STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN DIEGO TEACHERS ASSOCIATION, CTA/NEA, Charging Party,	)	Case No. LA-CE-549
v.	)	PERB Decision No. 234
SAN DIEGO UNIFIED SCHOOL DISTRICT, Respondent.	)	August 25, 1982

Appearances: Charles R. Gustafson, Attorney for San Diego Teachers Association, CTA/NEA; Ralph D. Stern, Attorney for San Diego Unified School District.

Before Morgenstern, Jaeger and Tovar, Members.

DECISION

This case is before the Public Employment Relations Board (hereafter PERB or Board) on exceptions filed by the San Diego Unified School District (hereafter District) to the attached proposed decision of the hearing officer, which found that the District violated subsections 3543.5(b) and (c) of the Educational Employment Relations Act (hereafter EERA)[1] by unilaterally adopting a program

[1]EERA is codified at Government Code sections 3540 et seq. All statutory references are to the Government Code, unless otherwise specified. Subsections 3543.5(b) and (c) provide as follows:

designed to assist "troubled" employees without first negotiating with the San Diego Teachers Association, CTA/NEA (hereafter Association). The hearing officer further found that the Association did not waive its right to bargain about the program by participating in informal discussions with the District.

The District excepts to the finding of violation on the grounds that an employee assistance program providing only counseling and referral is not within the scope of representation and that, in any event, the Association waived its right to bargain about the program.

For the reasons set forth below, the Board sustains the District's exception to the hearing officer's finding of violation. Therefore, it is unnecessary, and we expressly decline to decide whether any waiver occurred.

FACTS

The findings of fact stated in the hearing officer's proposed decision are adopted as the findings of the Board

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> It shall be unlawful for a public school employer to:
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.
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> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

itself. In addition, we find that certain relevant facts, amply supported by the record, were omitted from the hearing officer's findings. These supplemental findings of fact are set forth, infra.

In summary, the hearing officer found that the program was established to assist "troubled" employees and their families who had any health or behavioral problems, whether they be emotional, marital, family, occupational, financial, legal, medical or drug-alcohol related, which would affect their job performance. The espoused purpose of this program was (1) to improve the job performance of such troubled employees, and (2) to offer for humanitarian purposes a program which would assist workers by improving the quality of their lives and the lives of their families.

The program was to be a third-party compensation program which would provide interviews or referral at no cost to the employee. However, employees would be expected to pay any fees for treatment. The program in which the District would participate would be available to any employee and his or her family on a self-referral basis. In addition, the program envisioned supervisorial training on the goals and expectations of the program to include an overview of the policies, procedures and techniques utilized in the referral process. Thus, administrators and supervisors would learn skills relevant to making effective employee referrals to the program when and where appropriate.

In this regard, the hearing officer failed to note the testimony of Ronald Bippert, the District's employee services manager, who explained the referral process. He stated, "The supervisor could suggest that the individual may want to go and see the employee assistance office . . . he could not order the individual to go."

The program emphasized a concern for confidentiality of the information gathered. While the participating districts could refer employees to the program, the information derived through the interview process was to be kept confidential and not to be released to any employer absent an employee's express authorization for the release of such information. Here again, the hearing officer's findings of fact omitted Mr. Bippert's relevant and uncontroverted testimony. He stated that a supervisor who referred an employee to the program could find out whether the employee in fact went "only if the employee chooses to have EASE notify the supervisor that contact was made."

Additionally, the record in this case includes the credible and uncontroverted testimony of Ms. Ann Coughlin, an expert in employee assistance programs, as to the benefits an employer derives from the establishment of such a program. Though alluded to generally in his discussion, the hearing officer failed to make specific findings of fact as to

employer benefits. We, therefore, expressly find that employee assistance programs are cost-effective to the employer, producing a savings of $4 to $19 for every dollar invested by reducing employee absenteeism and health benefit costs, and that there are additional intangible benefits to the employer, such as improved employee morale and labor relations.

The record further indicates that these were the very reasons the District implemented the employee assistance program here. Dr. George Ellis, assistant superintendent for employee relations, testified as follows:

> Q What are the principal reasons for the implementation of such a program by the district?
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> A Well, we were aware of the research that has been done in this field, as it applied to increasing productivity, improving the quality and quantity of work, and reducing costs, and we know from experience that problem employees are absent much longer, they have longer absences, they -- more -- much higher incidents of malfunction on the job, poor efficiency on the job, greater use of health benefits, more use of workers' compensation, domination of supervisors time, a whole lot of reasons that we found to be true in our district, and paralleling the research in the field as we've monitored it.
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> Our purpose, our goals, as we have been working the last couple of years, in terms of what kind of a program would be effective, were simply that we wanted to reduce absenteeism, we wanted to increase the morale of our supervisors, as well as find a decent and honorable way to deal with these problems,

with human beings, and want to reduce workers' comp claims, reduce turnover, make savings in our health costs, especially to get at the problem of bringing expertise to bear on the remediation of these problems.

A single problem employee in a school can disrupt the morale, can push burdens on the other people there, in a clerical position or a classified position, the other people have to pick up the load when the person is absent. If we put substitutes in the room on these absences, there's a loss of productivity and instructional time, because no one can really replace the resident teacher, the continuity of the teacher.

There was a question of safety of employees, we have bus drivers, industrial art teachers, chemistry teachers, all kinds of employees who are involved where the safety of children is important, where they can't nod off, or dope off, or not be paying the best possible attention to those factors. We were looking for a way to enhance the requirements of law that relate to the counseling assistance required under the Stull Act, which is also required in our negotiated evaluation procedure with all employee groups.

We felt that our supervisors simply weren't experts in all of these very complex fields that are involved with a problem employee. As was mentioned previously, an employee who shows up with alcohol or behavior problems on the job, in their performance, may have many more deep-seated problems that have to be dealt with. So, the question is how we might counsel and assist, and bring the employee to an agency that could direct them away from the district, a confidential basis, to an appropriate agency.

DISCUSSION

The question in this case is whether an employee assistance program providing counseling and referral to "troubled" employees is a matter within the scope of representation requiring negotiation prior to adoption.

Section 3543.2 provides in pertinent part as follows:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200 . . . [of the Education Code].

Section 53200(d) provides:

> "Health and welfare benefit" means any one or more of the following: hospital, medical, surgical, disability, legal expense or related benefits including, but not limited to, medical, dental, life, legal expense, and income protection insurance or benefits, whether provided on an insurance or a service basis, and includes group life insurance as defined in subdivision (b) of this section.

In Anaheim Union High School District (10/28/81) PERB Decision No. 177, the Board reaffirmed its well-established test, developed in a series of cases,[2] for determining whether a subject, not specifically enumerated, is within the scope of representation. The Board stated at pp. 4-5:

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[2]San Mateo City School District (5/20/80) PERB Decision No. 129; Jefferson School District (6/19/80) PERB Decision No. 133; Healdsburg Union High School District (6/19/80) PERB Decision No. 132. See also Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7/16/79) PERB Decision No. 96.

> [A] subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

If a proposal meets the threshold test of relatedness to an enumerated term, then the employee interest in employment conditions is balanced against the extent to which managerial prerogatives are involved. San Mateo, supra, at p. 14; Healdsburg, supra, at pp. 12-13.

Employee assistance programs are not specifically enumerated in section 3543.2. Therefore, we apply the Anaheim test to determine whether the program is negotiable as a matter within the scope of representation.

Applying this test,[3] the hearing officer determined preliminarily that the program, while not providing treatment, is so inextricably related to treatment that it is logically and reasonably related to "health and welfare benefits as defined by Section 53200." We agree. However, we disagree with the hearing officer's analysis and application of the second and third elements of the Anaheim test to the facts of this case.

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[3]Though Anaheim, supra, was decided after the hearing officer's decision in this case, he articulated the identical test, citing San Mateo, supra.

By failing to consider the relevant testimony of the District witnesses cited above, the hearing officer erroneously both understated the District's managerial interest and overstated the effect of the program on conditions of employment. Specifically, the hearing officer ignored the District's fundamental concern with having sober, mentally sound and efficient employees teaching the students under its care and supervision. Management would surely be severely hampered if it lacked the ability to pursue such goals.

In contrast, the program's effect on conditions of employment and on employment relations is slight.

In its discussions with the District and subsequently, the Association's primary concerns were confidentiality of program participants and the impact on existing health and welfare benefits. Both of these concerns involve program impact. The District does not deny that it has a duty to negotiate over the impact of its decision, as opposed to the decision itself. And the District has specifically offered to negotiate as to these matters.

Considering separately the District's decision to establish this program, we find its effect on employment concerns to be minimal.

Participation is on a voluntary basis. Though a supervisor can suggest that an employee who demonstrates negative behavior affecting job performance consult the program, the supervisor can neither compel nor verify participation without the employee's consent. Therefore, neither participation nor refusal to participate in the program can be used for purposes of employee evaluation or discipline. While, under existing policies and procedures, management may have cause to take disciplinary action against problem behavior, this program confers no new right on management to take such action and, similarly, it creates no new obligations or behavior standards for employees. To the extent that referral to an assistance program provides an alternative to disciplinary action, it is an alternative already available to management, which is simply facilitated by having access to such a program "in house."[4] In short, management has acquired a new management tool but has not increased its rights at employee expense, nor have working conditions been changed.

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[4]See Amoco Chemical Corp. (1978) 237 NLRB 394, 396, finding that the unilateral implementation of an excessive absence counseling program is not unlawful because the "implementation of a more formal and regular procedure to be followed by its supervisors in counseling employees about their absences amounts to structuring of its internal procedures . . . . There is no substantial difference, insofar as the employees are concerned, whether the supervisor informs him, sua sponte, that his attendance is bad or that he is so informed as part of a regular management policy."

The cost of the program is assumed entirely by the District, imposing no additional costs and no reduction of existing benefits to employees. Additionally, the Association itself, in its informal consultations with the District, stated that the program should be kept outside the context of adversarial negotiations because of its highly sensitive nature. Thus, even from the Association's point of view, the matter could easily be exempted from negotiations.[5] Finally, the record contains uncontroverted expert testimony that in the private sector, employee assistance programs are usually not a part of the collective bargaining agreement.[6]

Based on all of the foregoing considerations and the record as a whole, we find that the employee assistance program so minimally and indirectly affects the employment

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[5]We do not decide whether the Association's conduct constitutes a waiver.

[6]While not dispositive of the issue, this testimonial evidence lends support to our conclusion, as does the apparent absence of any NLRB case squarely on point. See Leroy Machine Company (1964) 147 NLRB 1431, stating that an employer must bargain over a mandatory physical examination requirement the results of which would be considered in job placement. There the Trial Examiner indicated that a different rule might apply to the type of program at issue here, "where the examination is required solely for the benefit of the employee and to enable the latter to obtain treatment, if necessary, with no report thereof made to the employer and no change in the employment status can result." Leroy Machine Co., supra, at p. 1438.

"While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining." Fibreboard Corp. v. NLRB (1964) 379 U.S. 203, 211.

concerns of employees that conflict over the program is unlikely. At the same time, the program is central to the District's mission of providing educational services. Therefore, on balance, we conclude that the District's decision to establish the employee assistance program is properly excluded from the bargaining arena. In so concluding, we emphasize the District's acknowledgment of its obligation to negotiate with the Association regarding the impact of the program on program participants and on existing health and welfare benefits.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the Public Employment Relations Board ORDERS that the charges filed by the San Diego Teachers Association, CTA/NEA, against the San Diego Unified School District are hereby DISMISSED.

By: Marty Morgenstern, Member

John W. Jaeger, Member

Irene Tovar, Member

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

SAN DIEGO TEACHERS ASSOCIATION CTA/NEA, Charging Party, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-549 PROPOSED DECISION (6/26/80)

Appearances: Charles R. Gustafson, Esq., Attorney for San Diego Teachers Association CTA/NEA; Ralph D. Stern, Esq., Attorney for San Diego Unified School District.

Before Stephen H. Naiman, Hearing Officer

PROCEDURAL HISTORY

This case confronts the question of whether a program established to assist "troubled" employees by counseling and referral to psychiatric or other professional assistance is a program which is within the scope of representation pursuant to section 3543.2 of the Educational Employment Relations Act (hereafter EERA).[1]

On October 26, 1979, Charging Party, San Diego Teachers Association CTA/NEA (hereafter Association, SDTA or Charging

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[1]The Educational Employment Relations Act is found in Government Code section 3540 et seq. Unless otherwise noted, all code sections cited in this decision refer to the Government Code.

Party) filed an unfair practice charge against San Diego Unified School District (hereafter Employer, District or Respondent). The charge alleges that the District violated section 3543.5(b) and (c) by unilaterally undertaking to participate in an employee assistance program without negotiating with the Association.

On November 3, 1979, respondent District filed an answer which essentially admitted the allegations of the charge and affirmatively defended on the grounds that the employee assistance program was not within "the scope of negotiations" within the meaning of the EERA and that the Charging Party had waived any rights to negotiate concerning the employee assistance program.

An informal conference was held on December 7, 1979, and a formal hearing was held on February 1 and March 14, 1980. Thereafter, Charging Party and Respondent filed simultaneous opening and responsive briefs and on May 6, 1980, the matter was submitted for decision.

FINDINGS OF FACT

Background

San Diego Unified School District is a public school employer within the meaning of Government Code section 3540.1(k).[2] The District is comprised of

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[2]By stipulation of the parties.

elementary, junior high and high schools located in San Diego County.

San Diego Teachers Association is an employee organization within the meaning of Government Code section 3540.1(d) and is the exclusive bargaining representative for the certificated personnel of the District.[3] (See Gov. Code, sec. 3540.1(e).) The Association and the District are parties to a collective bargaining agreement which has as its effective date July 1, 1979 through June 30, 1980.[4]

In 1979, the San Diego Department of Education established a countywide program called "Employee Assistance Service for Education" (hereafter EASE). The county drafted a joint powers agreement which permitted school districts within the county to become a part of the program by becoming signatory to the agreement and paying a fee for the program service.

The county program is not unique to the public school system or to San Diego County. Indeed, in the private sector it appears that employee assistance programs have existed for many years. Many of these programs have been created pursuant to federal supervision and guidelines which require that employers, receiving federal funding, not discriminate against employees who fall within the definition of handicapped by

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[3]By stipulation of the parties.

[4]Ibid.

virtue of certain emotional and other problems related to alcohol or drug dependency or other psychological problems which interfere with their work.

Both in public and private employment, the purpose of the programs is to assist employees and their families by providing a mechanism through which they can resolve personal problems which might otherwise interfere with their work and their personal and private lives. In some instances, the programs are designed only to refer employees to appropriate treatment. In other instances, the programs both refer and treat "troubled" employees. Approximately 8 percent of the average work force have need of such programs.

Many assistance programs, especially those which are organized under the auspices of the federal government, are created by joint committees of labor and management. While the programs are not universally the subject of the collective bargaining process, they are the subject of joint agreements which are designed to deal with what is considered to be a serious problem by both labor and management. Most programs are designed to ensure that employees will be guaranteed confidentiality and protection from discrimination by virtue of the fact that they have sought referral or treatment.

The San Diego County Department of Education's Employee Assistance Program

The topic of an employee assistance program is not new in the San Diego school system. Since 1977, a program for

treatment of troubled employees, specifically with the problem of alcoholism, has been explored. As described in the joint powers agreement and the proposals which characterize the program, the San Diego County EASE program was established to assist "troubled" employees and their families who had any health or behavioral problems, whether they be emotional, marital, family, occupational, financial, legal, medical or drug-alcohol related which would relate to their job performance. The espoused purpose of this program was to (1) improve the job performance of such troubled employees and (2) to offer for humanitarian purposes a program which would assist workers by improving the quality of their lives and the lives of their families.

The county program would be available to any employee and his or her family on a self-referral basis, or any supervisor or any administrator who chooses to refer to the program an employee who demonstrates negative behavior affecting job performance. In this latter regard, the program envisioned supervisorial training which would advise administrative personnel of the goals and expectations of the program, which would include an overview of the policies, procedures and techniques utilized in the referral process. The program was to be a third-party compensation program which would provide interviews or referral at no cost to the employee. However, the employees would be expected to pay any fees for treatment.

The creators of the county's EASE program acknowledged that the insurance policies of most districts have limited coverage for "troubled" employees. In order to make the program work, the preliminary proposal for the program states that:

> By broadening coverage for troubled employees, the insurance companies can be made aware that they are, in effect, saving money. Without third party payments, many employees might well forego the assistance they need.

In conclusion, the proposal for EASE quotes an expert in occupational programs as follows:

> The overall potential impact that the Employee Assistance Program can have is enormous. Practically every person in our society is either directly or indirectly associated with an employer. Because the Employee Assistance Program is designed to include family members due to the effect they can have on an employee's work performance, it can play a singular major role which cannot be duplicated anywhere else in our society. The potential is unlimited; the movement finally has a good start with a firm basis; and the results appear to be justifying the effort. We feel there is great cause for optimism.

The county program was to cost approximately 5 dollars per employee per year and would require at least one fulltime professional employee to act as counselor for those persons who used the services of the EASE program. Finally, the program emphasized a concern for confidentiality of the information gathered. While the participating districts could refer employees to the program, the information derived through the

interview process was to be kept confidential and not to be released to any employer absent an employee's express authorization for the release of such information.

Association Representatives Become Interested in the Employee Assistance Program and Meet with Representatives of the District

In March 1979, teacher Jane Parker attended a chemical and drug abuse program as a nonabusing participant on behalf of the District. After attending the program, Parker, who was also a member of the Association's negotiating committee, spoke with SDTA Executive Director, Louis Boitano, and determined that such a program might be beneficial to employees who were members of the Association. Although the SDTA executive committee did not officially take a position on adoption of the employee assistance program, efforts were undertaken to prepare a proposal and to contact the District to discuss the possibilities of creating an assistance program for the District's employees represented by the Association.

When Parker and Boitano spoke with District representatives in June 1979, they learned that the District was itself considering participation in the countywide EASE program. A meeting was arranged on July 11 with Ronald Bippert, the District's Employee Services Manager. On July 11, Parker, Boitano and Bippert met and informally discussed the nature of the countywide plan. The meeting on July 11 appears to have been informational, with Bippert responding to the

Association's questions and concerns. On the other hand, it appears that the Association did express its interest in having an assistance program and stated that it believed that such a program involved highly sensitive issues concerning the individual employees. For this reason, Boitano and Parker took the position during the discussions on July 11 that the parties should not "codify" the question at that time. Rather, they were of the opinion that an employee assistance program would better be agreed upon between the Association and the District, outside the context of collective bargaining. Thereafter, the parties could reduce their understanding to writing.

A number of questions were left open and a second meeting was arranged on July 30, 1979. Attending this meeting were Parker and Boitano for the Association, Bippert for the District, accompanied by numerous officials from the District's personnel office and a person who was in charge of the countywide plan, Dr. Lee Panttaja. Like the first meeting on July 11, the July 30 meeting was again informational. The Association was given an opportunity to ask questions of the District and to specifically seek answers to areas of concern. At both meetings, the Association and the District discussed the problems of the need for confidentiality, to assure employees that in no way would the employer or anyone else discover their utilization of the assistance program.

The Association representatives discussed the aspects of the program designed to identify and isolate various employee problems and the treatment programs which would be available to those employees once referred out for treatment. The Association suggested that perhaps a single program which would involve both referral and treatment would be an approach to the problems of dealing with "troubled" employees. Further, Boitano and Parker discussed concerns about the ratio of employees to counselors and the qualifications of the persons charged with operating any assistance program established. At the conclusion of the July 30 meeting, the parties left with an understanding that they would meet again at some point to continue their discussions.

On or about September 20, 1980, the parties again met to discuss the EASE program. The discussions differed little from those held in July. At or about this time, the Association learned that the District intended to sign a joint powers agreement with the County Superintendent of Schools and participate in the EASE program which had been submitted for the District's consideration during the previous spring semester.

The Association Requests that the District Negotiate Concerning an Assistance Program and the Parties Discuss Negotiability

The Association immediately wrote to the District requesting that it not participate in the program until the

parties had met and negotiated over this matter. The Association based its request to reopen negotiations on Article XVII, section 3 of the collective bargaining agreement between the parties. The Association contended that the EASE program was clearly a fringe benefit and relates to terms and conditions of employment as defined by Government Code sections 3543.2 and 53200.

By letter of October 1, 1979, Dr. George Ellis, Assistant Superintendent for Employee Relations of the San Diego City Schools, responded to the Association's letter. The District acknowledged that the parties had had several "consultation meetings" on the subject and indicated its belief that the program would not be a fringe benefit because it was voluntary, totally client-centered, and available to all District employees. Therefore, the District declined the Association's request to reopen negotiations. The District indicated that it would consult with the Association concerning the program and reaffirmed the position that the program would be confidential and voluntary.

On October 2, 1979, the Association again demanded negotiations pursuant to Government Code section 3540 et seq. On October 2, 1979, Dr. Ellis responded on behalf of the District that the District would discuss whether the Employee Assistance Program was within the scope of negotiations and if persuaded that it was, it would negotiate on that matter. In

that same document, the District continued to offer assurances that the program was voluntary, confidential and independent of the school district.

The District Resolves to Participate in the EASE Program

The parties met on October 4, 1979 and were unable to agree that the implementation of an employee assistance plan or the District's participation in the EASE program was a negotiable matter. The board of trustees of the District, by resolution, agreed to become signatory to the joint powers agreement which made the District a participant in the EASE program and made the program available to all of the District's employees. Thereafter, the District offered and continues to offer to negotiate with the Association the question of confidentiality and the impact of the EASE program upon the health and welfare benefits presently available to employees.

ISSUES

1. Whether the District violated section 3543.5(c) and (b) of the Educational Employment Relations Act by unilaterally instituting an employee assistance plan and making this program available to its employees without first negotiating with the Association.

2. Whether the Association by its participation in discussions with the District and failure to demand negotiations at the outset of its meetings with the District has waived the right to negotiate this subject.

CONCLUSIONS OF LAW

The Association contends that the EASE program which the District adopted is a fringe benefit, arguably relates to employee evaluations and, therefore, falls within the meaning of terms and conditions of employment. The District, on the other hand, maintains that the determination to create an employee assistance program is a management decision made solely for the benefit of management for the efficiency of the operation of the schools and is a matter outside the scope of representation.

The Scope of Representation

The dispute between the Employer and the Association in this case is not new to the PERB. Since the EERA was enacted, the question of what matters are within the scope of representation has been considered by the Board. Section 3543.2 sets forth the legislative expression of the limits of the scope of representation:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of

> the Education Code. 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. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating . . . . (Emphasis added)

In a recent decision, PERB acknowledged that while the statute provided for certain express areas of negotiability, which are per se within the scope of representation, there was a broad range of issues which might fall within the scope of representation although not expressly enumerated by the statute. (San Mateo Elementary Teachers Association v. San Mateo City School District (5/20/80) PERB Decision No. 129 at pp. 9 - 12.)

In order to determine whether a matter is within scope, the Board sets forth a test by which to analyze this question. First, inquiry must be made as to whether the matter in dispute is "logically and reasonably related to wages, hours or an enumerated subject under 'terms and conditions of employment.'" (San Mateo Elementary Teachers Association, supra, PERB Decision No. 129 at p. 10.)

Next, even though a matter is logically and reasonably related to an item specified as being within scope, the affirmative answer to this threshold question still may require

an application of a balancing test to ascertain whether the subject is of such concern to both management and employees that conflict is likely to occur and that the mediatory influence of collective bargaining is appropriate. This interest is then balanced with the need to "exercise managerial prerogatives essential to the achievement of the employer's mission." San Mateo Elementary Teachers Association, supra, PERB Decision No. 129 at p. 14. See also Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7/16/79) PERB Decision No. 96. Fibreboard Paper Prods. Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609]. This test will be applied to the facts of this case.

The EASE Program is Logically and Reasonably Related to Terms and Conditions of Employment

Government Code section 3543.2 spells out certain enumerated items which comprise the legislature's limitation upon terms and conditions of employment. The enumerated area of particular concern in this case is "health and welfare benefits, as defined by section 53200" of the Government Code. Section 53200 of the Government Code defines health and welfare benefits as:

> (d) "Health and welfare benefit" means any one or more of the following: hospital, medical, surgical, disability, legal expense or related benefits including, but not limited to, medical, dental, life, legal expense and income protection insurance or benefits, whether provided on an insurance or a service basis, and includes group life insurance as defined in subdivision (b) of this section. (Emphasis added)

Government Code section 53202 gives school districts and other local agencies covered by the code the option to contract with insurance carriers of their own choosing as in the best interest of their employees after considering the preference of the employees and with the offering of alternative benefits if deemed desirable. Government Code section 53205 permits the payment of premiums for costs of such health and welfare benefits out of public funds. Section 53202.25 requires that records of persons entitled to benefits under health and welfare plans shall be confidential and not be disclosed to anyone except to the extent expressly authorized in an application for benefits or as expressly permitted by the statute. Government Code section 53207 states that no officer or employee of a local agency is required to join in any health or welfare plan.

As noted above, the program in dispute in this case would provide a referral service for employees who, by virtue of emotional, marital, physical, drug or alcohol related problems need psychological counseling or other treatment. Such a

program would reasonably be recognized by employees as a benefit to them or their families if made available to them by the District. Such a program is merely the beginning step in what is conceded by the District to be a related benefit of psychological or medical counseling for these problems. Such a program could merely be part of a continuum of services offered to employees. Thus, had the District's plan provided for both referral and treatment, there is no question but that the entire plan would fall within the definition of health and welfare benefits provided by the Government Code.

The plan in this case is one which is paid for by the District as permitted by statute. It is one which is voluntary and contains certain assurances of confidentiality. All of the indicia of the plan fall within the provisions of Government Code section 53200 et seq. While the EASE program arguably does not provide treatment, it is so inextricably related to treatment that it logically and reasonably relates to that subject of bargaining. The District argues that providing the EASE program to employees is no different than providing air-conditioning for schools or new and modern classrooms. This argument has little merit in the face of the above analysis in view of the relationship between the EASE program and the health and welfare benefits described in the Government Code.

On Balance, the EASE Program is Properly a Subject of the Negotiating Process

Having determined as a threshold matter that the EASE program is logically and reasonably related to fringe benefits as defined and described in section 3543.2 and section 53200 of the Government Code, an analysis of the subject in the light of managerial interests of the District balanced against its compatability with the negotiations process is helpful. The only managerial interest which the District has expressed is that the EASE program will enhance the cost efficiency of the District. The theory is that by reducing absenteeism and inefficiency which attend job performance by "troubled" employees, the District will enjoy some form of savings in the costs of operation. In analyzing the District's interest in this case, it must be recalled that we are dealing with a public school employer and not the ordinary industrial manufacturer found in private industry. The public school employer has different cost interests than does management in private industry. There, the increase in productivity may well be affected by "troubled" employees and the costs savings by referral to treatment can more reasonably be measured than can the savings in costs to a district in the public sector. On the other hand, it might be argued that performance will be enhanced by referral to treatment. However, it is hard to determine how this advantage would differ from the improved job

performance enjoyed by an employer who provides adequate and complete health benefits to its employees.

On the other hand, an employee assistance program as shown by this record is one that is of interest to both the employer and the employees' representatives. Further, the program is one which lends itself to a complete and open dialogue between the employer and employees' representative. The record shows that employee assistance programs are best created and maintained by joint committees of management and union representatives. While there was testimony in the record that in the private sector, the employee assistance programs are usually not a part of the collective bargaining agreement, this practice is not dispositive of whether such matters are or could be within the scope of representation if one party requests that they be negotiated. What is clear is that in the private sector, wherever these programs have been established, the majority of the programs have been established through a joint committee of labor and management.

It is concluded that when striking the balance between managerial interests and the interests of labor and management in creating an EASE program through the negotiating process, the balance must be struck in favor of negotiability.

It is thus found that an employee assistance program is within the scope of representation and the employer must bargain concerning its establishment and its provisions if

requested to do so. The District in this case refused to bargain and, absent a finding that the Association had waived its right to bargain over this matter, the District's refusal would be a violation of Government Code section 3543.5(c) and (b).[4]

Waiver

The District contends that the Association waived its rights to negotiate this matter. The District argues that the Association did not demand to negotiate an EASE program but, rather, suggested that the program should be the subject of informal discussions and later reduced to writing. The District throughout the record characterized the meetings as consultation meetings with the Association and suggests that its representatives believed that the Association did not wish to negotiate the matter of an employee assistance program. When the Association later demanded that the District negotiate on the question, the District contends its representatives were surprised and in some fashion had been deceived during the prior meetings.

Contrary to the District's contentions, no waiver is found here. PERB has held that waiver of a right to bargain will

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[4]PERB has held in San Francisco Community College District (10/12/79) PERB Decision No. 105 at p. 19, that a refusal to bargain under section 3543.5(c) is also a violation of employee organization rights under 3543.5(b).

not be inferred. Rather, waiver of the right to bargain must be intentional, clear and unmistakable. (Davis Unified School District, et al. (2/22/80) PERB Decision No. 116 at p. 171; San Francisco Community College District, supra, PERB Decision No. 105 at pp. 16-17.)

The Association did not clearly or unmistakably waive its right to negotiate in this case. Rather, representatives of the Association came to the District and requested that District representatives discuss the Association's concern about the need for an assistance program and disclose what the District's concerns were in this regard. There is no question that the parties were involved in an informal consultation process during the meetings of July 11, 30 and September 20. The Association representatives clearly believed that the program could best be created away from the bargaining table. However, at no time did the Association take a position that would be characterized as a clear and unmistakable waiver of the right to negotiate on the question of an assistance program. When the Association was informed that the District unilaterally intended to become signatory to a joint powers agreement which would implement the county schools' assistance program, the Association immediately demanded that the District negotiate concerning the intention to join the county plan.

The Association's conduct was consistent with the expressed concern about the sensitivity of discussions relating to an assistance program; and, further, the Association's conduct was consistent with the provisions of the collective bargaining agreement between the parties. In this regard, reference is made to article IV entitled "Negotiation and Consultation Procedures." Section 9.E provides in relevant part:

> The District and the Association agree that submission of a topic for consultation in no way limits either party from introducing the topic or information generated from the consultation process as a possible item for consideration within the scope of the Educational Employment Relations Act during the negotiation process at a later time. . . .

It is found that the Association representatives acted consistently with the provisions of the collective bargaining agreement and it cannot be inferred that they deviously or improperly obtained information from the District in the consultation process which it later used in the request for negotiations. Nor can it be concluded that the Association by consulting with the District concerning an EASE program had intentionally waived the right to contend that the program was clearly within the scope of representation under the EERA.

Having found that there has been no waiver, the District must be held to have violated section 3543.5 (c) and (b).

REMEDY

Section 3541.5(c) gives PERB broad powers to remedy unfair practices. Implicit within this section is an obligation upon the agency to find creative remedies in difficult situations. This case is one in which the appropriate remedy must be carefully analyzed. On the one hand, the District has violated the statute by unilaterally contracting with the San Diego County Superintendent of Schools to participate in an employee assistance program. On the other hand, unlike the cases where benefits are lost because of a change in insurance plan administrators,[5] in this case employees have suffered no loss by virtue of the District's participation in the EASE program. To order the District, without qualification, to cease and desist from participation in the EASE program would arguably interfere with rights of employees who were not members of the unit represented by the Association and would interfere with an existing contract between the District and the county.[6] Yet, to permit the District to remain in the

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[5]See Oakland Education Association v. Oakland Unified School District (4/23/80) PERB Decision No. 126; Campbell Unified School District (12/20/77) EERB Decision No. HO-U-17; Keystone Consolidated Industries v. NLRB (7th Cir. 1979) 606 F.2d 171 [102 LRRM 2664].

[6]The joint powers agreement permits withdrawal, with due notice, prior to March 1 of each year. The withdrawal is effective as of the end of the fiscal year, which is June 30. A withdrawing party may recoup the unused or uncommitted contribution after deduction of costs of administration.

plan would maintain the status quo while the Association is negotiating concerning whether the plan should remain in effect and the extent to which it should be changed.

It is concluded that the Association should be able to determine whether it wishes to have the county EASE plan continue to cover the employees in the unit it represents during the time that it is negotiating with the District concerning the implementation and provisions of the program. The Association might well determine that it is in the best interest of the employees it represents as well as in its best negotiating interest to leave the plan in effect and negotiate from the benefits already enjoyed.

Thus, the District should be ordered to negotiate with the Association concerning the terms and provisions of an employee assistance program. Further, if requested to do so by the Association, the District should also be ordered to withdraw from participation in the EASE program any and all unit members represented by the Association. Should the Association request the District to withdraw its unit members from participation in the EASE program, the District should have a reasonable opportunity to dissolve the contractual relationship covering those persons consistent with PERB law. (See Oakland Education Association v. Oakland Unified School District, supra, PERB Decision No. 126 at p. 9.)

The District should further be ordered to cease and desist from failing and refusing to meet and negotiate in good faith by taking unilateral action on matters within the scope of representation and from denying the Association its right to represent members by such refusal.

Affirmatively, the District should be ordered to immediately meet and negotiate with the Association concerning the establishment of and provisions for an employee assistance program, if requested to do so, and to properly post a copy of this Order and the attached notice where such notices are customarily placed.

Posting of such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. PERB has authorized the posting of notices in cases identical to this one. Davis Unified School District, et al., supra, PERB Decision No. 116. See also Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U. S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, IT IS HEREBY ORDERED that San Diego Unified School District and its representatives shall:

1. Cease and desist from failing and refusing to meet and negotiate in good faith with San Diego Teachers Association concerning all aspects of an employee assistance program for employees which is a matter within the scope of representation as defined by Government Code section 3543.2.

2. Cease and desist from denying the Association its right to represent unit members by failing and refusing to meet and negotiate about all aspects of an employee assistance program for employees when such matter is within the scope of representation.

3. Upon request, cease and desist from including employees represented by the Association in the San Diego County EASE program.

4. Take the following affirmative action which is necessary to effectuate the policies of the Educational Employment Relations Act:

   a. Upon request, immediately or as soon as practicable begin negotiations with the Association concerning the creation, establishment, or continuation of an employee assistance program.

   b. Within seven days of the decision becoming final, post at all school sites and all other work locations where notices to employees customarily are placed, immediately upon receipt thereof, copies of the notice attached as an appendix hereto. Such posting shall be maintained for a period of thirty (30) work days. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

   c. Immediately upon completion of the posting period set forth in 4(b), notify the Los Angeles Regional Director of the Public Employment Relations Board in writing what steps the District has taken to comply with the terms of this decision.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on July 16, 1980 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. The statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on July 16, 1980 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. (See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

Dated: June 26, 1980

Stephen H. Naiman
Hearing Officer

APPENDIX

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

After a hearing in unfair practice case No. LA-CE-549, in which all parties had the right to participate, it has been found that the San Diego Unified School District violated the Educational Employment Relations Act by failing and refusing to meet and negotiate with the San Diego Teachers Association with respect to the creation of a program affecting employees and relating to matters within the scope of representation. As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

WE WILL NOT fail or refuse, upon request, to meet and negotiate with the San Diego Teachers Association with respect to creation of and participation in an employee assistance program covering unit members.

WE WILL NOT change the terms and conditions of employment without negotiating with the San Diego Teachers Association.

Dated: SAN DIEGO UNIFIED SCHOOL DISTRICT

By_____

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