

## CHAPTER XIX

### COLLECTIVE BARGAINING AND LABOR RELATIONS

#### EDUCATION EMPLOYMENT RELATIONS ACT

##### A. History of Collective Bargaining in California

The National Labor Relations Act (NLRA) governs collective bargaining in the private sector.<sup>1</sup> The NLRA leaves it to the states to regulate collective bargaining in the public sector.<sup>2</sup>

Public employees in California do not have the right to bargain collectively absent authorizing legislation. Rather than enacting a single overarching employment relations law similar to the NLRA, the California Legislature has passed several different statutes covering specific categories of public employees.<sup>3</sup>

Prior to 1961, public employees in California enjoyed no formal rights to participate in the decision-making process which determined the terms and conditions of their employment. In 1961, the Legislature enacted the George Brown Act which, as originally enacted, applied to employees of state agencies, cities, counties, school districts, and institutions of higher education granting such employees the right to join employee organizations of their choosing and requiring public employers to meet and confer with employee organizations prior to undertaking action on matters related to employment conditions and employer-employee relations.<sup>4</sup>

In 1965, the Winton Act expanded the meet and confer rights of public school employees, and in 1968, the Legislature enacted the Meyers-Milias-Brown Act (MMBA) to provide a more structured collective bargaining process for most local government employees. State employees and school district employees were excluded from the MMBA, but separate statutes were later enacted to cover state and school district employees.<sup>5</sup>

In 1975, the Legislature enacted the Education Employment Relations Act (EERA) and created the Education Employment Relations Board (EERB). In 1977, the Legislature enacted the State Employer-Employee Relations Act to govern relations between the state government and certain classes of its employees (later renamed the Ralph C. Dills Act). The jurisdiction of the EERB was expanded to include adjudication of unfair practice charges under the Dills Act, and as a result, the EERB was renamed the PERB.<sup>6</sup>

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<sup>1</sup> See, 29 U.S.C. Section 151 et seq.

<sup>2</sup> 29 U.S.C. Section 152(2); Davenport v. Washington Education Association, 551 U.S. 177, 181, 127 S.Ct. 2372 (2007).

<sup>3</sup> County of Los Angeles v. Los Angeles County Employee Relations Commission, 56 Cal.4<sup>th</sup> 905, 915, 157 Cal.Rptr.3d 481 (2013).

<sup>4</sup> Pacific Legal Foundation v. Brown, 29 Cal.3d 168, 175-76, 172 Cal.Rptr. 487 (1981).

<sup>5</sup> County of Los Angeles v. Los Angeles County Employee Relations Commission, 56 Cal.4<sup>th</sup> 905, 915-16, 157 Cal.Rptr.3d 481 (2013); Pacific Legal Foundation v. Brown, 29 Cal.3d 168, 176, 172 Cal.Rptr. 487 (1981).

<sup>6</sup> Coachella Valley Mosquito & Vector Control District v. California Public Employment Relations Board, 35 Cal.4<sup>th</sup> 1072, 1084-85, 29 Cal.Rptr.3d 234 (2005).

Since 1977, the Legislature has continued to expand PERB's jurisdiction and has enacted new employment relations laws covering additional categories of public agencies and their employees. In 1978, the Legislature enacted the Higher Education Employer-Employee Relations Act to govern labor relations within the University of California, the California State University, and Hastings College of Law. In 2000, the Legislature brought the MMBA within PERB's jurisdiction. It also enacted several other collective bargaining laws for court employees and transit workers.<sup>7</sup>

## **B. The Passage of the EERA**

In 1975, the California Legislature enacted the Education Employment Relations Act (EERA).<sup>8</sup> The EERA establishes a system of labor relations for employees employed by school districts, county offices of education and community college districts in California.

The purpose of the EERA is to promote the improvement of personnel management and employer-employee relations within the public school systems of the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.<sup>9</sup> The provisions of the EERA do not supersede other provisions of the Education Code or the rules and regulations of public school employers which establish and regulate tenure, merit or civil service systems or which administer employer-employee relations so long as the rules and regulations do not conflict with lawful collective bargaining agreements.<sup>10</sup>

In Round Valley Teachers Association,<sup>11</sup> the California Supreme Court interpreted the provision of the EERA that states that the EERA does not supersede the provisions of the Education Code and held that a school district could not negotiate provisions in a collective bargaining agreement that conflicted with requirements of the Education Code.

In Round Valley Teachers Association, the school district had negotiated provisions in its collective bargaining agreement that placed additional conditions (specific reasons for dismissal, 30 day preliminary notice and 15 days to appeal the decision) on the procedure for dismissing probationary certificated employees. The union, on behalf of a probationary certificated employee, filed a grievance under the collective bargaining agreement for failure to comply with the additional negotiated procedures. The superior court granted the union's motion to compel arbitration and the arbitrator subsequently found that the school district violated the collective bargaining agreement by failing to give reasons for the probationary teacher's termination. The arbitrator ordered the school district to reconsider its decision not to reemploy the teacher.<sup>12</sup>

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<sup>7</sup> Id. at 1085-86.

<sup>8</sup> Government Code section 3540 et seq., operative July 1, 1976.

<sup>9</sup> Government Code section 3540.

<sup>10</sup> Ibid. See, Board of Education v. Round Valley Teachers Association, 13 Cal.4<sup>th</sup> 267, 52 Cal.Rptr.2d 115 (16).

<sup>11</sup> Ibid.

<sup>12</sup> Id. at 273.

The school district then appealed to vacate the arbitrator's award on the grounds that it exceeded the powers of the arbitrator. The California Supreme Court held that the Legislature intended to establish a uniform statewide procedure and vest exclusive discretion in the governing board of the school district with respect to the reelection of probationary certificated employees. Therefore, the court held that the procedures for terminating probationary certificated employees was not negotiable under the EERA as it was preempted by the provisions of the Education Code regulating the procedure.<sup>13</sup>

The PERB has also held that the EERA and collective bargaining agreements negotiated pursuant to the EERA cannot conflict with other state laws. In Berkeley Council of Classified Employees v. Berkeley Unified School District,<sup>14</sup> the PERB held that a school district violated the state Labor Code and EERA by declaring an impasse over negotiations on the renewal of an overpayment recoupment provision in an expired collective bargaining agreement. The provision in the collective bargaining agreement allowed the district to recoup erroneous salary overpayments by withholding the amount of overpayment from the employees' wages over the same period of time in which the payroll error occurred. The collective bargaining agreement did not require individual employee consent.

PERB held that recouping salary overpayments without employee consent violated the wage garnishment laws in the Labor Code. In California State Employees' Association v. State of California,<sup>15</sup> the Court of Appeal held that the wage garnishment laws prohibit an employer from unilaterally recouping wage overpayments without employee consent, a court order, or other due process.<sup>16</sup>

The EERA outlines the rights and duties of employers, employees and unions in broad terms and leaves the interpretation of the language of the EERA to the PERB and the courts. The EERA is modeled after the NLRA which governs collective bargaining in the private sector.<sup>17</sup> In many cases, PERB will apply National Labor Relations Board (NLRB) precedents established in the private sector to disputes under the EERA.<sup>18</sup>

If the pertinent language of both the Agriculture Labor Relations Act (ALRA) and the NLRA parallels that of the EERA, cases construing the ALRA and the NLRA will be persuasive precedents in interpreting the EERA.<sup>19</sup>

However, where the NLRA differs significantly from the EERA, as in the case of statutorily prescribed impasse procedures, the PERB may interpret the EERA in a different manner.<sup>20</sup> Thus, in Moreno Valley Unified School District v. PERB, the Court of Appeal upheld

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<sup>13</sup> Id. at 287.

<sup>14</sup> PERB Decision No. 2268-E (2012).

<sup>15</sup> 198 Cal.App.3d 374 (1988).

<sup>16</sup> See Labor Code Section 224.

<sup>17</sup> See, 29 U.S.C. Section 151 et seq.

<sup>18</sup> See, San Diego Teachers Association v. Superior Court, 24 Cal.3d 1, 12, 154 Cal.Rptr. 893 (1979).

<sup>19</sup> PERB v. Modesto City Schools District, 136 Cal.App.3d 881, 895-896, 186 Cal.Rptr. 634 (1982); Moreno Valley Unified School District v. Public Employment Relations Board, 142 Cal.App.3d 191, 196, 191 Cal.Rptr. 60 (1983).

<sup>20</sup> See, Moreno Valley Unified School District v. Public Employment Relations Board, 142 Cal.App.3d 191, 198-200, 191 Cal.Rptr. 60 (1983).

PERB's interpretation of the EERA finding a per se violation of the statutory duty of employers to participate in good faith in the impasse procedures where the employer took unilateral action prior to completion of the EERA impasse procedures.<sup>21</sup>

The EERA contains a number of statutory definitions which are used throughout the Act.<sup>22</sup> A certified organization or certified employee organization is an organization which has been certified by the PERB as the exclusive representative of the public school employees in an appropriate unit after an election or recognition by the employer.<sup>23</sup> An exclusive representative is defined as the employer organization recognized or certified as the exclusive negotiating representative of certificated or classified employees in an appropriate unit of a public school employer.<sup>24</sup> A public school employer is defined as the governing board of a school district, a county board of education or a county superintendent of schools.<sup>25</sup>

### **RIGHT TO BARGAIN COLLECTIVELY**

The EERA provides that a public school employer or such representatives as it may designate shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.<sup>26</sup> No persons serving in a management position, senior management position or confidential position shall be represented by an exclusive representative.<sup>27</sup> Any persons serving in such a position may represent himself or herself individually or by an employee organization whose membership is composed entirely of employees designated as holding such positions but in no case shall such an organization meet and negotiate with the public school employer.<sup>28</sup>

No representative shall be permitted by a public school employer to meet and negotiate on any benefit or compensation paid to persons serving in management positions, senior management positions or confidential positions.<sup>29</sup> A confidential employee is considered part of the nucleus of the management negotiating team, therefore, a confidential employee cannot also represent employees at negotiations and cannot be represented by a union in filing an unfair labor practice charge against the employer.<sup>30</sup>

The passage of the No Child Left Behind Act (NCLB)<sup>31</sup> does not directly impact state laws regulating collective bargaining. The NCLB states that nothing in the Act shall be construed to alter or otherwise affect the rights, remedies and procedures afforded school or school district employees under federal, state or local laws (including applicable regulations or court orders) or under the terms of collective bargaining agreements, memoranda of

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<sup>21</sup> Ibid.

<sup>22</sup> Government Code section 3540.1.

<sup>23</sup> Government Code section 3540.1(b).

<sup>24</sup> Government Code section 3540.1(e).

<sup>25</sup> Government Code section 3540.1(k).

<sup>26</sup> Government Code section 3543.3.

<sup>27</sup> Government Code section 3543.4.

<sup>28</sup> Ibid.

<sup>29</sup> Government Code section 3543.4

<sup>30</sup> McPherson v. Public Employment Relations Board, 189 Cal.App.3d 293, 312-313, 234 Cal.Rptr. 428 (1987).

<sup>31</sup> 20 U.S.C. Section 6301 et seq.

understanding, or other agreements between such employees and their employers.<sup>32</sup> However, other provisions of the NCLB impact matters within the scope of bargaining.

## **PUBLIC EMPLOYMENT RELATIONS BOARD**

### **A. The Structure of PERB Board**

The EERA establishes a PERB which is independent of any state agency and consists of five members.<sup>33</sup> The members of the PERB are appointed by the Governor by and with the consent of the state Senate. The members are appointed for a period of five years and are eligible for reappointment. One member is selected by the Governor to serve as chairperson. A member of the PERB may be removed by the Governor upon notice and hearing for neglect of duty or malfeasance in office but for no other cause.<sup>34</sup>

A vacancy in the PERB does not impair the right of remaining members to exercise all of the powers of the PERB and three members of the PERB at all times constitute a quorum.<sup>35</sup> The PERB may delegate its powers to any group of three or more board members. The members shall hold no other public office in the state and shall not receive any other compensation for services rendered.<sup>36</sup>

Each member of the PERB receives a salary and is reimbursed for all actual necessary expenses incurred in the performance of their duties.<sup>37</sup> The PERB must appoint an executive director who shall serve as the chief administrative officer and the executive director shall appoint such other persons as may, from time to time, be deemed necessary for the performance of the PERB's administrative functions.<sup>38</sup> The executive director shall prescribe the duties of the PERB employees, fix their compensation and provide for reimbursement of their expenses. The executive director must be familiar with employer-employee relations and is subject to removal at the pleasure of the PERB.<sup>39</sup>

The Governor is required to appoint a general counsel, upon the recommendation of the PERB, to assist the PERB in the performance of their function. The general counsel serves at the pleasure of the PERB.<sup>40</sup>

The executive director and general counsel are employees of the PERB and may, independently of the Attorney General, represent the PERB in any litigation or other matter pending in a court of law to which the PERB is a party or which it is otherwise interested.<sup>41</sup> The Governor is required to appoint one legal adviser for each member of the PERB upon the

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<sup>32</sup> 20 U.S.C. Section 6316.

<sup>33</sup> Government Code section 3541.

<sup>34</sup> Ibid.

<sup>35</sup> Government Code section 3541(b).

<sup>36</sup> Government Code sections 3541(c)(d).

<sup>37</sup> Government Code section 3541(e).

<sup>38</sup> Government Code section 3541(f).

<sup>39</sup> Ibid.

<sup>40</sup> Government Code section 3541(f).

<sup>41</sup> Government Code section 3541(g).

recommendation of each board member. Each legal adviser to a member of the PERB serves at the pleasure of the recommending board member and receives a salary fixed by the PERB with the approval of the Department of Finance.<sup>42</sup>

## **B. The Power and Authority of the Board**

The PERB has the power:

1. To determine in disputed cases, or otherwise approve, appropriate units.
2. To determine in disputed cases whether a particular item is within or without the scope of representation.
3. To arrange for and supervise representation elections which shall be conducted by means of secret ballot elections, and certify the results of the elections.
4. To establish lists of persons broadly representative of the public and qualified by experience to be able to serve as mediators, arbitrators or factfinders.
5. To establish by regulation appropriate procedures for review of proposals to change unit determinations.
6. Within its discretion, to conduct studies relating to employer-employee relations, including the collection, analysis and making available of data relating to wages, benefits, and employment practices in public and private employment and, when it appears necessary, to recommend legislation. The PERB may enter into contracts to develop and maintain research and training programs designed to assist public employers and employee organizations in the discharge of their mutual responsibilities under the EERA.
7. To adopt rules and regulations to carry out the provisions and effectuate the purposes and policies of the EERA.
8. To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers related to any matter within its jurisdiction.

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<sup>42</sup> Government Code section 3541(h).

9. To investigate unfair practice charges or alleged violations of the EERA and to take such action and make such determinations in respect to the charges or alleged violations as the PERB deems necessary to effectuate the purposes of the EERA.
10. To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions or rulings or to enforce the refusal to obey a subpoena. Upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair practice, the PERB may petition the court for appropriate temporary relief or restraining order.
11. To delegate its powers to any member of the PERB or to any person appointed by the PERB for the performance of its functions, except that no fewer than two board members may participate in the determination of any ruling or decision on the merits of any dispute coming before it, except for the decision to refuse to issue a complaint shall require the approval of two board members.
12. To decide contested matters involving recognition, certification or decertification of employee organizations.
13. To consider and decide issues relating to rights, privileges and duties of an employee organization in the event of a merger, amalgamation, or transfer of jurisdiction between two or more employer organizations.
14. To take such other action as the PERB deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of the EERA.<sup>43</sup>

Any person who willfully resists, prevents, impedes or interferes with any member of the PERB or its agents in the performance of its duties is guilty of a misdemeanor.<sup>44</sup>

### **C. The Exclusive Jurisdiction of the Board – Strikes**

The initial determination as to whether the charges of unfair practices are justified, and if so, what remedy is necessary to effectuate the purposes of the EERA is a matter within the exclusive jurisdiction of the PERB.<sup>45</sup> In San Diego Teachers' Association v. Superior Court,<sup>46</sup> the California Supreme Court held that the determination as to whether a strike by certificated employees was an unfair labor practice and what, if any, remedies the PERB should pursue was in the exclusive initial jurisdiction of the PERB. The California Supreme Court held that a

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<sup>43</sup> Government Code section 3541.3.

<sup>44</sup> Government Code section 3541.4.

<sup>45</sup> Government Code section 3541.5.

<sup>46</sup> 24 Cal.3d 1, 154 Cal.Rptr. 893 (1979).

school district must initially file a complaint with the PERB in seeking to enjoin a strike and may not file the request for an injunction directly in Superior Court.<sup>47</sup>

In El Rancho Unified School District v. National Education Association,<sup>48</sup> the California Supreme Court held that the EERA preempts the power of a superior court to entertain a complaint for damages arising out of a teachers' strike even if conducted by noncertified unions and that the PERB has exclusive initial jurisdiction to determine whether the strike is an unfair labor practice in violation of the EERA. In Leek v. Washington Unified School District,<sup>49</sup> the Court of Appeal held that public school employees, who are members of the collective bargaining unit and who refuse to become members of the exclusive representative or to pay representation fees to that association pursuant to a collective bargaining agreement, could not bring an action in superior court alleging violation of their constitutional rights but must exhaust their administrative remedies with the PERB since the matter was arguably an unfair labor practice and within the initial jurisdiction of the PERB.

In City of San Jose v. Operating Engineers Local Union No. 3,<sup>50</sup> the California Supreme Court held that PERB has exclusive initial jurisdiction over public employee strikes that may involve claims of unfair labor practices. The California Supreme Court held that if a public entity believes that a threatened strike by its employees is unlawful because it creates a substantial and imminent threat to public health and safety, the public entity must first file an unfair labor practice complaint with PERB and await PERB's adjudication of the complaint before asking a court for an injunction. The court held that a public entity must exhaust its administrative remedies before PERB before seeking judicial relief, unless one of the recognized exceptions to the exhaustion of the administrative remedies requirement is established.

In January 2006, the City of San Jose and defendant Operating Engineers Local Union No. 3, which represented approximately 800 full-time employees of the city, started negotiating a new labor contract. The old contract was to expire on April 14, 2006. The parties agreed that if their negotiations reached an impasse, the union would give the city 72 hours' notice before engaging in any work stoppages. The union did so on May 30, 2006, when it notified the city that work stoppages could occur any time after June 2, 2006. The city responded that it would seek a court order prohibiting any strike or work stoppage by the union members performing services essential to public health and safety.

On May 31, 2006, the union filed an unfair labor practice charge with PERB against the city. The union alleged that the city's threatened court action interfered with the union's right to represent its members, interfered with the rights of its members to participate in activities of an employee organization, and breached the city's obligation to meet and confer with the union in good faith.

On June 1, 2006, the city filed a complaint in Superior Court seeking to enjoin 110 employees from engaging in any work stoppage, alleging that a work stoppage by these

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<sup>47</sup> Ibid.

<sup>48</sup> 33 Cal.3d 946, 192 Cal.Rptr. 123 (1983).

<sup>49</sup> 124 Cal.App.3d 43, 177 Cal.Rptr. 196 (1981).

<sup>50</sup> 49 Cal.4th 597, 110 Cal.Rptr.3d 718 (2010).

employees would endanger public health and safety. Specifically, the complaint alleged that such work stoppage would disrupt the city's environmental service department's operation and maintenance of a water pollution control plant, which treats waste in sewage water before discharging the sewage into San Francisco Bay, would impair the ability of the city's Department of Transportation to maintain and repair traffic signals and street light poles and impair the ability of the city's General Services Department to adequately service facilities that support communications among emergency personnel, such as the police and fire departments.

The union opposed the city's request for injunctive relief, as did PERB. In denying relief, the Superior Court pointed to the city's failure to exhaust administrative remedies by not first seeking relief from PERB, which the court ruled had exclusive initial jurisdiction over the matter. The city appealed.

The California Supreme Court held that the enactment of Government Code section 3509, which is similar to the provisions of Education Code section 3541.5, made it clear that both statutory provisions expressly vest in PERB exclusive initial jurisdiction over unfair labor practice charges which includes whether a strike is an unfair practice and, if so, to determine the appropriate remedy.

The court held that the only exceptions to the requirement that public entities exhaust their administrative remedies with PERB are when the administrative remedy is inadequate, such as when the procedure is too slow to be effective.<sup>51</sup> The exhaustion of remedies doctrine would also not apply when irreparable harm would result by requiring exhaustion of administrative remedies before seeking judicial relief, or when it is clear that seeking administrative remedies would be futile.<sup>52</sup> The California Supreme Court then reviewed PERB's regulations and found that on their face they provide an adequate remedy for seeking injunctive relief in the event of a strike.<sup>53</sup>

The California Supreme Court's decision in City of San Jose reinforces its prior decision in San Diego Teachers' Association that, in the event of a threatened strike, districts must first exhaust their administrative remedies with PERB before seeking relief in court. The only exceptions would be when the PERB remedies would be inadequate, futile or when irreparable harm would result.

#### **D. The Exclusive Jurisdiction of the Board - Salary and Picketing**

In disputes involving salary freezes, discriminatory hour requirements and service fees, the courts have held that these disputes are within the initial jurisdiction of the PERB since they arguably involve unfair labor practice.<sup>54</sup> However, an action brought by a school district in

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<sup>51</sup> Glendale City Employees Association v. City of Glendale, 15 Cal.3d 382, 342, 124 Cal.Rptr. 513 (1975); Los Angeles County Employees Association v. Los Angeles, 168 Cal.App.3d 683, 686, 214 Cal.Rptr. 350 (1985).

<sup>52</sup> Department of Personnel Administration v. Superior Court, 5 Cal.App.4th 155, 169, 6 Cal.Rptr.2d 714 (1992); Sail'er Inn, Inc. v. Kirby, 5 Cal.3d 1, 7, 95 Cal.Rptr. 329 (1971); Coachella Valley Mosquito and Vector Control District v. California Public Employment Relations Board, 35 Cal.4th 1072, 1083, 29 Cal.Rptr.3d 234 (2005).

<sup>53</sup> Id. at \_\_\_\_\_. See, 8 California Code of Regulations section 32450 et seq.

<sup>54</sup> Pittsburgh Unified School District v. CSEA, 166 Cal.App.3d 875 (1985); Amador Valley Secondary Educators Association v. Newlin, 88 Cal.App.3d 254, 151 Cal.Rptr. 725 (1979); Los Angeles Council of School Nurses v. Los Angeles Unified School

superior court to enjoin the picketing of school board members' businesses during a strike was held not to be within the exclusive jurisdiction of the PERB.<sup>55</sup> The Court of Appeal cited NLRB precedent and held that such conduct was a matter of "local concern" which is not necessarily preempted by the EERA.<sup>56</sup> However, disputes involving violations of Education Code provisions such as the uniform salary schedule requirements are not within the initial jurisdiction of PERB.<sup>57</sup>

The procedures for investigating, hearing and deciding unfair labor practice charges are established by the PERB and must include the following:

1. Any employee, employer organization or employer shall have the right to file an unfair labor practice charge if filed within six months of the incident.
2. Any employee, employee organization or employer shall have the right to file an unfair labor practice charge except against conduct also prohibited by the provisions of a collective bargaining agreement until the grievance machinery of the agreement has been exhausted either by settlement or binding arbitration unless the charging party demonstrates that resort to the contract grievance procedures would be futile. The PERB shall have the discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of the EERA. If the PERB finds that the settlement or arbitration award is repugnant to the purposes of the EERA it shall issue a complaint on the basis of a timely filed charge and hear and decide the case on the merits; otherwise it shall dismiss the charge. The six month statute of limitations shall be tolled during the time it took the charging party to exhaust the grievance machinery.
3. The PERB shall not have the authority to enforce agreements between the parties and shall not issue a complaint on any charge based on an alleged violation of any agreement that would not also constitute an unfair labor practice under the EERA.

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District, 113 Cal.App.3d 666, 169 Cal.Rptr. 893 (1980); Link v. Antioch Unified School District, 142 Cal.App.3d 765, 191 Cal.Rptr. 264 (1983). See, also, Public Employment Relations Board v. Modesto City Schools, 136 Cal.App.3d 881, 186 Cal.Rptr. 634 (1982); McCammon v. Los Angeles Unified School District, 195 Cal.App.3d 661, 241 Cal.Rptr. 1 (1987).

<sup>55</sup> Pittsburgh Unified School District v. CSEA, 166 Cal.App.3d at 884-887.

<sup>56</sup> Ibid.

<sup>57</sup> California Teachers' Association v. Livingston Union School District, 219 Cal.App.3d 1503, 269 Cal.Rptr. 160 (1990); Dixson v. Board of Trustees of Saugus Unified School District, 216 Cal.App.3d 1269, 265 Cal.Rptr. 511 (1989); United Teachers of Ukiah v. Board of Education of Ukiah Unified School District, 201 Cal.App.3d 632, 251 Cal.Rptr. 499 (1988); Contrast, McCammon v. Los Angeles Unified School District, 195 Cal.App.3d 661, 241 Cal.Rptr. 1 (1987). See, also, California School Employees Association v. Travis Unified School District, 156 Cal.App.3d 242, 202 Cal.Rptr. 699 (1984); Wygant v. Victor Valley Joint Union High School District, 168 Cal.App.3d 319, 323, 214 Cal.Rptr. 205 (1985); California School Employees Association v. Azusa Unified School District, 152 Cal.App.3d 580, 591 199 Cal.Rptr. 635 (1984).

4. The PERB shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair labor practice and to take such affirmative action, including but not limited to, the reinstatement of employees, with or without back pay, in order to effectuate the policies of the EERA.

#### **E. The Exclusive Jurisdiction of the Board - Rehiring a Probationary Teacher**

PERB has the power to determine whether a school district may refuse to rehire a probationary teacher due to participation in protected union activities and may order the teacher's reinstatement as a tenured teacher.<sup>58</sup> Although the final determination about rehiring probationary teachers lies within the discretion of the governing board of the school district and tenure can be denied for any lawful reasons regardless of the sufficiency of the cause, a school district may not deny tenure in retaliation for the exercise of protected union activities.<sup>59</sup> The Court of Appeals stated:

“The initial determination regarding whether there has been an unfair labor practice and what shall be the remedy is within the exclusive jurisdiction of the PERB. . . . In fashioning a remedy, the PERB has the express authority to order reinstatement. . . . The fact that Stephens-Weaver will automatically obtain tenure as a result of reinstatement does not mean that the PERB is interfering with the District's authority to establish and regulate tenure. It merely gives effect to the determination that Stephens-Weaver would not have been denied tenure but for her exercise of protected rights. The reinstatement order was not in excess of the PERB's authority.”<sup>60</sup>

#### **F. The Exclusive Jurisdiction of the Board - Violations of the Education Code**

In Personnel Commission v. Barstow Unified School District,<sup>61</sup> the Court of Appeal held that PERB has initial exclusive jurisdiction over claims initially alleged as unfair labor practices even when allegations claiming violations of the Education Code are later filed in court. The Court of Appeal held that even though PERB lacked jurisdiction over Education Code violations, the employee union was required to exhaust its administrative remedies under PERB and could not proceed in court during the pendency of the PERB proceeding. The Court of Appeal held that the proper procedure was to stay the judicial proceedings pending the outcome of the PERB proceeding. If PERB failed to address any of the union claims, then the union could proceed in court.<sup>62</sup>

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<sup>58</sup> McFarland Unified School District v. Public Employment Relations Board, 228 Cal.App.3d 166, 279 Cal.Rptr. 26 (1991).

<sup>59</sup> Id. at 169.

<sup>60</sup> Id. at 169.

<sup>61</sup> 43 Cal.App.4th 871, 50 Cal.Rptr.2d (1996).

<sup>62</sup> Id. at 892.

The Court of Appeal held that there are three categories of cases. In the first category are cases in which the plaintiff alleges only a violation of the Education Code and there appears to be no arguable violation of the EERA. In these cases, the courts find no preemption by PERB and the plaintiff may proceed in court.<sup>63</sup> In the second category are cases in which the plaintiff alleges only conduct constituting an unfair labor practice or other violation of the EERA. In these cases, the courts have found preemption and initial jurisdiction in PERB.<sup>64</sup> In the third category are cases in which the plaintiff alleges both a violation of the Education Code and an unfair labor practice or other violation of the EERA. In these cases, the courts have also found preemption and initial jurisdiction in PERB.<sup>65</sup> In such cases, PERB has held that it may only consider the alleged EERA violations, not the alleged violations of the Education Code.<sup>66</sup>

In Barstow Unified, the union did not allege violations of the EERA in its superior court action claiming only that contracting out transportation jobs violated the Education Code. However, in its unfair labor practice charge the union alleged that contracting out the same transportation jobs violated the EERA. While the PERB action was pending, the union filed its superior court action. The Court of Appeal held that the holding in El Rancho Unified School District applied even though no EERA violation was pleaded in court and that preemption applies even where PERB may lack jurisdiction over some of the issues involved.<sup>67</sup>

The Court of Appeal held that it would be appropriate, under these circumstances, for the superior court to stay the union's cause of action rather than dismiss it since further judicial relief might be necessary after PERB rules on the matter. The court reasoned that if PERB's ultimate decision does not resolve the Education Code claims (i.e., provide for the same relief that the union could have obtained in court) then the union may seek judicial relief.<sup>68</sup>

## **RIGHT TO ORGANIZE, EXCLUSIVE REPRESENTATION**

The EERA provides that public school employees have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters relating to the employer-employee relationship.<sup>69</sup> Public school employees also have the right to refuse to join or participate in the activities of employee organizations and have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized or certified, no employee in that unit may meet and negotiate with the public school employer.<sup>70</sup>

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<sup>63</sup> Id. at 886; see, also, Dixon v. Board of Trustees, 216 Cal.App.3d 1269, 1277 (1989); Wygant v. Victor Valley Joint Union High School District, 168 Cal.App.3d 319, 323 (1985); United Teachers of Ukiah v. Board of Education, 201 Cal.App.3d 632, 638 (1988).

<sup>64</sup> Id. at 886; see, also, San Diego Teachers' Association v. Superior Court, 24 Cal.3d 1, 14, 154 Cal.Rptr. 893 (1979); Amador Valley Secondary Educators Association v. Newlin, 88 Cal.App.3d 254, 257 (1979).

<sup>65</sup> Id. at 886; El Rancho Unified School District v. National Education Association, 33 Cal.3d 946, 951-952, 961 (1983).

<sup>66</sup> Gorcey v. Oxnard Educators Association, PERB Decision No. 664, 12 PERC 19067 (1988).

<sup>67</sup> Id. at 889-889.

<sup>68</sup> Id. at 892.

<sup>69</sup> Government Code section 3543.

<sup>70</sup> Ibid.

Any employee may at any time present grievances to his employer and have such grievances adjusted without the intervention of the exclusive representative as long as the adjustment is reached prior to arbitration and the adjustment is not inconsistent with the terms of a written collective bargaining agreement; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.<sup>71</sup>

An employee organization may become the exclusive representative for the employees of an appropriate unit for purposes of meeting and negotiating by filing a request with a public school employer alleging that a majority of the employees in an appropriate unit wish to be represented by the organization and asking the public employer to recognize it as the exclusive representative.<sup>72</sup> The request must describe the grouping of jobs or positions which constitute the unit claimed to be appropriate and must be based upon majority support on the basis of current dues deductions authorizations or other evidence such as notarized membership lists, membership cards, or petitions designating the organization as the exclusive representative of the employee. Notice of any such requests must be immediately posted conspicuously on all employee bulletin boards in each facility of the public school employer in which members of the unit claimed to be appropriate are employed.<sup>73</sup>

The employer organization must submit proof of majority support to the PERB. The information submitted to the PERB shall remain confidential and not be disclosed by the PERB.<sup>74</sup> The PERB shall then obtain from the employer the information necessary for it to carry out its responsibilities and report to the employee organization and the public school employer as to whether the proof of majority support is adequate.<sup>75</sup>

The public school employer must grant a request for recognition filed with the PERB unless the public school employer desires that representation elections be conducted or doubts the appropriateness of the unit.<sup>76</sup> If the public school employer desires a representation election, the public school employer shall notify the PERB which must conduct a representation election.<sup>77</sup>

The public school employer need not grant a request for recognition where another employee organization files with the public school employer a challenge to the appropriateness to the unit or submits a competing claim of representation within fifteen work days of the posting of the notice of the written request.<sup>78</sup> The competing claim must be filed with the PERB and if the competing claim appears to have the support of at least thirty percent of the members of an appropriate unit a question of representation exists and the PERB must conduct a representation election.<sup>79</sup> A representation election is not required to be held by the PERB where there is

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<sup>71</sup> Government Code section 3543.

<sup>72</sup> Government Code section 3544(a).

<sup>73</sup> Ibid.

<sup>74</sup> Government Code section 3544(b).

<sup>75</sup> Ibid.

<sup>76</sup> Government Code section 3544(a).

<sup>77</sup> Government Code section 3544.1(a).

<sup>78</sup> Government Code section 3544.1(b).

<sup>79</sup> Ibid.

currently in effect a lawful written collective bargaining agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition unless the request for recognition is filed less than one hundred and twenty days (120) but more than ninety (90) days prior to the expiration date of the agreement or the public school employer has, within the previous twelve months, lawfully recognized another employee organization as the exclusive representative of any employees included in the unit described in the request for recognition.<sup>80</sup>

If by January 1, of any school year, no employee organization has made a claim of majority support in an appropriate unit, a majority of employees of an appropriate unit may submit to a public school employer a petition signed by at least a majority of the employees in the appropriate unit requesting a representation election.<sup>81</sup> An employee may sign such a petition though not a member of any employee organization.<sup>82</sup>

Upon the filing of such a petition, the public school employer must immediately post a notice of such request upon all employee bulletin boards at each school or other facility in which the members of the unit claimed to be appropriate are employed.<sup>83</sup>

Any employee organization shall have the right to appear on the ballot if, within fifteen work days after the posting of such notice, it makes the showing of interest showing the support of at least thirty percent of the members of the appropriate unit. Immediately upon expiration of the fifteen work day period following the posting of the notice, the public school employer shall transmit to the PERB the petition and the names of all employee organizations that have the right to appear on the ballot.<sup>84</sup>

A petition may be filed with the PERB, in accordance with its rules and regulations, requesting the PERB to investigate and decide the question of whether employees have selected or wish to select an exclusive representative or to determine the appropriateness of the unit by a public school employer alleging that it doubts the appropriateness of the claimed unit. A petition may also be filed by an employee organization alleging that it has filed a request for recognition as an exclusive representative with the public school employer and that the request has been denied or has not been acted upon within thirty days after the filing of the request or by an employee organization alleging that it has filed a competing claim of representation, or by an employee organization alleging that the employees in an appropriate unit no longer desire a particular employee organization as their exclusive representative provided that such petition is supported by evidence of support from thirty percent of the employees in the negotiating unit indicating support for another organization or lack of support for the incumbent exclusive representative.<sup>85</sup>

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<sup>80</sup> Government Code sections 3544.1(c)(d).

<sup>81</sup> Government Code section 3544.3.

<sup>82</sup> Ibid.

<sup>83</sup> Government Code section 3544.3.

<sup>84</sup> Government Code section 3544.3.

<sup>85</sup> Government Code section 3544.5.

Upon the receipt of a petition, the PERB shall conduct inquiries and investigations or hold any hearing that it deems necessary in order to decide the questions raised by the petition. The determination of the PERB may be based upon the evidence adduced in the inquiries, investigations or hearing.<sup>86</sup> However, if the PERB finds, on the basis of the evidence that a question of representation exists, it shall order that an election be conducted by secret ballot and it shall certify the results of the election on the basis of which ballot choice received a majority of the valid votes cast.<sup>87</sup>

Each ballot must contain an option for employees to indicate that they choose no exclusive representative. Each voter must record any choice on his or her ballot and any ballot upon which there is recorded more than one choice shall be void and shall not be counted for any purpose.<sup>88</sup> If, at the election, no choice on the ballot receives a majority of the votes cast, a runoff election must be conducted.<sup>89</sup>

No election shall be held and the petition shall be dismissed when either of the following occurs:

1. There is in effect a lawful written agreement negotiated by the public school employer and another employee organization covering any employees included in the unit described in the request for recognition, unless the request for recognition is filed less than one hundred and twenty days, but more than ninety days, prior to the expiration of the agreement; or
2. The public school employer has, within the previous twelve months, lawfully recognized an employee organization other than the petitioner as the exclusive representative of any employees included in the unit described in the petition.<sup>90</sup>

The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating is required to fairly represent each and every employee in the appropriate unit.<sup>91</sup>

## **THE BARGAINING UNIT**

In each case where the appropriateness of the unit is an issue, the PERB will decide the question of appropriateness on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization and the effect of the size of the unit on the efficient operation of the school district.<sup>92</sup> In all cases, a negotiating unit that includes

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<sup>86</sup> Government Code section 3544.7(a).

<sup>87</sup> Ibid.

<sup>88</sup> Government Code section 3544.7(a).

<sup>89</sup> Ibid.

<sup>90</sup> Government Code section 3544.7(b).

<sup>91</sup> Government Code section 3544.9.

<sup>92</sup> Government Code section 3545(a).

classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer except management employees, supervisory employees, and confidential employees.<sup>93</sup>

Management employees are employees in a position having significant responsibilities for formulating district policies or administering district programs and are designated by the public school employer as management employees subject to review by the PERB.<sup>94</sup> Supervisory employees are employees, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or the responsibility to assign work to and direct other employees or to adjust their grievances, or effectively recommend such action, if, in connection with these functions, the exercise of that authority is not of a merely routine or clerical nature but requires the use of independent judgment.<sup>95</sup> Confidential employees are employees who are required to develop or present management positions with respect to employer-employee relations or whose duties normally require access to confidential information that is used to contribute significantly to the development of management positions.<sup>96</sup>

A negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees employed by the district. Supervisory employees shall not be represented by the same employee organization as employees whom the supervisory employee supervises.<sup>97</sup> In addition, classified employees and certificated employees are required to be in separate negotiating units.<sup>98</sup>

No employer or employee organization shall have the right to judicial review of a unit determination except when the PERB in response to a petition from an employer or employee organization agrees that the case is one of special importance and the PERB joins in the request for such judicial review or when the issue is raised as the defense to an unfair labor practice complaint.<sup>99</sup> A PERB order directing an election shall not be stayed pending judicial review.<sup>100</sup>

The prohibition against classified employees and certificated employees being included in the same negotiating unit has been interpreted by the Attorney General to mean that classified supervisory employees and certificated supervisory employees may not be in the same negotiating unit despite the somewhat contradictory provision that states that a negotiating unit of supervisory employees shall not be appropriate unless it includes all supervisory employees

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<sup>93</sup> Government Code section 3545(b)(1).

<sup>94</sup> Government Code section 3540.1(g).

<sup>95</sup> Government Code section 3540.1(m).

<sup>96</sup> Government Code section 3540.1(c).

<sup>97</sup> Government Code section 3545(b)(2). Section 3545(c) contains an exception to this general rule. Section 3545(c) states,

“(c) In the case of a district which employs 20 or more supervisory peace officer employees, a negotiating unit of supervisory employees shall be appropriate if it includes any of the following: (1) All supervisory nonpeace officer employees employed by the district and all supervisory peace officer employees employed by the district. (2) All supervisory nonpeace officer employees employed by the district, exclusively. (3) All supervisory peace officer employees employed by the district, exclusively.

A negotiating unit of supervisory employees shall not be represented by the same employee organization as employees whom the supervisory employees supervise.”

<sup>98</sup> Government Code section 3545(b)(3).

<sup>99</sup> Government Code section 3542(a).

<sup>100</sup> Ibid.

employed by the district.<sup>101</sup> Also, the Court of Appeal has held that two bargaining units which are affiliated with the same international union are the same employee organization if either unit actually or potentially exercised substantial control over the others' course of action or if the international union actually or potentially exercises such control over both units.<sup>102</sup>

## **RIGHTS OF EMPLOYEE ORGANIZATIONS**

### **A. Right to Represent Employees**

The EERA provides that employee organizations shall have the right to represent the members in their employment relations with the public school employer, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit, only that employee organization may represent that unit in their employment regulations with the public school employer.<sup>103</sup> Employee organizations may establish reasonable restrictions regarding who may join the organization and may make reasonable provisions for the dismissal of individuals from membership in the employee organization.<sup>104</sup>

Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mail boxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of rights guaranteed under the EERA.<sup>105</sup>

PERB cases interpreting Government Code section 3543.1 and the term "reasonable regulation" have formulated a test to determine if the employer's regulation is reasonable. PERB will review whether the employer's regulation is necessary to the efficient operation of the employer's business and/or the safety of its employees or others and whether the regulation is narrowly drawn to avoid overbroad, unnecessary interference with the exercise of the union's right to communicate with its members.<sup>106</sup>

However, the United States Supreme Court has limited the right of unions to use an employee's internal mail system which delivers mail from site to site where it violates federal postal laws.<sup>107</sup> The Supreme Court's ruling would not prohibit unions from delivering mail to employer mail boxes located at a work site.

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<sup>101</sup> 60 Ops.Atty.Gen. 53 (1977).

<sup>102</sup> Los Angeles Unified School District v. Public Employment Relations Board, 191 Cal.App.3d 551, 237 Cal.Rptr. 278 (1986); see, also, Los Angeles Community College District v. Public Employment Relations Board, 121 Cal.App.3d 389, 175 Cal.Rptr. 223 (1981).

<sup>103</sup> Government Code section 3543.1(a).

<sup>104</sup> *Ibid.*

<sup>105</sup> Government Code section 3543.1(b).

<sup>106</sup> Service Employees International Union v. County of Riverside, 36 PERC 113 (2012).

<sup>107</sup> University of California v. Public Employment Relations Board, 108 S.Ct. 1404 (1988).

## B. Right to Use District Mailboxes

In San Leandro Teachers' Association v. Governing Board of the San Leandro Unified School District,<sup>108</sup> the California Supreme Court held that the provisions of Education Code section 7054, which prohibits the use of district equipment or services to urge the support or defeat of any candidate for election to the governing board of the district, is constitutional.<sup>109</sup> The underlying facts were that the union and the San Leandro Unified School District sought to place two newsletters in the district mailboxes that urge members to support the union-endorsed candidates for school board and to volunteer to phone or walk in support of the endorsed school board candidates. The newsletters were produced at union expense, but the district refused to allow the newsletters to be placed in the district mailboxes.

The union filed an unfair labor practice charge with the PERB alleging that the district violated the provisions of the EERA<sup>110</sup> by prohibiting the union from distributing union newsletters containing its political endorsements via the school mailboxes. The PERB dismissed the unfair labor practice charges. The union then filed an action in Superior Court and the Superior Court ruled in favor of the union. The school district then appealed and the Court of Appeal reversed the Superior Court's decision. The union then appealed to the California Supreme Court.

The California Supreme Court reviewed the language of Education Code section 7054(a) which states:

“No school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including but not limited to, any candidate for election to the governing board of the district.”

The California Supreme Court reviewed the legislative intent of Section 7054 and determined that the Legislature made a finding that the use of public funds in election campaigns is unjustified and inappropriate, and that no public entity should presume to use money derived from the whole of taxpayers to support or oppose ballot measures or candidates.<sup>111</sup> The legislative history indicated that the purpose of the legislation was to repeal the authorization for school board members to use for political purposes district telephones, copy machines, equipment, employees and materials produced with taxpayer monies. The California Supreme Court concluded that the broad term “equipment” was intended to encompass mailboxes, specially constructed at taxpayer expense, to serve as a school's internal communication channel, which one group may not use to its exclusive political advantage. The court held that there is no basis in the language of Section 7054 for concluding that Section 7054 applies to school districts but not employee organizations. The court upheld the district's regulation prohibiting the union from placing political materials in district mailboxes.

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<sup>108</sup> 46 Cal.4<sup>th</sup> 822, 95 Cal.Rptr.3d 164 (2009).

<sup>109</sup> The California Supreme Court's decision affirms an earlier Court of Appeal decision.

<sup>110</sup> Government Code section 3540 et seq.

<sup>111</sup> See, Stats. 1995, ch. 879 (SB 82), Sect. 1. See, also, Stanson v. Mott, 17 Cal.3d 206 (1976).

The court also held that under Education Code section 7058, a school district may make district mailboxes available to all parties to place political materials in the mailboxes. Section 7058 states, “Nothing in this article shall prohibit the use of a forum under the control of the governing board of a school district or a community college district if the forum is made available to all sides on an equitable basis.” However, most districts do not allow their mailboxes to be used for political purposes and the court upheld such a prohibition.

The California Supreme Court also upheld the constitutionality of Section 7054. The court held that under the First Amendment, school mailboxes would be considered nonpublic forums subject to regulation by the district so long as those regulations were viewpoint neutral with respect to the content of what is placed in those mailboxes. The California Supreme Court also held that Section 7054 was constitutional under the California Constitution. The court held that a district may constitutionally determine, under the California Constitution, that internal school mailboxes should be kept free of literature containing endorsements of political candidates.

This decision clarifies the law with respect to the political use of district mailboxes.

### **C. Right to Release Time**

A reasonable number of representatives of an exclusive representative have the right to receive reasonable periods of release time without loss of compensation when meeting and negotiating with the employer and for the processing of grievances.<sup>112</sup> All employee organizations shall have the right to have membership dues deducted, pursuant to the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit and then such deduction shall not be permissible except to the exclusive representative.<sup>113</sup>

### **D. Right to Representation at Meetings**

The right of employee organizations to represent their employees in their employment relations with the public school employer has been interpreted to mean that an employee has the right of representation at a meeting with the employer’s representative where the employee reasonably believes that the meeting or interview may result in disciplinary action against the employee.<sup>114</sup> Employee organizations also have the right to file grievances in their own name to enforce the collective bargaining agreement between the employer and employee organization.<sup>115</sup>

In Ulmschneider v. Los Banos Unified School District,<sup>116</sup> the PERB held that the school district was not required to provide an employee with a union representative during classroom visitations or during the delivery of letters of reprimand to him. The PERB noted that an

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<sup>112</sup> Government Code section 3543.1(c).

<sup>113</sup> Government Code section 3543.1(d).

<sup>114</sup> Redwoods Community College District v. Public Employment Relations Board, 159 Cal.App.3d 617, 205 Cal.Rptr. 523 (1984).

<sup>115</sup> South Bay Union High School District v. Public Employment Relations Board, 228 Cal.App.3d 502, 279 Cal.Rptr. 135 (1991).

<sup>116</sup> 32 PERC 17, PERB Decision No. 1935 (2007).

employee required to meet with the employer is entitled to union representation where the employee requested representation for an investigatory meeting which the employee reasonably believes might result in disciplinary action.<sup>117</sup>

In Service Employees International Union vs. Superior Court,<sup>118</sup> the PERB held that an employee was entitled to union representation at a meeting convened by the employer at the employee's request to discuss reasonable accommodation for the employee's disability. The PERB held that even though a reasonable accommodation meeting is not an investigatory meeting that might result in disciplinary action by the employer, the employee is entitled to union representation.

The PERB noted that the reasonable accommodation interactive process is an informal process to determine how the employee's disability can reasonably be accommodated. The PERB reviewed the interactive process under the California Fair Employment and Housing Act (FEHA) and concluded that the interactive process presents opportunities for a union representative to assist the employee in the process of obtaining an accommodation and that the process can lead to potential tension between reasonable accommodation obligations and seniority provisions in the collective bargaining agreement. Therefore, the PERB concluded that the presence of a union representative in the interactive meetings can assist the employer and employee with possible conflicts between reasonable accommodation and the collective bargaining agreement and assist the employee with the give and take and compromise that is part of the interactive process.

The PERB concluded that the right of representation includes the employee's right to have a representative assist them in the interactive process by attending meetings with the employer. The PERB also held that the union has a concurrent right to represent the employee in the interactive process. However, the union's right to represent the employee in the interactive process attaches only if the employee requests union representation.

In Crowell vs. Berkeley Unified School District,<sup>119</sup> the PERB held that an employee was entitled to union representation in meetings involving the employee's allegations regarding the compliance and viability of the ninth grade curriculum. The employee had expressed concerns about the curriculum and whether the curriculum complied with state standards.

The employee filed an unfair labor practice charge with the PERB alleging that the school district issued poor performance evaluations in retaliation for his raising a complaint about the school district's curriculum. The Office of General Counsel dismissed the unfair labor practice charge ruling that the filing of a complaint regarding educational curriculum does not constitute protected activity under the Educational Employment Relations Act (EERA).<sup>120</sup>

On appeal, the PERB overturned the General Counsel's dismissal and found that the EERA protects employees who file complaints regarding curriculum. The PERB ruled that the

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<sup>117</sup> See, Redwoods Community College District v. Public Employment Relations Board, 159 Cal.App.3d 617 (1984).

<sup>118</sup> PERB Decision No. 2409-C (January 13, 2015).

<sup>119</sup> PERB Decision No. 2411 (February 19, 2015).

<sup>120</sup> Government Code section 3540, et seq.

public school employees have the right to be represented by employee organizations of their choice in both their professional and employment relationships with public school employers. In addition, the PERB held that the EERA provides certificated employees with a voice in the formulation of educational policy. Therefore, it concluded that certificated employees are legitimately concerned about educational policy and academic freedom and the PERB held that the employee's complaint about the ninth grade curriculum was a protected activity.

The rulings in Service Employees International Union and Crowell greatly expand the rights of employees employed by community college districts, school districts and other public agencies.

#### **E. Right to Paid Leave of Absence**

School districts are required to grant to any employee a paid leave of absence to allow the employee to serve as an elected officer of an employee organization. The employee organization is required to reimburse the district.<sup>121</sup> In Tracy Educators' Association v. Superior Court,<sup>122</sup> the Court of Appeal held that a school district may not reject the teacher's leave request so long as the employer organization is willing to reimburse the district for the cost.<sup>123</sup> The effect of the Tracy decision is to void any caps on leave that may have been negotiated by school districts and exclusive representatives. The Tracy decision is limited to certificated employees.<sup>124</sup>

#### **F. Employees Rights During Ongoing Investigation**

In Los Angeles Community College District,<sup>125</sup> the Public Employment Relations Board (PERB) held that a directive prohibiting an employee from contacting faculty, staff or students during a fitness for duty examination constituted an unlawful interference with protected rights. The PERB held that the scope of the directive was overbroad and vague, because it did not define, in a clear manner, the specific conduct it sought to prohibit.

The Los Angeles Community College had sent a letter to the employee advising him that he would be placed on administrative leave while the district initiated a fitness for duty examination. The letter stated, in part, "You are hereby directed not to contact any member of the faculty, staff or students."

The PERB relied in part on a decision by the National Labor Relations Board (NLRB) in Banner Health System, which held that an employer's broad approach to prohibiting employee discussions of ongoing investigations violated employees' rights to engage in concerted activity regarding their working conditions. The PERB found that the letter was so broad that it could interfere with the employee's protected rights to contact the union. The PERB did acknowledge that employers may have the right to demand employee confidentiality during an investigation

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<sup>121</sup> Education Code section 44987(a); Tracy Educators' Association v. Superior Court, 96 Cal.App.4<sup>th</sup> 530 (2002).

<sup>122</sup> 96 Cal.App.4<sup>th</sup> 530 (2002).

<sup>123</sup> Ibid.

<sup>124</sup> Ibid.

<sup>125</sup> PERB Decision No. 2404 (December 24, 2014).

under certain circumstances, to preserve the integrity of the investigation, but that the burden is on the employer to demonstrate that a legitimate justification exists.

### UNION'S DUTY OF FAIR REPRESENTATION

The EERA requires the recognized or certified employee organization, as the exclusive representative, to fairly represent each and every employee in the appropriate unit.<sup>126</sup> This means that the exclusive representative must represent fairly all employees within the bargaining unit regardless of whether they are members of the union or not.<sup>127</sup> While the exclusive representative was required to fairly represent all nonunion members it was not forbidden from making or entering into contracts which might have an unfavorable effect upon some of the employees in the bargaining unit.<sup>128</sup> For example, in the private sector, the United States Supreme Court has upheld the right of a union to agree to give seniority credit for military service to employees who have not worked for the employer prior to their initial employment.<sup>129</sup>

The courts have also held that unions have a duty to process grievances by nonunion workers and the union must continue to act in good faith and without arbitrariness in the preparation and trial of the case before an arbitrator.<sup>130</sup> In Vaca v. Sipes,<sup>131</sup> the United States Supreme Court stated that it was well established that the exclusive representative under the NRLA has a duty to serve the interest of all unit members without hostility or discrimination and to exercise its discretion in good faith and to avoid arbitrary conduct. A union acts unlawfully when it implements a policy of race discrimination when negotiating a new agreement for unit members or when processing or refusing to process grievances.<sup>132</sup> The union may not refuse to process a grievance based on personal property animosity or other arbitrary reasons but may decline to initiate a grievance or settle it short of arbitration, if the union's decision is made in good faith on the merits of the employee's claim.<sup>133</sup>

Compensatory damages may be awarded against the union for its breach of the duty of fair representation.<sup>134</sup> However, damages attributable solely to the employer's breach of contract should not be charged to the union but increases, if any, of those damages caused by the union's refusal to process the grievance should not be charged to the employer but to the union.<sup>135</sup>

In the private sector, the NLRB may issue a cease and desist order against a union for violating its duties of fair representation.<sup>136</sup> Under the EERA, violation of the duty of fair representation may constitute an unfair labor practice and the PERB would have the exclusive

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<sup>126</sup> Government Code section 3544.9.

<sup>127</sup> See, Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

<sup>128</sup> Ibid.

<sup>129</sup> Ford Motor Company v. Huffman, 345 U.S. 330 (1953).

<sup>130</sup> Humphrey v. Moore, 375 U.S. 335 (1964); Conley v. Gibson, 355 U.S. 41 (1957); Hines v. Anchor Motor Freight, Inc., 96 S.Ct. 1048 (1976).

<sup>131</sup> 386 U.S. 171 (1976).

<sup>132</sup> Steele v. Louisville & N.R.R., 323 U.S. 192 (1944).

<sup>133</sup> Local 13, Longshoremen v. Pacific Maritime Association, 454 F.2d 262 (9<sup>th</sup> Cir. 1971).

<sup>134</sup> Vaca v. Sipes, 386 U.S. 171, 197 (1976).

<sup>135</sup> Vaca v. Sipes, 386 U.S. 171, 197-198 (1976).

<sup>136</sup> Local 1367, Longshoremen, 148 N.L.R.B. 897 (1964), enforced per curiam, 368 F.2d 1010 (5<sup>th</sup> Cir. 1966).

jurisdiction to determine if such unfair practices exist and if so, the PERB would be authorized to formulate a remedy to correct the situation.<sup>137</sup>

## ORGANIZATIONAL SECURITY

### A. Statutory Provisions

The EERA requires any public school employee who is in a unit for which an exclusive representative has been selected shall be required, as a condition of continued employment, either to join the recognized employee organization or to pay the organization a fair share service fee. The amount of the fee shall not exceed the dues that are payable by members of the employee organization, and shall cover the costs of the negotiation, contract administration and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Upon notification to the employer by the exclusive representative, the amount of the fee shall be deducted by the employer from the wages or salary of the employee and paid to the employee organization.<sup>138</sup>

This agency fee arrangement may be rescinded by a majority vote of all the employees in the bargaining units subject to the arrangement, if a request for a vote is supported by a petition containing thirty percent of the employees in the unit.<sup>139</sup>

Any employee who is a member of a religious body whose traditional tenets or teachings include objections to joining or financially supporting employee organizations shall not be required to join, maintain membership in, or financially support that employee organization as a condition of employment except that such employee may be required, in lieu of a service fee, to pay sums equal to such service fee either to a nonreligious nonlabor organization charitable fund exempt from taxation under the Internal Revenue Code chosen by such employee from a list of at least three such funds designated in the organizational security agreement or if the agreement fails to designate such funds, to any fund chosen by the employee.<sup>140</sup> Either the employee organization or the public school employer may require that proof of such payments be made on an annual basis to the public school employer as a condition of continued exemption from the requirement of financial support to the recognized employee organization. If such employee who holds conscientious objections requests the employee organization to use the grievance procedure or arbitration procedure on the employee's behalf, the employee organization is authorized to charge the employee for the reasonable cost of using the grievance procedure or arbitration procedure.<sup>141</sup>

Every recognized or certified employee organization is required to keep an adequate itemized record of its financial transactions and must make available annually, to the PERB and to the employees who are members of the organization, within sixty days after the end of its

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<sup>137</sup> Los Angeles Council of School Nurses v. Los Angeles Unified School District, 113 Cal.App.3d 666, 672, 169 Cal.Rptr. 893 (1980).

<sup>138</sup> Government Code section 3546(a).

<sup>139</sup> Government Code section 3546(d).

<sup>140</sup> Government Code section 3546.3.

<sup>141</sup> *Ibid.*

fiscal year, a detailed written financial report in the form of a balance sheet and an operating statement, signed and certified as to its accuracy by the president and treasurer or corresponding principal officers.<sup>142</sup> In the event of failure of compliance, any employee within the organization may petition the PERB for an order compelling such compliance or the PERB may issue such a compliance order on its own motion.<sup>143</sup>

The EERA defines organizational security as either of the following:

1. An arrangement pursuant to which a public school employee may decide whether or not to join an employee organization, but which requires him or her, as a condition of continued employment, if he or she does join, to maintain his or her membership in good standing for the duration of the written agreement. However, no such arrangement shall deprive the employee of the right to terminate his or her obligation to the employee organization within the period of thirty (30) days following the expiration of a written agreement.
2. An arrangement that requires an employee, as a condition of continued employment, either to join the recognized or certified employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of the organization for the duration of the agreement, or a period of three years from the effective date of the agreement, whichever comes first.<sup>144</sup>

In addition, all employee organizations have the right to have membership dues deducted pursuant to the Education Code until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit. When an employee organization becomes the exclusive representative it then shall have the sole right to have membership dues deducted.<sup>145</sup>

When an employee organization has been decertified an employer is no longer obligated to deduct membership dues.<sup>146</sup> The PERB has held that nonmembers of a union which represents the bargaining unit are bound by all provisions of a contract including the obligations to pay agency fees.<sup>147</sup>

## **B. Constitutionality of Agency Fee Arrangements**

The United States Supreme Court has upheld the constitutionality of agency fee arrangements in the public sector.<sup>148</sup> However, the amount of the agency fee and the appropriate

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<sup>142</sup> Government Code section 3546.5.

<sup>143</sup> Ibid.

<sup>144</sup> Government Code section 354.0.1(i).

<sup>145</sup> Government Code section 3543.1(d).

<sup>146</sup> San Mateo Community College District, PERB Dec. No. 543, 10 PERC 17015 (1985).

<sup>147</sup> Simi Valley Educators Association, PERB Dec. No. 315, 7 PERC 14164 (1983).

<sup>148</sup> Aboud v. Detroit Board of Education, 431 U.S. 209 (1977).

procedure to protect the constitutional rights of nonmembers continues to be litigated. In Chicago Teachers Union, Local No. 1 v. Hudson,<sup>149</sup> the United States Supreme Court held:

1. The exclusive representative must establish a procedure, prior to requiring an agency fee, which will avoid the risk that nonmembers' funds will be used, even on a temporary basis, to finance ideological or political activities unrelated to collective bargaining.
2. Nonmembers must be given sufficient information as to the amount of the agency fee so as to be able to evaluate the propriety of the amount of the exclusive bargaining representatives' agency fee.
3. The exclusive representative must provide a procedure whereby a nonmember can object to the amount of the agency fee. The procedure must provide for a reasonably prompt decision by an impartial decision maker and placement of the disputed funds in escrow while the matter is pending.

In Knox v. Service Employees International Union,<sup>150</sup> the United States Supreme Court held that the First Amendment required a union to provide nonmembers with a new Hudson Notice regarding its special assessment and that the union violated the First Amendment rights of objecting nonmembers by requiring them to pay 56.35% of the special assessment.

In June 2005, this Service Employees International Union, (SEIU), sent out its regular Hudson Notice informing employees what the agency fee would be for the year ahead. The notice set monthly dues at 1% of an employee's gross monthly salary that capped monthly dues at \$45.00. Based on the most recently audited year, the SEIU estimated that 56.35% of its total expenditures in the coming year would be dedicated to chargeable collective bargaining activities. Thus, if the nonunion employee objected within 30 days to payment of the full amount of union dues, the objecting employee was required to pay only 56.35% of total dues.<sup>151</sup>

During this time, the citizens of the State of California were engaged in a wide range of political debate regarding state budget deficits. On June 13, 2005, Governor Arnold Schwarzenegger called for special election to be held in November 2005 where voters would consider various ballot propositions aimed at state level structural reforms. Two of the controversial issues on the ballot would have required unions to obtain employees affirmative consent before charging them fees to be used for political purposes and would have limited state spending. The SEIU joined a coalition of public sector unions vigorously opposing these measures and raised more than ten million dollars.<sup>152</sup>

On July 30, 2005, shortly after the end of the thirty-day objection period for the June Hudson Notice, the SEIU proposed a temporary twenty-five percent increase in employee fees.

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<sup>149</sup> 106 S.Ct. 1066 (1986).

<sup>150</sup> 132 S.Ct. 2277 (2012).

<sup>151</sup> Id. at 2285.

<sup>152</sup> Id. at 2285.

The proposal stated that the money was needed to achieve the union's political objectives in the November 2005 election and in the November 2006 election. The money would be used for a broad range of political expenses including television and radio advertising, direct mail, voter registration, voter education, and get out the vote activities.<sup>153</sup>

On August 27, 2005, the SEIU's General Council voted to implement the proposal by raising their fees to 1.25% of gross monthly salary and the \$45.00 per month cap on regular dues would not apply. After receiving this notice, one of the plaintiffs in the case called the SEIU's office to complain that the union was levying the special assessment for political purposes without giving employees a fair opportunity to object. Petitioners filed a class action lawsuit on behalf of 28,000 nonunion employees who were required to contribute money to the special assessment fund.<sup>154</sup>

The Supreme Court concluded that a second Hudson Notice should have been sent to the employees to give them an opportunity to object. The Court found no justification for the union's failure to send a second Hudson Notice. The Court noted that Chicago Teachers Union rests on the principle that nonmembers should not be required to fund a union's political and ideological projects unless they choose to do so after having a fair opportunity to assess the impact of paying for nonchargeable union activities. The court observed that a nonunion member cannot make an informed choice about a special assessment or dues increase that is unknown when the annual notice is sent.<sup>155</sup>

The Court held that when a union levies a special assessment or raises dues as a result of unexpected developments, the factors influencing a nonmember's choice may change. In particular, a nonmember may take special exception to the uses for which the additional funds are sought. The Court concluded, "Therefore, when a public sector union imposes a special assessment or dues increase, the union must provide a fresh Hudson Notice and may not exact any funds from nonmembers without their affirmative consent."<sup>156</sup>

In Davenport v. Washington Education Association,<sup>157</sup> the United States Supreme Court held that the state of Washington did not violate the First Amendment when state legislation required that its public sector labor unions receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes. The decision will not have an immediate impact in California since California does not have a similar statute.

In prior decisions, the United States Supreme Court has upheld agency fee arrangements, but has held that public sector unions are constitutionally prohibited under the First Amendment from using agency fees of objecting nonmembers for ideological purposes that are not relevant to the union's collective bargaining duties.<sup>158</sup> In Chicago Teachers Union, the U. S. Supreme Court established procedural requirements that public sector unions collecting agency fees must

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<sup>153</sup> Id. at 2285-86.

<sup>154</sup> Id. at 2286.

<sup>155</sup> Id. at 2294-95.

<sup>156</sup> Id. at 2296.

<sup>157</sup> 172 S.Ct.2372, 551 U.S. 177 (2007).

<sup>158</sup> See, Abood v. Detroit Board of Education, 431 U.S. 209, 235-236, 97 S.Ct. 1782 (1977); Chicago Teachers Union, Local #1 v. Hudson, 475 U.S. 292, 302, 304-310, 106 S.Ct. 1066 (1986).

observe in order to ensure that an objecting nonmember can prevent the use of the agency fee for impermissible ideological purposes. In the state of Washington, Washington law allows the union to charge nonmembers an agency fee equivalent to the full membership dues of the union and to have this fee collected by the employer through payroll deductions. However, Washington state law prohibits the use of agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee unless affirmatively authorized by the individual.<sup>159</sup>

There is no similar statute in California. California law authorizes agency fee arrangements and authorizes payroll deduction for the amount of the fair share services rather than the entire membership fee. The amount of the fee cannot exceed the dues that are payable by members of the employee organization, and must cover the cost of negotiation, contract administration, and other activities of the employee organization that are germane to its functions as the exclusive bargaining representative. Agency fee payers have the right to receive a rate rebate or fee reduction, upon request, of that portion of their fee that is not devoted to the cost of negotiations, contract administration, and other activities of the employee organization that are germane to its function as the exclusive bargaining representative.<sup>160</sup>

In summary, the United States Supreme Court held that the state of Washington did not violate the First Amendment when it enacted a statute which required public sector labor unions to obtain the consent of nonmembers before using agency shop fees of a nonmember for election-related purposes. In California, affirmative consent is not required but nonmember employees have the right to request a rebate or fee reduction for that portion of the fees that is used for election or political purposes.

### **C. Challenges to Agency Fee Arrangements**

In Bissell v. Public Employment Relations Board,<sup>161</sup> the Court of Appeal held that a rival employee organization or an individual employee do not have standing to challenge a security agreement election. The Court of Appeal held that the authority to challenge the election is confined to either party to that election, the employer and the exclusive representative.

In Link v. Antioch Unified School District,<sup>162</sup> the Court of Appeal held that employees wishing to challenge an agency fee provision must file their complaint with the PERB since the PERB has initial jurisdiction over these matters. However, in San Lorenzo Education Association v. Wilson,<sup>163</sup> the California Supreme Court held that a teachers' union was not required to exhaust its administrative remedies with the PERB and could file a civil action against teachers who refuse to either join the union or pay the union a service fee as required by an organizational security provision in the collective bargaining agreement.

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<sup>159</sup> Wash. Rev. Code section 42.17.760.

<sup>160</sup> Government Code section 3546(a).

<sup>161</sup> 189 Cal.App.3d 878, 167 Cal.Rptr. 498 (1980).

<sup>162</sup> 142 Cal.App.3d 765, 191 Cal.Rptr. 264 (1983).

<sup>163</sup> 32 Cal.3d 841, 187 Cal.Rptr. 432 (1982).

#### **D. Use of Agency Fees for Political Purposes**

In Cumero v. Public Employment Relations Board,<sup>164</sup> the California Supreme Court held that the EERA forbids any use of an agency fee, over a non-member's objection, for activities beyond the organization's representational obligations (e.g., lobbying and election expenses, as well as the cost of recruiting new members). The California Supreme Court held that a union's authorized affiliate may spend agency fee funds in support of the organization's representational obligations and that the organization has the burden of proving which of its expenses, including funds extended through its affiliates, are chargeable to dissenting employees. The court also upheld the organization's right under the EERA to the collection of the fees through involuntary payroll deductions pursuant to the union's agreement with the employer.

William J. Cumero was a high school teacher employed by the King City Joint Union High School District. As of September 1, 1977, the District and the union, pursuant to the EERA, entered into a collective bargaining agreement that included an organizational security arrangement. The agreement provided for mandatory deduction of the service fee from the paycheck of any non-member teacher.<sup>165</sup>

Cumero charged that the amount of the service fee violated the EERA because it exceeded the association's cost of performing its representational obligations to him as a nonmember. The California Supreme Court held that since the union may not negotiate with the employer over matters outside the scope of representation and, in particular, may not negotiate over any contract proposal that would conflict with the Education Code, the costs of lobbying efforts to change the Education Code or other state statutes or campaigning for or against local or state ballot propositions were outside the union's representational obligations under the EERA and, therefore, these costs cannot be charged against the fees of objecting nonmembers.<sup>166</sup>

The court based its decision on statutory grounds rather than constitutional grounds and noted that some lobbying may be permitted under the First Amendment.<sup>167</sup> The court noted that the costs of organizing and recruiting activities are chargeable to nonmember service fees only to the extent those activities are normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.<sup>168</sup>

In essence, the union has a duty to inform, exchange ideas, and communicate with union members regarding the union's activities and plans for carrying out its representational duties.<sup>169</sup> However, the union has no EERA obligation to persuade nonmembers to become members, and therefore, these costs are not chargeable to nonmember service fees.<sup>170</sup> The court ruled that service fees could be paid to affiliated unions at the state and national level and would be subject to the same test as the local union.<sup>171</sup> The court cited Chicago Teachers Union, Local #1 v.

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<sup>164</sup> 49 Cal.3d 575, 581-582, 262 Cal.Rptr. 46 (1989).

<sup>165</sup> Id. at 582.

<sup>166</sup> Cumero at 594.

<sup>167</sup> Id. at 594-595

<sup>168</sup> Id. at 600.

<sup>169</sup> Id. at 600.

<sup>170</sup> Id. at 601.

<sup>171</sup> Id. at 604.

Hudson, and reiterated that the union has the burden of proof to show service fees are being properly expended.<sup>172</sup>

In Grunwald v. San Bernardino City Unified School District,<sup>173</sup> the Court of Appeals ruled that the union was required to reduce the amount of agency fees collected by it and was required to give notice and adequate information concerning agency fees to all nonmembers before any fees could be deducted from the nonmembers' paychecks.

The teachers in Grunwald claimed that the San Bernardino Teachers' Association (SBTA) procedure for collecting agency fees was unconstitutional. The SBTA procedure provided that from the start of the year all agency fees were to be placed into an independently managed interest bearing escrow account. By October 15th a notice was sent to all fee payers. The notice advised them of their right to receive a rebate for the portion of the fee that was not attributable to collective bargaining expenses and explained how the fee payer could request a rebate.

The objection procedure required the teacher to send a letter to the California Teachers' Association, Membership Accounting Department. The notice also provided SBTA's calculation of the percentage of dues that the SBTA believed to be chargeable with detailed backup material.<sup>174</sup>

The notice explained that from the start of the school year the SBTA would place all agency fees received into escrow but that an individual's fees would be released from escrow if he or she did not submit an objection by November 15th. If the individual did object, he or she might either accept the SBTA's calculation of the chargeable percentage in which case a rebate was issued by December 7th for the entire year or request the opportunity to have the amount of the fee determined in arbitration before a neutral decision maker. In such cases, a rebate check would not be sent until after receipt of the arbitrator's decision.<sup>175</sup>

The Court of Appeals reviewed the SBTA procedure and held that advance reductions of agency shop fees amounting to 100% of union dues violated the requirements of Chicago Teachers Union. The court held that SBTA can only deduct a reasonable estimate of the percentage of fees attributable to collective bargaining. The court further held that adequate information concerning the agency fee must be given to all nonmembers before any fees may be collected from them.<sup>176</sup>

## **E. Liability of District for Improper Agency Fees**

In Foster v. Mahdesian,<sup>177</sup> the Court of Appeals ruled that under certain circumstances, a public sector employer is not liable for a union's failure to provide a non-union employee with

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<sup>172</sup> Id. at 605.

<sup>173</sup> 917 F.2d 1223 (9<sup>th</sup> Cir. 1990).

<sup>174</sup> Grunwald at 1225.

<sup>175</sup> Id. at 1225.

<sup>176</sup> Id. at 1228.

<sup>177</sup> 268 F.3d 689 (9<sup>th</sup> Cir. 2001).

an appropriate explanation of the basis for agency fees paid by the non-union employee to the union.

Under California collective bargaining laws,<sup>178</sup> public employees who are not members of their local teachers' union can be required to pay agency fees to the local union. Agency fees are designed to compensate unions for the benefits non-union employees receive from collective bargaining and are automatically deducted from the non-union employees' paychecks by their school district employers and transferred to the unions. Since unions many times engage in activities unrelated to collective bargaining, such as contributing to political candidates and ideological causes, non-union employees who pay agency fees may not be required to support such activities. Non-union employees may only be charged a pro rata share of the union's expenditures on activities that relate to representation in the collective bargaining process. To ensure that agency fee payers are not required to pay fees in excess of those properly chargeable, the courts have established three procedural protections.

First, agency fee payers are entitled to an adequate explanation of the basis for the fee, which includes the major categories of expenses as well as verification by an independent auditor. This explanation is called a "Hudson Notice" based on the holding of the United States Supreme Court in Chicago Teachers Union.<sup>179</sup> Second, unions must provide agency fee payers with a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker. And third, unions must create an escrow account for the amounts reasonably in dispute while such challenges are pending.

The District Court found that in the Foster case, the unions failed to meet Chicago Teachers Union's first requirement, provision of an adequate notice. The plaintiff non-union employees sued not only the union but also the district superintendents. The plaintiffs claimed and the District Court held that the superintendents had a legal duty to ensure that the union complies with the Hudson Notice requirement before deducting any agency fees. The district superintendents appealed.<sup>180</sup>

The Court of Appeals reversed the decision of the District Court and held that the district superintendents were not liable. The Court cited its prior opinion in Knight v. Kenai Peninsula Borough School District.<sup>181</sup> The Court held that the routine collection of agency fees did not trigger a duty on the part of the employer to ensure that every employee has received a proper Hudson Notice. The court held:

"Although employers certainly owe nonunion member employees the general duty set forth in Hudson of ensuring that procedures exist 'that minimize impingement and that facilitate a nonunion employee's ability to protect his rights' . . . they owe no specific duty to employees to ensure that a proper Hudson notice is received by each employee before agency fees are deducted.

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<sup>178</sup> Government Code section 3540 et seq.

<sup>179</sup> 475 U.S. 292 (1996).

<sup>180</sup> 268 F.3d 689, 692 (9<sup>th</sup> Cir. 2001).

<sup>181</sup> 131 F.3d 807 (9<sup>th</sup> Cir. 1997).

Action more serious than the routine collection of fees is required before the duty discussed in Knight is triggered.”<sup>182</sup>

The Court of Appeal’s decision in Foster should be very beneficial to community college districts, school districts, and regional occupational programs, and reduce the possibility of liability in many of these situations.

## SCOPE OF BARGAINING

### A. Statutory Provisions

The EERA states that the scope of representation or scope of bargaining is limited to matters relating to wages, hours of employment and other terms and conditions of employment. Terms and conditions of employment are defined as health and welfare benefits, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security, and procedures for processing grievances.<sup>183</sup> In addition, certificated school district employees have the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum and the selection of textbooks to the extent such matters are within the discretion of the public school employer. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating provided that nothing in the EERA may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.<sup>184</sup>

In recent years, the EERA has been amended to state that the public school employer and the exclusive representative shall, upon the request of either party, meet and negotiate regarding causes and procedures for disciplinary action, other than dismissal, including a suspension of pay for up to fifteen days, affecting certificated employees. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Education Code section 44944 which govern dismissal and suspension shall apply.<sup>185</sup>

The EERA also has been amended to state that the public school employer and the exclusive representative shall, upon the request of either party, meet and negotiate regarding procedures and criteria for the layoff of certificated employees. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Education Code section 44955 which govern the layoff of certificated employees shall apply.<sup>186</sup>

The public school employee and exclusive representative shall, upon the request of either party, meet and negotiate regarding the payment of additional compensation based upon criteria other than years of training and years of experience. If the public school employer and the

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<sup>182</sup> 268 F.3d 689, 694 (9<sup>th</sup> Cir. 2001).

<sup>183</sup> Government Code section 3543.2(a).

<sup>184</sup> Government Code section 3543.2(a).

<sup>185</sup> Government Code section 3543.2(b).

<sup>186</sup> Government Code section 3543.2(c).

exclusive representative do not reach mutual agreement, then the provisions of Education Code section 45028 which govern the salary criteria for certificated employees shall apply.<sup>187</sup>

On September 29, 2014, Governor Brown signed Assembly Bill 1611,<sup>188</sup> effective January 1, 2015. AB 1611 amends Government Code section 3543.2 regarding the scope of representation. Matters within the scope of representation must be negotiated with the employee unions.

Government Code section 3543.2(a)(2), as amended, states that a public school employer shall give reasonable written notice to the exclusive representative of the public school employer's intent to make any changes to matters within the scope of representation of the employees represented by the exclusive representative for purposes of providing the exclusive representative a reasonable amount of time to negotiate with the public school employer regarding the proposed changes. This change to the law will make it more difficult for public school employers to make any unilateral changes without first advising the union. In some cases, it will be difficult to determine whether a matter is within the scope of representation and whether reasonable written notice to the union must be given.

The scope of representation, pursuant to Government Code section 3543.2(a)(1) includes wages, hours of employment, health and welfare benefits, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security, procedures for processing grievances, the layoff of probationary certificated employees, and alternative compensation or benefits for employees adversely affected by certain pension limitations. The Public Employment Relations Board has broadly interpreted these requirements to include decisions which may be related to these terms and conditions of employment.

## **B. The California Supreme Court's Definition of the Scope of Bargaining**

In San Mateo City School District v. Public Employment Relations Board,<sup>189</sup> the California Supreme Court held that a subject is negotiable even though not specifically enumerated in the EERA if it is logically and reasonably related to hours, wages or an enumerated term and condition of employment. The California Supreme Court upheld the test formulated by the PERB and remanded the matter back to the PERB to determine whether specific subjects raised in the underlying case were within the scope of bargaining.<sup>190</sup>

The California Supreme Court also held that provisions in the Education Code which cover employee work conditions preempted the employer's duty to negotiate the subject only where such provisions leave no room for discretionary action by the employer. Where a contract proposal would replace or set aside a section of the Education Code it is nonnegotiable.<sup>191</sup>

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<sup>187</sup> Government Code section 3543.2(d).

<sup>188</sup> Stats. 2014, ch. 801.

<sup>189</sup> 33 Cal.3d 850, 191 Cal.Rptr. 800 (1983).

<sup>190</sup> *Ibid.*

<sup>191</sup> *Id.* at 866.

On remand, the PERB held that an employer may not refuse to discuss proposals which are vague or ambiguous but that the employer must make a good faith effort to seek clarification of the proposal from the union. The employer must state the reasons for believing the proposal to be outside the scope of bargaining and allow a clarification to be presented. If the proposal contains provisions which are within the scope of bargaining, the employer must bargain over the provisions which are within the scope of bargaining.<sup>192</sup>

On remand, the PERB applied the test approved by the California Supreme Court to evaluate bargaining proposals affecting both classified employees and certificated employees. The PERB held that the union's proposals relating to access to employees, access to personnel records, release time, duties of job representatives, employee uniforms, materials and supplies, employee achievement awards, hold harmless clauses requiring the school district to pay for the cost of defending employees, retroactive seniority accrual, student workers, distribution of job description, promotional procedures, job classifications, determination of the salary of reclassified positions, rights of reclassified employees, demotions in lieu of layoff, reduction of hours in lieu of layoff, layoff procedures, voluntary demotion in lieu of layoff, retirement in lieu of layoff, updating of the seniority roster, notification of reemployment opportunities, remedies for improper layoff, disciplinary procedures, assignment of overtime for bus drivers, in service training for employees, tuition reimbursement for employees, subcontracting of bargaining unit work without union consent, and increasing the length of the teachers' instructional day and decreasing the preparation time to be mandatory subjects of bargaining.<sup>193</sup>

### **C. Subsequent PERB Decisions – Scope of Bargaining**

In other cases, the PERB has held that union proposals relating to affirmative action,<sup>194</sup> the amount of the agency fee,<sup>195</sup> assignment of counselors to teaching positions,<sup>196</sup> class size, case load of counselors, extra duties, stipends for extra duties, identity of the health insurance carrier, holidays, leaves of absence, lesson plans, no strike clauses, overtime pay, the work load of psychologists, transfers and reclassification, the transfer of work out of the bargaining unit, vacations, and work days, are mandatory subjects of bargaining.<sup>197</sup>

PERB has held that the contracting out of unit work (e.g., the removal of existing work performed by employees in the bargaining unit and assignment of the work to an independent contractor) is within the scope of bargaining under the EERA. PERB held that where unit and nonunit employees have previously performed some of the same duties, the employer does not violate the duty to bargain merely by increasing the quantity of work that the nonunit employees perform even if the amount of work performed by unit employees is thereby decreased.<sup>198</sup>

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<sup>192</sup> Healdsburg Union High School District v. San Mateo City School District, PERB Dec. No. 375, 8 PERC 15021 (1984).

<sup>193</sup> San Mateo City School District, 8 PERC 15021 (1984).

<sup>194</sup> Healdsburg Union High School District v. San Mateo City School District, PERB Dec. No. 375, p. 11, 8 PERC 15021 (1984).

<sup>195</sup> Fresno Unified School District, PERB Dec. No. 208, 6 PERC 13110 (1982).

<sup>196</sup> Rio Hondo Community College District, PERC Dec. No. 279, 7 PERC 14036 (1982).

<sup>197</sup> Moreno Valley Unified School District v. PERB, 142 Cal.App.3d 191 (1983); Rio Hondo Community College District, PERB Dec. No. 279, 7 PERC 14036 (1982).

<sup>198</sup> Beverly Hills Unified School District, 14 PERC 21042 (1990); Eureka City School District, 9 PERC 16060 (1985).

A proposal by a union to arbitrate the dismissal of probationary certificated employees was held to conflict with the provisions of the Education Code and was, therefore, not negotiable. Similarly, a proposal to arbitrate the dismissal of classified employees was held not to be negotiable since it conflicted with the Education Code.<sup>199</sup>

The PERB held that a school district's agreement with a classified unit that requires the employer to increase the salary of the bargaining unit if a more favorable salary increase is later negotiated by the certificated unit was not held to be bad faith conduct towards the certificated unit. The California Supreme Court upheld the PERB decision and held that a parity clause is not an improper subject of bargaining and, therefore, not illegal per se under the EERA, but must be decided by the PERB on a case-by-case basis to determine whether a given parity agreement violates the EERA. The California Supreme Court found that parity agreements did not violate the requirement in the EERA that certificated employees and classified employees be in separate bargaining units.<sup>200</sup>

In addition, although certain decisions may be non-negotiable, in many cases the effects of those decisions must be negotiated such as the closing of a school, eliminating services or laying off employees. The Court of Appeal has held that a school employer is required to bargain over the effects of a non-negotiable decision prior to its implementation.

#### **D. Scope of Bargaining - Layoffs**

In International Association of Firefighters v. Public Employment Relations Board,<sup>201</sup> the California Supreme Court held that the City of Richmond was not required to negotiate its decision to layoff firefighters with the firefighters' union.

The California Supreme Court held that when a city, faced with a budget deficit, decides that some firefighters must be laid off as a cost-saving measure, the city is not required to meet and confer with the firefighters' authorized employee representative before making that initial decision. The court held that the city's duty to bargain with the employee representative extends only to the implementation and effects of the lay-off decision, including the number and identity of the employees to be laid off, and the timing of the layoffs.

#### **E. Scope of Bargaining – Dress and Grooming Standards**

The PERB has held that California school districts have a non-negotiable right to adopt a dress and grooming policy for employees.<sup>202</sup> In Inglewood Unified School District,<sup>203</sup> an administrative law judge held that the school district had the non-negotiable managerial prerogative to implement an employee dress code. In Santa Ana Unified School District,<sup>204</sup> an

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<sup>199</sup> United Steelworkers of America v. Board of Education, 162 Cal.App.3d 823, 209 Cal.Rptr. 16 (1984).

<sup>200</sup> Banning Teachers Association v. Public Employment Relations Board, 44 Cal.3d 799 (1988).

<sup>201</sup> 51 Cal.4th 259, 120 Cal.Rptr.3d 117 (2011).

<sup>202</sup> Districts have asked whether a school district may prohibit teachers and other employees from displaying tattoos or body piercings in the workplace. In our opinion, a school district may adopt a policy which prohibits employees from visibly displaying tattoos or body piercings in the workplace or in the presence of students.

<sup>203</sup> 10 PERC 17000 (1985).

<sup>204</sup> 22 PERC 29136 (1998).

administrative law judge found that the district's dress and grooming policy was non-negotiable because the policy did not logically and reasonably relate to enumerated subjects within the scope of bargaining. The administrative law judge rejected the faculty association's argument that the dress code policy was related to the negotiable subject of wages because the employees had to buy new clothes and pay increased cleaning bills. The administrative law judge did find that the district was obligated to negotiate the effects of the policy on negotiable subjects.

#### **F. Scope of Bargaining – Computer Use Policy**

In California Faculty Association v. Trustees of the California State University,<sup>205</sup> the PERB held that the university was not required to meet and negotiate the university's decision to implement a computer use policy at its Monterey Bay campus. PERB held that the decision to implement a computer use or computer resource policy was a managerial policy that was not negotiable. PERB held that the policy was not within the scope of representation.

PERB found that computer use policies were necessary for the university to fulfill its goals, to protect against unauthorized use or hacking, and to protect the entire computer network. PERB went on to state that the university still had a duty to negotiate the effects of the computer use policy, including the effect on the bargaining unit members and its impact on matters within the scope of representation.

#### **G. Scope of Bargaining - Parking**

In California Faculty Association v. Public Employment Relations Board,<sup>206</sup> the Court of Appeal held that the terms and conditions on which an employer makes parking available to its employees involves the employment relationship. The Court of Appeal held that the availability of parking and its costs are matters of concern to employees and the terms and conditions under which parking is available are plainly germane to working conditions. The court noted that the amount of fees employees paid for parking was expressly provided for as a benefit of employment in the collective bargaining agreement. Therefore, the Court of Appeal held that the availability of parking and the cost of parking is within the scope of representation.

The Court of Appeal set aside PERB's decision and remanded the matter back to PERB to conduct further proceedings to determine whether the association established the remaining elements of its unfair labor practice charge.

The passage of the NCLB<sup>207</sup> will impact issues within the scope of bargaining. In particular it is likely that the NCLB will impact issues related to transfer and reassignment, instructional day, instructional year, employee evaluation procedures, class size and staff development.

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<sup>205</sup> 31 PERC 152, PERB Decision No. 1926-H (2007).

<sup>206</sup> 160 Cal.App.4<sup>th</sup> 609 (2008).

<sup>207</sup> 20 U.S.C. Section 6301 et seq.

## **H. Scope of Bargaining – LCFF K-3 Grade Span Adjustment**

Education Code section 42238.02(d)(3)(B) sets forth the statutory requirements under the Local Control Funding Formula (LCFF) for the K-3 Grade Span Adjustment. Section 42238.02(d)(3) sets forth a formula for school districts to reach a goal for making “...progress toward an average class enrollment of not more than 24 pupils for each schoolsite in kindergarten and grades 1 to 3, inclusive, unless a collectively bargained alternative average class enrollment **for each schoolsite** in those grades is agreed to by the school district . . .”<sup>208</sup>

Education Code section 42238.02(d)(3)(D) states that upon full implementation of LCFF, “. . . all school districts shall maintain an average class enrollment for each schoolsite for kindergarten and grades 1 to 3, inclusive, of not more than 24 pupils for each schoolsite in kindergarten and grades 1 to 3, inclusive, unless a collectively bargained alternative ratio is agreed to by the school district.”

The LCFF Frequently Asked Questions posted on the California Department of Education’s (CDE) website under K-3 Grade Span Adjustment (page 10 of 12) states that a school district may “. . . agree to a collectively bargained alternative to the statutory K-3 GSA requirements.”

The FAQ goes on to state that the school district can enter into a new collective bargaining agreement, renegotiate an existing collective bargaining agreement, or mutually agree with its local union that an existing collective bargaining agreement contains an alternative annual average class enrollment for each school site. The FAQ indicates that a districtwide average cannot be used and that only a school site average can be used.

We would agree that only a school site average may be collectively bargained since the statutory language above states, “. . . unless a collectively bargained alternative average class enrollment **for each schoolsite** in those grades is agreed to by the school district . . .”

## **I. Scope of Bargaining – Consultation with Teachers’ Union Regarding LCAP and Common Core State Standards**

Government Code section 3543.2 defines the scope of representation or scope of bargaining under the EERA. Section 3543.2(a) states in part, “In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law.”

Generally, consultation or sometimes referred to as “meet and confer” is defined as the free exchange of information, opinions, informal proposals, and recommendations according to orderly procedures and a conscientious effort to incorporate such recommendations into a policy or plan.<sup>209</sup> School districts have been receiving demands to consult from teachers unions over

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<sup>208</sup> [Emphasis added.]

<sup>209</sup> See, San Juan Teachers Association v. San Juan Unified School District, 44 Cal.App.3d 232, 253, 118 Cal.Rptr. 662 (1974).

Common Core State Standards and the Local Control and Accountability Plan (LCAP). While the adoption of Common Core State Standards and the LCAP are not subject to negotiation, school districts and county offices of education should consult with certificated bargaining representatives on the curriculum-related issues involved with Common Core State Standards and LCAP.<sup>210</sup>

In addition, school districts and county offices of education may be required to negotiate the effects or impact of the LCAP or Common Core State Standards if those decisions have an impact on negotiable subjects, such as hours of employment, compensation for professional development, or salaries and wages. For example, teachers may wish to bargain or consult on collaboration time for teachers with respect to the impact of the Common Core State Standards or LCAP.

## **THE NEGOTIATION PROCESS**

### **A. Initial Proposals**

The EERA provides that all initial proposals of exclusive representatives and public school employers, which relate to matters within the scope of representation, must be presented at a public meeting of the public school employer and thereafter are a public record. Meeting and negotiating cannot take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has had the opportunity to express itself regarding the proposal at a meeting of the public school employer. After the public has had the opportunity to express itself, the public school employer shall, at a meeting which is open to the public, adopt its initial proposal.

New subjects of meeting and negotiating arising after the presentation of initial proposals must be made public within twenty four (24) hours. If a vote is taken on any new subject by the public school employer, the vote thereon by each member voting must also be made public within twenty four (24) hours. Before a collective bargaining agreement can be entered into, the major provisions of the agreement, including the costs to the public school employer for current and subsequent fiscal years, must be disclosed at a public meeting in a format prescribed by the State Superintendent of Public Instruction.<sup>211</sup>

### **B. Certification by District Superintendent and Chief Business Official**

The district superintendent and chief business official are required to certify in writing that the costs incurred by the school district under the collective bargaining agreement can be set by the district during the term of the agreement. The certification must itemize any budget revisions necessary to meet the costs of the collective bargaining agreement in each year of its term. If a school district does not adopt all of the revisions to its budget needed in the current fiscal year to meet the costs of a collective bargaining agreement, the county superintendent of

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<sup>210</sup> See, Education Code section 52060(g).

<sup>211</sup> Government Code section 3547.5.

schools is required to issue a qualified or negative certification for the district on the next interim report.<sup>212</sup>

### **C. Qualified Negative Certification**

A school district that has a qualified or negative certification pursuant to Education Code section 42131 is required to allow the county office of education at least ten working days to review and comment on any proposed collective bargaining agreement. The county superintendent of schools is required to notify the school district, district superintendent, governing board of the school district and the county board of education within ten working days if, in his or her opinion, the agreement would endanger the fiscal well-being of the school district. The Superintendent of Public Instruction is required to review the collective bargaining agreement if it involves a county office of education with a qualified or negative certification and notify the county superintendent of schools and the county board of education if the proposed agreement would endanger the fiscal well-being of the county office of education.<sup>213</sup>

### **D. Closed Session**

Any meeting and negotiating discussion between a public school employer and the exclusive representative, mediation, fact finding or arbitration and any meeting of the public school employer between the public school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives is exempt from the public meeting provisions of the Brown Act and may be held in closed session.<sup>214</sup>

### **E. Negotiations in Good Faith**

The EERA requires the public school employer and the employee organization to meet and negotiate in good faith.<sup>215</sup> The employer's duty to bargain in good faith includes the duty to recognize the union and to bargain in good faith over mandatory subjects of bargaining and respond to union proposals, the duty to bargain in good faith before initiating changes in a current contract or other working conditions, the duty to furnish information relating to bargaining or contract administration and the duty to participate in post bargaining impasse procedures in good faith.<sup>216</sup> The union has the right to initiate the bargaining process in an effort to reach a contract for improved working conditions and the right to require the maintenance of current work conditions unless a change in work conditions is bargained upon.<sup>217</sup> The union has the duty to engage in good faith conduct during the bargaining process including impasse procedures and the duty to respond to the employer's offers to bargain over a proposal to change an existing working condition.<sup>218</sup>

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<sup>212</sup> Government Code section 3547.5.

<sup>213</sup> Government Code section 3540.2.

<sup>214</sup> Government Code section 3549.1.

<sup>215</sup> Government Code sections 3543.5(c), 3543.6(c).

<sup>216</sup> Government Code section 3543.3.

<sup>217</sup> Moreno Valley Unified School District v. Public Employment Relations Board, 142 Cal.App.3d 191 (1983).

<sup>218</sup> Government Code section 3543.6.

Good faith is determined by the PERB on a case-by-case basis. The PERB will review the totality of conduct by the parties or look to see whether a single incident or conduct by one party constitutes a per se violation of the good faith requirement.<sup>219</sup>

In determining whether the totality of the conduct of the parties during the negotiations constitutes a failure to bargain in good faith, the PERB will look to such factors as the failure to meet at reasonable times, failure to make bargaining proposals, failure to agree on any subject, failure to vest authority in the negotiator, refusal to execute an agreement after tentative agreement is reached, delaying and evasive tactics, placing conditions on bargaining proposals or ground rules and making regressive proposals.<sup>220</sup> This does not mean that the employer is required to make concessions on every proposal or required to reach final agreement and, in several cases, PERB has held that where the employer refused to make any concessions on one union proposal the party had acted in good faith.<sup>221</sup>

A union can be found to bargain in bad faith when it refuses to schedule a negotiating session for three and a half months during the summer.<sup>222</sup> An employer's delay of one month between negotiating sessions with respect to the effects of a pending layoff was held to be in bad faith where the employer arrived late and failed to respond to proposals.<sup>223</sup>

Where the employer had refused to negotiate with a tape recorder present, had attempted to limit the number of union negotiators, had made direct communications to employees and had established conditions for negotiations, the PERB reviewed the totality of the circumstances and held that the employer had not negotiated in bad faith.<sup>224</sup> A school district's proposal declining to make a wage increase retroactive when negotiations continued past the expiration of the collective bargaining unit was held not to be regressive bargaining.<sup>225</sup> But when a district makes a negative offer after ten weeks of insisting upon maintenance of the status quo, PERB held the conduct was inconsistent with a desire to reach agreement.<sup>226</sup>

PERB has held that per se violation of the duty to negotiate in good faith occurs when the employer takes unilateral action.<sup>227</sup> Other instances of per se violations of the duty to bargain in good faith are the outright refusal to bargain with the union after a factfinder's report is issued but prior to the completion of impasse, the technical refusal to recognize the union or bargaining unit by refusing to bargain, the refusal to bargain over a proposal which covers a bargainable subject, the bypassing of a union to bargain directly with the employees through verbal or written communications, the insistence on bargaining a nonbargainable subject to impasse and the

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<sup>219</sup> Pajaro Valley Unified School District, PERB Dec. No. 51, 2 PERC 2107 (1978).

<sup>220</sup> San Ramon Valley Unified School District, PERB Dec. No. 111, 3 PERC 10149 (1979).

<sup>221</sup> Oakland Unified School District, PERB Dec. No. 178, 5 PERC 12149 (1981), San Ysidro School District, PERB Dec. No. 134, 4 PERC 11105 (1980); Oakland Unified School District, PERC Dec. No. 275, 7 PERC 14029 (1982).

<sup>222</sup> Gonzalez Union High School District, PERB Dec. No. 480, 9 PERC 16057 (1985).

<sup>223</sup> Oakland Unified School District, PERB Dec. No. 326, 7 PERC 14195 (1983).

<sup>224</sup> Muroc Unified School District, PERB Dec. No. 80, 3 PERC 10004.

<sup>225</sup> Beaumont Unified School District, PERB Dec. No. 429a, 9 PERC 16065 (1985).

<sup>226</sup> Fremont Unified School District, PERB Dec. No. 136, 4 PERC 11118 (1980).

<sup>227</sup> See, NLRB v. Katz, 369 U.S. 736 (1962).

refusal to provide information relevant to the bargaining or contract administration to the union.<sup>228</sup>

However, the PERB has held that the employer has no duty to bargain after the parties have reached tentative agreement and where ratification was pending. The employer had proposed an early retirement benefit in addition to compensation already agreed to in the tentative contract. When the union failed to ratify the proposal, the employer withdrew the early retirement offer and refused further negotiations on the subject. PERB held that the employer had no duty to leave a proposal on the table which would modify an existing agreement provided no unilateral changes in working conditions were implemented.<sup>229</sup>

## **F. Negotiations in Good Faith Following a Declaration of Impasse**

PERB has also held that school district's insistence on a contract provision excluding the union from the first informal grievance step was an unlawful refusal to bargain in good faith and the school district's refusal to negotiate with the teachers' union and provide release time for the union's negotiator after issuance of the factfinder's report was a refusal to negotiate in good faith.<sup>230</sup>

Unlike the NLRA, the EERA includes statutory impasse procedures.<sup>231</sup> The EERA provides that either a public school employer or exclusive representative may declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and may request the PERB to appoint a mediator for the purpose of assisting the parties in reconciling their differences and resolving the dispute on terms which are mutually acceptable. If the PERB determines that an impasse exists, it must, in no event later than five working days after the receipt of the request, appoint a mediator in accordance with its rules.<sup>232</sup> The mediator must then meet with the parties or their representatives either jointly or separately and take such other steps as the mediator may deem appropriate in order to persuade the parties to resolve their differences and reach a mutually acceptable agreement. The services of the mediator, including any per diem fees and actual and necessary travel and subsistence expenses are paid by the PERB without cost to the parties.<sup>233</sup>

The parties may mutually agree upon their own mediation procedure and in the event of such an agreement, the PERB does not appoint its own mediator unless failure to do so would be

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<sup>228</sup> Modesto City Schools District, PERB Dec. No. 291, 7 PERC 14091 (1983); Redondo Beach City School District, PERB Dec. No. 140, 4 PERC 11181 (1980); Muroc Unified School District, PERB Dec. No. 80, 3 PERC 10004 (1978); Lake Elsinore School District, PERB Dec. No. 563, 10 PERC 7062 (1986); Ross School District, PERB Dec. No. 48, 2 PERC 2056 (1978); Stockton Unified School District, PERB Dec. No. 143, 4 PERC 11189 (1980).

<sup>229</sup> Alhambra City and High School District, PERB Dec. No. 560, 10 PERC 17046 (1986).

<sup>230</sup> Modesto City Schools District, PERB Dec. No. 291, 7 PERC 14090 (1983).

<sup>231</sup> Government Code section 3548 et seq.; *See*, also, San Diego Housing Commission v. Public Employment Relations Board, \_\_\_ Cal.App.4th \_\_\_ (2016) (under the Meyers-Milias-Brown Act, Government Code sections 3500, et seq., impasse procedures and fact finding apply to negotiations of any bargainable matter not just negotiation of a comprehensive memorandum of understanding). The ruling in San Diego Housing Commission may also apply to school districts, community college districts and county offices of education as well.

<sup>232</sup> Government Code section 3548.

<sup>233</sup> *Ibid*.

inconsistent with the policies of the EERA.<sup>234</sup> If the parties agree upon their own mediation and procedure, the cost of the services of any appointed mediator, unless appointed by the PERB, including any per diem fees and actual and necessary travel and subsistence expenses, shall be borne equally by the parties.<sup>235</sup>

If the mediator is unable to effect a settlement of the controversy within fifteen days after his appointment then the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel.<sup>236</sup> Within five days after receipt of the written request, either party shall select a person to serve as its member on the fact finding panel. The PERB shall within five days after such selection, select a chairman of the factfinding panel.<sup>237</sup>

The factfinding panel shall, within ten days after its appointment, meet with the parties or their representatives, either jointly or separately and make inquiries and investigations, hold hearings and take such other steps as it may deem appropriate. For the purpose of such hearings, investigations and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. The parties shall furnish the factfinding panel, upon its request, with all records, papers and information in their possession relating to any matter under investigation by or in issue before the panel.<sup>238</sup>

In arriving at the findings and recommendations, the factfinding panel shall consider, weigh and be guided by the following criteria:

1. State and federal laws that are applicable to the employer.
2. Stipulations of the parties.
3. The interest and welfare of the public and the financial ability of the public school employer.
4. Comparison of the wages, hours and conditions of employment of the employers involved in the fact finding proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.
5. The consumer price index for goods and services commonly known as the cost of living.
6. The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other

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<sup>234</sup> Government Code section 3548.

<sup>235</sup> Ibid.

<sup>236</sup> Government Code section 3548.1.

<sup>237</sup> Ibid.

<sup>238</sup> Government Code section 3548.2.

excused time, insurance and pension, medical and hospitalization benefits, the continuity and the stability of employment and all other benefits received.

7. Any other facts, not confined to those specified above which are normally or traditionally taken into consideration in making such findings and recommendations.<sup>239</sup>

If the dispute is not settled within thirty days after the appointment of the factfinding panel, or upon agreement by both parties within a longer period, the factfinding panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted in writing to the parties privately before they are made public. The public school employer shall make such findings and recommendations public within ten days after their receipt.<sup>240</sup>

The cost for the services of the factfinding panel chairperson selected by the PERB shall be borne by the PERB. The cost for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties. Any other mutually incurred costs shall be borne equally by the public school employer and the exclusive representative. Any separately incurred cost for the panel members selected by each party shall be borne by such party.<sup>241</sup>

The EERA provides that a mediator may be appointed for continuing mediation efforts on the basis of the findings of fact and recommended terms of settlement made by the factfinding panel.<sup>242</sup>

The failure of a party to refuse to participate in good faith in the impasse procedures is a violation of the EERA.<sup>243</sup> Where an employer makes unilateral changes in working conditions within the scope of representation during the pendency of impasse procedures, the employer has violated the EERA.<sup>244</sup> Thus, a school district is required to give notice and an opportunity to bargain as to the effects of its decision to eliminate certain positions before implementing unilateral changes during the pendency of impasse procedures.<sup>245</sup>

## **G. Unilateral Implementation of Last, Best, and Final Offer**

In California School Employees' Association v. Los Angeles Unified School District,<sup>246</sup> the Public Employment Relations Board (PERB) ruled that the school district may bargain a proposal over a mandatory subject of bargaining to impasse. However, if no agreement is reached, unilateral implementation upon impasse is not permitted. PERB held that this approach would ensure that when parties fail to reach an agreement on a proposal, a broad discretionary

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<sup>239</sup> Ibid.

<sup>240</sup> Government Code section 3548.3.

<sup>241</sup> Government Code sections 3548.2, 3548.3.

<sup>242</sup> Government Code section 3548.4.

<sup>243</sup> Government Code sections 3543.5(e), 3543.6(d).

<sup>244</sup> Moreno Valley Unified School District v. Public Employment Relations Board, 142 Cal.App.3d 191, 191 Cal.Rptr. 60 (1983).

<sup>245</sup> Ibid.

<sup>246</sup> PERB Case No. 2326 (September 20, 2013).

proposal will not become a way for an employer to make a recurring, unilateral decision over fundamental bargaining subjects by simply imposing its last, best, and final offer.

The California School Employees' Association (CSEA) filed an unfair labor practice charge against the Los Angeles Unified School District, alleging that the school district violated the Educational Employment Relations Act (EERA) by failing and refusing to bargain in good faith in violation of Government Code section 3543.5(c) and by failing and refusing to participate in impasse procedures in good faith in violation of Government Code section 3543.5(e), when, after having been notified by CSEA that CSEA opposed district bargaining proposals.

The dispute arose in the context of negotiations for a successor agreement because the district's proposal was to continue in effect contract language that defined certain reductions in hours and work year bases as a layoff. It also gave the school district unfettered discretion over decisions with respect to such reductions. Through this contract language, the school district sought to retain unilateral control over a mandatory subject of bargaining (i.e., hours of employment). Over CSEA's continuing objection, the school district insisted on the proposal to the point of impasse.

From March 25, 2009 through September 16, 2009, CSEA and the school district were engaged in successor agreement negotiations. After twelve negotiation sessions, the parties reached agreement on all but one issue. Appendix C had been part of the parties' collective bargaining agreement since 1991, but CSEA no longer agreed to its inclusion. CSEA maintained its opposition to inclusion in the successor agreement of Appendix C. The provisions of Appendix C defined reductions in hours of employment as a layoff and gave the school district discretion to make decisions with respect to layoffs.

On January 14, 2010, the parties met with a mediator but were unable to reach agreement with respect to Appendix C.

The EERA requires public school employers and exclusive representatives to meet and negotiate with one another on matters within scope of representation.<sup>247</sup> A decision to reduce hours or an employees' work year is within the scope of representation.<sup>248</sup>

Neither the employer nor the exclusive representative has a duty to bargain with respect to subjects outside the scope of representation. As to these subjects, the parties may negotiate on a permissive basis.<sup>249</sup>

Impasse is defined under the EERA as meaning that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences and positions are so substantial or prolonged that future meetings would be futile.<sup>250</sup>

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<sup>247</sup> Government Code section 3543.3.

<sup>248</sup> Oakland Unified School District, PERB Decision No. 540 (1985); Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District, PERB Decision No. 375 (1984); North Sacramento School District, PERB Decision No. 193 (1981); Pittsburg Unified School District, PERB Decision No. 318 (1983); Eureka City School District, PERB Decision No. 481 (1985).

<sup>249</sup> NLRB v. Woost Division of Borg-Warner Corp., 356 U.S. 342, 349 (1958).

<sup>250</sup> Government Code section 3540.1(f).

PERB has held that an impasse in bargaining exists where the parties have considered each other's proposals and counter-proposals, attempted to narrow the gap of disagreement, and have, nonetheless, reached a point in their negotiations where continued discussion would be futile.<sup>251</sup> When the parties have reached a bona fide impasse in negotiations, the parties are obligated to participate in specified statutory impasse procedures, including mediation and fact finding. The EERA imposes a mutual duty on the parties to participate in good faith in the statutory impasse procedures.<sup>252</sup>

If the impasse procedures are exhausted without breaking the deadlock, the parties remain at impasse. At this point, the employer may take unilateral action to implement the last offer the union has rejected.<sup>253</sup> The terms and conditions so implemented must be reasonably comprehended within the pre-impasse proposals.<sup>254</sup>

In McClatchy Newspaper, the NLRB held that a merit pay proposal was mandatory subject to bargaining on which the employer could lawfully insist to impasse, but that implementation upon impasse was unlawful.<sup>255</sup> The NLRB recognized a narrow exception to the implementation upon impasse rules where implementation would confer on an employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employer's rates of pay.<sup>256</sup>

The NLRB held that impasse is designed to be a temporary circumstance, not a device to allow any party to continue to act unilaterally or to engage in the disparagement of the collective bargaining process.<sup>257</sup> The NLRB held that the employer's ongoing exercise of discretion in setting wage increases and the union's ongoing exclusion from negotiating directly impacts a key term and condition of employment and a primary basis for negotiations, as well as disparaging the union by demonstrating its incapacity to act as the employee's representative in setting terms and conditions of employment.<sup>258</sup> The Court of Appeals affirmed the NLRB's decision.<sup>259</sup>

In Edward S. Quirk Co. v. NLRB,<sup>260</sup> the First Circuit Court of Appeals explained the reason for the exception to the rule allowing employers to impose their last, best, and final offer after impasse as highly pragmatic. The Court of Appeals held that allowing a succession of unilateral changes by the employer, as opposed to an initial change, would make a union seem impotent to its members over time and further undermine the union's bargaining ability by creating uncertainty over prevailing terms. In contrast, permitting one set of unilateral changes per impasse lets the employer make an initial adjustment, but forces the employer to bargain again with the union if it wishes to make further adjustments later.<sup>261</sup>

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<sup>251</sup> Mt. Antonio Community College District, PERB Order No. AD-124 (1981).

<sup>252</sup> Government Code section 3543.5(e).

<sup>253</sup> Public Employment Relations Board v. Modesto City School District, 136 Cal.App.3d 881, 900 (1982); NLRB v. Katz, 369 U.S. 736, 745 (1962).

<sup>254</sup> Ibid.

<sup>255</sup> 321 NLRB 1386 (1996).

<sup>256</sup> Id. at 1388.

<sup>257</sup> Id. at 1390.

<sup>258</sup> Id. at 1391.

<sup>259</sup> McClatchy Newspapers v. NLRB, 131 F.3d 1026 (D.C. Cir. 1997).

<sup>260</sup> 241 F.3d 41, 43 (1<sup>st</sup> Cir. 2001).

<sup>261</sup> Id. at 43.

PERB analyzed the facts in CSEA v. Los Angeles Unified School District with the NLRB precedents in mind. The PERB noted that CSEA consented to the adoption of Appendix C in 1991 and it has been incorporated into every collective bargaining agreement between the parties since that time. Thus, contract language reserving to the school district unfettered managerial discretion to make unilateral decisions regarding reductions in hours, a mandatory subject of bargaining, will continue in effect where the district merely remains firm in its resolve. PERB stated, “The district’s position implies that what the district won at the bargaining table in 1991, through skillful negotiations, the employer retains in perpetuity as a form of entitlement. This type of bargaining conduct replaces bilateralism in decision making with unfettered managerial discretion and unilateral control.”<sup>262</sup>

The PERB held that the school district had an advantage of CSEA that is plainly inimical to the bilateral nature of collective bargaining. Bargaining by the employer for exclusive control of decision making over mandatory subjects, particularly those at the top of a hierarchy, such as wages and hours, test the remedial powers of the PERB. In reviewing the NLRB precedents, the PERB held that the school district did not commit an unfair labor practice by insisting to impasse on the Appendix C language because the Appendix C language, regarding reduction in hours and work year are mandatory subjects of bargaining. Therefore, the school district was privileged to insist on the Appendix C language to the point of impasse and through statutory impasse procedures. However, the PERB held that the school district was not privileged to implement the proposal after the completion of impasse procedures.

The PERB held that unilateral implementation upon impasse of the Appendix C language would be so inherently destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine to break impasse at restore active collective bargaining. The PERB stated, “If we fail to recognize an exception to the post-impasse implementation rule, impasse would become an opportunity to act unilaterally concerning matters within the scope of representation on a recurring basis without regard to the collective bargaining process.”<sup>263</sup>

The PERB stated that this narrow exception functions as a gate at the end of a process that assumes good faith on both sides and is designed to ensure that the employer’s unilateral implementation of its last, best, and final offer does not include a proposal that has a destabilizing effect on the collective bargaining process itself.<sup>264</sup> The PERB stated that without an exception to the post-impasse implementation rule, fundamental principles of collective bargaining would be turned on their head. Impasse, intended as a temporary state, would be status quo in which the employer may take recurring unilateral action. Where the employer has unconstrained authority to adjust employees’ hours to respond to changing conditions, that employer has less motivation to restart collective bargaining. The PERB said that this would be contrary to the fundamental principles of collective bargaining and destructive of the bargaining relationship between the employer and the exclusive representative.<sup>265</sup>

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<sup>262</sup> Id. at 18. PERB’s language raises an interesting question: Would the same principle of entitlement apply where the union retains a provision in perpetuity?

<sup>263</sup> Id. at 19.

<sup>264</sup> Id. at 21.

<sup>265</sup> Id. at 22.

The PERB then remanded the matter for further proceedings consistent with their decision. The PERB imposed their decision prospectively.

Many school districts and community college districts have language defining a layoff as including a reduction in hours. In light of this decision, school districts and community college districts should expect CSEA to object to that definition and reserving their right to bargain the decision and the effects of any reduction in hours or work year.

## **GRIEVANCES AND ARBITRATION**

### **A. The Filing of Grievances**

Any employee may at any time present grievances to his employer and have such grievances adjusted without the intervention of the exclusive representative as long as the adjustment is reached prior to arbitration and the adjustment is not inconsistent with the terms of the written collective bargaining agreement then in effect.<sup>266</sup> The public school employer cannot agree to a resolution of a grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and the exclusive representative has been given the opportunity to file a response.<sup>267</sup>

Employee organizations have the right to represent their members in their employment relations with public school employers including grievances.<sup>268</sup> The exclusive representative may refuse to investigate a grievance, refuse to process a grievance or refuse to provide representation to an individual if its interpretation that the grievance was invalid is found to be reasonable.<sup>269</sup> However, the union may not refuse to submit a grievance to arbitration unless nonunion members pay the cost of arbitration where the collective bargaining agreement did not contain an agency fee provision.<sup>270</sup>

An employee has the protected right to file a grievance pursuant to a collective bargaining agreement.<sup>271</sup> The employer may neither assist an employee in filing a grievance or interfere with the filing of a grievance.<sup>272</sup>

### **B. Employer's Refusal to Agree to Resolution of a Grievance**

The refusal of an employer to agree to resolution of a grievance or to arbitrate that grievance is not an unfair labor practice if the employer's action is based upon a reasonable interpretation of the collective bargaining agreement.<sup>273</sup> However, if the employer repudiates the grievance process by consistently refusing to process grievances or unreasonably delays in

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<sup>266</sup> Government Code section 3543.

<sup>267</sup> Ibid.

<sup>268</sup> Government Code section 3543.1. A union may file a grievance on its own behalf. South Bay Union School District v. Public Employment Relations Board, 228 Cal.App.3d 502, 279 Cal.Rptr. 135 (1991).

<sup>269</sup> Los Angeles Unified School District, PERB Dec. No. 526, 9 PERC 16218 (1985).

<sup>270</sup> San Francisco Federation of Teachers, PERB Dec. No. 222, 6 PERC 13159 (1982).

<sup>271</sup> North Sacramento School District, PERB Dec. No. 264, 7 PERC 14017 (1983).

<sup>272</sup> Chula Vista Unified School District, PERB Dec. No. 256, 6 PERC 13254 (1982).

<sup>273</sup> Chaffey Joint Union High School District, PERB Dec. No. 202, 6 PERC 13077 (1982).

responding to grievances, a bad faith bargaining violation may be found by the PERB.<sup>274</sup> The employer must provide information relevant to a pending grievance to the union.<sup>275</sup>

### **C. Expiration of Collective Bargaining Agreement**

Following the expiration of a collective bargaining agreement, the employer's duty to process grievances under the former grievance procedure continues unless the parties have expressly agreed otherwise. The duty to continue the grievance procedure exists whether the collective bargaining agreement provided for binding arbitration or advisory arbitration.<sup>276</sup> However, if the contract or collective bargaining agreement expressly provides that the arbitration provisions will expire at the end of the term of the agreement then the duty to arbitrate terminates.<sup>277</sup>

### **D. Binding Arbitration**

The EERA expressly states that collective bargaining agreements may include in their grievance procedures binding arbitration of disputes that may arise involving the interpretation, application or violation of the collective bargaining agreement.<sup>278</sup> If the collective bargaining agreement does not include binding arbitration provisions, both parties to the collective bargaining agreement may agree to submit any dispute involved in the interpretation, application, or violation of the agreement to final and binding arbitration pursuant to the rules of the PERB.<sup>279</sup>

Either party to a collective bargaining agreement which contains a binding arbitration provision may petition the superior court to compel arbitration pursuant to the Code of Civil Procedure.<sup>280</sup> An arbitration award made pursuant to a binding arbitration agreement shall be final and binding upon the party and may be enforced by a court pursuant to the Code of Civil Procedure.<sup>281</sup>

In many cases, it is initially difficult to determine whether a dispute involves the interpretation, application or violation of the collective bargaining agreement or is an unfair labor practice charge under the EERA. The EERA provides that an unfair labor practice charge shall not issue against conduct which is also prohibited by the provisions of the collective bargaining agreement until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.<sup>282</sup>

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<sup>274</sup> California State University, PERB Dec. No. 392-H, 8 PERC 15135 (1984).

<sup>275</sup> Modesto City Schools District, PERB Dec. No. 518, 9 PERC 16198 (1985).

<sup>276</sup> Anaheim City School District, PERB Dec. No. 364, 8 PERC 15005 (1983).

<sup>277</sup> Los Angeles Unified School District, PERB Dec. No. 440, 9 PERC 16004 (1984).

<sup>278</sup> Government Code section 3548.5.

<sup>279</sup> Government Code section 3548.6.

<sup>280</sup> Government Code section 3548.7.

<sup>281</sup> Government Code section 3548.8.

<sup>282</sup> Government Code section 3541.5(a).

In Anaheim Union High School District v. American Federation of State, County, and Municipal Employees,<sup>283</sup> the Court of Appeal upheld an arbitration award in favor of the American Foundation of State, County, and Municipal Employees. The school district contended that the court was required to vacate the arbitration award because the arbitrator exceeded his powers when he ruled that the district violated the collective bargaining agreement between the parties by reducing the work year of certain classified employees without the consent of the union and the employees. The Court of Appeal held that the arbitrator did not exceed his powers.

The Court of Appeal held that the school district had no statutory right under Education Code sections 45117 and 45308 to reduce a classified employee's work year in lieu of a layoff for lack of funds, without complying with the collective bargaining agreement. The Court of Appeal held that a mere compliance with the layoff procedures prescribed in Sections 45117 and 45308 does not transform a reduction of hours or work year into a layoff.<sup>284</sup>

The Court of Appeal held that a school district's decision to offer to reduce certain employees' work hours in lieu of layoff was within the scope of representation and, therefore, the school district violated the Educational Employment Relations Act (EERA) by taking unilateral action without negotiating with the employee union. The court held that layoffs and reduction of hours are separate actions. A layoff suspends the employment relationship entirely while a reduction in hours or work year maintains the relationship but alters some of its terms.<sup>285</sup>

Therefore, the Court of Appeal upheld the arbitration award.

#### **E. Discretionary Jurisdiction of PERB**

However, when the charging party demonstrates that resort to contract grievance procedures would be futile, exhaustion of the grievance procedure is not necessary. The PERB has discretionary jurisdiction to review settlement or arbitration awards reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of the EERA. If the PERB finds that the settlement or arbitration award is repugnant to the purposes of the EERA, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits, otherwise it shall dismiss the charge.<sup>286</sup> The six month statute of limitations is tolled during the time it took the charging party to exhaust the grievance machinery.<sup>287</sup>

The PERB has no authority to enforce collective bargaining agreements between the parties and shall not issue a complaint on any charge alleging a violation of the collective bargaining agreement that would not also constitute an unfair labor practice under the EERA.<sup>288</sup>

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<sup>283</sup> 222 Cal.App.4<sup>th</sup> 887, 166 Cal.Rptr.3d 289, 300 Ed.Law Rep. 358 (2013).

<sup>284</sup> See, also, California School Employees Association v. North Sacramento School District, PERB Decision No. 193 (1981).

<sup>285</sup> 222 Cal.App.4<sup>th</sup> 887, 893-94 (2013).

<sup>286</sup> Government Code section 3541.5(a).

<sup>287</sup> Ibid.

<sup>288</sup> Government Code section 3541.5(b).

The PERB has held that it has no jurisdiction to consider unfair labor practice charges which may be deferred to binding arbitration under a collective bargaining agreement. The PERB held that the EERA requires the PERB to dismiss those complaints filed with the PERB involving conduct also covered by the provisions of the collective bargaining agreement between the parties if the collective bargaining agreement contains provisions for binding arbitration.<sup>289</sup> The failure of a party to have filed a timely grievance does not require the PERB to hear the case to provide an adequate remedy.<sup>290</sup> The decision overrules prior PERB decisions.

In order to require deferral to arbitration and deprive PERB of jurisdiction, the grievance procedure must culminate in binding arbitration and the dispute must concern the application of a contractual provision.<sup>291</sup> Where the collective bargaining agreement incorporates the employee's statutory rights of nondiscrimination and noninterference in connection with protected union activity, deferral to binding arbitration is appropriate.<sup>292</sup> However, if the collective bargaining agreement contains no language, then deferral to arbitration is not appropriate.<sup>293</sup>

## **F. Arbitration of Discipline of Employees**

Although in the private sector many collective bargaining agreements submit employee suspensions and dismissals to arbitration, the Court of Appeal has held that a school district may not submit the dismissal of a permanent classified employee to binding arbitration because it would conflict with the provisions of Education Code section 45113 which states that the governing board of the school district will review the cause for the disciplinary action against a permanent classified employee and make the final decision.<sup>294</sup> The Court of Appeal also held that the dismissal of a probationary certificated employee is preempted by the Education Code and may not be submitted to binding arbitration.<sup>295</sup>

In Bellflower Education Association v. Bellflower Unified School District,<sup>296</sup> the Court of Appeal held the nonreelection of probationary teachers pursuant to Education Code section 44929.21 is within the sole discretion of the governing board of the school district. A probationary teacher may be nonreelected without any cause whatsoever, without any statement of reasons, and without any hearing on appeal. Therefore, an arbitrator considering a grievance by a nonreelected probationary teacher who contends that the school district had deprived her of a fair chance to achieve tenured status by failing to conduct her performance evaluation in accordance with the procedures set forth in the collective bargaining agreement, did not have the power to order the teacher reinstated for an additional probationary year for further evaluation in accordance with the collective bargaining agreement.<sup>297</sup>

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<sup>289</sup> Lake Elsinore School District, PERB Dec. No. 646, 12 PERC 19012 (1987).

<sup>290</sup> Ibid.

<sup>291</sup> Lancaster Elementary School District, PERB Dec. No. 358, 7 PERC 14292 (1983).

<sup>292</sup> Los Angeles Unified School District, PERB Dec. No. 587, 10 PERC 17159 (1986).

<sup>293</sup> Merced Union High School District, PERB Dec. No. Ad-150, 10 PERC 17011 (1985).

<sup>294</sup> United Steel Workers of America v. Board of Education of the Fontana Unified School District, 162 Cal.App.3d 823 (1985).

<sup>295</sup> Fontana Teachers Association v. Fontana Unified School District, 201 Cal.App.3d 1517 (1988).

<sup>296</sup> 228 Cal.App.3rd 805, 279 Cal.Rptr. 179 (1991).

<sup>297</sup> Bellflower at 812.

## **G. Arbitration Awards Repugnant to EERA**

In determining whether an arbitration award is repugnant to the EERA, the PERB considers the following factors:

1. The matters raised in the unfair practice charge must have been presented to and considered by the arbitrator.
2. The arbitration proceedings must have been fair and regular.
3. All parties to the arbitration proceedings must have agreed to be bound by the arbitration award.
4. The award must not be repugnant to the EERA as interpreted by the PERB.

The PERB, in Dry Creek Joint Elementary School District,<sup>298</sup> found that the arbitration award was repugnant to the purposes of the EERA because the arbitrator did not order a “make whole” remedy or restoration of salary to the employees where the arbitrator found that the district had unilaterally reduced salaries in violation of the collective bargaining agreement.<sup>299</sup> The PERB held that it would consider an arbitration award repugnant to the EERA if it failed to protect the essential and fundamental principles of good faith in negotiations but that the PERB would not find an award repugnant simply because the PERB would have provided a different remedy than the arbitrator.

In Oakland Unified School District,<sup>300</sup> the union charged that the school district unlawfully refused to allow post-termination arbitration of disciplinary disputes. The refusal was claimed to constitute a unilateral change in working conditions. The arbitrator found no provision for such arbitration in the parties’ contract and, therefore, no unilateral change. PERB noted that it might have interpreted the contract in a different manner but declined to overrule the arbitrator.

In Ramona Unified School District,<sup>301</sup> the PERB found an arbitration award to be repugnant to the EERA because the arbitrator did not order a restoration of salary to the employees. The district reassigned employees, eliminated positions, and transferred a position from the certificated bargaining unit to the classified bargaining unit without allowing the union to negotiate the effects of the decision. The employer’s actions resulted in a reduction of salary and benefits for some employees. The arbitrator found that the district failed to meet and negotiate regarding the impact of the personnel reassignment in violation of the EERA and the collective bargaining agreement and ordered new negotiations as a remedy but did not order back pay and benefits. For this reason, the PERB found the arbitration award repugnant to the EERA and ordered the restoration of salary.

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<sup>298</sup> PERB Dec. No. Ad-81a, 4 PERC 11140 (1980).

<sup>299</sup> Ibid.

<sup>300</sup> PERB Dec. No. 538, 10 PERC 17007 (1985).

<sup>301</sup> PERB Dec. No. 517, 9 PERC 16192 (1985).

## H. Arbitration of Provisions Contrary to the Education Code

In United Teachers of Los Angeles v. Los Angeles Unified School District,<sup>302</sup> the California Supreme Court unanimously held that a school district may not be compelled to arbitrate a provision in the collective bargaining agreement that directly conflicts with the Education Code. The court held the provisions in a collective bargaining agreement that delay statutory timelines for establishment of a charter school or add to a charter school's requirements for filing a petition seeking to establish a charter school are unenforceable.

The Los Angeles Unified School District approved the conversion of an existing public school into a charter school and the United Teachers of Los Angeles (UTLA) filed a number of grievances claiming that the district failed to comply with the provisions of the collective bargaining agreement that relate to charter school conversion. After attempts to resolve the grievances informally failed, UTLA sought to compel arbitration pursuant to the collective bargaining agreement. The district argued that the collective bargaining provisions regulating charter school conversion were unlawful because they conflicted with the statutory scheme for creation and conversion of charter schools.<sup>303</sup>

The trial court agreed with the school district's position and denied UTLA's petition. However, the Court of Appeal reversed concluding that it was not for the court, on a petition to compel arbitration, to decide whether there was a conflict between the collective bargaining agreement and the charter school statutes. Rather, the Court of Appeal held that the court's function in adjudicating a petition to compel arbitration was limited to determining whether there was a valid arbitration agreement that had not been waived. The school district appealed to the California Supreme Court.<sup>304</sup>

The California Supreme Court held that under the Education Code, an arbitrator has no authority to deny or revoke a school charter, as UTLA requested. On May 11, 2007, Green Dot Public Schools filed a charter petition with the district board of education. The petition sought to convert Locke High School to a charter school. The board granted the charter school petition on September 11, 2007.<sup>305</sup>

On May 9, 2008, UTLA filed a petition to compel arbitration pursuant to a written collective bargaining agreement. UTLA alleged that the district violated several articles of the collective bargaining agreement. The district opposed the union's petition relying on the California Supreme Court's decision in Board of Education v. Round Valley Teachers' Association.<sup>306</sup> The district argued that enforcement of the collective bargaining agreement provisions would conflict with Education Code section 47611.5(e), which provides that the approval of a charter school petition shall not be controlled by a collective bargaining agreement. The district further argued that the collective bargaining agreement is invalid because it requires

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<sup>302</sup> 54 Cal.4<sup>th</sup> 504, 142 Cal.Rptr.3d 850, 280 Ed.Law Rep. 1090 (2012).

<sup>303</sup> Id. at 509-10.

<sup>304</sup> Id. at 510.

<sup>305</sup> Id. at 510.

<sup>306</sup> 13 Cal.4<sup>th</sup> 269, 277-288, 52 Cal.Rptr.2d 115 (1996).

the district to take procedural steps beyond what is required under Education Code section 47605.<sup>307</sup>

The California Supreme Court noted that in ruling on a petition to compel arbitration to enforce a collective bargaining agreement between a school district and its employees, the court is required to resolve the tension between two principles:

1. Collective bargaining provisions that may be in conflict with the Education Code.
2. The reluctance of courts to examine the merits of the underlying dispute in deciding whether to enforce arbitration agreements.<sup>308</sup>

The California Supreme Court noted that in its prior decision in San Mateo City School District v. Public Employment Relations Board,<sup>309</sup> the court ruled that Government Code section 3540 prohibited negotiations when provisions of the Education Code would be replaced, set aside or annulled by the language of the proposed contract. Government Code section 3540 states in part, “This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil servant system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective bargaining agreements.”

The California Supreme Court held that the intent of Section 3540 is to preclude contractual agreements which would alter statutory provisions where statutes are mandatory. A contract proposal that alters the statutory scheme would be non-negotiable under Section 3540 because the proposal would replace or set aside the section of the Education Code.<sup>310</sup>

In Round Valley, the California Supreme Court vacated an arbitration award reinstating a probationary teacher who had not been reelected. The court ruled that the provisions of Education Code section 44929.21(b) controlled and that the collective bargaining agreement conflicted with the provisions of Section 44929.21 and, therefore, the provisions of the collective bargaining agreement were unenforceable. The court held that when the Legislature vests exclusive discretion in a body to determine the scope of procedural protection to specific employees, the subject matter may not be the subject of either mandatory or permissive collective bargaining and on that basis vacated the arbitration award because it sought to enforce an unlawful collective bargaining provision.

The California Supreme Court noted that although Round Valley involved the vacation of an arbitration award, the principles expounded in Round Valley and San Mateo have been relied upon in two Court of Appeal cases to deny a petition to compel arbitration. In United Steelworkers of America v. Board of Education,<sup>311</sup> the Court of Appeal upheld the denial of a

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<sup>307</sup> 54 Cal.4<sup>th</sup> 504, 510-11 (2012.)

<sup>308</sup> Id. at 512.

<sup>309</sup> 33 Cal.3d 850, 191 Cal.Rptr. 800 (1983).

<sup>310</sup> Id. at 866.

<sup>311</sup> 162 Cal.App.3d 823, 209 Cal.Rptr. 16 (1984).

petition to compel arbitration of a disputed collective bargaining agreement provision concerning the Fontana Unified School District's termination of a bus driver who was a permanent classified employee. The Court of Appeal ruled that arbitration would directly conflict with Education Code section 45113, which at the time stated that any employee designated as a permanent employee shall be subject to disciplinary action only for cause as prescribed by rule or regulation of the governing board and that the governing board's determination of the sufficiency of the cause for disciplinary action shall be conclusive. The Court of Appeal concluded that the governing board's determination as to sufficiency of cause to terminate is conclusive and cannot be usurped by an agreement with the union to subsequently submit grievances to binding arbitration.<sup>312</sup>

In Fontana Teachers' Association v. Fontana Unified School District,<sup>313</sup> the Court of Appeal concluded that collective bargaining provisions for non-reelection of probationary teachers were preempted by the Education Code and, thus, not subject to arbitration. In Round Valley, the California Supreme Court specifically endorsed the result in Fontana.

The California Supreme Court further held that the refusal to compel arbitration of collective bargaining agreement provisions in conflict with the Education Code is consistent with Government Code section 3548.5, and the statutory scheme under the Education Employment Relations Act (EERA). The court observed that Section 3548.5 makes clear that authorization to arbitrate is predicated on the existence of a collective bargaining agreement covering matters within the scope of representation. In San Mateo, the California Supreme Court ruled that the scope of representation does not include matters that would annul, set aside, or replace portions of the Education Code. Therefore, the California Supreme Court concluded that Government Code section 3548.5, read in conjunction with Government Code section 3540, means that the EERA does not authorize arbitration of collective bargaining agreement provisions that directly conflict with the Education Code.<sup>314</sup>

The California Supreme Court went on to state that their conclusion was not at odds with the California Arbitration Act.<sup>315</sup> The court noted that it is well established that a court will not grant a petition to compel arbitration filed pursuant to Code of Civil Procedure section 1281.2, if the subject matter to be arbitrated is not within the scope of the arbitration agreement. The scope of arbitration between a school district and a union representing school employees is limited as a matter of law by Government Code sections 3540 and 3548.5. Therefore, the court concluded that Code of Civil Procedure section 1281.2, that a court shall compel arbitration where a valid arbitration agreement exists is qualified by the EERA's placement of certain subjects governed by the Education Code beyond the scope of an arbitration agreement between a school district and an employee union.<sup>316</sup> The court stated:

“In sum, we reaffirm the principles set forth in San Mateo and its progeny that collective bargaining provisions pursuant to the EERA that annul, set aside, or replace provisions of the

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<sup>312</sup> 54 Cal.4<sup>th</sup> 504, 514-15 (2012).

<sup>313</sup> 201 Cal.App.3d 1517, 1521-1526, 247 Cal.Rptr. 761 (1988).

<sup>314</sup> 54 Cal.4<sup>th</sup> 504, 515-16 (2012).

<sup>315</sup> Code of Civil Procedure section 1280 et seq.

<sup>316</sup> Id. at 516-17.

Education Code cannot be enforced. That non-enforcement will take various forms, depending on the point at which the attempt to enforce the unlawful provision occurs. A court will refuse to compel a school district to negotiate about a subject that the Education Code places off limits to collective bargaining...If a court is asked to compel arbitration of a collective bargaining provision that directly conflicts with the Education Code – in other words, when the Education Code makes clear that the arbitrator would be unable to lawfully grant the aggrieved party any form of relief – it should deny the petition to compel arbitration...When there are doubts about the arbitrability of a grievance, however, those doubts should be resolved in favor of arbitration . . . Once a grievance crosses the threshold of arbitrability because the matter in dispute is not excluded from collective bargaining by the Education Code or by the parties themselves, a court may not deny a petition to compel arbitration on the ground that the grievance lacks merit . . . If the matter proceeds to arbitration and results in an award that conflicts with the Education Code, the award must be vacated.”<sup>317</sup>

The California Supreme Court then reviewed the provisions of the Charter School Act of 1992.<sup>318</sup> The court noted that Education Code section 47605 details the means by which a charter school may be established. After a charter is granted, the Education Code sets forth the limited grounds for revocation.<sup>319</sup> In addition, Education Code section 47611.5 states that while the EERA shall apply to charter schools, the approval or denial of a charter petition by a granting agency pursuant to Section 47605(b) shall not be controlled by collective bargaining agreements or subject to review or regulation by the Public Employment Relations Board.

Based on these provisions, the court concluded that rescission of the charter approval is precluded by Government Code section 3540 and Education Code sections 47605, 47607, and 47611.5. The court ruled that any collective bargaining provision that delays the timeline set forth in Section 47605 or adds to an applicant’s statutory obligation for securing approval of a charter conflicts with Section 47605 and may not be enforced.<sup>320</sup> The court concluded:

“We hold only that a collective bargaining provision does not conflict with the Education Code if its enforcement would neither control the approval or denial of a charter petition or delay or obstruct the charter petition approval process. Because it is unclear which collective bargaining provisions are at issue in this case, we remand to the trial court to identify those provisions and to determine whether their enforcement would set aside, annul, or replace provisions of the Education Code. We also make clear that

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<sup>317</sup> *Id.* at 520.

<sup>318</sup> Education Code section 47605 et seq.

<sup>319</sup> Education Code section 47607.

<sup>320</sup> 54 Cal.4<sup>th</sup> 504, 526 (2012).

if the arbitration process, in applying the collective bargaining agreement to the particulars of this dispute, ends up imposing obligations on the district that run counter to the statute or otherwise violate public policy, the arbitration award must be vacated.”<sup>321</sup>

The California Supreme Court reversed the judgment of the Court of Appeal and remanded the matter back to the trial court for further proceedings consistent with its opinion.

## **STRIKES AND OTHER CONCERTED ACTIVITY**

### **A. Legality of Public Employee Strikes**

The EERA does not specifically address the issue of strikes and concerted activities. However, Government Code section 3549 expressly excludes public school employees from the provisions of Labor Code section 923 which authorize workers in the private sector to engage in concerted activities (e.g., strikes) for the purpose of collective bargaining or other mutual aid or protection.<sup>322</sup> Prior case law held that this provision prohibited public school employees from engaging in strikes or other concerted activities.<sup>323</sup>

However, in County Sanitation District No. 2 v. Los Angeles County Employees Association,<sup>324</sup> the California Supreme Court overturned prior case law and held that public employees had a common law right to strike. The California Supreme Court stated:

“The right to form and be represented by unions is a fundamental right of American workers that has been extended to public employees through constitutional adjudication as well as by statute . . .

“As the union contends however, the right to unionize means little unless it has acquired some degree of protection regarding its principal aim - effective collective bargaining. For such bargaining to be meaningful, employee groups must maintain the ability to apply pressure or at least threaten its application. A credible right to strike is one means of doing so.”<sup>325</sup>

The California Supreme Court did not hold that all strikes were legal at common law and held that strikes which create a threat to the health or safety of the public may be unlawful. The California Supreme Court stated:

“After consideration of the various alternatives before us, we believe the following standard may properly guide courts in the

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<sup>321</sup> Id. at 522-28.

<sup>322</sup> Government Code section 3549.

<sup>323</sup> Pasadena Unified School District v. Pasadena Federation of Teachers, 72 Cal.App.3d 100, 140 Cal.Rptr. 41 (1977).

<sup>324</sup> 38 Cal.3d 564 (1985).

<sup>325</sup> Id. at 587-588.

resolution of future disputes in this area: strikes by public employees are not unlawful at common law unless or until it is clearly demonstrated that such a strike creates a substantial and imminent threat to the health and safety of the public. This standard allows exceptions in certain essential areas of public employment (e.g., the prohibition against firefighters and law enforcement personnel) and also requires the courts to determine on a case by case basis whether the public interest overrides the basic right to strike.”<sup>326</sup>

## **B. Right of Public School Employees to Strike**

Following the California Supreme Court’s decision in County Sanitation District No. 2, the PERB ruled that the right to strike under County Sanitation District No. 2 did not apply to employees of the public schools. Since education was a fundamental right under the California Constitution the disruption of such a fundamental right was unlawful and the public school employee strikes amounted to an unlawful unilateral change in the terms and conditions of employment.<sup>327</sup> In addition, the United States Supreme Court has held that there is no constitutional right of public employees to strike.<sup>328</sup>

## **C. Economic Strikes Versus Unfair Labor Practices Strikes**

The PERB has reviewed strikes and other concerted activities to determine whether the strike was an economic strike solely for the purposes of pursuing economic aims, or an unfair practice strike, resulting from the conduct of the employer. The PERB has held that employee strikes in response to unfair practices by the employer are protected under the EERA; however, more recent PERB decisions have limited this protection.<sup>329</sup> The PERB will examine whether the totality of the employee organization’s conduct raises an inference of bad faith or whether the work stoppage was prompted by the district’s unlawful conduct and was undertaken as a last resort before determining whether it was an unfair practice strike or an economic strike.<sup>330</sup> The PERB stated:

“ . . . [W]e ruled that, even in the presence of an employer’s alleged unfair practice, the employee organization must show a cause or connection between the employer’s action and the strike. Where the employer’s unfair practices arguably provoked the strike, we will also look to see if other means, short of a strike, are available to resolve the dispute.”<sup>331</sup>

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<sup>326</sup> Id. at 586.

<sup>327</sup> Compton Unified School District, PERB Order No. IR-50, 11 PERC 18067 (1987).

<sup>328</sup> United Federation of Postal Clerks v. Blount, 325 F.Supp. 879, 884 (D.D.C. 1971), aff’d 404 U.S. 802 (1971).

<sup>329</sup> Modesto City Schools, PERB Order No. IR-12, 4 PERC 11034 (1980), aff’d, PERB v. Modesto City Schools District, 136 Cal.App.3d 881 (1982). To the extent that Compton Unified School District, PERB Order No. IR-50, 11 PERC 18067 (1987) overruled Modesto, the law is somewhat unclear on this point.

<sup>330</sup> Sacramento City Unified School District, PERB Order No. IR-49, 11 PERC 18053 (1987). See, also, Westminster School District, PERB Dec. No. 277, 7 PERC 14034 (1982).

<sup>331</sup> Sacramento City Unified School District, PERB Order No. IR-49, 11 PERC 18053 (1987).

In several cases, the PERB has ruled that a public school employee strike occurring prior to the exhaustion of impasse proceedings was an unfair labor practice under Government Code section 3543.6(d).<sup>332</sup> The PERB has stated:

“We find that the statutory impasse procedures are exhausted only when the fact finder’s report has been considered in good faith, and then only if it fails to change the circumstances and provides no basis for settlement or movement that could lead to settlement. At that point, impasse under the EERA is identical to impasse under the NLRA; either party may decline further requests to bargain, and the employer may implement policies reasonably comprehended within previous offers made and negotiated between the parties. If the factfinding report, and/or new proposals made after the report, change circumstances and bargaining is subsequently resumed but again deadlocks, the board cannot recertify impasse or reimpose the already exhausted impasse procedures.”<sup>333</sup>

Strikes occurring prior to the exhaustion of these procedures create a rebuttable presumption that the employee organization has refused to negotiate in good faith or has refused to participate in impasse procedures.<sup>334</sup>

In Vallejo City Unified School District,<sup>335</sup> the PERB refused to enjoin a teachers strike. After unsuccessful post factfinding negotiations, the district lowered salaries, reduced the work year and capped employer contributions for medical programs. In response, teachers conducted a two-day strike. The district’s unfair labor practice charge alleged that the strike constituted unlawful unilateral change in teachers’ hours of work, unfair negotiating pressure tactic because students had no educational alternatives, unlawful activity under Government Code section 3549 and an imminent threat to the health and safety of the public under County Sanitation District No. 2.<sup>336</sup> PERB summarily dismissed the first three allegations and rejected the notion that all strikes by teachers are illegal.<sup>337</sup> PERB also rejected the allegation that the health and safety of the public under County Sanitation District No. 2 was threatened by the strike finding that the school district was able to recruit substitute teachers to replace the striking teachers and that while the first day of the strike fifty percent of the students did not report to school, attendance rose sharply after the first day. Also, PERB found that there was not a total breakdown in the bargaining process since the parties had already completed post factfinding negotiations.<sup>338</sup>

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<sup>332</sup> Modesto City Schools, PERB Dec. No. 291, 7 PERC 14090 (1983); Fremont Unified School District, PERB Dec. No. 136A, 7 PERC 14100 (1982); Fresno Unified School District, PERB Dec. No. 208, 6 PERC 13110 (1982); Rio Hondo Faculty Association, PERB Dec. No. 292, 7 PERC 14091 (1983).

<sup>333</sup> Modesto City Schools, PERB Dec. No. 291, 7 PERC 14090 (1983).

<sup>334</sup> Sacramento City Unified School District, PERB Order No. IR-49, 11 PERC 18053 (1987); Westminster School District, PERB Dec. No. 277, 7 PERC 14034 (1982).

<sup>335</sup> PERB Decision No. 1015, 17 PERC page 24166 (1993).

<sup>336</sup> Id. at 520.

<sup>337</sup> Ibid.

<sup>338</sup> Id. at 519.

## **D. The Withholding of Services/Partial Strikes**

The withholding of services short of a complete refusal to work is considered to be a partial strike and the PERB and the courts have found partial strikes to be unprotected activity under the EERA.<sup>339</sup> The PERB has enjoined intermittent strikes since these strikes provide the employer with little or no notice and are extremely disruptive to the educational process.<sup>340</sup> Employees who refuse to perform work otherwise done but which is not required of them by law or contract such as extra duties or committee work may be engaging in unprotected activity under the EERA.<sup>341</sup> The PERB stated:

“Employees may not pick and choose the work they wish to do even though their action is in support of legitimate negotiating interests. Accepting full pay for their services implies a willingness to provide full service.”<sup>342</sup>

The refusal to perform purely voluntary duties as opposed to required duties is protected conduct and the employer may not lawfully discipline employees under the EERA.<sup>343</sup> In Modesto City Schools,<sup>344</sup> the PERB found that the following types of activities were required duties and that the employer could lawfully discipline employees with letters of reprimand:

1. Refusal to participate in Stull Act evaluations;
2. Refusal to turn in district issued school keys prior to a strike;
3. Refusal to submit lesson plans; and
4. Refusal to attend a faculty meeting.

The refusal to give final examinations to students was found to be unprotected activity.<sup>345</sup> The PERB also found that teachers who picketed outside a school during their thirty minute preparation period, even though they were not required to be in a specific location during that time, engaged in unprotected conduct since it was implicit that the teachers were to perform services for the employer during that period of time even though they had discretion as to the location.<sup>346</sup>

## **E. Picketing and Other Concerted Activity**

Certain forms of picketing and concerted activity are protected under the free speech and freedom of assembly clauses of the First Amendment of the United States Constitution and

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<sup>339</sup> San Ramon Valley Unified School District, PERB Order No. IR-46, 8 PERC 15187 (1984).

<sup>340</sup> Compton Unified School District, PERB Order No. IR-50, 11 PERC 18067 (1987).

<sup>341</sup> Palos Verdes Peninsula Unified School District, PERB Dec. No. 195, 6 PERC 13061 (1982).

<sup>342</sup> Ibid.

<sup>343</sup> Modesto City Schools, PERB Dec. No. 291, 7 PERC 14090 (1983).

<sup>344</sup> Ibid.

<sup>345</sup> Palos Verdes Peninsula Unified School District, PERB Dec. No. 195, 6 PERC 13061 (1982).

<sup>346</sup> El Dorado Union High School District, PERB Dec. No. 437, 10 PERC 17006 (1985).

Article I, sections 2 and 3 of the California Constitution. Public school employees enjoy the same rights as other citizens to comment publicly on matters of public interest in connection with the operation of the public schools in which they work.<sup>347</sup>

In Pittsburgh Unified School District v. California School Employees Association,<sup>348</sup> the Court of Appeal held that school employees involved in a labor dispute with the school district could picket and distribute leaflets outside the private business offices of certain governing board members of the school district. The Court of Appeal held that the dissemination of information concerning the facts of a labor dispute and the right to inform the public on public issues is protected as free speech and free assembly under the United States Constitution and the California Constitution. The Court of Appeal held that the school district failed to present substantial evidence to show that picketing in front of the board members' businesses was intended as an economic boycott that might possibly justify the issuance of a preliminary injunction by the trial court. The Court of Appeal stated:

“Because of its perception that free discussion concerning the issues involved in a labor dispute is often ‘indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society’ . . . the United States Supreme Court has more than once reiterated that ‘the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.’ . . . The right to inform the public on such issues is protected not only as part of free speech, but as part of free assembly . . . Furthermore, where the activity in question targets government officials, the right of petition is also placed in issue . . .

“When, as in the instant case, such right has been restricted, we must ‘make an independent examination of the whole record,’ so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.’ . . . ‘It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should weigh the circumstances and appraise the substantiality of the reasons advanced in the support of the challenged regulations’ . . . For an injunction cannot be granted where the restraint interferes with protected First Amendment activity without the showing of a substantial public need for doing so.”<sup>349</sup>

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<sup>347</sup> Pickering v. Board of Education, 391 U.S. 563, 568 (1968). In Best Friends Animal Society v. Macerich West Side Pavilion Property,<sup>347</sup> the California Court of Appeal held that under Article I, Section 2 of the California Constitution, state law may not give preferential treatment to labor speech and discriminate against other types of speech.

<sup>348</sup> 166 Cal.App.3d 875, 213 Cal.Rptr. 34 (1985).

<sup>349</sup> Id. at 888-90.

However, certain communications which are flagrant, insulting, defamatory, insubordinate or fraught with malice which would cause substantial disruption of school activities generally are not protected speech.<sup>350</sup> However, if employees wish to address the governing board of a district before, during or after a strike with respect to issues involving negotiations, school district employees have the same right as all citizens to address the board.<sup>351</sup> On this issue, the United States Supreme Court has stated:

“To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. Whatever its duties as an employer, when the board sits in public meetings to conduct public business and to hear the views of citizens it may not be required to discriminate between speakers on the basis of their employment, or the content of their speech.”<sup>352</sup>

While the courts have found that peaceful picketing of places of business of school board members is protected under the First Amendment, the courts have upheld city ordinances which prohibit residential picketing.<sup>353</sup> The courts stated:

“To those inside . . . the house becomes something less than a home when and while the picketing . . . continues . . . the tensions and pressures may be psychological, not physical, but they are not, for that reason, less inimical to family privacy and truly domestic tranquility.”<sup>354</sup>

In Annenberg v. Southern California District Council of Labor,<sup>355</sup> the Court of Appeal upheld picketing at the Annenberg estate based on its determination that it was not a normal residence since it was much larger than most residences and employed a large number of employees. In Annenberg, the Court of Appeal upheld picketing of the residence. By contrast, with respect to picketing of businesses, the courts have been much less sympathetic to privacy claims and have upheld such picketing as protected activity.

In Pittsburgh Unified School District v. California School Employees Association,<sup>356</sup> the Court of Appeal stated:

“We recognize that respondents are only engaged in their public duties part time and rely for their livelihood on private employment; but they nonetheless remain public officials. Public office is no place for the thin-skinned. Those who function in the public arena must be prepared to withstand . . . the protesting and

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<sup>350</sup> Rancho Santiago Community College District, PERB Dec. No. 602, 11 PERC 18021 (1986).

<sup>351</sup> City of Madison v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976).

<sup>352</sup> Id. at 175-76.

<sup>353</sup> Frisby v. Schultz, 108 S.Ct. 2495 (1988).

<sup>354</sup> Id. at 2503, quoting from Wauwatosa v. King, 182 N.W. 2d 530, 537 (1971).

<sup>355</sup> 38 Cal.App.3d 637 (1974).

<sup>356</sup> 166 Cal.App.3d 875, 899, 213 Cal.Rptr. 34 (1985).

controversy which their earlier actions and statements have generated.”

Hand-billing or leafletting is another form of speech which is entitled to constitutional protection.<sup>357</sup> However, reasonable regulation of the distribution of such literature as to time, place and manner is permissible and school resources may not be used in the production or distribution of such material.<sup>358</sup>

In the event of mass picketing or violent picketing, the public school employer, under state case law, may seek an injunction directly in superior court.<sup>359</sup> Violence on the picket line or other misconduct may also be actionable by the employer as an unfair labor practice charge if striking employees coerce or intimidate nonstriking employees.<sup>360</sup> If the collective bargaining agreement has a no strike clause, employers may be able to bring a successful breach of contract action against the employee organization for damages resulting from the strike but employers may not recover tort damages resulting from unlawful strike activity.<sup>361</sup>

During the pendency of a strike, state law provides that striking employees may not receive unemployment insurance benefits.<sup>362</sup> However, it is unclear whether striking employees may continue to receive group health care coverage from the employer.<sup>363</sup>

## UNFAIR LABOR PRACTICES - IN GENERAL

### A. Filing of an Unfair Labor Practice Charge

The EERA states that an unfair labor practice charge may be filed by an employee, an exclusive representative, employee organization or the employer.<sup>364</sup> Following the filing of the unfair labor practice charge, an attorney within the general counsel’s office of the PERB conducts an investigation to determine whether a complaint will be issued. The investigation is an informal process designed to reveal whether the charge states a prima facie case of violation of the EERA.<sup>365</sup> After completing the investigation, the attorney may issue a complaint, dismiss the charge, or request an amendment to the charge. If the charge is dismissed, the charging party may file a written appeal to the PERB.<sup>366</sup>

If a complaint is issued, the respondent must file an answer within twenty (20) calendar days.<sup>367</sup> Following the filing of the answer, an informal settlement conference before an

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<sup>357</sup> Lovell v. City of Griffin, 303 U.S. 494 (1938).

<sup>358</sup> Education Code section 7054.

<sup>359</sup> United Farm Workers of America v. Superior Court, 16 Cal.3d 449 (1976).

<sup>360</sup> Fresno Unified School District, PERB Dec. No. 208, 6 PERC 13110 (1982).

<sup>361</sup> City and County of San Francisco v. United Assn. of Journeymen, 42 Cal.3d 810, 812 (1986).

<sup>362</sup> Unemployment Insurance Code section 1262.

<sup>363</sup> See, Consolidated Omnibus Budget Reconciliation Act of 1985.

<sup>364</sup> Government Code section 3541.5.

<sup>365</sup> See, San Juan Unified School District, EERB Dec. No.12, 1 PERC 77 (1977).

<sup>366</sup> 8 Admin. Code sections 32620, 32630.

<sup>367</sup> 8 Admin. Code section 32644.

administrative law judge is held to assist the parties in seeking a voluntary resolution of the case.<sup>368</sup>

## **B. Hearing Before Administrative Law Judge and PERB**

If the matter cannot be settled at the informal level, the case may then proceed to a formal hearing before a different administrative law judge. The hearing is conducted in a less formal manner than a civil trial and the technical rules of evidence do not apply. The burden of proof in an unfair labor practice case rests with the charging party but in many cases, such as discrimination cases, the burden shifts to the employer upon the presentation of a threshold amount of evidence. A transcript is made at the hearing and at the conclusion of the hearing the parties are afforded an opportunity to file written briefs following the receipt of the transcript. The briefing period is normally twenty to thirty days. Following submission on the case, the administrative law judge issues a written proposed decision which analyzes the evidence and relevant labor law.<sup>369</sup>

If the proposed decision is not appealed to the PERB, it becomes final though nonprecedential. If either party appeals the proposed decision, a three member panel of PERB reviews the evidentiary record, transcript, proposed decision, and supplemental briefs filed by the parties. After completing its deliberations, the panel will issue a written decision.<sup>370</sup>

## **C. Appeal of PERB Decision**

A decision of the PERB may be appealed by filing a writ of review in the Court of Appeal within thirty days after the issuance of PERB's final order.<sup>371</sup> The Court of Appeal has discretion whether or not to hear the appeal and if the court accepts the case, the PERB decision will be upheld if the decision is supported by substantial evidence. In general, PERB decisions are overturned when a court finds that the PERB has misinterpreted the statutory language of the EERA. In such cases, the Court of Appeal directs PERB to issue a new decision consistent with the Court of Appeal's interpretation.<sup>372</sup> The findings of the PERB with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive.<sup>373</sup>

The Court of Appeal in Trustees of the California State University v. Public Employment Retirement Board<sup>374</sup> stated:

“Judicial review of a labor board’s determinations under the substantial evidence standard is limited. The reviewing court

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<sup>368</sup> 8 Admin. Code section 32650.

<sup>369</sup> 8 Admin. Code section 32765 et seq.

<sup>370</sup> 8 Admin. Code section 32300 et seq.

<sup>371</sup> Government Code section 3542; San Mateo Federation of Teachers v. Public Employment Relations Board, 28 Cal.App.4<sup>th</sup> 150 (1994) (5 days extension for service by mail does not extend 30 day deadline to file petition in Court of Appeal).

<sup>372</sup> Government Code section 3542; Moreno Valley Unified School District v. PERB, 142 Cal.App.3d 191 (1983).

<sup>373</sup> Trustees of the California State University v. Public Employment Relations Board, 6 Cal.App.4<sup>th</sup> 1107, 8 Cal.Rptr.2d 60 (1992).

<sup>374</sup> 6 Cal.App.4<sup>th</sup> 1107, 8 Cal.Rptr.2d 60 (1992).

does not reweigh the evidence. If there is a plausible basis for the Board's factual decisions, the reviewing court is not concerned that contrary findings may seem equally reasonable, or even more so. The reviewing court will uphold the board's decision if it is supported by substantial evidence on the whole record. Under the substantial evidence standard, when a labor board chooses between two conflicting views, a reviewing court may not substitute its judgment for that of the board."<sup>375</sup>

#### **D. Statute of Limitations**

The EERA requires that unfair labor practice charges be filed within six months of the alleged conduct.<sup>376</sup> Generally, this means that the statute of limitations runs from the date the charging party knew or reasonably should have known that the employer committed an alleged unfair labor practice.<sup>377</sup> Knowledge of the employer's conduct must be held by a union officer in order to attribute the knowledge to the union.<sup>378</sup> The PERB may consider events which occurred prior to the six-month period if they would tend to prove conduct violative of the EERA occurring within the six-month period.<sup>379</sup>

The statute of limitations may not apply to continuing conduct. A unilateral change by the employer is considered a single act rather than a continuing violation and an unfair labor practice charge must be filed within six months following the original act.<sup>380</sup>

The EERA expressly provides a statutory tolling of the statute of limitations where the party files a grievance under a collective bargaining agreement with binding arbitration.<sup>381</sup> The PERB has administratively interpreted the deadlines to be tolled when an employee or the union pursues a dispute through a grievance process before filing an unfair labor practice charge. The charging party must have reasonably and in good faith pursued the dispute through an alternative method of relief and the tolling of the statute of limitations must not cause surprise or prejudice to the other party.<sup>382</sup> The statute is tolled from the time the employee takes informal steps to utilize the grievance procedure up until the time the grievance decision is announced.<sup>383</sup> The filing of a grievance by an individual employee tolled the statute for the employee as well as a grievance filed by the employee organization.<sup>384</sup> Filing a claim with the Equal Opportunity Commission or Fair Employment and Housing Commission or pursuing a claim with the state Legislature does not toll the statute of limitations on an unfair labor practice charge.<sup>385</sup>

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<sup>375</sup> Id. at 1123.

<sup>376</sup> Government Code section 3541.5(a).

<sup>377</sup> Fairfield-Suisun Unified School District, PERB Dec. No. 547, 10 PERC 17022 (1985).

<sup>378</sup> Victor Valley Joint Union High School District, PERB Dec. No. 273, 7 PERC 14030 (1982).

<sup>379</sup> Walnut Valley Unified School District, PERB Dec. No. 289, 7 PERC 14084 (1983).

<sup>380</sup> Riverside Unified School District, PERB Dec. No. 289, 7 PERC 16212 (1985).

<sup>381</sup> Government Code section 3541.5(a).

<sup>382</sup> Victor Valley Joint Union High School District, PERB Dec. No. 273, 7 PERC 14030 (1982).

<sup>383</sup> Los Angeles Unified School District, PERB Dec. No. 311, 7 PERC 14157 (1983).

<sup>384</sup> Victor Valley Joint Union High School District, PERB Dec. No. 273, 7 PERC 14030 (1982).

<sup>385</sup> Los Angeles Unified School District, PERB Dec. No. 237, 6 PERC 13203 (1982).

## E. Remedies for Unfair Labor Practice

The EERA authorizes the PERB to remedy unfair labor practice charges by ordering the offending party to cease and desist and to give affirmative relief, including restatement of employees with back pay.<sup>386</sup> In practice, the PERB has utilized broad remedies to make the charging party whole. Generally, these remedies relate to lost wages or benefits since the PERB has no specific statutory authority to grant punitive damages.<sup>387</sup>

In many cases, the PERB, in issuing a cease and desist order also orders the employer to post in appropriate locations notice that the employer or the employee organization has acted in an unlawful manner.<sup>388</sup> The courts have endorsed such posting requirements.<sup>389</sup> In cases involving former employees, the PERB has ordered personal notification to employees and former employees.<sup>390</sup>

In discrimination cases by the employer against an employee, the PERB will attempt to make the employee whole. In some cases the PERB will order reinstatement of the employee where there was a discriminatory refusal to hire.<sup>391</sup> The remedy of reinstatement may be delayed until the next school semester if it would disrupt the educational process.<sup>392</sup> However, in cases where an employee was denied a fair opportunity to compete for a promotional opportunity, the PERB will reinstate the competitive process.<sup>393</sup>

Where an employee has been found to have been denied wages due to the unfair practices of the employer, the PERB will order back wages with interest from the date of the discrimination up to the date the remedy is implemented.<sup>394</sup> The amount of back wages will be reduced by the amount of earnings earned by the employee from other employment.<sup>395</sup>

The PERB may also order the removal of letters of reprimand from the employee's personnel file when the PERB determines that the letter of reprimand was wrongfully placed in the employee's personnel file. The PERB has held that such a remedy is not a violation of the Public Records Act.<sup>396</sup>

The PERB, where it finds that there has been a refusal to provide relevant information, will order disclosure of the relevant information.<sup>397</sup> The PERB will order that the results of an

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<sup>386</sup> Government Code section 3541.5(c). See, McFarland Unified School District v. Public Employment Relations Board, 228 Cal.App.3d 166, 279 Cal.Rptr. 26 (1991) (reinstatement authorized even if it confers tenure on probationary certificated employee).

<sup>387</sup> Government Code section 3541.5(c).

<sup>388</sup> Placerville Union School District PERB Dec. No. 69, 2 PERC 2185 (1978).

<sup>389</sup> Pandol and Sons v. Agricultural Labor Relations Board, 98 Cal.App.3d 580, 587 (1979).

<sup>390</sup> Oakland Unified School District; PERB Dec. No. 126, 4 PERC 11072 (1980), aff'd, Oakland Unified School District v. PERB, 120 Cal.App.3d 1007 (1981).

<sup>391</sup> Santa Clara Unified School District, PERB Dec. No. 104, 3 PERC 10124 (1979).

<sup>392</sup> San Leandro Unified School District, PERB Dec. No. 288, 7 PERC 14026 (1982).

<sup>393</sup> Le Moore Union High School District, PERB Dec. No. 271, 7 PERC 14026 (1982).

<sup>394</sup> State of California (Department of Transportation), PERB Dec. No. 459-S, 9 PERC 16027 (1987).

<sup>395</sup> Baldwin Park Unified School District, PERB Dec. No. 221, 6 PERC 13158 (1982).

<sup>396</sup> Mt. San Antonio Community College District, PERB Dec. no. 224, 6 PERC 13163 (1982); Rio Hondo Community College District, PERB Dec. no. 260, 7 PERC 14010 (1982).

<sup>397</sup> Mt. San Antonio Community College District, PERB Dec. No. 224, 6 PERC 13163 (1982).

election be set aside and a new election ordered where the employer unlawfully supported one employee organization over another.<sup>398</sup>

The PERB will order a return to the status quo when it is found that the employer made a unilateral change in working conditions. In addition, the PERB will order the employer to reimburse employees for lost benefits (e.g., compensatory time off and monetary compensation), or to repay out-of-pocket expenses incurred as a result of the unilateral change.<sup>399</sup>

The PERB will not order restoration of the status quo where the unilateral change was to the advantage of the employees, such as an increase in wages, although the PERB may issue a cease and desist order.<sup>400</sup> Where the return to the status quo would be disruptive to the educational process, the PERB will not order a return to the status quo.<sup>401</sup> Also, where it is impossible or impractical to restore the status quo, limited back pay may be ordered, such as where the employer refused to bargain the effects of layoff. In such cases, the PERB has held that employees were not entitled to reinstatement because they were lawfully laid off, but that they are entitled to limited back pay from the time of the layoff to the occurrence of earliest of either of the following conditions:

1. The date the parties reach agreement;
2. The date the statutory impasse procedures are exhausted;
3. The failure of the union to request negotiations within thirty days of service of the PERB decision;
4. The subsequent failure of the union to negotiate in good faith.<sup>402</sup>

The PERB will generally only award attorneys' fees to a successful party upon a showing that the charge or defense was without arguable merit or upon a showing of frivolous or dilatory litigation. A request for attorneys' fees will generally be denied if the issues are debatable and brought in good faith.<sup>403</sup> PERB will also not award litigation costs unless it can be shown that it was a frivolous or dilatory claim or was without arguable merit.<sup>404</sup>

The PERB may also determine whether individual administrators are acting as agents of the public school employer. In Inglewood Teachers Association v. Public Employment Relations Board,<sup>405</sup> the PERB held that a principal who filed a lawsuit against teachers alleging

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<sup>398</sup> Clovis Unified School District, PERB Dec. No. 389, 8 PERC 15119 (1984).

<sup>399</sup> Oakland Unified School District; PERB Dec. No. 126, 4 PERC 11072 (1980), aff'd, Oakland Unified School District v. PERB, 120 Cal.App.3d 1007 (1981); Corning Union High School District, PERB Dec. No. 399, 8 PERC 15149 (1984).

<sup>400</sup> Clovis Unified School District, PERB Dec. No. 389, 8 PERC 15119 (1984); Nevada Joint Union High School District, PERB Dec. No. 557, 10 PERC 17040 (1985).

<sup>401</sup> Los Angeles Community College District, PERB Dec. No. 252, 6 PERC 13241 (1982); Rialto Unified School District, PERB Dec. No. 209, 6 PERC 13113 (1982).

<sup>402</sup> Solano Community College District, PERB Dec. No. 219, 6 PERC 13154 (1982); Mt. Diablo Unified School District, PERB Dec. No. 373, 8 PERC 15017 (1983).

<sup>403</sup> Chula Vista City School District, PERB Dec. No. 256, 6 PERC 13254 (1982).

<sup>404</sup> Modesto City Schools, PERB Dec. No. 518, 9 PERC 16198 (1985).

<sup>405</sup> 227 Cal.App.3rd 767, 278 Cal.Rptr 228 (1991).

libel when they were engaging in protected union activity, acted on his own and without the knowledge of the school district, therefore, the school district was not liable for the acts of the principal. The Court of Appeal held that the union must prove that the district had knowledge of the lawsuit in order to show that the district condoned or ratified the filing of the lawsuit in retaliation for union activities.<sup>406</sup>

## EMPLOYER UNFAIR LABOR PRACTICES

### A. Discrimination Against Employees

The EERA states that it shall be unlawful for a public school employer to “. . . impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or to otherwise interfere with, restrain, or coerce employees because of their exercise of rights. . . .” guaranteed by the EERA.<sup>407</sup> Under the NLRA, the courts have held that the employer may not act out of antiunion animus in discriminating against an employee but when the employer acts out of legitimate business interest, the courts have upheld the employer’s action unless antiunion animus can be shown or the conduct is inherently destructive of the employee’s interests.<sup>408</sup>

### B. NLRB Cases

In NLRB v. Great Dane Trailers Inc.,<sup>409</sup> the United States Supreme Court stated:

“The statutory language ‘discrimination . . . to . . . discourage . . .’ means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose . . . Some conduct, however, is so ‘inherently destructive of employee interests’ that it may be deemed proscribed without need for proof of an improper motive . . . If the conduct in question falls within this ‘inherently destructive’ category, the employer has the burden of explaining away, justifying or characterizing ‘his actions as something different than they appear on their face’ and if he fails, ‘an unfair labor practice charge is made out.’<sup>410</sup>

The discharge or dismissal of employees including layoffs and transfers has not been held by the courts to be inherently destructive of employee rights.<sup>411</sup> The courts have held that in

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<sup>406</sup> Id. at 783.

<sup>407</sup> Government Code section 3543.5(a).

<sup>408</sup> See, American Ship Building v. NLRB, 380 U.S. 300 (1965); NLRB v. Great Dane Trailers, Inc.; 388 U.S. 26 (1967).

<sup>409</sup> 388 U.S. 26 (1967).

<sup>410</sup> Id. at 33.

<sup>411</sup> American Ship Co. v. NLRB, U.S. 300 (1965); Berry Schools v. NLRB, 627 F.2d 692 (5<sup>th</sup> Cir. 1980); NLRB v. Adams Delivery Service, 623 F.2d 96 (9<sup>th</sup> Cir. 1980); L’Eggs Products, Inc. v. NLRB, 619 F.2d 96 (9<sup>th</sup> Cir. 1980); Stephenson v. NLRB, 614 F.2d 1210 (9<sup>th</sup> Cir. 1980); NLRB v. Federal Pacific Electric Co., 441 F.2d 765 (5<sup>th</sup> Cir. 1971); NLRB v. Century Broadcasting Corp., 419 F.2d 771 (8<sup>th</sup> Cir. 1969); NLRB v. Materials Transportation Co., 412 F.2d 1074 (5<sup>th</sup> Cir. 1969); Reading & Bates, Inc. v. NLRB, 403 F.2d 9 (5<sup>th</sup> Cir. 1968); NLRB v. Red Top Cab & Baggage Co., 383 F.2d 547 (5<sup>th</sup> Cir. 1967); NLRB

discharge cases, antiunion animus must be the motivating or dominant factor for the discharge and that “but for” the employee’s union activities, he would not have been discharged.<sup>412</sup>

In NLRB v. O.A. Fuller Super Markets, Inc.,<sup>413</sup> the Court of Appeals stated:

“[A] discriminatory act on the part of the employer is not in itself unlawful unless intended to prejudice an employee’s position because of his union activity, i.e., some element of the antiunion animus is necessary... Thus, in controversies involving employee discharges, the motive of the employer is the controlling factor...and, absent a showing of antiunion motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all...if the specific employee happens to be both inefficient and engaged in union activities, that coincidence standing alone is insufficient to destroy the just cause for his discharge . . .”<sup>414</sup>

In Reading & Bates, Inc. v. NLRB,<sup>415</sup> the Court of Appeals stated:

“If the employee’s misdeeds are so flagrant that he would almost certainly have been fired regardless of antiunion animus, then there is no ‘discrimination’ . . . the board [NLRB] may look to the employer’s intent or the dominant motive behind discharge to determine whether discrimination has occurred. No . . . violation occurs . . . unless the employer acts discriminatorily with intent to discourage union membership and such improper motive is a cause without which the employee would not be discharged.”<sup>416</sup>

The courts have held that it is not the role of the labor relations agency to second guess the employer’s policies or actions or substitute its judgment for that of the employer.<sup>417</sup> The labor relations agency’s role is to determine if the employer’s dominant motivation was antiunion animus. The agency’s finding must be based on substantial evidence. Evidence of the employer’s general hostility toward unions or mere suspicion of antiunion motivation is insufficient.<sup>418</sup> The Court of Appeals summarized the applicable case law:

“Management decisions are not subject to the second guessing of the board [NLRB] or the Courts unless it is shown by

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v. O.A. Fuller Super Markets, Inc., 374 F.2d 197 (5<sup>th</sup> Cir. 1967); NLRB v. Superior Sales, Inc., 366 F.2d 229 (8<sup>th</sup> Cir. 1966); NLRB v. Ace Comb Co., 342 F.2d 841 (8<sup>th</sup> Cir. 1965).

<sup>412</sup> NLRB v. Adams Delivery Service, 623 F.2d 96 (9<sup>th</sup> Cir. 1980); L’Eggs, Inc. v. NLRB, 619 F.2d 1337 (9<sup>th</sup> Cir. 1980); Stephenson v. NLRB, 614 F.2d 1210 (9<sup>th</sup> Cir. 1980); NLRB v. O.A. Fuller Super Markets, Inc., 374 F.2d 197 (5<sup>th</sup> Cir. 1967).

<sup>413</sup> 374 F.2d 197 (5<sup>th</sup> Cir. 1967).

<sup>414</sup> Id. at 200.

<sup>415</sup> 403 F.2d 9 (5<sup>th</sup> Cir. 1968).

<sup>416</sup> Id. at 11.

<sup>417</sup> See, NLRB v. Materials Transportation Co., 412 F.2d 1074 (5<sup>th</sup> Cir. 1969); NLRB v. Ace Comb Co., 342 F.2d 841 (8<sup>th</sup> Cir. 1965).

<sup>418</sup> NLRB v. Materials Transportation Co., 441 F.2d 1074 (5<sup>th</sup> Cir. 1969).

substantial evidence . . . that the decision violates the Act [NLRA] . . . an employer’s general hostility to unions without more, does not supply an unlawful motive as to discharges . . . Business judgment cannot be condemned merely because it coincides with antiunion sentiment . . . To show discrimination the board must prove that the employee would have been treated differently in the absence of union activity . . .”<sup>419</sup>

Thus, there must be substantial believable evidence on the record to support an inference of unlawful employer motivation.<sup>420</sup> Even seemingly harsh discharges are not unlawful unless motivated by an intent to discourage union activity.<sup>421</sup> Other jurisdictions and the NLRB have adopted a similar standard.<sup>422</sup>

The employer’s knowledge of the employees union activities is also essential to show discrimination due to union activities.<sup>423</sup> Without proof that the employer had knowledge of the employee’s union activities, discriminatory conduct cannot be found. In NLRB v. Century Broadcasting Company,<sup>424</sup> the Court of Appeals noted:

“Absent knowledge of union activity, the Company could not have been motivated . . . by antiunion animus. The near coincidence . . . with union activity without more is not substantially indicative of a discriminatory motive.”<sup>425</sup>

### C. ALRA Cases

The language of the California Agricultural Labor Relations Act (ALRA)<sup>426</sup> is virtually identical to the language of the NLRA.<sup>427</sup> Section 1153 of the California Labor Code states in part:

“It shall be an unfair labor practice for an agricultural employer to do any of the following: (a) To interfere with, restrain, or coerce agricultural employees in the exercise of their rights guaranteed in Section 1152. . . . (c) By discrimination in regard to the hiring or tenure of employment or any term or

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<sup>419</sup> Id. at 1078.

<sup>420</sup> NLRB v. Federal Pacific Electric Co., 441 F.2d 765, 770 (5<sup>th</sup> Cir. 1971).

<sup>421</sup> Ibid.

<sup>422</sup> See, e.g., Columbia County Bd. of Public Instruction v. Public Employees Relations Comm’n, 353 So. 2d 127 (Fla. Dist. Ct. App. 1977); Pasco County School Board v. Florida Public Employees Relations Comm’n, 353 So. 2d 108 (Fla. Dist. Ct. App. 1977); Martori Bros. Distributors v. Agricultural Labor Relations Board, 29 Cal.3d 721, 631 P.2d 60, 175 Cal.Rptr. 626 (1981); Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083 (1980).

<sup>423</sup> L’Eggs Products, Inc. v. NLRB, 619 F.2d 1337, 1341 (9<sup>th</sup> Cir. 1980); NLRB v. Century Broadcasting Co., 419 F.2d 771, 778 (8<sup>th</sup> Cir. 1969).

<sup>424</sup> 419 F.2d 771, 777 (8<sup>th</sup> Cir. 1969).

<sup>425</sup> Id. at 778 (quoting NLRB v. South Rambler Co., 324 F.2d 447, 449-50 (8<sup>th</sup> Cir. 1963).

<sup>426</sup> Labor Code sections 1140-1166.3.

<sup>427</sup> 29 U.S.C. Sections 141-166 (1976). Both statutory schemes (NLRA and ALRA) utilize the phrase “in the exercise of rights guaranteed.”

condition of employment, to encourage or discourage membership in any labor organization . . .”<sup>428</sup>

The rights guaranteed in Section 1153 are virtually indistinguishable from the rights guaranteed under Section 157 of the NLRA and the EERA. All these statutory schemes guarantee the right of employees to self-organize, the right to form, join and support labor organizations and the right to engage in union activities.

The California Supreme Court in Martori Brothers Distributors v. Agricultural Labor Relations Board,<sup>429</sup> interpreting the language of California Labor Code section 1153, adopted the “but for” test formulated by the federal courts and the NLRB under the NLRA.<sup>430</sup> The court stated that:

“[i]n the absence of union discrimination, the purpose of labor legislation does not vest in the administrative board any control over an employer’s business policies . . . The mere fact that an employee is or was participating in union activities does not insulate him from immunity from routine employment decisions.”<sup>431</sup>

Furthermore, the court in Martori Brothers stated that when an employer is motivated by both an antiunion bias and a legitimate business interest, the discharge of an employee will be upheld unless it can be shown that “but for” the employee’s union activities he would not have been dismissed.<sup>432</sup> In effect, if it is found that the employee would have been discharged in the absence of union activities or if the union activities were disregarded, the discharge will be upheld. The court directed the NLRB to apply the “but for” test in all future cases.<sup>433</sup>

#### **D. EERA Cases**

The EERA contains language similar to the NLRA and the ALRA. Initially, in interpreting the language of the EERA, the PERB interpreted the language of the EERA in a less stringent manner than the courts had interpreted the NLRA and the ALRA. In Carlsbad Unified School District,<sup>434</sup> the PERB set forth a “single test” for violation of Section 3543(a) as follows:

1. A single test shall be applicable in all instances in which violations of Section 3543.5(a) are alleged;
2. Where the charging party establishes that the employer’s conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;

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<sup>428</sup> Labor Code section 1153.

<sup>429</sup> 29 Cal.3d 721, 631 P.2d 60, 175 Cal.Rptr. 626 (1981).

<sup>430</sup> Ibid. See, also, Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083 (1980).

<sup>431</sup> Martori Brothers, 29 Cal.3d 721.

<sup>432</sup> Ibid.

<sup>433</sup> Id. at 730.

<sup>434</sup> PERB Dec. No. 89, 3 PERC 369 (1977).

3. Where the harm to the employee's rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.<sup>435</sup>

The test set forth in Carlsbad places more of the burden of proof on the employer and does not appear to require antiunion animus on the part of the employer. Later PERB cases have required antiunion animus.<sup>436</sup> In Novato Unified School District, the PERB stated:

“To justify such an inference, the charging party must prove that the employer had actual or imputed knowledge of the employee's protected activity . . . Knowledge along with other factors may support the inference of unlawful motive. The timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of employees engaged in such activity, its departure from established procedures and standards when dealing with such employees, and the employer's inconsistent or contradictory justification for its action are a fact which may support the inference of unlawful motive. In general, the inference can be drawn from a review of the record as whole . . .”<sup>437</sup>

In Kern County Office of Education,<sup>438</sup> the PERB applied the test set forth in Novato and held that a custodian was lawfully discharged even though the custodian was a union officer where the evidence failed to show the discharge was motivated by the custodian's protected union activities. The evidence showed that the custodian had received poor evaluations that indicated a need for improvement prior to the custodian becoming a union officer and that there was no evidence of disparate treatment of similarly situated employees.<sup>439</sup>

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<sup>435</sup> Ibid.

<sup>436</sup> See, Novato Unified School District, PERB Dec. No. 210, 6 PERC 13114 (1982). See, also, Mc Pherson v. PERB, 189 Cal.App.3d 293, 304-05, 234 Cal.Rptr. 428 (1987).

<sup>437</sup> Ibid.

<sup>438</sup> PERB Dec. No. 630, 11 PERC 18133 (1987).

<sup>439</sup> Ibid.

In order for an employee to establish a prima facie case of discrimination, the employee must show that the employee engaged in protected activity, the employer had knowledge of the protected activity and that the employer was motivated by antiunion animus. The employee's protected activity is not required to be direct union activity. Activities such as protesting a school district's policy with respect to extra duty assignments are protected activities under the EERA.<sup>440</sup>

An employee failed to show that an employer acted out of antiunion animus and retaliated against the employee due to the employee's grievance activities where the employee failed to show that the employer was aware or had knowledge of these activities.<sup>441</sup> An employee involved in a union organizing effort who is discharged for theft failed to show that the school district or any management employee was aware of the employee's union activities until after his discharge. In the absence of knowledge of the protected activity by the employer, there was no basis on which the PERB could find antiunion animus motivated the discharge.<sup>442</sup> However, where a member of the union executive board addresses the governing board of the district on matters within the scope of representation the governing board is deemed to have knowledge of the employee's protected union activity.<sup>443</sup>

Antiunion animus can be shown by direct evidence, such as statements by management employees which are negative or critical of the union, prior to the discharge or other disciplinary action imposed upon the union activist by circumstantial evidence.<sup>444</sup> Where there is disparate treatment toward the union activist, and the union activist is disciplined more heavily than other employees, an inference of antiunion animus may be inferred. The disciplining of the union activist when a carload of teachers arrived at school late without the disciplining of other teachers was held to be clear evidence of disparate treatment.<sup>445</sup> However, where there is a solid business reason for the action, disparate treatment or antiunion animus will not be found, such as in the case of refusing to hire a custodian for summer work because the custodian's broken wrist was in a cast, even when the employee had testified on behalf of the union at a PERB hearing a few months earlier.<sup>446</sup>

Antiunion animus can be shown where a school district does not follow its usual procedures with respect to transferring teachers.<sup>447</sup> The denial of an unpaid leave of absence request by the governing board of a district after recommended approval by the administration where the evidence showed that the governing board had never denied an unpaid leave of absence request before was evidence of antiunion animus when the leave was requested by the union president.<sup>448</sup>

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<sup>440</sup> San Leandro Unified School District, PERB Dec. No. 288, 7 PERC 14079 (1983).

<sup>441</sup> Sacramento City Unified School District, PERB Dec. No. 492, 9 PERC 16094 (1985).

<sup>442</sup> Mooreland Elementary School District, PERB Dec. No. 227, 6 PERC 13171 (1982).

<sup>443</sup> San Diego Community College District, PERB Dec. No. 368, 8 PERC 15009 (1983).

<sup>444</sup> Ibid.

<sup>445</sup> Belridge School District, PERB Dec. No. 157, 5 PERC 12015 (1980).

<sup>446</sup> Placer Hills Union School District, PERB Dec. No. 377, 8 PERC 15037 (1984).

<sup>447</sup> San Leandro Unified School District, PERB Dec. No. 288, 7 PERC 14079 (1983).

<sup>448</sup> Rio Hondo Community College District, PERB Dec. No. 226, 6 PERC 13167 (1982).

The timing of the disciplinary action of an employee who has engaged in protected union activity can also be critical when an employee has had a history of good evaluations and then following the employee's participation in protected union activity, continually receives reprimands, an inference of unlawful motivation or antiunion animus is raised.<sup>449</sup> In North Sacramento School District,<sup>450</sup> a certificated employee had for five years received no reprimands, however, after filing a grievance the employee repeatedly received reprimands. In Novato Unified School District,<sup>451</sup> the governing board of a school district transferred a teacher one month after the teacher objected to new record keeping procedures. The PERB found antiunion animus.

In defense to a discrimination charge, the employer must present legitimate business justification for the action taken against the employee. Misconduct by the employee, including such things as violation of work rules, insubordination, theft, improper use of alcohol or drugs, excessive absences, or excessive tardiness, may justify employer disciplinary action. The employer must show that the discipline would have been imposed regardless of the protected union activity.

Therefore, if the evidence presented at the PERB hearing shows that the work rules in the past were not strictly enforced and the employer is now strictly enforcing the rules against an employee who engaged in protected union activity, the justification will be found to be insufficient.<sup>452</sup> An employee may not act in an insubordinate manner by refusing to comply with the directive of an employer but must challenge the employer's action by legitimate means, such as the filing of an unfair labor practice charge with the PERB. An employee's refusal to follow the directive of an employer which results in suspending the teacher on grounds of insubordination is adequate justification for the employer's action.<sup>453</sup>

Teachers who failed to give final examinations and who were reprimanded were not engaging in protected union activity even though the activity was part of a slow down during contract negotiations. The PERB held that the district discipline was not discriminatory and not violative of the EERA.<sup>454</sup>

The PERB has also held that where an employee has previously litigated the issue of discrimination based on union activity in a dismissal proceeding where a full and fair hearing was held, the PERB will dismiss a subsequent unfair labor practice charge on the basis of collateral estoppel.<sup>455</sup> However, where the dismissal proceeding does not address the issue of union discrimination, the employee may file an unfair labor practice charge with the PERB.<sup>456</sup>

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<sup>449</sup> North Sacramento School District, PERB Dec. No. 265, 7 PERC 14017 (1982).

<sup>450</sup> Ibid.

<sup>451</sup> PERB Dec. No. 210, 6 PERC 13114 (1982).

<sup>452</sup> Marin Community College District, PERB Dec. No. 145, 4 PERC 11198 (1980).

<sup>453</sup> Mammoth Unified School District, PERB Dec. No. 371, 8 PERC 15015 (1983).

<sup>454</sup> Palos Verdes Peninsula Unified School District, PERB Dec. No. 195, 6 PERC 13061 (1982).

<sup>455</sup> Kern County Office of Education, PERB Dec. No. 630, 11 PERC 18133 (1987); San Diego Unified School District, PERB Dec. No. 631, 11 PERC 18148 (1988).

<sup>456</sup> See, for example, San Ysidro School District, PERB Dec. No. 134, 4 PERC 11105 (1980).

In order to be considered litigated in a prior proceeding, the prior proceeding must have allowed both parties the right to cross-examine witnesses and require specific findings of fact to ensure a full and fair hearing on the issue. Whether the hearing must be before an independent party is unclear.

In addition to discrimination charges, employers may not interfere with the protected rights of employees.<sup>457</sup> Interference cases differ from discrimination cases generally because they usually involve group activities directly engaged in by the employee organization. An example of interference would be an employer's speech which is found to be coercive, which restricts union or employee activities or threatens loss of benefits or promises benefits to employees who engage in or who refrain from engaging in protected union activity. A public school employer may not condition a salary increase offer to the union on the condition that it waive its statutory right to bargain since this would interfere with the employee organization's statutory rights under the EERA.<sup>458</sup>

An employer's speech which does not coerce or threaten has been held not to be violative of the EERA.<sup>459</sup> When the employer expresses its views on labor related matters over which it has legitimate concerns for the purpose of debate but the written correspondence contains no threat or promises of benefits, the PERB has held that the employer's conduct did not violate the EERA.<sup>460</sup> A complete retraction by a representative of the district, if the retraction is honestly given and reaches all of the employees who have read or heard the threat, can remedy a violation of the EERA.<sup>461</sup>

The commendation of teachers who were nonstrikers even where no threats were made against strikers was held to be violative of the EERA since it could affect future promotional opportunities and other working conditions.<sup>462</sup> The reprimanding of a certificated employee for addressing a union meeting was held to be unlawful interference with the teacher's protected rights under the EERA.<sup>463</sup> A district policy which restricted a union representative from speaking at a school board meeting with respect to an arbitration award unlawfully interfered with the employee organization's right to participate in matters of employer-employee relations under the EERA.<sup>464</sup>

## **E. Denial of Union Statutory Rights**

The EERA states that it is unlawful for a public school employer to deny to employee organizations' rights guaranteed to them under the EERA.<sup>465</sup> These statutory rights include access to employees, the right to use institutional bulletin boards, mailboxes and other means of communication, subject to reasonable regulation, the right to use institutional facilities at

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<sup>457</sup> Government Code section 3543.5(a).

<sup>458</sup> Santa Monica Community College District, PERB Dec. No. 103, 3 PERC 10123 (1979).

<sup>459</sup> Rio Hondo Community College District, PERB Dec. No. 128, 4 PERC 11089 (1980).

<sup>460</sup> Ibid.

<sup>461</sup> Inglewood Unified School District, PERB Dec. No. 624, 11 PERC 18114 (1987).

<sup>462</sup> San Diego Unified School District, PERB Dec. No. 137, 4 PERC 11115 (1980).

<sup>463</sup> Delano Union Elementary District, PERB Dec. No. 213, 6 PERC 13117 (1982).

<sup>464</sup> San Ramon Valley Unified School District, PERB Dec. No. 230, 6 PERC 13184 (1982).

<sup>465</sup> Government Code section 3543.5(b).

reasonable times for the purpose of meetings concerned with the exercise of rights under the EERA, and membership dues deduction.<sup>466</sup>

Government Code section 3543.1 states in part, “Employee organizations shall have the right of access at reasonable times to areas which employees work . . . subject to reasonable regulation . . .”

The PERB cases interpreting Section 3543.1 and the term “reasonable regulation” have formulated a test to determine if the employer’s regulation is reasonable. PERB will review whether the employer’s regulation is necessary to the efficient operation of the employer’s business and/or the safety of its employees or others and whether the regulation is narrowly drawn to avoid overbroad, unnecessary interference with the exercise of the union’s right to communicate with its members.<sup>467</sup>

With respect to union access to employees, the PERB has established a “reasonableness test” to determine whether employer regulations restrict reasonable access. The PERB has interpreted the EERA to specifically include the right of unions to use a school district’s internal mail system, however, the United States Supreme Court has recently restricted the use of an employer’s internal mail system where it would violate federal postal statutes.<sup>468</sup>

The public school employer’s failure to grant release time from work responsibilities for a reasonable number of union representatives for the purposes of collective bargaining is a statutory violation of the EERA, but generally, the collective bargaining agreement will specifically define the number of union representatives who shall be released.<sup>469</sup>

In Berkeley Council of Classified Employees v. Berkeley Unified School District,<sup>470</sup> the PERB held that the school district did not violate the EERA, and did not violate Government Code section 3543.5.

The underlying facts were that the president of the teachers’ union had been on a full-time leave of absence to work on union business pursuant to Education Code section 45210. The union reimbursed the district for the full amount of salary and benefits provided to the president of the union during the negotiations for a successor collective bargaining agreement. The president of the union’s leave of absence compensation for the 2006-2007 school year was on the table.

On October 13, 2006, the district proposed maintaining the terms and conditions of the leave granted pursuant to Education Code section 45210, that the president be granted leave with full salary and benefits with the union reimbursing the district for the costs. The union disagreed with the proposal believing that under the release time provisions of Government Code section 3543.1(c), it was not required to reimburse the district for the time that the union president spent

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<sup>466</sup> Government Code section 3543.1.

<sup>467</sup> Service Employees International Union v. County of Riverside, 36 PERC 113 (2012).

<sup>468</sup> Regents of University of California v. PERB, 108 S.Ct. 1404 (1988).

<sup>469</sup> See, Sierra Joint Community College District, PERB Dec. No. 179, 5 PERC 12150 (1981).

<sup>470</sup> 32 PERC 73, PERB Decision No. 1954 (2008).

meeting and negotiating. The union proposed that it not be required to reimburse the district for the time that the union president spent meeting and negotiating. No agreement was reached on this issue and impasse was declared in December 2006.

The matter was not resolved in mediation and on February 6, 2007, the union filed an unfair labor practice charge with PERB alleging that the district unilaterally changed the release time policy. The union also alleged that the district engaged in bad faith bargaining.

The PERB noted that Education Code section 45210 mandates that classified school district employees be granted leaves of absence to serve as elected officers of local school district employee organizations or statewide or national employee organizations with which a local organization is affiliated. Under Education Code section 45210, a school district continues to compensate its employee and is reimbursed by the employee organization for the time the employee is on leave.<sup>471</sup>

PERB also noted that Government Code section 3543.1(c) governs release time, and states that a reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of release time without loss of compensation when meeting and negotiating and for the processing of grievances. The union argued that the union president is entitled to both a leave of absence under the Education Code and release time under Government Code section 3543.1(c), and that the district's refusal to agree to the application of both provisions to the union president is bad faith bargaining. PERB disagreed.

PERB held that the leave of absence allowed by the Education Code and the release time required under Government Code section 3453.1(c) have different purposes. The Education Code's provisions allow an employee to carry out his or her duties as a union officer while on leave from their normal work duties. In essence, during the time that the employee is on leave, it is the union that directs their duties.

In contrast, release time under the EERA is for employees to continue to carry out their normal work duties for the school district, but who are afforded reasonable paid time off to participate in negotiations and grievance processing. While it is not inconceivable that the duties performed by a union officer while on a leave of absence would include negotiations and grievance processing, the possible overlap does not change the fact that an employee who was on leave under Education Code section 45210 is on leave from their normal work duties to serve as a union officer. PERB held that because such an employee is already on leave from their normal duties, it stands to reason that release time (which is afforded to allow an employee time away from their normal duties) is not possible, as the employee is already on leave.

In essence, PERB held that an employee is not entitled to both a leave of absence under Education Code section 45210 and release time under Government Code section 3543.1(c).

A school district's ban on solicitation and distribution efforts directed at teachers who are not assigned work during twenty minute periods before and after classes was not improper or violative of the EERA. The PERB upheld the district's rule during this period of time since this

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<sup>471</sup> See, also, Tracy Educator's Association v. Superior Court, 96 Cal.App.4<sup>th</sup> 530, 535, 116 Cal.Rptr.2d 916 (2002).

period of time was considered working time or duty hours and were paid preparation periods in which teachers were expected to be available and accessible to students, parents and administrators. PERB held that even though the district did not object to the teachers utilizing the twenty minutes as nonduty break time, the school district did not thereby waive its right to insist that union business not be transacted during that period of time.<sup>472</sup>

The PERB held that the school district's rule requiring the union to submit a request twenty four hours in advance for the use of school rooms to conduct union meetings as reasonable. The PERB held that the school district's rule prohibiting union business in nonworking areas during nonworking times and from occurring in or near the presence of students or nonemployees was unreasonable where the district failed to demonstrate that such union activity would be disruptive to the educational process.<sup>473</sup>

## **F. Domination of Employee Organizations**

The EERA states that it is unlawful for a public school employer to dominate or interfere with the information or administration of any employee organization or in any way encourage employees to join any organization in preference to another.<sup>474</sup> Therefore, public school employers must remain neutral when there are competing employee organizations. The PERB has held that it is unnecessary to find unlawful motive where the employer is found to have encouraged employees to join one employee organization in preference to another.<sup>475</sup>

Where the employer organizes an employee organization which represents employees or where the employer allows management and supervisory employees to establish or organize an employee organization and the employer does not disassociate itself from the actions of the management and supervisory employees, the public school employer has violated the EERA.<sup>476</sup>

In Antelope Valley Community College District,<sup>477</sup> management and supervisory employees established an employee organization after the classified employees filed a petition for union recognition. After the representation petition was filed, the college president met with employees designated by management and requested that they submit a wage and fringe benefit proposal. The college president also met with all classified employees and told them that he favored a bargaining unit which included all classified employees. The designated employees later submitted a wage and fringe benefit package proposal on behalf of all classified employees and the package was ultimately adopted by the governing board of the district. PERB found that the district's actions dominated the employees organization and encouraged employees to join the group formed by the management and supervisory employees instead of CSEA and found a violation of the EERA.

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<sup>472</sup> Long Beach Unified School District, 11 PERC 18029, PERB Dec. No. 608 (1987).

<sup>473</sup> Ibid.

<sup>474</sup> Government Code section 3543.5(d).

<sup>475</sup> Santa Monica Community College District, PERB Dec. No. 103, 3 PERC 10123 (1979).

<sup>476</sup> Antelope Valley Community College District, PERB Dec. No. 97, 3 PERC 10098 (1979).

<sup>477</sup> PERB Dec. No. 97, 3 PERC 10098 (1979).

In Oak Grove School District<sup>478</sup> the creation of a teacher forum was found by the PERB to be an employer dominated employee organization and violative of the EERA. The PERB stated:

“This is not to say all faculty councils or groups are per se unlawful or that individual employees cannot speak to their employers about working conditions, including those within the scope of representation. But when the district sets up an organized group of teachers (or other represented employees) to meet at regular intervals on school time to discuss topics of mutual interest, it permits discussion of negotiable subjects at its own risk.”<sup>479</sup>

In Redwoods Community College District,<sup>480</sup> the PERB found that the public school employer violated the EERA by creating and operating a classified employees’ council. The PERB held that the evidence showed that the council was an employee organization within the meaning of the EERA because one of its primary purposes was representation of employees in their relations with the school district. The district provided release time to council employee representatives and that among the items discussed at council meetings were matters within the scope of representation. The PERB held that although discussions alone would not violate the EERA, in the instant case, the classified employees’ council was also responsible for making proposals to the district regarding matters within the scope of representation.<sup>481</sup>

### **G. Failure to Bargain in Good Faith – Totality of Conduct**

The EERA states that it shall be unlawful for a public school employer to refuse to or fail to meet and negotiate in good faith with an exclusive representative.<sup>482</sup> The refusal to bargain in good faith can be established by conduct evidencing bad faith bargaining. The refusal to provide relevant information relating to bargaining or contract administration, unilateral changes in working conditions (discussed below) and refusal to bargain over a subject proposed by the union may be evidence of a refusal to bargain in good faith.

Whether the public school employer has acted in good faith is determined by the PERB on a case-by-case basis. The PERB will review the “totality of conduct” and will review whether a single incident or conduct by one party was a flagrant “per se” violation of the good faith requirement of the EERA.<sup>483</sup>

Unlike the NLRA, the EERA contains a statutory impasse procedure and failure to participate in good faith in the impasse procedures is an unlawful labor practice.<sup>484</sup> The statutory

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<sup>478</sup> PERB Dec. No. 582, 10 PERC 17134 (1986).

<sup>479</sup> Ibid.

<sup>480</sup> PERB Dec. No. 650, 12 PERC 19018 (1987).

<sup>481</sup> Ibid.

<sup>482</sup> Government Code section 3543.5(c).

<sup>483</sup> Pajaro Valley Unified School District, PERB Dec. No. 51, 2 PERC 2107 (1978).

<sup>484</sup> Government Code section 3543.5(e); see, also, Moreno Valley Unified School District v. PERB, 142 Cal.App.3d 191, 198, 191 Cal.Rptr. 60 (1983).

impasse procedures contemplate continuation of the bilateral negotiations process, including mediation.<sup>485</sup> Unlike the NLRA where impasse indicates a halt to the bilateral process, the EERA statutory impasse procedures contemplate a continuation of the labor management dispute resolution process and unilateral changes by the employer during the pendency of impasse procedures has been held to be a per se violation of the statutory duty of employers to participate in good faith in the impasse procedures set forth in the EERA.<sup>486</sup>

In Public Employer Relations Board v. Modesto City Schools District,<sup>487</sup> the Court of Appeals stated:

“We find nothing in the EERA intimating that the duty to bargain automatically ceases at the end of impasse procedures. Even though section 3548.4 may not mandate post-factfinding mediation, it does provide that mediation efforts may continue. Moreover, . . . District’s contention that, under the instant circumstances, it had no duty to bargain after issuance of a factfinding report is without support in the law and would undermine the collective bargaining process established by the EERA to improve employer-employee relations within the public school systems in California. If, after exhausting statutory impasse procedures, an employer’s duty to bargain permanently ceases under all circumstances, the impasse procedure will . . . become an empty charade.

“Indeed, it is well settled in the private sector that a legal impasse can be terminated by nearly any change in bargain-related circumstances. An impasse is a fragile state of affairs and may be broken by a change in circumstances which suggests that attempts to adjust differences may no longer be futile. In such a case, the parties are obligated to resume negotiations and the employer is no longer free to implement changes in the working conditions without bargaining. Just as there is no litmus-paper test to determine when an impasse has been created, there is none which determines when it has been broken . . . Most obviously, an impasse will be broken when one party announces a retreat from some of its negotiating demands . . .

“. . . [S]ince collective bargaining is at the heart of the EERA scheme, it is necessary that PERB embrace the concept of the duty to bargain which revives when impasse is broken. The existence of impasse resolution procedures does not negate this conclusion. Whether one considers impasse to happen at the beginning, the end, or throughout the statutory impasse resolution

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<sup>485</sup> Moreno Valley, at 199.

<sup>486</sup> Id. at 200.

<sup>487</sup> 136 Cal.App.3d 881, 898-899, 186 Cal.Rptr. 634 (1982).

mechanism, at some point that impasse can be broken, just as in the private sector. When it is, the duty to bargain revives.”

## **H. Failure to Bargain in Good Faith After Fact Finding Report**

In Modesto City Schools, the Court of Appeal found that following the issuance of the factfinding report, the association and district met several times. While the district agreed to meet with the association, it still maintained that it had no obligation to engage in the give and take of collective bargaining. The Court of Appeal noted that the PERB found that the association’s concessions were sufficient to break the impasse which had existed between the district and association and, therefore, the district’s duty to meet and negotiate in good faith was revived.<sup>488</sup> The Court of Appeal went on to state:

“An employer cannot change matters within the scope of representation without first providing the exclusive representative notice and opportunity to negotiate. Unilateral change in these areas prior to impasse is seen as a violation of the duty to negotiate in good faith because it is tantamount to a refusal to bargain. However, once impasse is reached, the employer may take unilateral action to implement the last offer the union has rejected . . . The employer need not implement changes absolutely identical with its last offer on a given issue. However, the unilateral adoptions must be reasonably comprehended within the preimpasse proposals . . .

“We believe PERB had sufficient information before March 1980 to establish reasonable cause to believe that the district violated the duty to bargain in good faith by unilaterally implementing changes inconsistent with its last best offer . . .

“In addition, there was reasonable cause for PERB to conclude that the district had unilaterally abolished the contractual grievance procedure and substituted in its place a District-devised grievance procedure . . .

“We conclude that there was reasonable cause to believe that district violated Section 3543.5, subdivision(c), by (1) refusing to meet and negotiate with Association over concessions and new proposals that Association offered following exhaustion of statutory impasse procedures, and (2) by unilaterally changing some terms and conditions of employment inconsistent with its last best offer.”<sup>489</sup>

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<sup>488</sup> Id. at 900.

<sup>489</sup> Id. at 900-901.

The Court of Appeal went on to uphold the injunction against the district as just and proper as a means of preserving the status quo of the parties and held that PERB had the authority to seek injunctive relief to prevent the district from implementing unilateral changes.<sup>490</sup>

In summary, the courts have held that it is unlawful for a public school employer to make unilateral changes in employment conditions within the scope of representation during the pendency of impasse procedures and following the implementation of impasse procedures, including the factfinder's report, where the employee organization has broken the impasse by making proposals which contain concessions or changes from their prior proposals. In such cases, where the employee organization has broken the impasse, the duty to meet and negotiate has been revived and the employer commits an unfair labor practice by attempting to make unilateral changes in working conditions.<sup>491</sup>

### **I. Unilateral Change in Working Conditions or Past Practices**

The PERB has ruled that a public school employer's unilateral change in terms and conditions of employment constitutes a per se violation of the EERA if:

1. The employer breached or altered the parties' written agreement or its own established past practice;
2. Such action is taken without giving the other party notice or an opportunity to bargain over the change;
3. The change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and
4. The change in policy concerns a matter within the scope of representation.<sup>492</sup>

The PERB has held that the assignment of work is a nonnegotiable management prerogative if the newly assigned work is reasonably related to existing duties performed by employees.<sup>493</sup> If the changes are reasonably comprehended within the existing job duties, an assignment of such duties, even if never performed before, is not a violation.<sup>494</sup> For example, if there has been no newly assigned work and it has been the consistent past practice of the district to require teachers and classified instructional aides to administer medication and to provide

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<sup>490</sup> Id. at 905.

<sup>491</sup> Cal.Rptr. 60 (1983); Public Employment Relations Board v. Modesto City Schools District, 136 Cal.App.3d 881, 186 Cal.Rptr. 634 (1982).

<sup>492</sup> United Educators of San Francisco v. San Francisco Unified School District, 33 PERC 145, PERB Case No. 2057 (2009); citing, Walnut Valley Unified School District, PERB Decision No. 160 (1981); Grant Joint Union High School District, PERB Decision No. 196 (1982).

<sup>493</sup> City and County of San Francisco, PERB Decision No. 1608-M (2004).

<sup>494</sup> Rio Honda Community College District, PERB Decision No. 279 (1982).

specialized physical healthcare, then there has not been a unilateral change in working conditions and no violation of the Education Employment Relations Act (EERA).<sup>495</sup>

A unilateral change in working conditions includes increases in employee benefits, as well as decreases, since unilateral action that benefits employees may undercut the authority of the union.<sup>496</sup> The employer may rebut a charge of unilateral action by showing that there was no change in the collective bargaining agreement or past practice or it was due to business necessity or an emergency.

Where the language of the collective bargaining agreement is clear, the PERB will review the collective bargaining agreement to determine whether a change has occurred.<sup>497</sup> Where the language of the collective bargaining agreement is unclear, the PERB will review the bargaining history of the collective bargaining agreement.<sup>498</sup> Where the collective bargaining agreement does not address the issue and the district is relying on past practice, the PERB will weigh the testimony of the witnesses to determine whether the past practice is well established to determine if a unilateral change has taken place.<sup>499</sup>

The business necessity defense is upheld by the PERB only when the employer can establish that it was required to act. In several cases, the PERB has upheld the business necessity defense in cases where the school district was required to adopt a tentative student attendance calendar subject to continuing to bargain in good faith over a related employee work calendar.<sup>500</sup>

The PERB has held that a single instance of minor employer bargaining conduct was not serious enough to find a violation of the EERA.<sup>501</sup> In addition, an employer may unilaterally change working conditions or refuse to bargain on issues outside the scope of representation or on matters which are superseded by the Education Code.<sup>502</sup> However, the employer may have the duty to negotiate the effects of certain nonnegotiable decisions such as layoffs.<sup>503</sup>

The employer, as a defense, may assert that the issue is waived by contract or bargaining history. For the employer to successfully show that the employee organization waived its right to negotiate on a particular issue, the employer must demonstrate by clear and unmistakable contract language or bargaining history that the employee organization had a reasonable opportunity to bargain over a decision not already firmly made and the union waived its right to do so.

A zipper clause in a contract containing general language that all other issues are hereby waived does not justify unilateral action unless additional specific contract language covers the

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<sup>495</sup> Government Code section 3540 et seq.

<sup>496</sup> Palo Verde Unified School District, PERB Dec. No. 321, 7 PERC 14182 (1983).

<sup>497</sup> Marysville Unified School District, PERB Dec. No. 314, 7 PERC 14163 (1983).

<sup>498</sup> San Mateo County Community College District, PERB Dec. No. 486, 9 PERC 16084 (1985).

<sup>499</sup> Los Rios Community College District, PERB Dec. No. 499, 9 PERC 16105 (1985).

<sup>500</sup> San Jose Community College District, PERB Dec. No. 240, 9 PERC 13222 (1982); Lake Elsinore School District, PERB Dec. No. 606, 11 PERC 18025 (1986).

<sup>501</sup> Lake Elsinore School District, PERB Dec. No. 666, 12 PERC 19077 (1988).

<sup>502</sup> Healdsburg Union High School District, PERB Dec. No. 375, 8 PERC 15021 (1984).

<sup>503</sup> North Sacramento School District, PERB Dec. No. 193, 6 PERC 13026 (1982).

issue.<sup>504</sup> Where the employer and employee organization agreed to contract language which authorized the employer to reduce the teachers' duty free lunch period to no less than thirty minutes each day, the employer was justified in making the change two years later.<sup>505</sup> However, contract language covering certain effects of layoff did not waive the union's right to bargain additional effects of layoff after a subsequent layoff occurred.<sup>506</sup>

Where the employer notifies the union of the opportunity to bargain a proposed change in working conditions and the union fails to act a waiver may be found.<sup>507</sup>

Where the union seeks to negotiate a subject which is nonnegotiable and does not seek to bargain the negotiable effects of the decision, such as a layoff, a waiver may be found.<sup>508</sup> Where the union has been provided notice of a proposed layoff and fails to pursue negotiations over the effects of the layoff prior to the implementation of the layoffs, a waiver may be found.<sup>509</sup>

In Oakland Unified School District v. Public Employment Relations Board,<sup>510</sup> the Court of Appeal held that the school district's unilateral change of administrators for its health plan violated the EERA. The Court of Appeal stated:

“The question is whether the change in administrators had a ‘material and significant effect or impact upon the terms and conditions of employment.’

“The Blue Cross plan provided in writing ‘a member who terminates employment and thereby leaves the group may continue Blue Cross protection by applying for a Blue Cross group conversion program.’ No such written conversion privilege attached to the contract with Western Administration Company . . .

“With the change from Blue Cross to Western Administration Company, employees of the district were issued a card by the district; however that card does not provide the same assurance that admission to a hospital outside of Northern California will be quick and relatively problem free . . .

“We conclude that there is substantial evidence to support the board's conclusion that while the change in administrators does not affect the coverage provided by the district self-insurance plan, Blue Cross administration resulted in certain benefits which were lost when the district switched to Western Administration Company. These lost benefits have a material impact on the terms and conditions of employment of the Association members. Since

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<sup>504</sup> Los Angeles Community College District, PERB Dec. No. 252, 6 PERC 13241 (1982).

<sup>505</sup> Marysville Joint Unified School, PERB Dec. No. 314, 7 PERC 14163 (1983).

<sup>506</sup> Placentia Unified School District, PERB Dec. No. 595, 10 PERC 17181 (1986).

<sup>507</sup> Los Angeles Community College District, PERB Dec. No. 252, 6 PERC 13241 (1982).

<sup>508</sup> Newman-Crows Landing Unified School District, PERB Dec. No. 223, 6 PERC 13160 (1982).

<sup>509</sup> Kern Community College District, PERB Dec. No. 372, 8 PERC 15016 (1983).

<sup>510</sup> 120 Cal.App.3d 1007, 175 Cal.Rptr. 105 (1981).

these benefits are linked to the identity of the administrator, the District change in administrators should have been negotiated pursuant to Section 3543.2 . . .

“Since the district was found to violate Government Code Section 3543.5, subdivisions (a), (b), and (c), by unilaterally terminating Blue Cross as its administrator, a proper remedy would be to order the district to return to the status quo by reinstating Blue Cross. This is a common and accepted remedial approach in unilateral change cases . . .

“Here, however, the board provided alternatives to reinstatement so that the district would not have to disrupt its contract with Western Administration Company.

“It ordered the district (1) to reinstate Blue Cross as Administrator, or (2) to negotiate with Western Administration Company a modification in their existing agreement to provide the benefits lost, or (3) to negotiate a different settlement with OEA, reduce it to writing, and submit it to the regional director as proof of compliance with the order.

“In addition the board ordered the District to reimburse employees’ expenses incurred as a result of the change in administrators and to give employees written notice of the board’s action. The remedy ordered appears to be even handed and temperate . . .”<sup>511</sup>

The PERB has defined a binding past practice as one that is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. In addition, a valid past practice is one that is regular and consistent or historic and accepted.<sup>512</sup> The Court of Appeal in Riverside Sheriffs Association v. County of Riverside<sup>513</sup> adopted the PERB definition of past practice.

A unilateral change violation will be found if:

- The employer breached or altered the parties' written agreement or its own past practice;
- Such action was taken without giving the other party notice or an opportunity to bargain over the change;

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<sup>511</sup> Id. at 1012-1015.

<sup>512</sup> California State Employee’s Association, SEIU Local 1000, PERB Decision No. SA-CO-237-S, 26 PERC 33058, p. 196 (2002).

<sup>513</sup> 106 Cal.App.4<sup>th</sup> 1285; 131 Cal.Rptr.2d 454 (2003).

- The change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment);
- The change in policy concerns a matter within the scope of representation.

PERB has applied these criteria to side letters and side agreements.<sup>514</sup> PERB defines a side letter as an agreement between the employer and union that modifies, clarifies or interprets an existing provision in a MOU or collective bargaining agreement or addresses issues that are not covered in the MOU or collective bargaining agreement.

## **J. Duty to Supply Information**

An employer may also be found to violate the duty to bargain in good faith where the employer fails to provide relevant information which is requested by the employee organization.<sup>515</sup> The PERB has held that the exclusive representative has a statutory duty to represent bargaining unit employees in collective bargaining, the filing of grievances and other contract administration issues. Therefore, the exclusive representative may need information that is necessary and relevant to discharging its duties and it may not be able to perform its statutory duties if the employer refuses to provide requested information.<sup>516</sup>

The employer, in many cases, will be required to provide home addresses of unit members and former employees even where the employer alleges that it would be a violation of the privacy rights of employees.<sup>517</sup> Employers also may be required to provide wage information to the employee organization, including the salary of each bargaining unit employee.<sup>518</sup>

The PERB has held that the district is not required to give the employee organization the social security numbers of non-unit employees and has held that this information is confidential and not subject to disclosure.<sup>519</sup> The employer may demand that the union share in the cost of reproducing the requested materials and where the costs are substantial and the union objects, the parties must bargain over the allocation of cost.<sup>520</sup> The union is not entitled to demand receipt of the information in a particular form, but the employer must provide relevant information in a timely manner.<sup>521</sup> The failure to provide an employee organization with a seniority list for six months without justification was found to be a violation of the EERA.<sup>522</sup>

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<sup>514</sup> Council of Classified Employees/AFT, Local 4522 v. Palomar Community College District, 36 PERC 69 (2011).

<sup>515</sup> Ibid.

<sup>516</sup> Stockton Unified School District, PERB Dec. No. 143, 4 PERC 11189 (1980).

<sup>517</sup> Mt. San Antonio Community College District, PERB Dec. No. 224, 6 PERC 13163 (1982).

<sup>518</sup> Lucia Mar Unified School District, 6 PERC 13244 (1982).

<sup>519</sup> Los Rios Community College District, PERB Dec. No. 670, 12 PERC 19083 (1988).

<sup>520</sup> Los Rios Community College District, PERB Dec. No. 670, 12 PERC 19083 (1988).

<sup>521</sup> Ibid.

<sup>522</sup> Azuza Unified School District, PERB Dec. No. 374, 8 PERC 15018 (1983).

Knowingly providing an exclusive representative with inaccurate information, whether or not it is in response to a request for information, regarding the financial resources of the district constitutes a refusal or failure to meet and negotiate in good faith.<sup>523</sup>

In Stockton Teachers' Association v. Stockton Unified School District,<sup>524</sup> the union representing teachers requested information from the district. The union wanted to know the district's monthly "payout" for health insurance benefits for unit members, for the purpose of preparing for mid-term negotiations on health benefits and wages. The district refused to cooperate, stating that this information was not "necessary and relevant." The PERB disagreed, stating as follows:

"In defining the parameters of 'necessary and relevant information' to which the representative is entitled, the courts have concluded that information pertaining immediately to mandatory subjects of bargaining is so intrinsic to the core of the employer-employee relationship that it is considered presumptively relevant and must be disclosed unless the employer can establish that the information is plainly irrelevant or can provide adequate reasons why it cannot furnish the information."

In California Faculty Association v. Trustees of the California State University,<sup>525</sup> the PERB set forth the following standard with regard to determine what information is necessary and relevant:

"The key inquiry is relevance. If the information requested has no relevance to any collective bargaining need, a refusal to furnish it could not be an unfair labor practice. Relevance must be determined by a standard more liberal than that normally applied in hearings, more akin to a discovery-type standard. Information is not made irrelevant simply because a union is able to negotiate a contract without the requested data."

In Service Employees International Union v. City of Redding,<sup>526</sup> the PERB applied the balancing test when the city refused to provide investigative reports regarding a harassment complaint and customer service complaints to the union SEIU.

In applying the balancing test, the PERB looked at the individual privacy rights of the individuals involved. SEIU was willing to accept redacted reports from the city, which would blot out any personal identifying information. Additionally, SEIU's interest in obtaining the information was great, as they have the right and duty to represent their members in disciplinary actions. The PERB weighed SIEU's request with the city's argument, which was that their managers and non-unit employees – whom the union did not represent – were entitled to their

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<sup>523</sup> Government Code section 3543.5(c). Added by Stats.2003, ch.276 (A.B. 109) effective January 1, 2004.

<sup>524</sup> PERB Decision No. 143 (1980).

<sup>525</sup> PERB Decision No. 613-H (1987).

<sup>526</sup> PERB Decision No. 2190-M (2011).

privacy. After balancing the request of the union with the privacy argument of the city, the Board determined that the city must provide the reports to the union, as the city interest in privacy was outweighed by the union's need for the information.

When information is requested by a union, the PERB must determine if the information is necessary and relevant. The PERB uses a liberal standard to determine the relevance of the requested information. If an employer questions the relevance of the information, the union must provide an explanation. An employer may rebut the relevance of the requested information, and the burden shifts to the union to show how the information is relevant to its representational responsibilities. Finally, unions do not gain automatic access to information that is deemed necessary and relevant. Constitutional privacy rights may limit a union's ability to receive requested information. In order to remedy this issue, the PERB will apply the "balancing test": weighing union needs and interests in receiving relevant employee information with an employee's privacy and confidentiality interests.

In County of Los Angeles v. Los Angeles County Employee Relations Commission,<sup>527</sup> the California Supreme Court held that the Service Employees International Union (SEIU), as the exclusive bargaining representative of all Los Angeles County employees, was entitled to obtain the home addresses and phone numbers of all represented employees, including those who are not union members.

The California Supreme Court held that applicable labor laws require public agencies to give employee union's home addresses and telephone numbers to the employee union that represents the employees, regardless of whether the employees are union members. The court held that Article I, section 1 of the California Constitution which sets forth a right of privacy does not outweigh the right of the unions to obtain the information.<sup>528</sup>

The California Supreme Court noted that under state law county employees<sup>529</sup> have a collective right to unionize and an individual right to refuse to join or participate in a union.<sup>530</sup> Each of the county's bargaining unit has a memorandum of understanding with service employees and international union. Most of these MOU's have an agency shop provision that gives county employees four options:

1. Join SEIU and pay dues;
2. Decline to join and pay a fair share fee;
3. Decline to join, object to the fair share fee and instead pay an agency shop fee; or
4. Decline to join, claim a religious exemption, and pay the agency shop fee to a nonreligious, nonlabor charitable fund.

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<sup>527</sup> 56 Cal.4<sup>th</sup> 905, 157 Cal.Rptr.3d 481(2013).

<sup>528</sup> 56 Cal.4<sup>th</sup> 905, 912-13 (2013).

<sup>529</sup> Similar laws apply to employees of community college districts, school districts and county offices of education.

<sup>530</sup> Government Code section 3502.

The California Supreme Court noted that SEIU acts on behalf of all employees in the bargaining unit whether the employees are union members or not. Federal law requires that SEIU send county employees an annual notice to collect fees for nonmembers.<sup>531</sup> The Hudson Notice sets out membership options, applicable fees and reasons for these fees. The notice also includes forms allowing the employee to join or decline to join the union. Those who decline are asked to provide their name, home address and home telephone number. Employees who do not return the form are considered fair share fee payers. As of 2007, nearly 12,000 of the county's approximately 14,500 nonmember employees were fair share fee payers. SEIU has home addresses for about half of these nonmembers and has contact information for approximately 46,000 county employees who are members.<sup>532</sup>

Historically, the County of Los Angeles provided lists of nonmembers' names, worksites, office addresses and supervisors, but has never given SEIU home addresses or telephone numbers. As a result, SEIU has not sent Hudson Notices directly to county employees. Instead, since at least 1994, SEIU has delivered Hudson Notice packets to the Los Angeles County Employee Relations Commission (ERCOM), an independent body that manages its relations between the county and its employees under the Meyers-Milias-Brown Act (MMBA).<sup>533</sup> ERCOM would then mail the Hudson Notices, using address labels provided by the county.<sup>534</sup>

During negotiations in 2006, SEIU proposed amending the MOU to requiring the county to furnish the employee union with the names and home addresses of employees in the bargaining unit covered by agency shop provisions. SEIU sought the information to provide Hudson Notices, to communicate with all county employees, members or not, about union activities and events. SEIU also wanted the information for recruitment and investigation of grievances.<sup>535</sup>

The county rejected SEIU's proposal and SEIU filed an unfair labor practices charge. The county refused to comply with the administrative order requiring disclosure and filed a court action. The matter was appealed to the California Supreme Court.<sup>536</sup>

The California Supreme Court reviewed the relevant case law under the NLRA and the decisions of the PERB. The court also reviewed the provisions of Government Code section 3505 which require the employer and the employee union to exchange freely information, opinions and proposals, and to endeavor to reach agreement on matters within the scope of representation. The court held that the overwhelming weight of the decisions require disclosure of home addresses and phone numbers of all county employees. The court further held that disclosure of home addresses and telephone numbers does not violate the constitutional right of privacy under the California Constitution.<sup>537</sup>

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<sup>531</sup> Chicago Teachers Union, Local #1 v. Hudson, 475 U.S. 292 (1986).

<sup>532</sup> Id. at 912.

<sup>533</sup> See, Government Code sections 3507, 3509.

<sup>534</sup> 56 Cal.4<sup>th</sup> 905, 913 (2013).

<sup>535</sup> Id. at 913-14.

<sup>536</sup> Ibid.

<sup>537</sup> Id. at 915-16.

The court held that nonmember employees have a reduced expectation of privacy in the context of county employment. The court noted that a union breaches a duty of fair representation if it fails to inform all employees about the status of negotiations or changes in the contractual terms of their employment. Because the union's duty extends to all employees in the bargaining unit, regardless of union membership, the union must have the means of communicating with all employees on these important topics. In addition, a union must give nonmembers an opportunity to express their views on bargaining matters even those employees who do not have a vote.<sup>538</sup>

The court noted that employers may bargain for a notice and opt out procedure in negotiating collective bargaining agreements with employee unions. Public employers can also draft employment agreements that will notify employees their home contact information is subject to disclosure to the union and permit employees to request nondisclosure. The court stated, “. . . Nothing in the relevant statutes or case law appears to prohibit agencies such as PERB or ERCOM from developing notice and opt out procedures that would allow employees to preserve the confidentiality of their home addresses and telephone numbers.”<sup>539</sup>

The court concluded as follows:

“Longstanding case law and public policies support direct communication between unions and the employees they represent. On balance, we conclude SEIU's interest in communicating with all county employees significantly outweighs nonmembers interest in preserving the privacy of the contact information.”<sup>540</sup>

In summary, the California Supreme Court broadly proclaimed that employee unions to the home addresses and phone numbers of all employees including nonmembers. However, the court left open the option for allowing employers to negotiate with the employee union to establish notice and opt out procedures for employees who do not wish to disclose their home address and telephone number.

## **K. Parity Agreements**

In Banning Teachers Association v. Public Employment Relations Board,<sup>541</sup> the California Supreme Court held that where a school district had entered into a collective bargaining agreement with the classified employees' union that provided that if the certificated employees received a larger salary increase than the classified employees, the classified employees would also receive a larger increase, there was no violation of the EERA. The California Supreme Court held that such parity agreements were not a per se violation of the EERA. The California Supreme Court stated:

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<sup>538</sup> Id. at 925-28.

<sup>539</sup> Id. at 933.

<sup>540</sup> Id. at 933.

<sup>541</sup> 44 Cal.3d 799 (1988).

“Section 3543.5, subdivision (c) requires the school district to negotiate in good faith. In the proper exercise of its discretion, PERB again found no evidence on which to base a finding that by entering into the parity agreement here the District contravened the statute. The Teachers Association argues that a parity agreement with the first unit is a unilateral action as to the second unit, disapproved by PERB.

“In determining whether an employer practice is per se an illegal unilateral action, the question is whether unilateral action by an employer amounts to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining . . .

“The Court of Appeal’s concern with the obstruction of bargaining is unfounded. Parity agreements no more restrict the District’s bargaining position than do the confines of a limited budget which exist absence such agreement. Each employee bargaining unit necessarily has an impact on negotiations of every other unit, regardless of the order in which contracts are negotiated or whether the district enters into parity agreements . . .

“To hold parity agreements per se illegal would place a burdensome limitation on public school employers to negotiate effectively in an already cumbersome environment of multi-unit collective bargaining. It would obstruct employment relations . . . it would also adversely affect the bargaining efficiency and strategy of school districts and public sector unions in California and would prolong bargaining, making settlements more difficult and labor unrest more frequent.

“Although we conclude that parity agreements do not per se violate either Section 3543.5, subdivision (c) or Section 3545, subdivision (b)(3) and that PERB did not abuse its discretion in finding that parity agreements here did not violate the statutes, we nevertheless recognize that under different circumstances an employer might violate the EERA by entering into a parity agreement.”<sup>542</sup>

## **L. Security Cameras**

In California School Employees Association v. Rio Hondo Community College District,<sup>543</sup> the PERB held that the community college district violated the EERA, Government

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<sup>542</sup> Id. at 806-809.

<sup>543</sup> PERB Decision No. 2313 (March 21, 2013).

Code section 3543.5, by refusing to bargain with the California School Employees Association (CSEA) over the effects of a decision to install security cameras.

In April 2009, the community college district informed CSEA of its intent to install security surveillance cameras in its learning resource center and in its parking lots. In June 2009, CSEA requested to negotiate over the decision and the effects of the decision to install surveillance cameras. In its letter, CSEA stated that their intent was not to prevent the district from using such cameras, but rather, to ensure that the district does not use the cameras to monitor CSEA bargaining unit employees while they are at work or for disciplining classified employees. CSEA further requested that the district not implement any aspect of the camera surveillance installation unless and until the district has completed bargaining with CSEA. On June 30, 2009, the community college district denied CSEA's request to negotiate.

In October 2009, CSEA filed an unfair labor practice charge. The Administrative Law Judge (ALJ) concluded that CSEA requested bargaining on the effects of installing security cameras in the areas of performance evaluation and potential discipline. The ALJ concluded that the district's decision to install security surveillance cameras did have reasonably foreseeable negotiable effects. The ALJ concluded that the district's denial of CSEA's request to negotiate over the decision's effects violated Government Code section 3543.5(a), (b), and (c). The district appealed and the PERB affirmed the decision of the ALJ.

The PERB held that upon reaching a firm decision and before implementing a non-negotiable decision, an employer must give notice and bargain upon request over the reasonably foreseeable effects of that decision.<sup>544</sup> The employer must provide notice sufficiently in advance of implementation to permit the union a reasonable amount of time to consider demanding to bargain and to negotiate over the effects.<sup>545</sup>

The union's demand to bargain the effects of a management decision should afford the employer general notice of the union's interest in the effect of the decision.<sup>546</sup> The demand to bargain the effects of a decision need not be specific or made in a particular form so long as the demand adequately signifies to the employer a desire to negotiate on a subject within the scope of representation (i.e., the effects of a non-negotiable decision rather than the decision itself). Further, the demand must identify clearly the areas within the scope of representation that are impacted and which the union wishes to bargain.<sup>547</sup>

Upon receiving a demand to bargain the effects of a decision, and before refusing to negotiate, an employer must attempt to clarify through discussions with the union any uncertainty as to what is proposed for bargaining and whether it falls within the scope of representation.<sup>548</sup> Refusing a bargaining demand to negotiate the effects of a management

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<sup>544</sup> Mt. Diablo Unified School District, PERB Decision No. 373 (1983); Trustees of the California State University, PERB Decision No. 2287-H (2012).

<sup>545</sup> Victor Valley Union High School District, PERB Decision No. 565 (1986); Compton Community College District, PERB Decision No. 720 (1989).

<sup>546</sup> Newman-Crows Landing Unified School District, PERB Decision No. 223 (1982).

<sup>547</sup> Ibid.

<sup>548</sup> Healdsburg Union High School District, PERB Decision No. 375 (1983).

decision without first attempting to clarify ambiguities or whether matters proposed for bargaining fall within the scope of representation violate the duty to bargain in good faith.<sup>549</sup>

A waiver of the right to negotiate must be clear and unmistakable. The evidence must indicate an intentional relinquishment of the right to bargain.<sup>550</sup> Public policy disfavors finding a waiver based on inference.<sup>551</sup> The burden of establishing a waiver is upon the party asserting it, whether the claim waiver is based on alleged inaction, contract language, or a simple failure to demand bargaining.

An employer receiving a demand to bargain the effects of a decision may claim that the union's bargaining demand was inadequate and therefore the union waived its right to meet and negotiate over effects. To succeed with this claim, the employer must demonstrate that the employer met its obligation to seek clarification of the union's demand to bargain effects and even as clarified, the union's demand to bargain the effects of a management decision was inadequate and failed to indicate a desire to bargain effects, as opposed to the decision, or failed to identify clearly a matter within the scope of representation to negotiate.

The district contends that the district notified CSEA of its decision to install surveillance security cameras on April 16, 2009, and that CSEA waited until June 8, 2009, to demand to bargain the effects of the decision. Therefore, the district argues that CSEA waived its right to bargain the effects of the decision.

PERB has held that silence of more than three months has been deemed sufficient to find waiver of bargaining rights. However, PERB concluded that, in the present case, the district failed to show clear and unmistakable proof of waiver.<sup>552</sup> PERB held that without more than silence, CSEA's delay alone is insufficient to establish clearly and unmistakably that CSEA intentionally waived its bargaining rights to negotiate the effects of the employer's decision. PERB held that the district failed to prove that it faced any deadline for implementing its decision to install the cameras, nor did the district show that it was prejudiced by CSEA's delay in tendering its demand to bargain.

PERB held that CSEA's letter demanding to bargain was sufficiently clear. PERB held that the employer had three options when receiving a demand to bargain the effects of a decision:

1. Accede to the demand and address the union's concerns in negotiations;
2. Ask the union for negotiation justification and clarification of the areas of impact proposed for negotiation and whether these areas of impact are within the scope of representation; or
3. Refuse the union's demand.

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<sup>549</sup> Ibid.

<sup>550</sup> Amador Valley Joint Union High School District, PERB Decision No. 74 (1978); California State Employees Association v. PERB, 51 Cal.App.4<sup>th</sup> 923, 937-38 (1996).

<sup>551</sup> Long Beach Community College District, PERB Decision No. 1568 (2003).

<sup>552</sup> See, Stockton Police Officers Association v. City of Stockton, 206 Cal.App.3d 62, 66 (1988).

In choosing the third option, the district did so at its peril. PERB cited several cases in which the union failed to clarify its demand to bargain the effects of the decision rather than the decision itself.<sup>553</sup>

In the present case, PERB held that CSEA requested to bargain over the effects of installation of surveillance cameras on discipline and evaluation procedures. The district contended that the type of evidence it uses for evaluation and discipline of employees is not a matter within the scope of representation. PERB held that the type of evidence an employer relies on or is permitted to use to substantiate employee performance evaluations is logically and reasonably related to evaluation procedures, which is an enumerated term and condition of employment in Government Code section 3543.2(a), as well as for imposing discipline. Using surveillance cameras to monitor employees at work and potentially using the product of that surveillance at disciplinary proceedings is logically and reasonably related to disciplinary procedures, a matter which has been held to be within the scope of representation.<sup>554</sup>

PERB also noted that employer policies or workplace rules concerned with monitoring employee Internet usage are negotiable.<sup>555</sup> Therefore, PERB deemed surveillance camera monitoring of employee compliance with workplace rules presents the same concerns and may lead to disagreements over whether and how to use the video records of employee observations in evaluations or disciplinary proceedings. PERB noted that both employers and employees are interested in the types, sources, and reliability of evidence that the employer may use in evaluating in disciplining employees, as well as in the availability to the union and employees of existing records which may contradict eyewitness or other employer evidence. PERB stated:

“We conclude that requiring negotiation over the effects on performance evaluations and potential discipline flowing from the district’s decision to install security cameras would not significantly abridge the exercise of managerial prerogatives essential to the achievement of the employer’s mission. PERB and California courts have found that fundamental managerial or policy decisions include layoffs, contracting out, background investigations required by statute, policies for police officer discharge of firearms, and police review procedures.<sup>556</sup> However, PERB held that making and using video recordings of employees for purposes of disciplining them and/or evaluating their work performance affects wages, hours, and other terms of conditions of employment within the scope of representation, not fundamental

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<sup>553</sup> See, County of Riverside, PERB Decision No. 2097-M (2010); Sylvan Union Elementary School District, PERB Decision No. 919 (1992); Allan Hancock Community College District, PERB Decision No. 768 (1989); Beverly Hills Unified School District, PERB Decision No. 1969-E (2008).

<sup>554</sup> Fairfield-Suisun Unified School District, PERB Decision No. 2262 (2012); Arvin Union School District, PERB Decision No. 300 (1983); San Bernardino City Unified School District, PERB Decision No. 255 (1982).

<sup>555</sup> Trustees of the California State University, PERB Decision No. 1507-H (2003); State of California (Water Resources Control Board), PERB Decision No. 1337-S (1999).

<sup>556</sup> Building Material and Construction Teamsters Union v. Farrell, 41 Cal.3d 651 (1986); Sutter County In-Home Supportive Services Public Authority, PERB Decision No. 1900-M (2007); San Jose Peace Officers Association v. City of San Jose, 78 Cal.App.3d 935 (1978); Berkeley Police Association v. City of Berkeley, 76 Cal.App.3d 931 (1977).

managerial or policy matters concerning the nature and quality of public services.”

Therefore, PERB held that the effects of video surveillance of employees are negotiable.<sup>557</sup> PERB further held that the ALJ properly relied on authority under the National Labor Relations Act, finding that the employer’s use of surveillance cameras in the workplace was negotiable.<sup>558</sup> PERB concluded that whether the cameras were hidden or not did not matter with respect to the issue of negotiating the effects of an employer’s decision to install security cameras.<sup>559</sup>

PERB ordered the community college district to cease and desist from refusing to bargain with CSEA about the effects on employee discipline and performance evaluations of the decision to install security cameras. PERB ordered the community college district to take the following affirmative actions designed to effectuate the policies of the EERA:

1. Bargain with the CSEA upon request about the effects on employee discipline and performance evaluation of the district’s decision to install security cameras.
2. Within ten work days of the service of a final decision, post at all work locations where notices to employees in the district are customarily posted, copies of the notice attached to the decision as an appendix. Such posting shall be maintained for a period of 30 consecutive days.
3. Written notification of the actions taken to comply with PERB’s order shall be made to the general counsel of PERB and the district shall provide reports, in writing, as directed by PERB’s general counsel. Copies of the reports shall be served concurrently on CSEA.<sup>560</sup>

#### **M. Bargaining Effects of Management Decisions**

In Santa Clara County Correctional Peace Officers’ Association v. County of Santa Clara,<sup>561</sup> the PERB overruled several earlier decisions and determined that a union is no longer required to demand to bargain effects as a precondition to enforcing an employer’s duty to provide it with reasonable advance notice of decisions that have reasonably foreseeable effects on matters within the scope of bargaining and the opportunity to bargain regarding such effects.

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<sup>557</sup> California School Employees Association v. Rio Hondo Community College District, PERB Decision No. 2313, p. 16 (March 21, 2013).

<sup>558</sup> Colgate-Palmolive Co., 323 NLRB 515 (1997).

<sup>559</sup> California School Employees Association v. Rio Hondo Community College District, PERB Decision No. 2313, p. 21 (March 21, 2013).

<sup>560</sup> Id. at 23.

<sup>561</sup> PERB Decision No. 2321-M (July 25, 2013).

The decision stemmed from a case in which the Santa Clara County Correctional Peace Officers Association alleged that the County of Santa Clara reduced staffing at its jail by ten on-duty officers during days and by eight officers at nighttime. The association claimed that the staffing changes foreseeably impacted safety, that the impact of the changes was within the scope of representation, and that the county implemented the changes without providing it notice.

The PERB Office of General Counsel dismissed the allegations because the association failed to allege that it first demanded to negotiate over the safety and workload effects of the staffing changes. PERB reversed, concluding that the association's failure to make such a demand did not prevent it from pursuing an unfair practice charge. PERB established four criteria concerning a demand to bargain over effects:

1. The employer has a duty to provide reasonable notice and an opportunity to bargain before it implements a decision within its managerial prerogative that has foreseeable effects on negotiable terms and conditions of employment.
2. Once having received such advance notice, the union must demand to bargain the effects or risks waiving its demand to do so.
3. Having received such advance notice and an opportunity to bargain, the union's failure to demand effects bargaining may waive the right to bargain the reasonably foreseeable effects waiver is an affirmative defense. Where a union alleges that the employer did not provide reasonable notice and an opportunity to bargain prior to the employer's implementation of the change in a non-negotiable policy, having a reasonably foreseeable impact on a matter within the scope of representation, a prima facie case of failure to bargain in good faith is established.
4. Where an employer implements the change without giving the union reasonable notice and an opportunity to bargain over foreseeable effects on matters within the scope of representation, it acts at its own peril. If the employer is found to have had a duty to bargain over effects and thus to have provided the union reasonable pre-implementation notice and an opportunity to bargain, its implementation without giving such notice and an opportunity to bargain constitutes a refusal to bargain.

#### **N. Bargaining the Effects of a Non-Negotiable Management Decision**

In Teamsters Local 150 v. County of Sacramento,<sup>562</sup> the PERB held that the Teamsters had failed to make a sufficient demand to negotiate the effects of the County of Sacramento's

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<sup>562</sup> PERB Case No. SACE-717-M (April 15, 2013).

decision to terminate a home vehicle retention assignment. The PERB upheld the general counsel's decision to dismiss the case.

Since 1995, sewer district supervisors, who are represented by the Teamsters, were permitted to take their county-issued vehicles home to facilitate the supervisor's response to emergencies at night and on weekends. In a letter dated October 5, 2010, the County of Sacramento notified the Teamsters' representative that it intended to discontinue this benefit for about twenty of the supervisors who had not been called to respond to emergencies on a frequent basis in the past year. The home vehicle retention policy authorized the county to terminate the employees' retention of the vehicles upon thirty days written notice.

The October 5, 2010 letter informed the Teamsters that the county intended to give the affected employees thirty days' notice as required by the policy. The letter stated that the Teamsters could contact the county by October 13, 2010, if they wanted to discuss the issue. The Teamsters did not respond by October 13, 2010, and on October 21, 2010, the county notified the Teamsters that it was going to give the employees their thirty day notice before rescinding the home vehicle retention assignment.

In November 2010, the Teamsters' representative spoke to the county representative and scheduled a meeting for November 16, 2010. At that meeting, the county went over the data that supported terminating the home retention vehicle assignments. The Teamsters representative stated that he would confer with his members and get back to the county. There was no allegation that the Teamsters demanded to bargain either before or after this meeting.

On November 30, 2010, the Teamsters' representative wrote the County of Sacramento informing the county that the employees vehemently objected to the change and stated that there were various issues which deserved discussion. The letter concluded with a request for possible meeting times.

In a December 17, 2010 e-mail, the county asked the Teamsters representative for possible meeting dates and informed him that the county would be moving forward with the termination of the affected employees' home retention vehicle assignments.

The Teamsters responded on December 31, 2010, offering to meet on three dates in mid-January 2011, and asked the county to refrain from terminating the home retention of vehicles. On January 7, 2011, the county informed the Teamsters that the policy had already been implemented and would not be rescinded. The county stated that nevertheless they would be willing to meet to answer any questions the Teamsters might have. An unfair labor practice charge was filed on March 8, 2011.

The Office of the General Counsel dismissed the charge, finding that the Teamsters had failed to make an effective demand to negotiate over the effects of the county's decision to end the vehicle home retention assignment.<sup>563</sup> The Office of the General Counsel concluded that the Teamsters' letter of November 30, 2010, describing the members as "resistive" to the proposed changes and stating that there were various issues which deserved discussion did not trigger the

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<sup>563</sup> See, State of California (Department of Veterans' Affairs), PERB Decision No. 2110-S (2010).

employer's duty to negotiate effects of its decision because it did not explicitly request to negotiate effects and did not identify any specific effects of the decision that would be negotiable.

The PERB held that under its recent decision in California School Employees Association v. Rio Hondo Community College District,<sup>564</sup> the union's demand must identify clearly the areas of impact (i.e., within the scope of representation) on which the union proposes to bargain. The union must seek to bargain at least over the effects of the employer's decision and identify the matters within the scope foreseeably affected by the change. PERB held that in this case, the Office of the General Counsel correctly found that the Teamsters request to bargain failed even under the standard in California School Employees Association v. Rio Hondo Community College District.

Further, PERB held that the facts alleged do not demonstrate that the county ever agreed to negotiate in response to the Teamsters' communications. Rather, the facts show that the county was willing to answer further questions or provide further information.

PERB held that the county gave the Teamsters reasonable notice of its decision to terminate the home vehicle retention assignment for certain unit members. Having done so, it was up to the Teamsters to make a valid demand to bargain over effects. PERB found that the Teamsters failed to make such a demand or submit proposals even though it had ample opportunity to do so at the November 16, 2010 meeting, or at any time after receiving the October 5, 2010 notice of the proposed change.

### **EMPLOYEE UNFAIR LABOR PRACTICES**

The EERA states that it shall be unlawful for an employee organization to cause or attempt to cause a public school employer to violate the EERA, impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees or otherwise interfere with, restrain or coerce employees because of their exercise of rights guaranteed under the EERA. The EERA further states that it is unlawful for an employee organization to refuse to or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative and refuse to participate in good faith in the impasse procedures.<sup>565</sup>

The PERB has held that in cases where it is alleged that the employee organization has interfered with an employees' protected activities under the EERA, the same standard which applied to the public school employer applies to employee organizations. In Fresno Unified School District,<sup>566</sup> it was alleged that picket line misconduct during a strike threatened employees who exercised the right to refrain from participating in the strike. The PERB held that the threats of physical violence and bodily injury while coercive did not cause undue delay or bodily injury and, thus, there was no violation of the EERA.<sup>567</sup>

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<sup>564</sup> PERB Decision No. 2313 (March 21, 2013).

<sup>565</sup> Government Code section 3543.6.

<sup>566</sup> PERB Dec. No. 208, 6 PERC 13110 (1982).

<sup>567</sup> Ibid.

A refusal to bargain in good faith will be found against an employee organization where the employee organization used evasive and unfair tactics, such as refusing to schedule bargaining sessions during the summer and refusing to offer any position with respect to two mandatory subjects of bargaining for an inordinate period of time.<sup>568</sup> The PERB will look at the employee organization's conduct and will look at the "totality of the circumstances" or will look to see if there is conduct which "per se" violates the EERA.

An economic strike engaged in by an employee organization prior to the completion of statutory impasse procedures is presumed to be a refusal to bargain in good faith in violation of the EERA.<sup>569</sup> An unfair labor practices strike resulting from an employer's conduct in violation of the EERA is protected at any stage of the collective bargaining process.<sup>570</sup>

An employee organization may not strike during the pendency of statutory impasse procedures.<sup>571</sup> The premature release of a factfinder's report to the public before the district received a copy of the report was held to be a violation of the duties to participate in good faith in the impasse procedures.<sup>572</sup>

In addition, the employee organization commits an unfair labor practice when it violates its duty of fair representation. A breach in the duty of fair representation occurs when the union's conduct toward a member of the bargaining unit is arbitrary or violated an affirmative duty owed to unit members.<sup>573</sup> As discussed above, the duty of fair representation is specifically set forth in the EERA.<sup>574</sup>

In Los Angeles Council of School Nurses v. Los Angeles Unified School District,<sup>575</sup> the Court of Appeal held that a lawsuit brought by nonteacher employees against the school district and the exclusive bargaining representative alleging that the parties had improperly negotiated an agreement which required longer onsite hours was arguably an unfair labor practice charge and initially under the jurisdiction of the PERB. The Court of Appeal stated:

"Under Sections 3544.9 and 3543.6 of the California Government Code, the exclusive organization representing public employees has a duty to fairly represent each employee and not to discriminate against such employee. Violation of this duty may constitute unfair practices in which the Public Employment Relations Board shall have the exclusive jurisdiction to determine if such unfair practices exist, and if so, fashion relief necessary to remedy the situation.

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<sup>568</sup> Gonzalez Union High School District Teachers Association, PERB Dec. No. 488, 9 PERC 16092 (1985).

<sup>569</sup> Modesto City Schools District, PERB Dec. No. 291, 7 PERC 14090 (1983).

<sup>570</sup> San Ramon Valley Unified School District, PERB Order No. IR-46, 8 PERC 15187 (1984).

<sup>571</sup> Westminster School District, PERB Dec. No. 277, 7 PERC 14034 (1982).

<sup>572</sup> Capistrano Unified School District, PERB Dec. No. 294, 7 PERC 14101 (1983).

<sup>573</sup> Rocklin Teachers Professional Association, PERB Dec. No. 124 4 PERC 11055 (1980).

<sup>574</sup> Government Code section 3544.9.

<sup>575</sup> 113 Cal.App.3d 666, 169 Cal.Rptr. 893 (1980).

“Turning to the contentions set forth by the appellants in this case, the appellants have alleged that the provisions of the collective bargaining agreement was unfair and discriminatory and that, United Teachers Los Angeles had breached its duty of fair representation. In asserting such contentions, the appellants have raised a dispute which arguably could constitute an unfair practice claim. As a result, the matters should be deferred to the exclusive jurisdiction of the Public Employment Relations Board.”<sup>576</sup>

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<sup>576</sup> Id. at 672.