 3543.6(d)" (citations omitted). Indeed, PERB's own rules adopted subsequent to that decision, reflect a similar concern to protect the integrity of the impasse procedures. (See PERB rule 38100.)

Thus, under the facts alleged and those developed through the investigative report, the parties themselves have chosen to attempt to resolve their negotiating differences in accordance and under the auspices of the impasse procedures as provided by the Legislature in the EERA. Given that these impasse procedures were intended to head off strikes, it is inconsistent with the statute to strike at a time when such negotiations are under way. As in other cases where this Board

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> efforts on the basis of the findings of fact and recommended terms of settlement made pursuant to Section 3548.3.

has found a teachers' strike to be a probable violation of the EERA, this strike also should be enjoined immediately while PERB continues to process the unfair practice charges filed by the parties. Associated unlawful conduct by the employer should also be enjoined.

In summary, by this decision it is obvious that the majority of this Board will use any excuse in its attempts to protect or legalize strikes under the EERA.[5] In this case, they argue that "the District's failure to include sufficient facts in support of its request for injunctive relief is critically deficient." What more facts are needed than the fact that PERB's own investigation has proven that a strike

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[5]In spite of itself, the majority may have unwittingly yielded jurisdiction over the strike and freed the District to seek relief directly in Superior Court. PERB's rules (see rule 38120(a)), clearly contemplate that the Board will consider its own investigation report in deciding whether an injunction is warranted. By contrast, the decision on whether to dismiss a charge is to be made on the charge and pleadings alone. If the charge or evidence is insufficient to state a prima facie case, it is to be dismissed (see PERB rule 32620).

The majority decision indicates that it has "examined the unfair practice charge which forms the basis" for the injunctive relief request as well as the supporting documents. It nowhere mentions the PERB investigation report. By concluding that the District's request is factually insufficient, it may be reasonably inferred that the District failed to state a prima facie case on its pleadings alone. Therefore, there was no need to consider the PERB's investigation report; i.e., if the facts are insufficient to state a prima facie case, then the injunctive relief request cannot be entertained and must necessarily be denied.

situation in the Burbank Unified School District indeed exists as of March 27, 1980.

In the Modesto strike situation[6] the majority failed to act at all until a Modesto Bee editorial critically condemned their inaction: "By refusing to seek injunctive relief against the Modesto strike and yet declining to relinquish jurisdiction over the dispute, PERB has effectively blocked the contending parties from direct access to the courts."

Here again the majority continues its efforts to do what neither the Legislature nor the court has done: establish the legality of strikes for public employees. And they do this by hiding behind the flimsiest of excuses: the argument that the District failed to technically comply with our rules although the District's declaration and our own investigation provide sufficient facts to prove that a strike exists. Even the striking teachers in Burbank have proudly proclaimed their strike. What other facts are needed?

Raymond J. Gonzales, Member

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[6]See Modesto City Schools (3/10/80) PERB Decision No. IR 11; Modesto City Schools (3/12/80) PERB Decision No. IR 12.

APPENDIX A

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

UNFAIR PRACTICE CHARGE

	DO NOT WRITE IN THIS SPACE
INSTRUCTIONS: File an original and three (3) copies of this charge in the appropriate regional office of the Public Employment Relations Board. If more space is needed for any item, attach additional sheets and number items accordingly.	**Case Name:** BURBANK UNIFIED SCHOOL DISTRICT v. BURBANK TEACHERS ASSOCIATION **Case No:** LA-CO-125 **Date Filed:** March 27, 1980

1. CHARGING PARTY: EMPLOYEE ( ) EMPLOYEE ORGANIZATION ( ) EMPLOYER ( )

a. Full name: BURBANK UNIFIED SCHOOL DISTRICT

b. Mailing address: 245 E. Magnolia Boulevard, Burbank, California 91502

c. Telephone number: (213) 846-7121
area code

d. Name, title and telephone number of person filing charge: Tom D. Barkelew, Superintendent (213) 846-7121

2. CHARGE FILED AGAINST: EMPLOYEE ORGANIZATION (X) EMPLOYER ( )

a. Full name: BURBANK TEACHERS ASSOCIATION

b. Mailing address: 3220 West Magnolia Boulevard, Burbank, California 91505

c. Telephone number: (213) 842-6154
area code

d. Name, title and telephone number of agent to contact: Walter Trexler, BTA Executive Director

3. NAME OF EMPLOYER (Complete this section only if the charge is filed against an employee organization)

a. Full name: BURBANK UNIFIED SCHOOL DISTRICT

b. Mailing address: 245 E. Magnolia Blvd, Burbank, California 91502

4. APPOINTING POWER (Complete this section only if the employer is the State of California. See Government Code Section 18524)

a. **Full name:**

b. **Mailing address:**

c. **Agent:**

5. GRIEVANCE PROCEDURE

a. **Has any grievance procedure been invoked in relation to the subject matter of this charge? (circle answer)** **Yes** **No**

b. **If "yes," when?** _____
(date)

SEE REVERSE SIDE

6. STATEMENT OF CHARGE

a. The charging party hereby alleges that the above-named respondent has engaged in or is engaging in an unfair practice within the meaning of: (check one)

X The Educational Employment Relations Act (Govt. Code sections 3543.5 or 3543.6)

_____ The State Employer-Employee Relations Act (Govt. Code sections 3519 or 3519.5)

_____ The Higher Education Employer-Employee Relations Act (Govt. Code sections 3571 or 3571.1)

b. The specific section(s) (and subsection(s) where appropriate), of the above-cited sections, alleged to have been violated is/are: 3543.6(c) (d)

c. The specific section(s) (and subsection(s) where appropriate), if any, other than the above-cited sections, alleged to have been violated is/are: _____

d. Provide a clear and concise statement of the conduct alleged to constitute an unfair practice, including, where known, the time and place of each instance of respondent's conduct, and the name and capacity of each person involved. This must be a statement of the facts that support your claim and not conclusions of law. (Use and attach additional sheets of paper where necessary to adequately set forth the supporting factual allegations.)

SEE ATTACHMENT TO UNFAIR PRACTICE CHARGE

DECLARATION

I declare under penalty of perjury that I have read the above charge and that the statements herein are true and complete to the best of my knowledge and belief and that this declaration was executed on March 26, 1980 at Burbank, California.

Tom D. Barkelew
(Type or Print Name)

Tom D. Barkelew
(Signature)

Title, if any: Superintendent
Mailing Address: 245 E. Magnolia Blvd, Burbank, Ca 91502
Telephone Number: (213) 846-7121

ATTACHMENT TO UNFAIR PRACTICE CHARGE

A. Respondent BURBANK TEACHERS' ASSOCIATION (hereinafter "BTA") has refused to meet and negotiate in good faith with Charging Party, BURBANK UNIFIED SCHOOL DISTRICT (hereinafter, "DISTRICT") and, has, in addition, refused to participate in good faith in the impasse procedure as set forth in Article 9, commencing with Section 3548 of the Government Code as evidenced by the following:

1. Collective bargaining between the parties began on or about June 1979 for a successor agreement to the contract which expired on September 1, 1979. Factfinding hearings were held in January, 1980 after BTA declared impasse on or about September 14, 1979 and the District formally requested factfinding on or about December 21, 1979.

2. On or about February 20, 1980, the collective bargaining between the parties for a complete successor agreement was continued through the process of post factfinding mediation sessions. At least five of these sessions have been held as of the time of filing of the instant Unfair Practice Charge.

3. Throughout said negotiating process the parties have come progressively closer to reaching agreement on a complete contract and resolving the outstanding issues which include Children's Center Instructors' work year and split shift differential, eligibility dates for the 1979/80 salary schedule and anniversary increments, and the Support of Agreement article.

4. On March 21, 1980, the District's negotiator lodged a

written request with BTA's chief negotiator for a continuation of the negotiating process based upon the progress evidenced in recent negotiating sessions.

5. On March 21, 1980, in the midst of said bargaining process, the BTA membership was asked to vote on the issue of whether or not to strike in support of the Association's position at the bargaining table.

6. The District was not notified by BTA as to whether or not the membership authorized said strike by a majority vote. However, on March 22, 1980 it was reported in the local newspaper, The Burbank Review, that BTA had "voted to strike" and that the President of BTA refused to divulge the date chosen for the initial "walkout".

7. On March 24, 1980, virtually the entire certificated staff at Burbank and John Muir High Schools picketted said respective school sites from 7:30 A.M. to 8:00 A.M.

8. On March 27, 1980, Respondent called a strike whereby the certificated staff at selected schools in the District refused to report to work as required.

B. The BTA has refused to meet and negotiate in good faith with Charging Party, BURBANK UNIFIED SCHOOL DISTRICT (hereinafter, "DISTRICT") and, has, in addition, refused to participate in good faith in the impasse procedure as set forth in Article 9, commencing with Section 3548 of the Government Code as evidenced by the following:

1. Since the beginning of the school year in September, 1979 and continuing to the present, the BTA, its officers, agents and members have engaged in the partial withholding of services in the areas of extra-curricular activities and adjunct duties in support of the BTA's bargaining demands.

2. Since the beginning of the school year in September, 1979 and continuing to the present, the BTA, its officers, agents and members have encouraged pupils in the District to engage in disruptive activities in support of the BTA's bargaining demands; and, in addition, the aforementioned BTA officers and agents have encouraged and continue to encourage the pupils in the District to illegally absent themselves from the schools, and to obstruct the attempts of District officials to continue the normal educational process.

3. Beginning March 24,.1980 and continuing to the present the BTA, its officers, agents and members have engaged in an unprotected and illegal partial and intermittent work stoppage, whereby selected groups of employees, without notice to the employer, report to work on one day and withhold their services on another.

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STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

BURBANK UNIFIED SCHOOL DISTRICT, Petitioner, vs. BURBANK TEACHERS ASSOCIATION, Respondents.	NO. IA-C0-125 REQUEST FOR INJUNCTIVE RELIEF

REQUEST IS HEREBY MADE on behalf of Petitioner, BURBANK UNIFIED SCHOOL DISTRICT, (hereinafter referred to as Petitioner or as District) for injunctive relief as follows:

I.

1. That Respondents, and each of them, and their agents, employee representatives, officers, organizers, committee-persons, stewards and members and all corporations, unincorporated associations and natural persons acting in active concert and participation with any of them be enjoined and restrained from engaging in any and all of the acts set forth in subsections (a) and (b) of Paragraph 3 below prior to completing or exhausting collective bargaining procedures as required by

the Educational Employment Relations Act (hereinafter, "EERA").

2. That Respondents should be so enjoined on the grounds that said requisite procedures of the EERA provide for collective bargaining between public school employers and employees and include provisions requiring good faith completion of negotiations and of specified impasse procedures as set forth in Government Code Sections 3548, et seq., and also require exhaustion of the procedures set forth in Government Code Sections 3543, et seq. for resolving alleged unfair labor practices.

3. That for Respondents' failure to exhaust said procedures, Petitioner prays for relief restraining Respondents:

(a) From calling, engaging in, continuing, sanctioning, inducing, aiding, encouraging, abetting or assisting any strike, sympathetic or otherwise, walkout, slowdown or work stoppage of any nature against Petitioner or intentionally interfering with such District by agreeing in concert with others not to work for the District;

(b) Prom permitting to continue in effect, or refusing to rescind any strike, walkout, slowdown, or work stoppage, notice, call, order or sanction heretofore issued by Respondents with respect to the work stoppage, which commenced on March 27, 1980.

4. That Respondents, and each of them, and their agents, employees, representatives, officers, organizers, committeemen, stewards, members and all corporations, unincorporated associations and natural persons acting in concert with them be enjoined and restrained from doing or attempting to do, directly or indirectly by means, method or device whatsoever, any of the

acts enjoined in Paragraphs 1 and 2 hereof and each subdivision thereof during the pendency of this action.

4. That Respondent Association, its officers, agents and representatives, shall forthwith issue such notices, and take such steps as shall be necessary and appropriate to direct the subject employees to return to work at the District's schools forthwith.

II.

1. That Respondent, and each of them, and their agents, employee representatives, officers, organizers, committee-persons, stewards and members and all corporations, unincorporated associations and natural persons acting in active concert and participation with any of them be enjoined and restrained from engaging in any and all of the specific acts set forth in subsections (a) and (b) of Paragraph 5 below.

2. That Respondents should be so enjoined on the grounds that said acts by public school employees in California have been conclusively determined by the Courts to constitute unlawful concerted activity in the absence of statutory authorization, even under circumstances where an employer has committed a corresponding unfair labor practice.

3. That the EERA not only contains no statutory authorization for strikes by public school employees, but also provides in Government Code Section 3549 that Labor Code Section 923 does not give public school employees the right to strike.

4. That, in addition to being condemned by the Courts as unlawful, Respondents' concerted activity must be deemed

to constitute an unfair practice under the EERA insofar as it is an attempt to pressure a public school employer to accede to Respondents' position at the bargaining table.

5. And that, therefore, on the basis that Respondents' concerted activities constitute an unlawful strike under California law and an unfair practice under the EERA, Petitioner prays for relief restraining Respondents:

(a) From calling, engaging in, continuing, sanctioning, inducing, aiding, encouraging, abetting or assisting any strike, sympathetic or otherwise, walkout, slowdown or work stoppage of any nature against Petitioner or intentionally interfering with such District by agreeing in concert with others not to work for the District;

(b) From permitting to continue in effect or refusing to rescind any strike, walkout, slowdown, or work stoppage, notice, call, order or sanction heretofore issued by Respondents with respect to the work stoppage, which commenced on March 27, 1980.

6. That Respondents, and each of them, and their agents, employees, representatives, officers, organizers, committeemen, stewards, members and all corporations, unincorporated associations and natural persons acting in concert with them be enjoined and restrained from doing or attempting to do, directly or indirectly by means, method or device whatsoever, any of the acts enjoined in Paragraphs 1 and 2 hereof and each subdivision thereof during the pendency of this action.

7. That Respondent Association, its officers, agents and representatives, shall forthwith issue such notices, and take

such steps as shall be necessary and appropriate to direct the subject employees to return to work at the District's schools forthwith.

III

1. That Respondents, and each of them, and their agents, employee representatives, officers, organizers, committee-persons, stewards and members and all corporations, unincorporated associations and natural persons acting in active concert and participation with any of them be enjoined and restrained from engaging in any and all of the specific acts set forth in subsections (a) and (b) of Paragraph 3 below.

2. That Respondents should be so enjoined on the grounds that, under any circumstances, the means employed by Respondents' in implementing the strike at issue, namely the intermittent and partial work stoppages, and the utilization of public school pupils as instrumentalities for furthering and implementing Respondents' concerted activities, are unlawful and condemned by both the Courts and public policy.

3. Wherefore, Petitioner prays for relief restraining Respondents:

(a) Prom calling, engaging in, continuing, sanctioning, inducing, aiding, encouraging, abetting or assisting any strike, sympathetic or otherwise, walkout, slowdown or work stoppage of any nature against Petitioner or intentionally interfering with such District by agreeing in concert with others not to work for the District;

(b) From permitting to continue in effect or refusing to rescind any strike, walkout, slowdown, or work stoppage,

notice, call, order or sanction heretofore issued by Respondents with respect to the work stoppage, which commenced on March 26, 1980.

4. That Respondents, and each of them, and their agents, employees, representatives, officers, organizers, committeemen, stewards, members and all corporations, unincorporated associations and natural persons acting in concert with them be enjoined and restrained from doing or attempting to do, directly or indirectly by means, method or device whatsoever, any of the acts enjoined in Paragraphs 1 and 2 hereof and each subdivision thereof during the pendency of this action.

5. That Respondent Association, its officers, agents and representatives, shall forthwith issue such notices, and take such steps as shall be necessary and appropriate to direct the subject employees to return to work at the District's schools forthwith.

IV

1. Petitioner files the instant Request for Injunctive Relief in compliance with the provisions of 8 Cal.Admin. Code Sections 38100, et seq., pursuant to its duty to exhaust all remedies available to it through the Public Employment Relations Board (hereinafter, "PERB"). Said request is filed solely for the purpose of preserving Petitioner's access to all available legal remedies without thereby prejudicing its right to properly pursue other alternative remedies; and without thereby admitting by means of its actions, that PERB's assertion of exclusive jurisdiction in this instance is in fact proper.

2. In the event that PERB determines that the injunctive relief requested may not be granted in conformity with the above cited code sections, Petitioner contends that the instant Request should be dismissed pursuant to 8 Cal.Admin. Code Section 32620(b)(3) so that Petitioner may, without delay, pursue alternative channels of relief.

This application is based upon: the provisions of 8 Cal. Admin. Code Section 38100, et seq; California Code of Civil Procedure, Section 527; the Unfair Practice Charge; the Declaration of Tom D. Barkelew in Support of Request for Injunctive Relief, and the Declaration of Susan I. Covey in Support of Notice For Request for Injunctive Relief, all of which have been filed concurrently herewith.

DATED: March 27, 1980

Respectfully submitted,

WHITMORE & KAY

By: Susan I. Covey
Susan I. Covey,
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STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

BURBANK UNIFIED SCHOOL DISTRICT, Petitioner, vs. BURBANK TEACHERS ASSOCIATION, Respondents.	NO. LA-CO-125. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST FOR INJUNCTIVE RELIEF

PRELIMINARY STATEMENT

This request for injunctive relief by Petitioner, Burbank Unified School District, (hereinafter, "Petitioner" or "District") is filed pursuant to 8 Cal. Admin. Code, Sections 38100, et seq., against Respondents, Burbank Teachers' Association (hereinafter, "BTA"), along with the attached requisite Unfair Labor Practice Charge alleging a violation by BTA of Government c Code Sections 3543.6(c) and (d), and the attached requisite declaration in support of Notice or Request for Injunctive Relief.

The instant filing by the District of said Request for Injunctive Relief is premised upon the declaration of Legislative

intent contained in Government Code Section 38100 which states in pertinent part that:

> "The EERA imposes a duty on employers and -the exclusive representatives to participate in good faith in the impasse procedure and treats that duty so seriously that it specifically makes it unlawful for either an employer or exclusive representative to refuse to do so. The Board considers those provisions as strong evidence of legislative intent to head off work stoppages and lockouts until completion of the impasse procedure and will, therefore, in each case before it, determine whether injunctive relief will further the purposes of the EERA by fostering constructive employment relations by facilitating the collective negotiations process and by protecting the public interest in maintaining the continuity and quality of educational services."

STATEMENT OF FACTS

The District and BTA are currently in the process of negotiating a successor agreement. Said negotiations began on or about June, 1979. The prior collective agreement between the parties had expired on September 1, 1979.

The parties have, prior to the filing of the instant Request, participated in the mediation and factfinding process as prescribed by Government Code Sections 3548, et seq. On or about September 14, 1979, BTA declared impasse. Subsequently, on or about December 21, 1979, the District made a request for factfinding, and accordingly, factfinding hearings took place on January 11, 23 and 29, 1980.

• On or about February 20, 1980, the collective bargaining process between the parties was further continued by means of the post fact-finding mediation process. During these recent negotiating sessions, the parties have discussed several out-

standing issues including Children's Center Instructors' work year and split shift differential, effective dates of eligibility for the 1979/80 salary schedule and anniversary increments, and the contract article regarding Support of Agreement.

Throughout said negotiation process the parties have come progressively closer to reaching agreement on a complete collective agreement and accordingly, on March 21, 1980, the District's negotiator requested a continuation of the post factfinding mediation process.

On March 21, 1980 the membership of BTA voted on the issue of whether or not to go out on strike in support of the Association's position at the bargaining table. The District was not notified of the result of said strike vote.

On March 22, 1980 the local newspaper, the Burbank Review, reported that the BTA membership had voted to strike and, although said report did not indicate whether or not the membership had actually authorized said strike by a majority vote, it reported that the BTA President would not divulge the specific date chosen for the initial walkout.

On March 24, 1980, from 7:30 A.M. to 8:00 A.M. virtually the entire certificated staff at John Muir and Burbank High Schools picketted their respective school sites. On March 25, 1980, negotiations continued between the parties.

On March 27, 1980 BTA called a partial work stoppage at selected school sites at approximately 9:30 A.M. (See Declaration of Tom D. Barkelew incorporated by reference and attached hereto, in which the details of said picketting, negotiations, and strike activity is more full set forth).

I.

IF PERB DECIDES NOT TO ISSUE INJUNCTIVE RELIEF, IT MUST DISMISS THE ACTION SO THAT PETITIONER MAY PURSUE ITS RIGHT TO ALTERNATIVE RELIEF WITHOUT DELAY

The California Supreme Court in San Diego Teachers' Association v. Superior Court (1974) 24 Cal.3d 1, 154 Cal.Rptr. 893 declared that the Public Employment Relations Board (hereinafter, "PERB") has been granted by the Legislature initial jurisdiction over strikes which can properly be found to constitute an "unlawful" act under the Educational Employment Relations Act (hereinafter, "EERA") 24 Cal.3d at page 13, 154 Cal.Rptr, at page 901. Along these lines the Court further declared that a prerequisite to such assertion of jurisdiction was the ability of PERB to furnish "relief equivalent to that which would be provided by a trial court." 24 Cal.3d at page 7, 154 Cal.Rptr, at page 897.

Under the terms of Government Code Section 3541.3(j) PERB's power to petition the Courts for injunctive relief is premised upon the "issuance of a complaint" by PERB. Clearly, in the absence of a basis for issuing such complaint, namely the existence of an act which is unlawful under the EERA, PERB would be unable to furnish a petitioning party with "relief equivalent to that which would be provided by a trial court." Therefore under the rule announced in San Diego PERB would be precluded in such case from asserting exclusive initial jurisdiction over such case.

Accordingly, following this mandate in the instant case, PERB may properly assert jurisdiction over the strike at issue only if it first determines that said strike constitutes

a violation of the EERA and can therefore support a petition for injunctive relief. In the absence of such finding, PERB must dismiss the instant action pursuant to its regular procedure embodied in Government Code Section 32620(b)(3) in order that Petitioner may immediately and without delay pursue its right to seek injunctive relief from the Courts.

II.

AN ILLEGAL STRIKE BY PUBLIC SCHOOL EMPLOYEES SHOULD BE DEEMED TO CONSTITUTE AN UNFAIR PRACTICE UNDER THE EERA

It is well established rule that in the absence of statutory authorization, there is no fundamental or constitutional right to strike. United Federation of Postal Clerks v. Blount (D.C. Fir 1971) 325 F.Supp. 879, Los Angeles Metropolitan Transit Authority v. Brotherhood of Railroad Trainmen (1960) 54 Cal.2d 684, 687, 355 P.2d 905, 906, 8 Cal.Rptr. 1, 2.

Every appellate court in the State of California which has ruled on the issue has held that public employees do not have the right to strike.

In Los Angeles Unified School District v. Unified Teachers, Los Angeles, et al., (1972) 24 Cal.App. 3d. 142, 100, Cal.Rptr. 806, the Court affirmed the issuance of a preliminary injunction restraining the teachers of Los Angeles Unified School District from striking. In reviewing California law concerning public employee strikes, the Court noted that in the three California appellate districts where the issue had been considered, the courts of appeal had consistently held public employee strikes illegal in the

absence of statutory authorization and the California Supreme Court had denied hearings in each instance. 24 Cal.App.3d 142, 145; Almond v. County of Sacramento, (1969) 276 Cal.App.2d. 32, 80 Cal.Rptr. 518; City of San Diego v. American Federation of State, County and Municipal Employees Local 127, (1970) 8 Cal. App.3d. 308, 87 Cal.Rptr. 258; Trustees of the California State Colleges v. Local 1352, San Francisco State College Federation of Teachers (1970) 13 Cal.App.3d. 863, 92 Cal. Rptr. 134.

Trustees of California State Colleges v. Local 1352, San Francisco State College Federation of Teachers, supra, held that California follows and applies the common law rule that public employees do not have the right to strike in the absence of statutory authorization, that no such authorization exists, that a strike by academic employees at San Francisco State College was unlawful, and that the lower court properly enjoined the strike and physical interference by pickets.

City of San Diego v. American Federation of State, County and Municipal Employees Local 127, et al., (1970) 8 Cal.App.3d. 308, 87 Cal.Rptr. 258, reversed a trial court order denying the city's petition for a temporary restraining order to enjoin a strike by employees of the City Utilities and Public Work Departments. The appellate court found that the trial Judge's opinion was based on the erroneous conclusion that public employees have a right to strike.

In City and County of San Francisco v. Evankovich (1977) 69 Cal.App.3d. 41, 137 Cal.Rptr. 883, hrg. den., the Court

affirmed the issuance of an injunction restraining a strike against the city as well as the advocacy of a strike and picketing in support of that strike. The Court concluded that a strike against the City constituted an unlawful objective under public policy of the State of California and that advocacy and picketing in support of same could be restrained.

Under the EERA governing public school employer-employee relations there is no statutory provision granting public school employees the right to strike. In fact, the California State Legislature has specifically provided in Government Code Section 3549 that Labor Code 923, which gives certain individual public employees the right to strike, is not applicable to public school employees. See also Almond v. County of Sacramento, and City and County of San Francisco v. Evakovich, supra.

In California, a simple showing that a strike is unlawful is sufficient to warrant a court's issuance of injunctive relief, even though peaceful means are used to implement said strike. The rule is that the unlawful object renders illegal even otherwise lawful means illegal. See City of Los Angeles v. Los Angeles Bldg & Constr. Trades Council (1949) 94 Cal.App. 2d. 36, 210 P.2d. 305.

In the Los Angeles Unified School District v. United Teachers of Los Angeles (1972) 24 Cal.App.3d 142, 100 Cal. Rptr. 806, a temporary restraining order prohibiting a public school teacher strike was granted based upon a single showing that the strike would result in a loss of state and

federal funds to the district.

Applying the controlling rules to the instant case, the Court should grant PERB's request for injunctive relief to restrain the unlawful strike by the District's public school teachers because said strike is prohibited in California as illegal per se and has been shown by the District to have seriously compromised its financial and practical ability to provide educational services to the surrounding community.

Since it is the avowed policy of PERB under 8 Cal.Admin. Code Section 38000 to:

> "...in each case before it, determine whether injunctive relief will further the purposes of the EERA by fostering constructive employment relations, by facilitating the collective negotiations process and by protecting the public interest in maintaining the continuity and quality of educational services."

it must evaluate the instant strike in light of the goal of protecting the negotiating process and the public interest.

Given the clear fact that strikes by public school teachers in California are illegal not only for lack of a statutory basis, but also on the basis of the specific exemption expressed in Government Code Section 3549 which makes the right to strike granted in Labor Code Section 923 inapplicable to public school employees, the instant strike, which has been instigated in support of BTA's position at the bargaining table, should be deemed by PERB to constitute an unfair labor practice.

The simple logic behind this proposition is that any otherwise unlawful act such as the instant strike by BTA which is furthermore and in addition used to frustrate and

impede collective bargaining between the parties contrary to the clear thrust and spirit of the EERA, should clearly and properly be relegatd to the category of unfair practices prohibited by the Act, so that it can be effectively dealt with by affording injunctive relief to parties adversely affected.

III.,

EVEN THOUGH STRIKES UNDER CERTAIN CIRCUMSTANCES MAY CONSTITUTE PROTECTED ACTIVITY, PARTIAL STRIKES ARE ILLEGAL PER SE

An otherwise protected strike, namely one based upon a legal objective, may nevertheless be rendered unlawful by resort to unlawful means. See generally, Morris, The Developing Labor Law, 1971, Chapter 19, Part III.

One example of such unlawful means is a partial strike which is a concerted attempt by employees to pressure an employer into succumbing to their bargaining demand while remaining at work. This type of strike is illustrated by situation such as employees refusing to work overtime or to perform selected tasks. See, e.g., Scott Paper Box Co. (1949) 81 NLRB 535, 23 LRRM 1380, Montgomery Ward & Co. (1946) 64 NLRB 432, 17 LRRM 11.

Another example of a partial strike which applies to the instant case is that of intermittent or sporadic work stoppages by employees. The National Labor Relations Board has declared that such strikes are devoid of protection under Section 7 of the Labor Management Relations Act, however lawful the initial objective may have been. Pacific Telephone & Telegraph Co. (1954) 107 NLRB 1547, 33 LRRM 1433.

By analogy to federal precedent, the instant strike which intermittently occurs at selective school sites is unlawful per se regardless of whether or not its objective is determined to be protected or prohibited, because the means by which said strike is being executed are unlawful in and of themselves. Therefore, said strike not only does not warrant protection under the EERA, but must be found to be unlawful per se and upon that basis enjoinable by the Courts.

IV

A STRIKE CALLED FOR THE PURPOSE OF PRESSURING A PUBLIC SCHOOL EMPLOYER AT THE BARGAINING TABLE CONSTITUTES A VIOLATION OF THE EERA

The mandatory statutory impasse procedures defined in Government Code Sections 3548-3548.3 are a natural extension of the collective bargaining process. Oakdale Elementary School District (1978) PERB Decision No. AD-46 at page 4, 2 PERC 2182 cited in Moreno Valley Unified School District (1980), LA-CE=398 78/79, 4 PERC 1022.

Recently in Modesto City Schools (March 12, 1980) PERB Decision No. 1R-12, PERB implicitly acknowledged this principle when it premised its petition for injunctive relief against the Association's strike on the fact that:

> "The Association has invoked the processes of PERB to compel a resumption of negotiations. It has demonstrated a desire to resolve differences at the negotiating table by making numerous proposals and counterproposals on significant issues following factfinding. While apparently believing it had no duty to enter into further negotiations, the District has nonetheless met with the Association to hear MTA ideas and thus a basis for resumption of negotiations does exist.

> The EERA is a collective negotiations statute. An ultimate purpose of the Act is to promote stability in employer-employee relations in the public schools. This is best served when the parties resolve their disputes at the negotiating table. Id. at page 5.

The California Supreme Court in the San Diego case, supra, declared that:

> "The impasse procedures almost certainly were included in the EERA for the purposes of heading off strikes. Since they assume deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in the impasse procedures in good faith and thus an unfair practice under section 3543.6, subdivision (d)." 24 Cal.3d at pages 8-9, 154 Cal.Rptr, at page 890 (emphasis added, citations omitted).

The Court further noted that the "question of negotiation in good faith is resolved by determining whether there was a genuine desire to reach agreement", and observed that if a particular strike were found to be an "illegal pressure tactic" the strike "could support a finding that good faith was lacking." *Id.*

In the instant case, BTA declared a strike in the midst of progressive collective bargaining between the parties which was being facilitated by means of the post fact-finding mediation process. Several significant issues were in the process of being discussed in an attempt to reach complete agreement. Neither the collective bargaining nor the impasse process had been completed prior to said strike on the part of BTA. The strike has been called to pressure the District into accepting BTA's position at the table in circumvention of the clearly enunciated policy of PERB and the Courts to resolve

disputes through the collective bargaining process.

Consequently, BTA has violated the letter and spirit of the EERA and its primary purpose of promoting collective bargaining between public school employers and employees is implemented by the Act's impasse procedures. Specifically, BTA's engagement in a strike activity prior to completion of the collective bargaining and impasse process specified by the EERA indicates that good faith is lacking on its part and therefore constitutes a violation of Sections 3543.6 (c) and (d) of the Act.

V.

CONCLUSION

In conclusion, PERB should assert jurisdiction over the instant strike by BTA on the basis that such concerted activity constitutes a violation of the duty of BTA to participate in good faith in the collective bargaining process as specified in the EERA and as implemented by the impasse procedures under the Act, because the complained of strike activity was instigated prior to the completion of said process between the parties and in the midst of progressive negotiations.

Given the fact that said strike activity constitutes an unfair practice under the Act, PERB should file a Complaint for Injunctive Relief with the Superior Court of the State of California pursuant to its powers under Section 3541.3(j) of the EERA.

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DATED: March 27, 1980

Respectfully submitted,

WHITMORE & KAY

By _____
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Attorney for Petitioner

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STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

BURBANK UNIFIED SCHOOL DISTRICT, Petitioner, vs. BURBANK TEACHERS ASSOCIATION, Respondents.	NO. LA-CO-125 DECLARATION OF SUSAN I. COVEY IN SUPPORT OF NOTICE FOR REQUEST FOR INJUNCTIVE RELIEF

I, SUSAN I. COVEY, declare as follows:

1. I am one of the attorneys for Burbank Unified School District, in the above entitled action, and I am licensed to practice in all the courts of the State of California.

2. Pursuant to 8 Cal.Admin. Code, Section 38105(b) and (c), Petitioner reasonably attempted to, and actually did notify Respondents herein of its intention to seek injunctive relief. Said notification was made on March 27, 1980 at about 11:20 A.M. by telephone to Mr. Walt Trexler, chief negotiator and spokesperson for Respondents.

3. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of March, 1980, at Palo Alto, California.

Susan I. Covey
Attorney for Petitioner

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STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

BURBANK UNIFIED SCHOOL DISTRICT, Petitioner, vs. BURBANK TEACHERS ASSOCIATION, Respondents.	NO. LA-CO-125 DECLARATION OF TOM D. BARKELEW IN SUPPORT OF REQUEST FOR INJUNCTIVE RELIEF

I, TOM D. BARKELEW, declare as follows:

1. I am the Superintendent of the Burbank Unified School District, and as such serve in the capacity as chief administrative officer of the District.

2. The District and Burbank Teachers Association (hereinafter, "BTA"), are currently in the process of negotiating a successor agreement. Said negotiations began on or about June, 1979 prior to the expiration of the former collective agreement on September 1, 1979. On or about September 14, 1979, BTA declared impasse. Subsequently, on or about December 21, 1979, the District made a request for factfinding, and accordingly, factfinding hearings took place on January 11, 23 and

and 29, 1980.

3. On or about February 20, 1980, the collective bargaining process between the parties continued through post fact-finding mediation sessions. During these most recent negotiating sessions, the parties have discussed several outstanding issues including Children's Center Instructors' work year and split shift differential, effective dates of eligibility for the 1979/80 salary schedule and anniversary increments, and the contract article regarding "Support of Agreement" (No Strike clause).

4. Throughout said negotiation process the parties have come progressively closer to reaching agreement on a complete collective agreement and accordingly, on March 21, 1980, the District's negotiator requested a continuation of the post factfinding mediation process.

5. On March 21, 1980 the membership of BTA voted on the issue of whether or not to go out on strike in support of the Association's position at the bargaining table. The District was not notified of the result of said strike vote.

6. On March 22, 1980 I read an account in the local newspaper, the Burbank Review, regarding the BTA membership strike vote. Although said report did not indicate whether or not the membership had actually authorized said strike by a majority vote, it reported that the BTA President would not divulge the specific date chosen for the initial walkout.

7. On March 24, 1980, from 7:30 A.M. to 8:00 A.M. I observed that virtually the entire certificated staff at John Muir and Burbank High Schools picketted their respective school sites.

8. On March 25, 1980, negotiations continued between the parties on the issues listed in paragraph "3" herein. The District made concessions with regard to its previous proposals on a no-strike clause and certain wage items. BTA adhered to its previously announced position on said items.

'9. On March 27, 1980, the strike was called by the BTA in support of their positions taken in bargaining a successor contract with the District. Approximately 50-80% of the District's certificated employee staff failed to report for work on this date.

10. Since September, the District's certificated employees have refused to perform regularly assigned job duties such as participating in coaching and drama assignments.

On March 27, 1980 at about 8:00 a.m., the strike began. 50% of the District's Elementary teachers failed to report to work and approximately 80% of the District's secondary teachers failed to report to work.

11. I have reason to believe that the strike, if allowed to continue, would cause irreparable damage and harm not only to the District but to the pupils of the District for whom the District is required to provide a public education.

12. If the strike is unabated, the pupils of the District will lose irreplaceable instruction time and services which were caused by not only the disruptive atmosphere but also by the instructional changes which were necessitated by the loss of the regular instructional personnel. For example, the District's historic chronic inability to procure an adequate

number of qualified or available substitute teachers under normal circumstances is greatly magnified under the extreme circumstances of the instant strike, resulting in a severe compromise of the regular instructional program.

13. The District stands to lose substantial revenue by the fact that a strike will discourage students from attendance at school, thus reducing the per capita income to the District. District, because of the strike, has incurred and will continue to incur substantial costs for procuring and payment of replacement personnel, overtime for classified employees, additional administrative and legal costs.

14. If the strike is unabated, the cafeterias serving the various District school sites, which do not draw on the District's general fund for financial support, will lose income to the extent that the normally projected number of students fail to purchase their meals through said cafeterias, and will, in addition, be forced to waste food prepared upon the basis of said normal attendance projections-

IB. Finally, if the strike continues unabated the District will suffer an erosion of the public support necessary for the continued well being of the educational process in Burbank.

I declare under penalty of perjury that the foregoing is true and correct and if called as a witness I could competently testify thereto.

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Executed this 27th day of March, 1980, at Burbank, California.

Tom D. Barkelew
Superintendent