OVERRULED IN PART by Los Angeles Unified School District
(2014) PERB Decision No. 2359

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LONG BEACH COUNCIL OF CLASSIFIED EMPLOYEES, Charging Party, v. LONG BEACH COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-4373-E PERB Decision No. 2002 January 30, 2009

Appearances: Rodney W. Wickers, Attorney, for Long Beach Council of Classified Employees; Parker & Covert by Spencer E. Covert, Attorney, for Long Beach Community College District.

Before Neuwald, Chair; Wesley, Rystrom and Dowdin Calvillo, Members.

DECISION

WESLEY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the Long Beach Council of Classified Employees (Council) and the Long Beach Community College District (District) to the proposed decision (attached) of an administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally adopting a four-day-per-week, 10-hour-per-day (4/10) schedule for its classified employees during June and July 2001.

The Board has reviewed the entire record in this case, including but not limited to, the complaint and answer, the hearing transcripts and exhibits, the ALJ's proposed decision, the

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

Council's exception and the District's response thereto, and the District's exceptions and supporting brief.[2] Based on this review, the Board finds the ALJ's proposed decision to be a correct statement of the law and well-reasoned, and therefore adopts it as the decision of the Board itself, subject to the discussion below.

BACKGROUND

Facts Underlying the Unfair Practice Charge

The ALJ's proposed decision contains a thorough and accurate recitation of the facts underlying the unfair practice charge and complaint. We briefly summarize the relevant facts here to provide context for our discussion below.

At all times relevant to this case, no collective bargaining agreement (CBA) existed between the District and the Council. Nonetheless, the parties had agreed to abide by the provisions of the expired CBA between the District and the California School Employees Association, which represented the District's classified employees prior to the Council's certification as exclusive representative in March 2000. Additionally, the parties had negotiated an interim grievance procedure that was in effect during the months in 2001 at issue here. The procedure provided for an informal grievance conference, followed by a formal filing of a grievance with the appropriate dean or director (Level 1), an appeal to the appropriate vice president or executive dean (Level 2), and finally, non-binding mediation (Level 3). When the parties failed to reach agreement at a particular step, the grievant had 20 days to move the grievance to the next step in the process. However, the parties could extend the timeline by mutual agreement.

[2]The District filed its exceptions concurrently with its response to the Council's exception. The Council did not respond to the District's exceptions.

On April 10, 2001, Victor Collins (Collins), the District's dean of human services, sent a letter to Shannon Willson (Willson), the president of the Council. The letter informed the Council that, due to the ongoing California energy crisis, the District would be instituting a 4/10 schedule for classified employees from June 4 through July 26, 2001.

On April 13, 2001, Willson and Collins, along with another Council representative and the District's interim human resources director, met to discuss the 4/10 schedule. The Council made two proposals that were rejected by the District. At the end of the meeting, the parties agreed that the Council would survey its members about the 4/10 schedule and then meet again with the District.

On May 1, 2001, the District notified its classified employees by memorandum of the impending change to the 4/10 schedule. The following day, Willson and Collins met to discuss the results of the Council's survey. Willson stated that the Council would have to file a grievance if the District did not negotiate over the 4/10 schedule. Collins responded that the District would accommodate some employees, but that it had no choice but to implement the 4/10 schedule.

On May 7, 2001, Willson sent Collins a letter summarizing employee responses to the Council's survey. Collins responded by letter on May 11 that the District intended to implement the 4/10 schedule but would work with the Council before implementation to accommodate specific employees. Willson did not respond to this letter.

The District implemented the 4/10 schedule for classified employees effective June 4, 2001. On June 20, the Council filed a Level 1 grievance over the 4/10 schedule. As a remedy, the grievance sought credit for all vacation and/or unpaid leave taken by employees as a result of implementation of the 4/10 schedule. The District immediately moved the grievance to Level 3 mediation. Collins testified that although the grievance was untimely, he felt that a

mediator could help the parties reach agreement on the issue. Mediation took place on August 2, 2001, but no agreement was reached. The Council filed this unfair practice charge on January 25, 2002.

Dismissal of the Charge and Appeal to the Board

On March 26, 2002, a PERB Board agent dismissed the Council's charge because it was not filed within six months of the alleged unfair practice, as required by EERA section 3541.5(a)(1). The Board agent rejected the Council's argument that the six-month period was equitably tolled while the Council engaged in the non-binding interim grievance procedure. In the dismissal letter, the Board agent pointed out that the Board had ceased to recognize the doctrine of equitable tolling in Regents of the University of California (1990) PERB Decision No. 826-H (Regents). On April 19, 2002, the Council appealed the dismissal to the Board itself.

In its decision on the appeal, Long Beach Community College District (2003) PERB Decision No. 1564 (Long Beach CCD I), the Board held that the six-month limitations period set forth in EERA section 3541.5(a)(1) is not jurisdictional. Based on this holding, the Board reinstated the doctrine of equitable tolling. However, because the record did not establish when the Council initiated the non-binding grievance procedure, the Board could not determine the length of the equitable tolling period in this case. Consequently, the Board remanded the charge to the Office of the General Counsel for further investigation.

After further investigation, the parties agreed that their April 13, 2001 meeting constituted the Council's initiation of the non-binding grievance procedure. Because this agreement resolved the timeliness issue, the General Counsel issued a complaint on the charge on March 9, 2004. The District answered the complaint on March 26, 2004, asserting the six-month statute of limitations as a defense. After the parties failed to reach a settlement, the case

proceeded to hearing before an ALJ on October 27 through 29, 2004. The ALJ issued his proposed decision on March 28, 2005.

ALJ's Proposed Decision

The ALJ found the charge was timely because the six-month statute of limitations was equitably tolled from April 13 to August 2, 2001 while the Council pursued a remedy through the non-binding interim grievance procedure. The District argued, contrary to its earlier agreement, that the parties' meetings of April 13 and May 2, 2001, did not satisfy the "informal grievance conference" step of the procedure because the Council did not formally invoke the grievance process at either meeting. The ALJ rejected this argument, finding that the substance of the meetings was consistent with that described in the informal grievance conference step of the process. The District also argued that the Council failed to diligently pursue the grievance procedure because it filed its June 20, 2001 grievance more than 20 days after the informal conference step ended. The ALJ reasoned that by accepting the Council's late grievance, the District agreed to extend the grievance procedure's filing timelines.

Turning to the merits of the complaint, the ALJ found that work schedules are within the scope of representation and that the District did not bargain with the Council before implementing the 4/10 schedule.[3] He then proceeded to examine whether the Council waived its right to negotiate over the 4/10 schedule.[4] After reviewing the CBA provisions regarding work hours and workweek, the ALJ concluded that nothing in the CBA allowed the District to

[3]The parties stipulated that the District did not bargain before implementation.

[4]The ALJ and the parties framed the issue as whether the District had a contractual right to change the workweek but this is generally analyzed as whether the union waived its right to negotiate over the workweek change. (See Desert Sands Unified School District (2004) PERB Decision No. 1682 [applying waiver analysis to district's claim that CBA's management rights clause allowed it to unilaterally transfer work from one job classification to another].)

implement a 4/10 schedule without first negotiating the change with the Council. Consequently, the ALJ found that the District's unilateral implementation of the 4/10 schedule violated EERA.

As a remedy, the ALJ ordered the District to restore any vacation or compensatory time off that bargaining unit employees used to avoid working full ten-hour days during June and July 2001. He also ordered back pay for employees who took leave without pay to avoid working a ten-hour day. However, the ALJ rejected the Council's request for overtime pay for all bargaining unit employees because most of the employees consented to working the 4/10 schedule.

DISCUSSION

1. Statute of Limitations

a. Nature of Limitation

In its exceptions, the District urges the Board to overrule Long Beach CCD I and return to the Board's prior view that the six-month limitations period set forth in EERA section 3541.5(a)(1)[5] is jurisdictional and therefore precludes the Board from equitably tolling the statutory filing period. For the following reasons, we reaffirm the Board's holding in Long Beach CCD I that EERA's statute of limitations is not jurisdictional.

In California State University, San Diego (1989) PERB Decision No. 718-H (CSU, San Diego), the Board held that EERA section 3541.5(a)(1) acts as an absolute

[5]EERA section 3541.5 states, in relevant part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
>
> (1) Issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

limitation on PERB's jurisdiction to issue complaints because the statute states that the Board "shall not" issue a complaint based on any conduct occurring more than six months before the charge was filed.[6] In so holding, the Board relied on cases stating the general rule that "[t]he word 'shall' is ordinarily 'used in laws, regulations, or directives to express what is mandatory.'" (Hogya v. Superior Court (1977) 75 Cal.App.3d 122, 133 [142 Cal.Rptr. 325].) Nonetheless, "shall" may be construed as directory rather than mandatory unless doing so would defeat the purpose of the provision in which it appears. (Id., at p. 134.) Thus, the Legislature's use of the word "shall" does not always mean that a statute imposes a mandatory requirement. Therefore, it is necessary to look at the context in which "shall" is used in the statute to determine whether the requirement is mandatory or directory.

In construing the language of EERA section 3541.5(a)(1), the Board must apply these rules of statutory construction in the context of the law applicable to statutes of limitation. As a general rule, the statute of limitations is a defense that is waived if not raised at the appropriate time. (John R. Sand & Gravel Co. v. United States (2008) 128 S.Ct. 750, 753 [169 L.Ed.2d 591] (John R. Sand & Gravel); Moore v. City of Los Angeles (2007) 156 Cal.App.4th 373, 382 [67 Cal.Rptr.3d 218].) "This general rule applies to proceedings before an administrative tribunal." (Bohn v. Watson (1954) 130 Cal.App.2d 24, 36-37 [278 P.2d 454].) However, statutory limitation periods may be considered jurisdictional, rather than a defense, when they seek "to achieve a broader system-related goal." (John R. Sand &

[6]CSU, San Diego involved interpretation of the Higher Education Employer-Employee Relations Act (HEERA). (HEERA is codified at Government Code sec. 3560 et seq.) HEERA section 3563.2(a) provides, in relevant part, that "the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." Because EERA section 3541.5(a)(1) contains identical language, the Board in CSU, San Diego applied its holding that HEERA section 3563.2(a) was jurisdictional to this parallel EERA provision.

Gravel, at p. 753.) In such cases, the language of the statute must clearly indicate that the Legislature intended for the time limitation to be absolute. (United States v. Brockamp (1997) 519 U.S. 347, 350-351 [117 S.Ct. 849].)

Applying the above principles, we find that the language of EERA section 3541.5(a)(1) does not clearly indicate that the six-month limitation is jurisdictional. There is nothing in the text of the statute to signify that the words "shall not" were meant to be mandatory. Both the National Labor Relations Act (NLRA)[7] and California's Agricultural Labor Relations Act (ALRA)[8] provide that: "[n]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the board." (29 U.S.C. sec. 160(b); Lab. Code sec. 1160.2; emphasis added.) Though both of these statutes use the word "shall," neither has been interpreted as an absolute limit on the administering labor board's jurisdiction to issue complaints. (Chicago Roll Forming Corp. (1967) 167 NLRB 961, 971 [66 LRRM 1228]; National Labor Relations Bd. v. A.E. Nettleton Co. (2d Cir. 1957) 241 F.2d 130, 133 [39 LRRM 2338]; Ruline Nursery v. Agricultural Labor Relations Bd. (1985) 169 Cal.App.3d 247, 265 [214 Cal.Rptr. 704].) Further, we have found no authority showing that the phrase "shall not" is subject to different rules of interpretation than the word "shall" standing alone. Accordingly, we attach no legal significance to the Legislature's choice of "shall not" rather than "shall" in EERA section 3541.5(a). There is thus no textual basis for finding the six-month period in EERA section 3541.5(a)(1) to be a jurisdictional limitation.[9]

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[7]The NLRA is codified at 29 U.S.C. section 151 et seq.

[8]The ALRA is codified at Labor Code section 1140 et seq.

[9]It is also worth noting that the first sentence of EERA section 3541.5 sets forth the Board's jurisdiction, while the second sentence provides that the Board shall establish "[p]rocedures for investigating, hearing, and deciding" unfair practice charges. Subsection (a), which contains the six-month limitation period, thus falls under the Board's authority to

Moreover, interpreting the limitation as non-jurisdictional does not defeat the purpose of the limitation. "[T]he primary purpose of statutes of limitation is to prevent the assertion of stale claims by plaintiffs who have failed to file their action until evidence is no longer fresh and witnesses are no longer available." (Addison v. State of California (1978) 21 Cal.3d 313, 317 [146 Cal.Rptr. 224].) PERB will not toll the statutory limitations period unless the dispute for which the parties utilized a non-binding dispute resolution procedure is the same as the dispute underlying the unfair practice charge. (Victor Valley Community College District (1986) PERB Decision No. 570 (Victor Valley CCD).) This rule prevents prejudice to the respondent because the initiation of the dispute resolution procedure puts the respondent on notice of the dispute that is the subject of the unfair practice charge. (Ibid.) Therefore, because the respondent's interest in avoiding "stale claims" may be adequately protected without interpreting the statutory time limitation as mandatory, we conclude that the six-month limitation in EERA section 3541.5(a)(1) is not jurisdictional.

b. Type of Defense

While we agree with the Board's holding in Long Beach CCD I that the six-month period set forth in EERA section 3541.5(a)(1) is a non-jurisdictional statute of limitations, we disagree with the Board's statement that it "must be raised as an affirmative defense." For the following reasons, we find that EERA's statute of limitations is not a true affirmative defense but instead an element of the charging party's prima facie case.

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establish case handling procedures rather than under the section conferring jurisdiction upon the Board. This further indicates that the limitation period is not jurisdictional. (See Kontrick v. Ryan (2004) 540 U.S. 443, 453-454 [157 L.Ed.2d 867] [holding that time limitation was not jurisdictional because it was promulgated pursuant to the bankruptcy court's authority to establish "rules of practice and procedure"].)

Code of Civil Procedure section 431.30(b) recognizes two types of defenses that may be raised in an answer to a complaint: "(1) The general or specific denial of the material allegations of the complaint controverted by the defendant" and "(2) A statement of any new matter constituting a defense," or what is commonly known as an affirmative defense. An affirmative defense absolves a defendant of liability even if the plaintiff has proven all of the necessary elements of its claim. (Pettus v. Cole (1996) 49 Cal.App.4th 402, 439 [57 Cal.Rptr.2d 46]; see Cal. Code Regs., tit. 2, sec. 7286.7 ["If employment discrimination is established, this employment discrimination is nonetheless lawful where a proper, relevant affirmative defense is proved."].) Thus, "affirmative defenses do not simply negate an element of the plaintiff's prima facie case, they raise matters extraneous to the prima facie case." (In re Lauricella (Bankr. 9th Cir. 1989) 105 B.R. 536, 541, citing Ford Motor Co. v. Transport Indem. Co. (6th Cir. 1986) 795 F.2d 538, 546; see City of Stockton v. Superior Court (2007) 42 Cal.4th 730, 746, fn. 12 [68 Cal.Rptr.3d 295] [stating an affirmative defense "is one that depends on facts beyond those put at issue by the plaintiff"].) In most civil actions, timeliness is not part of the plaintiff's prima facie case and therefore the plaintiff does not have to plead timeliness in its complaint. (Samuels v. Mix (1999) 22 Cal.4th 1, 8 [91 Cal.Rptr.2d 273] (Samuels).) In such cases, the statute of limitations is an affirmative defense that the defendant must plead in its answer and prove by a preponderance of the evidence. (Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd. (1985) 39 Cal.3d 57, 67, fn. 8 [216 Cal.Rptr. 115].)

In contrast, PERB has long held that, in order for a complaint to issue, the charging party must allege facts establishing that the unfair practice occurred within the statute of limitations period. In San Francisco Unified School District (1985) PERB Decision No. 501, the Board

stated that both EERA itself and PERB Regulation 32615(a)[10] require the charging party to allege facts that establish when the unfair practice occurred. Because the charge failed to do so, the Board could not determine whether the alleged unlawful conduct occurred within the limitations period. Consequently, the Board affirmed the Board agent's dismissal of the charge for lack of timeliness.

PERB continues to apply this rule to incoming charges. Indeed, PERB Regulation 32620(b)(4) requires the Board agent to "determine whether the charge is subject to . . . dismissal for lack of timeliness." Thus, unlike in civil actions, timeliness is part of the charging party's prima facie case in PERB unfair practice proceedings. As a result, the statute of limitations is not a true affirmative defense because it negates an element of the prima facie case rather than establishing a defense based on matters outside of the prima facie case. (See Samuels, at p. 8 [holding that the statute of limitations was an affirmative defense because the relevant statute did not make timeliness an element of the plaintiff's prima facie case].)

Nevertheless, in Long Beach CCD I, the Board characterized EERA's six-month statute of limitations as an affirmative defense that the respondent bears the burden of raising and proving. This characterization comes from the Board's decision in Walnut Valley Unified School District (1983) PERB Decision No. 289 (Walnut Valley), which appears to have changed PERB's prior practice regarding the statute of limitations. In San Dieguito Union High School District (1982) PERB Decision No. 194 (San Dieguito), the Board affirmed the hearing officer's dismissal of the charge for lack of timeliness because the record did not show that the alleged unfair practice occurred within the six-month statute of limitations period. Importantly, the

[10]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32615(a)(5) requires a charge to contain a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice."

Board made no mention of the respondent having the burden of proving the charge was untimely. Thus, before Walnut Valley, PERB seems to have required the charging party to prove timeliness as part of its prima facie case at hearing.

The Board's restoration of the Walnut Valley rule in Long Beach CCD I has created a system where PERB considers timeliness part of the prima facie case at the charge stage, but once a complaint issues it is no longer part of the prima facie case but instead an affirmative defense that the respondent must raise in its answer and prove by a preponderance of the evidence at hearing. This shifting of the burden of proof on timeliness is contrary to the Legislature's allocation of the burden of proof in civil proceedings as set forth in Evidence Code section 500,[11] which states that "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting." The Law Revision Commission Comment states that Evidence Code section 500 follows the basic rule "that whatever facts a party must affirmatively plead he also has the burden of proving."

Because the current Walnut Valley scheme is contrary to this fundamental principle, we overrule Walnut Valley and its progeny, including Long Beach CCD I, to the extent those cases hold that the respondent bears both the burden of pleading the statute of limitations as an affirmative defense in its answer and the burden of proving at hearing that the charge was untimely. PERB's approach before Walnut Valley, as exemplified in San Dieguito, was consistent with Evidence Code section 500 because it required the charging party to prove at hearing what it alleged in its charge. Accordingly, we hold that the charging party bears the

[11]PERB is not required in unfair practice cases to comply with "the technical rules of evidence applied in the courts." (PERB Reg. 32176.) Nonetheless, such a fundamental rule of evidence is entitled to great weight in the Board's administration of its unfair practice proceedings.

burden of proving by a preponderance of the evidence that the charge was filed within the six-month statute of limitations period.[12]

2. Equitable Tolling

a. PERB's Ability to Equitably Toll

As noted above, the District argues in its exceptions that the Board should overrule Long Beach CCD I and reinstate its decision in Regents, where the Board held that PERB could not equitably toll the statutory limitation period because the limitation was jurisdictional. Having reaffirmed that the limitation period in EERA section 3541.5(a)(1) is not jurisdictional, we also reaffirm for the following reasons that equitable tolling is allowed under EERA.

The California Supreme Court recently addressed equitable tolling in McDonald v. Antelope Valley Community College Dist. (2008) 45 Cal.4th 88 [84 Cal.Rptr.3d 734] (McDonald). Equitable tolling is a judicially created doctrine that operates independently of codified statutes of limitation. (Id., at p. 99.) The purpose of the doctrine is to allow a party who has several legal remedies to pursue one of them without forfeiting the other(s). (Id., at p. 100.) Equitable tolling is allowed unless: (1) the statute clearly states that its list of tolling bases is exhaustive, or (2) "either the text of a statute or a manifest legislative policy underlying it cannot be reconciled with permitting equitable tolling." (Id., at p. 105.)

None of these criteria is met here. EERA section 3541.5(a)(2) provides that the six-month statute of limitations is tolled while the parties are engaged in contractual grievance

[12]In light of this holding, we do not adopt the last two sentences on page 14 of the attached proposed decision, which state that the statute of limitations is an affirmative defense which has been raised by the respondent and therefore the charging party now bears the burden of demonstrating timeliness. Rather, as discussed above, the charging party bears the burden of demonstrating timeliness at all stages of the unfair practice proceeding. This holding is consistent with PERB Regulation 32178, which requires "[t]he charging party shall prove the complaint by a preponderance of the evidence in order to prevail."

procedures that end in binding arbitration or settlement. The statute contains no language indicating that these are the only bases on which PERB can toll the statute of limitations. (See Code Civ. Proc., sec. 340.6 [stating that "in no event shall the prescriptive period be tolled except under those circumstances specified in the statute"].) Nor does the language of EERA section 3541.5(a)(1) "suggest an implicit legislative intent to preclude equitable tolling." (McDonald, at p. 107.) Indeed, EERA's six-month limitation period is "typical of the short limitations periods to which [the courts] have consistently extended equitable tolling principles." (Ibid.)

Finally, there is no fundamental policy underlying EERA that would categorically foreclose equitable tolling. EERA was enacted "to promote the improvement of personnel management and employer-employee relations within the public school systems." (EERA sec. 3540.) PERB has stated that "the central purpose of the EERA" is to promote "harmonious labor relations." (Los Angeles Unified School District (1988) PERB Decision No. 659.) The health and stability of a collective bargaining relationship is better maintained by allowing the parties to resolve a dispute through negotiated, albeit non-binding, dispute resolution procedures than through an adversarial proceeding before PERB. Accordingly, equitable tolling can easily be reconciled with EERA's fundamental purpose of promoting harmonious labor relations.

In sum, there is nothing in the text or underlying purpose of EERA to indicate that the Legislature intended to prohibit PERB from equitably tolling the six-month limitation period in EERA section 3541.5(a)(1). Therefore, we hold that EERA allows the Board to equitably toll in appropriate circumstances.

b. Scope of Equitable Tolling

We agree that the scope of equitable tolling set forth in Long Beach CCD I is appropriate. Nonetheless, it is necessary to clarify one aspect of the legal standard that the Board established for determining when the statute of limitations is equitably tolled. In Long Beach CCD I, the Board stated that the limitation period should be tolled "[w]hen a grievance has been filed utilizing a bilaterally agreed upon dispute resolution procedure." For purposes of providing guidance to future parties, it is important to explicitly state what is implicit in the above-quoted phrase: the dispute resolution procedure must be contained in a written agreement negotiated by the parties, as it is in this case. In other words, the dispute resolution process itself must be the product of collective bargaining between the parties, as evidenced by a written memorialization of the parties' agreement. This limitation on the scope of equitable tolling is consistent with EERA's objective "to promote and encourage the resolution of disputes through the give and take of collective bargaining." (Modesto City Schools (1983) PERB Decision No. 291.) In light of this clarification, we now hold that the statute of limitations is tolled during the period of time the parties are utilizing a non-binding dispute resolution procedure if: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent.

c. Application of Equitable Tolling in This Case

Applying the above test, we find that the Council met its burden of establishing by a preponderance of the evidence that the statute of limitations was equitably tolled in this case. It is undisputed that the Council and the District were parties to a negotiated, written interim

grievance procedure and that the Council's grievance and unfair practice charge involved the same dispute over the District's implementation of the 4/10 schedule during June and July 2001. Because the Council's grievance gave the District notice of the subject of the unfair practice charge, tolling would not prejudice the District. (Victor Valley CCD.) Finally, for the reasons set forth in the attached proposed decision, we find the Council "reasonably and in good faith" utilized the interim grievance procedure by participating in informal grievance conferences, filing a formal grievance and participating in mediation. Accordingly, we agree with the ALJ that, because the statute of limitations was equitably tolled from the first informal grievance conference on April 13, 2001, through the mediation session on August 2, 2001, the Council's unfair practice charge was timely filed on January 25, 2002.

3. District's Remaining Exceptions

Aside from the exception discussed immediately below, the District's remaining exceptions were also raised before the ALJ and are adequately and correctly addressed in the proposed decision. For this reason, we do not address those exceptions here.

The District argues for the first time in its exceptions that it would not be equitable to toll the statute of limitations in this case because the Council sought a different remedy before PERB than it sought during the non-binding grievance process. In its June 20, 2001 grievance, the Council sought vacation credit and/or back pay for classified employees who took vacation time or leave without pay to avoid working a 10-hour day under the 4/10 schedule during June and July 2001. The Council sought this same remedy before PERB, but also requested overtime pay for all classified employees who worked over eight hours on any given day during June and July 2001 as a result of the 4/10 schedule.

The District cites no authority, nor have we found any, for the proposition that equitable tolling is not allowed unless the remedies sought in the non-binding dispute

resolution procedure and the unfair practice proceeding are identical. However, there is authority for the contrary proposition. In Elkins v. Derby (1974) 12 Cal.3d 410 [115 Cal.Rptr. 641] (Elkins), Elkins filed a workers' compensation claim over an on-the-job injury. (Id., at p. 413.) After the claim was rejected, Elkins filed a tort action against the employer based on the same injury. (Ibid.) Because of the limitations placed on an employee's recovery by the workers' compensation statutes, Elkins could not have recovered as much on his workers' compensation claim as he potentially could have on his personal injury claim. (See Fermino v. Fedco, Inc. (1994) 7 Cal.4th 701, 708 [30 Cal.Rptr.2d 18] [stating that under California's workers' compensation system an "employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range of damages potentially available in tort" (emphasis added)].) Nonetheless, the Supreme Court held that the statue of limitations on Elkins' tort claim was equitably tolled during the proceedings on his workers' compensation claim. (Elkins, at p. 412.) Based on this authority, we conclude that the Council's request for a greater remedy from PERB than it sought in the non-binding dispute resolution procedure does not preclude equitable tolling of the statute of limitations.[13]

4. Council's Exception to the Proposed Remedy

The Council filed a single exception over the ALJ's refusal to award overtime to all classified employees who worked over eight hours on any given day during June and July 2001

[13]Additionally, though it does not appear to be so in this case, it is possible that the parties' negotiated alternative dispute resolution procedure cannot provide the same remedy as PERB. We see no compelling reason to exclude such cases from the application of equitable tolling.

as a result of the 4/10 schedule.[14] The Council's exception challenges the ALJ's finding that, because the majority of employees surveyed by the Council indicated they would willingly work the 4/10 schedule, those employees concurred with the 4/10 schedule and thus were not entitled to overtime under the CBA. We agree that the employees were not entitled to overtime as part of the remedy for the following reasons.

The normal remedy for a unilateral change is to restore the status quo by rescinding the change and making affected employees whole for any losses suffered as a result of the change. (California State Employees Assn. v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923, 946 [59 Cal.Rptr.2d 488].) PERB will only order backpay of overtime as part of a "make whole" remedy when the unilateral change eliminated or reduced overtime hours to which the employee otherwise would have been entitled. (San Jacinto Unified School District (1994) PERB Decision No. 1078.) The record does not establish that the District's implementation of the 4/10 schedule caused the affected employees to lose overtime hours to which they were entitled. Consequently, an award of overtime is not necessary to make them whole. Accordingly, the ALJ's proposed remedy adequately and completely compensates affected employees for the losses they suffered as a result of the District's unlawful unilateral implementation of the 4/10 schedule.

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[14]Attached to the Council's exception was a seven-page spreadsheet. PERB Regulation 32300(b) provides that "Reference shall be made in the statement of exceptions only to matters contained in the record of the case." The spreadsheet was not introduced at the hearing and thus was not part of the record before the Board on appeal. Although PERB has authority to order the record reopened for the taking of further evidence (Reg. 32320(a)(2)), the standard to be applied is the same as that governing requests for reconsideration. (San Mateo Community College District (1985) PERB Decision No. 543; see also, California State University (1990) PERB Decision No. 799a-H.) Thus, in offering the spreadsheet as part of its statement of exceptions, the Council should have followed the process set forth in PERB Regulation 32410(a), including a declaration under penalty of perjury that establishes grounds for consideration of the new evidence. Because no such declaration was filed with the exception, the Board has not considered the spreadsheet in deciding this case.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is found that the Long Beach Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), by unilaterally implementing a four-day-per-week, 10-hour-per-day work schedule for the District's classified employees during June and July 2001.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Long Beach Council of Classified Employees (Council), as the exclusive representative of the District's classified employees, by unilaterally changing classified employee work schedules.

2. Interfering with the right of employees to be represented by the Council by the conduct described in paragraph A.1. above.

3. Denying the Council the right to represent its members by the conduct described in paragraph A.1. above.

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

1. Restore vacation credits and compensatory time off to those employees who used those forms of leave to reduce the 10-hour workdays imposed upon them in June and July 2001.

2. Pay backpay, with interest at the rate of seven percent per annum, to those employees who took leave without pay to reduce the 10-hour workdays imposed upon them in June and July 2001.

3. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees are customarily posted, copies of the Notice attached hereto. The Notice must be signed by an authorized agent of the District, indicating the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Council.

Chair Neuwald and Members Rystrom and Dowdin Calvillo joined in this Decision.

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-4373-E, Long Beach Council of Classified Employees v. Long Beach Community College District, in which all parties had the right to participate, it has been found that the Long Beach Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), by unilaterally implementing a four-day-per-week, 10-hour-per-day work schedule for the District's classified employees during June and July 2001.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the Long Beach Council of Classified Employees (Council), as the exclusive representative of the District's classified employees, by unilaterally changing classified employee work schedules.

2. Interfering with the right of employees to be represented by the Council by the conduct described in paragraph A.1. above.

3. Denying the Council the right to represent its members by the conduct described in paragraph A.1. above.

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

1. Restore vacation credits and compensatory time off to those employees who used those forms of leave to reduce the 10-hour workdays imposed upon them in June and July 2001.

2. Pay backpay, with interest at the rate of seven percent per annum, to those employees who took leave without pay to reduce the 10-hour workdays imposed upon them in June and July 2001.

Dated: _____ LONG BEACH COMMUNITY COLLEGE DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LONG BEACH COUNCIL OF CLASSIFIED EMPLOYEES, Charging Party, v. LONG BEACH COMMUNITY COLLEGE DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-4373-E PROPOSED DECISION (3/28/05)

Appearances: Rodney W. Wickers, Attorney, for Long Beach Council of Classified Employees; Parker & Covert LLP by Spencer E. Covert, Attorney, for Long Beach Community College District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges that an employer unilaterally and unlawfully changed a work schedule policy. The employer denies any unlawful conduct.

This case already has a long procedural history. The Long Beach Council of Classified Employees (LBCCE) filed an unfair practice charge against the Long Beach Community College District (District) on January 25, 2002. The General Counsel of the Public Employment Relations Board (PERB) dismissed the charge on March 26, 2002, explaining to LBCCE's representative:

> I received a letter from you on March 25, 2002 via fax. In your letter, you assert that the charge is timely because PERB has adopted the doctrine of equitable tolling, citing Victor Valley Joint Union High School District (1982) PERB Decision No. 273. You acknowledge that charging party [LBCCE] had notice of the proposed summer work schedule change at least as early as April 13, 2001, when the parties began engaging in good faith negotiations regarding the District's April 10, 2001 memorandum. The parties continued to meet in an effort to

> resolve the dispute, culminating in a mediation session on August 3, 2001. You end by stating that "the Parties engaged in a procedure that constituted the pursuit of an alternative remedy which would toll the statute of limitations . . ."
>
> You are correct in stating that PERB once recognized the doctrine of equitable tolling under certain circumstances; however this was prior to 1990. PERB case law no longer recognizes the doctrine. San Diego Unified School District (1991) PERB Decision No. 885; University of California (1990) PERB Decision No. 826-H. PERB will not assert jurisdiction over an unfair practice charge that is not filed within the six-month period for filing and may not issue a complaint under those circumstances. Consequently, charging party has not met the burden of showing timeliness in filing as part of its prima facie case.

LBCCE appealed the dismissal to PERB itself.

PERB issued its decision on the appeal on December 8, 2003. In that decision, Long Beach Community College District (2003) PERB Decision No. 1564, PERB announced the return of the doctrine of equitable tolling, which it stated as follows:

> When a grievance has been filed utilizing a bilaterally agreed upon dispute resolution procedure in an effort to resolve the same dispute which is the subject of the charge, the statue of limitations is tolled during the period of time the grievance is being pursued if: (1) the charging party reasonably and in good faith pursues the grievance; and (2) tolling did not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent.

On applying the doctrine to LBCCE's charge, PERB stated:

> It is undisputed that the contractual grievance filed by LBCCE was part of a "bilaterally agreed upon dispute resolution procedure." That procedure ended with an unsuccessful mediation session on August 2, 2001. Under the doctrine of equitable tolling, the period of time utilized to exhaust the contractual grievance process is not counted towards the six-month limitations period. (See State of California (Secretary of State) (1990) PERB Decision No. 812-S.) Accordingly, after August 2, 2001, the limitations period began to run again. LBCCE did not file its unfair practice charge until January 25,

> 2002. Thus, even after the contractual grievance ended, LBCCE waited five months and twenty-three days before filing its charge.
>
> What is unclear is when the contractual grievance procedure began. According to the charge, LBCCE was informed of the District's intent to change the summer work schedule as early as April 10, 2001. LBCCE did not file its formal first-level grievance until June 20, 2001. However, the contractual grievance also provides for an informal grievance stage. There is evidence in the record that LBCCE met with the District to discuss the proposed schedule change as early as April 13, 2001. What is unclear is whether that meeting was intended to constitute LBCCE's initiation of the grievance process.

In light of this ambiguity, PERB remanded the case to its General Counsel for further investigation.

On January 26, 2004, the PERB General Counsel asked LBCCE and the District for statements on "whether the April 13, 2001 meeting was intended to constitute LBCCE's initiation of the grievance procedure." On February 5, 2004, LBCCE filed a statement asserting that the meeting was the beginning of the informal stage of the grievance procedure. On February 13, 2004, the District filed a statement agreeing that the meeting "constituted the LBCCE's initiation of the informal grievance stage and was intended to constitute LBCCE's initiation of the grievance process."[1] Accordingly, on March 9, 2004, the PERB General Counsel issued a complaint against the District.

The District filed an answer to the PERB complaint on March 26, 2004, denying any unlawful conduct and raising the six-month statute of limitations as one of its defenses. PERB held informal settlement conferences on May 12 and (by telephone) June 1 and July 6, 2004, but the case was not settled. PERB held a formal hearing on October 27-29, 2004. With the receipt of final post-hearing briefs on January 25, 2005, the case was submitted for decision.

[1] The District disagreed, however, with "the contention [of LBCCE] that the informal stage continued beyond May 11, 2001," because there was "no agreement to extend the grievance time limits."

FINDINGS OF FACT

The District is a public school employer under the Educational Employment Relations Act (EERA).[2] LBCCE is an employee organization under EERA and is the exclusive representative of a unit of the District's classified employees.

At the beginning of the PERB hearing, LBCCE and the District stipulated as follows:

> 1. The Long Beach Community College District ("LBCCD") determined to implement a change in the work schedule from June 4, 2001 through July 27, 2001, and notice thereof was given by Memorandum from Mr. Victor Collins dated April 10, 2001 (Jt. Ex. 7), to Shannon Willson, President, LBCCE.
>
> 2. LBCCD changed the work schedule for most classified employees from eight (8) hours a day, five (5) days a week to four (4) days a week, ten (10) hours a day ("4/10") and implemented the change without overtime pay for work over eight (8) hours but less than ten (10) hours for the 4 days and 40 hours, and without negotiation with LBCCE, the exclusive representative of the Classified Employees of LBCCD.
>
> 3. Most LBCCE members followed the 4/10 work schedule. Some of the members were permitted by LBCCD to use their Vacation, Compensatory time and leave without pay when necessary to accomplish the 4/10 work schedule.
>
> 4. The LBCCE, using the Interim Grievance Procedure (Jt. Ex. 6), grieved the implementation of the 4/10 work schedule by filing a Grievance on June 20, 2001 (Jt. Ex. 10).
>
> 5. Additionally, in accordance with the Grievance Procedure, the Parties participated in a mediation session on August 2, 2001. The mediation session resulted in non-agreement and Arbitration was not available under the Interim Grievance Procedure (Jt. Ex. 6).
>
> 6. The Administrative Law Judge shall retain jurisdiction to determine the amount, if any, of back pay, should the Charging Party prevail and should the Parties be unable to agree.

LBCCE and the District also stipulated to the admission of 20 joint exhibits.

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[2] EERA is codified at Government Code section 3540 and following.

This case arises out of a contract dispute during the California energy crisis of 2000-2001. The contract in question was negotiated by the District not with LBCCE but with LBCCE's predecessor as exclusive representative, the California School Employees Association (CSEA). The District and CSEA had an agreement (CSEA agreement) for the term July 1994 through June 1997, later extended through June 1998. PERB certified LBCCE, then known as the AFT Council of Classified Employees, as the new exclusive representative in March 2000. No successor to the CSEA agreement has been negotiated, except for an interim grievance procedure.

The contract dispute centers on Article XII (Hours and Overtime) of the CSEA agreement. That article provides in relevant part:

> A. Workday
>
> 1. The workday for full-time unit employees shall be eight (8) hours, subject to the exception contained in this Agreement pertaining to the voluntary four-day and 9/80 workweek. Each unit employee shall be assigned a fixed, regular shift. The fixed shift may be changed by the District for compelling business necessity after a 22 working day notice to and consultation with the unit employee and notification to CSEA. Employees may waive the 22 working day notice.
>
> With references [sic] to the above (A.1.) the District shall ask for volunteers first. If there are no volunteers then the least senior employee(s) shall be assigned.
>
> 2. When an employee desires to have a temporary reduction or permanent reduction of hours, the employee shall notify CSEA and the District. CSEA and the District shall meet and negotiate . Any agreement to reduce hours must be approved by the District and CSEA and shall have a signed agreement. The agreement shall include such things as how work load currently being done by the employee will be handled, whether the employee will continue to receive medical benefits, and how the leave from the District will be charged.

B. Workweek

1. The workweek shall be forty (40) hours for full-time unit employees. The workweek for all unit employees shall be a fixed and regular five (5) consecutive day period except as indicated in Section A and in the following paragraph.

2. The District may, with the concurrence of the affected unit employee(s), institute a full-time workweek of four (4) fixed and regular consecutive days, at ten (10) hours per day and the 9/80 workweek. The District may abolish the four (4) and ten (10) and the 9/80 after it is established for good and sufficient reason for a specific group of unit employees after suitable notice to and consultation with the unit employee(s) affected and notice to CSEA.

   In departments where more than one person desires to work the 4/10 or the 9/80 workweeks and it is not possible to allow all employees that desire the shift to work it at the same time, employees shall be assigned alternate 4/10 or 9/80 assignments for six month periods. Assignments shall be based on seniority.

C. Notification to union to establish OR MODIFY A POSITIONS' [sic] WORK HOURS/WORKWEEK/WEEKEND SCHEDULE.

1. MANAGERS WHO DESIRE TO CHANGE A POSITIONS' [sic] WORK HOURS OR WORKWEEK WITH THE EXCEPTION OF THE 10/4 OR 9/80 WORK SCHEDULE (B.2) SHALL NOTIFY THE EXECUTIVE DEAN OF HUMAN RESOURCES BY COMPLETING A REQUEST FOR CHANGE IN A CLASSIFIED EMPLOYEE'S WORK SCHEDULE, (APPENDIX G). THIS NOTIFICATION IS ALSO REQUIRED IF AN EMPLOYEE REQUESTS THE CHANGE. THE AFFECTED EMPLOYEE(S) NEEDS TO BE NOTIFIED IN ACCORDANCE WITH A.1. OF THIS ARTICLE.

   "ARTICLE XII, SECTION C.1 WILL REMAIN IN EFFECT PER ARTICLE XXXI, SECTION C [concerning contract administration]." [Emphasis in the original.]

2. In the event the District desires to assign variable hours and/or workweek to a position/employee who was not previously so assigned, the District shall notify CSEA of their intent, and upon request from CSEA, the District

> shall meet and negotiate concerning the proposed assignments.

Appendix G to the CSEA agreement, referenced in Article XII, Section C.1, is a form titled "Request for Change in Classified Employee's Work Schedule." The top of the form states in part:

> When managers or supervisors need to make a change in an employee's or work unit's schedule, they need to complete the following information and forward it to . . . Executive Dean-Human Resources before implementing the revised work schedule. After negotiating the change with CSEA, the manager will be informed of the disposition of the request. A proposed change cannot take place until the authorization has been received.

The form calls in part for the manager or supervisor to list the names of affected employees and their current and proposed schedules. It also calls in part for the manager or supervisor to describe the reasons for, the consequences of, and any alternatives to the proposed schedule change. The bottom of the form states:

> I have determined after thoughtful review and analysis that a compelling business necessity exists to change the hours of employment.

This last statement was to be signed by the executive dean of human resources.

Article XII also states in part:

> E. Overtime
>
> 2. Unit employees will be compensated at the rate of one and one-half (1-1/2) times the unit employee's regular rate for work accomplished in excess of eight (8) hours per day (or ten (10) hours per day in the case of four-day-workweek employees) or forty (40) hours per week.

Article XII, Section F.2, gives employees the option of requesting compensatory time off in lieu of overtime compensation. Article XII, Section G, provides shift differentials for employees regularly working evening swing shifts or after-midnight graveyard shifts.

On April 10, 2001, Victor R. Collins (Collins), the District's executive dean of human services, sent the following memo to Shannon Willson (Willson), president of LBCCE:

> The District, like other major employers, will experience the detrimental impact of the recent rate increase approved by the Public Utility Commission. Even with this major rate increase, it is expected that electrical shortages will occur during the summer months. In order to fulfill our educational obligations to students that enroll in our summer programs, the District must take action to modify its hours of operation.
>
> The summer educational program commencing on June 4, 2001 will be limited to a 4-day schedule, Monday through Thursday. No classes will be offered at the LAC [Liberal Arts Campus] or PCC [Pacific Coast Campus] facilities on Friday or Saturday during that time, under the current operational plan. In order to reduce operation expenses, the District will also institute a 4-day work-week of 10-hours per day for the majority of the classified service. The only categories not involved in this plan will be those that would not be affected by loss of power and/or lighting. For that limited group, a 4/10 plan will remain optional.
>
> The modified work-week will remain in effect for the period of Monday, June 4, 2001 through Thursday, July 26, 2001. Commencing on Monday, July 30, 2001, all employees will revert to their regular 5-day work-week schedule.
>
> District administration recognizes that the 4/10 plan may create problems with child care and other family situations for some classified personnel. In those situations, employees may request to use a prorated amount of vacation in order to continue an 8-hour assignment for the 4-day period. Area administrators will evaluate those requests in an effort to accommodate employees while meeting the operational needs of the respective departments.
>
> It is important to note that the 4/10 plan will mean that employees who miss work for vacation or sick leave will be charged 10-hours of the applicable leave. In addition, the July 4, 2001 holiday will result in employees being absent for the 10-hour day

> as opposed to the traditional 8-hours under a normal working schedule. Overtime will continue to apply for work beyond 40-hours per week including any assigned work on Friday and/or Saturday during the period of June 4 through July 26, 2001.
>
> The Human Resources Department has requested that administrators begin communicating with assigned classified personnel regarding the work schedule in order to allow adequate planning time and to begin assignment consideration of individual circumstances for affected personnel. If AFT/CCE representatives would like to discuss this matter in more detail, please do not hesitate to arrange an appointment to meet with me.

This April 10 memo did not cite Article XII or any other part of the CSEA agreement.

Relevant to the events after the April 10 memo (and ultimately to the timeliness of LBCCE's charge) is the interim grievance procedure negotiated between the District and LBCCE in April 2000, when LBCCE was still known as the AFT Council of Classified Employees. The procedure provides in part:

> B. Informal Level
>
> Within twenty (20) days after the unit employee and/or AFT knew, or reasonably should have known, of the alleged violation, the grievant shall attempt to resolve the grievance by an informal conference with the immediate supervisor.
>
> C. Formal Level
>
> Level 1 (Dean/Director of Area Being Grieved)
>
> Within 20 days after the informal conference, should the grievance not be resolved, the grievance [sic] must present his/her grievance in writing on the District Classified Grievance form to the Dean/Director of the area being grieved.

A "day" is defined as a week day when District offices are open.

The procedure also provides in part:

D. Miscellaneous

1. Failure of the grievant to file or appeal a grievance within the time limits contained in this agreement constitutes a waiver of that particular grievance. Time limits may be extended by mutual agreement of the parties.

Level 2 of the procedure is before a vice president or executive dean. Level 3 is mediation and is the final level.

Upon receiving Collins's April 10 memo, Willson immediately called Collins and set up a meeting for April 13, 2001. That meeting was attended by Willson, Collins, LBCCE's field representative Skip Seiser (Seiser), and the District's interim human resources director Les Allen (Allen). Neither Seiser nor Allen testified at the PERB hearing.

At the April 13 meeting, Willson never said the meeting was an informal grievance conference. She testified that in her view it was "sort of like a merged negotiation attempt, informal grievance process." Willson knew the District had negotiated modified workweeks with CSEA for some previous summers (up to and including the summer of 1998), and she insisted that the District negotiate the subject with LBCCE. She remembered stating that if the District did not negotiate, LBCCE would have to file a grievance. Collins did not remember such a statement. He regarded the meeting as "consultation" under Article XII, Section A, and he said so at the meeting. Willson was sympathetic to the District's need to control energy costs, but she did not believe that Article XII allowed the District, under any circumstances, to impose a 4/10 work schedule on employees without negotiating.

LBCCE made several proposals at the April 13 meeting. One proposal was to allow all employees to work four eight-hour days but still be paid for five eight-hour days. Another proposal was to allow employees who could not work four ten-hour days to continue to work five eight-hour days somewhere on campus. The District rejected these two proposals. The

District agreed, however, to let LBCCE survey the employees and to meet again to discuss the results.

In late April 2001, LBCCE did survey the employees and received a signed response from most of them. Of the almost 200 employees responding, the great majority indicated, "I can and will work the 4/10 schedule," without reservation (and sometimes with enthusiasm). Other employees indicated they could not work the schedule, or they could work it only with some accommodation, or they had another preference.

On May 1, 2001, Collins sent a memo to employees stating:

> On April 13, 2001 the district met with AFT [LBCCE] representatives to reaffirm the district's earlier communication of the decision to implement a 4/10 work-schedule for the period of June 4, 2001 through July 27, 2001. A copy of the memorandum is attached for your information and addresses the compelling business necessity for the change. A recent 40%+ increase for electrical costs approved by the Public Utility Commission (PUC) is not adequately budgeted in the 2000-2001 operating budget of the district. It is also necessary to take appropriate steps to reduce the budgetary implications of the action by the PUC during the summer months of the new budget year.
>
> The district has requested AFT to communicate specific problems for bargaining unit members created by this decision. We will consider proper alternatives that will allow the district to maintain essential service levels during Monday through Thursday of the affected two months. We have also asked area deans, directors and management personnel to gather the same information.
>
> The majority of all district operations will be closed on Friday in order to conserve electrical usage and reduce unnecessary budget expenditures for utility costs. The district will continue conservation efforts for the foreseeable future to avoid significant detrimental impact of [sic] the district's operational budget.

On the next day, May 2, 2001, Collins met with Willson (without Seiser or Allen) to discuss the survey results.

At the May 2 meeting, Willson again never said the meeting was an informal grievance conference. She remembered again stating that if the District did not negotiate, LBCCE would have to file a grievance. Collins again did not remember such a statement. Collins did tell Willson that the District would make some accommodations but that (as Willson testified) "the 4/10 was the only option that employees would have."

On May 7, 2001, Willson sent Collins a memo beginning:

> As per our conversation of May 2nd, I am sending you some specific concerns regarding the challenges faced by some classified personnel to work the 4/10 schedule that the District is proposing. I received 197 surveys, so this list may not cover all potential problems that may arise.
>
> Prior to listing these specific concerns I would like to repeat my recommendations that the workweek for June 4th through July 26th, be a 32-hour week. This would be the simplest and most effective way to handle the situation. Otherwise, there may be contractual ramifications.
>
> - The District negotiated with CSEA with regard to the contract and changing the work schedule for the summer session in May of 1998, and offered the option of employees working Fridays if they could not work the 4 day week.
> If this is again an option, the LBCCE will not pursue the grievance or Unfair Labor Practice avenues. This would be the second favorite choice of resolution.

On May 11, 2001, Collins responded with a memo stating in part:

> Thank you very much for summarizing the information you received in 197 surveys from classified staff. It is important to emphasize that, effective June 4, 2001, the district will implement a 4/10 work schedule that will continue through July 27, 2001. That modification is in accordance with the terms and conditions of classified service wherein the district may modify the fixed, regular shift of classified employees for "compelling business necessity." The district also retains the right to determine the times and hours of operation as well as the methods and means to provide its various services.

> The majority of employee problems that you have summarized in the attachment to the memorandum of May 7, 2001 relate to 1) Request for a 9/80 work schedule; 2) Flexibility of starting and/or ending time, and 3) Days of vacation leave. As I have indicated, both verbally and in writing, the 4/10 work schedule is the only alternative established by the district. The reason for that decision is to avoid the significant cost of electricity on Fridays. In addition, the schedule will also minimize the apparent problems if our community is subject to electrical blackouts.
>
> I am sure that you are aware that the district will incur significant costs as a result of recent and ongoing electrical usage charges established through the Public Utilities Commission. The district believes that there is sufficient justification in this budgetary impact to declare the 4/10 work schedule a compelling business necessity. In so doing, we will give consideration to the difficulties created for classified employees within the bargaining unit represented by the AFT [LBCCE]. We will also communicate directly with you as appropriate during this period.

It does not appear that Willson replied to this memo.

As far as the evidence shows, the only communication between LBCCE and the District after May 11, 2001, and before June 20, 2001, concerned questions posed by Seiser to Allen about departments that would still be open on Fridays throughout June and July. On June 6, 2001, Allen forwarded those questions to Collins, who answered them the same day. On June 7, 2001, Allen forwarded those answers to Willson.

District offices were closed for Memorial Day on May 28, 2001. They were also closed on Fridays beginning June 8, 2001. They were therefore open for 24 workdays between May 11, 2001, and June 20, 2001.

On June 20, 2001, Willson filed with Collins a Level 1 grievance, alleging in part that the District had violated Article XII by "imposing a 4/10 work week." The grievance sought the following remedy:

> All classified employees who would not normally have taken vacation or leave without pay between June 4 through July 27,

> 2001, shall be credited back vacation time and/or back pay if leave without pay was taken.
>
> The District must negotiate with the LBCCE in all matters pertaining to wages, hours and working conditions. [Emphasis in the original.]

Collins referred the grievance to Allen, with a note to include it with other grievances scheduled for mediation at Level 3 of the procedure. Collins testified that the grievance was "untimely" but he hoped "some discussion [with the help of a mediator] would allow us to have a better mutual acceptance of the situation."

Mediation took place on August 2, 2001, but did not resolve the matter. LBCCE filed its unfair practice charge on January 25, 2002.

ISSUES

1. Was LBCCE's charge timely?
2. Did the District unilaterally change work schedule policy?

CONCLUSIONS OF LAW

Timeliness

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) The statute of limitations is an affirmative defense which has been raised by the respondent in this case (the District). (Long Beach Community College District, supra, PERB Decision No. 1564.) Therefore, charging party (LBCCE) now bears the burden of demonstrating that the charge is timely filed. (Cf. Tehachapi Unified

School District (1993) PERB Decision No. 1024; State of California (Department of Insurance) (1997) PERB Decision No. 1197-S.)

In Long Beach Community College District, supra, PERB Decision No. 1564, as noted in the procedural history above, PERB announced the return of the doctrine of equitable tolling, which it stated as follows:

> When a grievance has been filed utilizing a bilaterally agreed upon dispute resolution procedure in an effort to resolve the same dispute which is the subject of the charge, the statue of limitations is tolled during the period of time the grievance is being pursued if: (1) the charging party reasonably and in good faith pursues the grievance; and (2) tolling did not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent.

On applying the doctrine to LBCCE's charge, PERB stated:

> It is undisputed that the contractual grievance filed by LBCCE was part of a "bilaterally agreed upon dispute resolution procedure." That procedure ended with an unsuccessful mediation session on August 2, 2001. Under the doctrine of equitable tolling, the period of time utilized to exhaust the contractual grievance process is not counted towards the six-month limitations period. (See State of California (Secretary of State) (1990) PERB Decision No. 812-S.) Accordingly, after August 2, 2001, the limitations period began to run again. LBCCE did not file its unfair practice charge until January 25, 2002. Thus, even after the contractual grievance ended, LBCCE waited five months and twenty-three days before filing its charge.
>
> What is unclear is when the contractual grievance procedure began. According to the charge, LBCCE was informed of the District's intent to change the summer work schedule as early as April 10, 2001. LBCCE did not file its formal first-level grievance until June 20, 2001. However, the contractual grievance also provides for an informal grievance stage. There is evidence in the record that LBCCE met with the District to discuss the proposed schedule change as early as April 13, 2001. What is unclear is whether that meeting was intended to constitute LBCCE's initiation of the grievance process.

In light of this ambiguity, PERB remanded the case to its General Counsel for further investigation.

In its Decision No. 1564, PERB seemed to indicate that the only unresolved question with regard to equitable tolling in this case was whether the meeting of April 13, 2001, "was intended to constitute LBCCE's initiation of the grievance process." As stated in the procedural history above, the PERB complaint was issued after the District agreed in writing that the April 13 meeting "constituted the LBCCE's initiation of the informal grievance stage and was intended to constitute LBCCE's initiation of the grievance process."

The District now argues to the contrary, however, because at the meetings of April 13 and May 2, 2001, LBCCE President Willson never said either meeting was an "informal grievance conference." I find this argument unpersuasive. The negotiated interim grievance procedure does not require that a grievant say any particular words. What it requires is that a grievant "attempt to resolve the grievance by an informal conference with the immediate supervisor." That is what LBCCE attempted to do. There is no evidence that its attempt was unreasonable or in bad faith.

Furthermore, I credit Willson's testimony that at the April 13 and May 2 meetings she said that if the District did not negotiate, LBCCE would have to file a grievance. This testimony is consistent with her follow-up memo of May 7, 2001, in which she stated that if the District agreed to a particular option "LBCCE will not pursue the grievance or Unfair Practice avenues." The District was thus on notice that if it did not agree it could expect a formal grievance or an unfair practice charge or both.

Of course, the District did not agree, as it made abundantly clear in Collins's reply memo of May 11, 2001. After that, LBCCE let 24 full workdays go by before it filed a formal grievance, even though the interim grievance procedure required that a formal grievance be

filed within 20 workdays after an informal conference. If the District had rejected LBCCE's formal grievance as untimely, I would have concluded (1) that the rejection was within the District's rights, (2) that the negotiated grievance process had ended no later than May 11, 2001, and (3) that any equitable tolling had also ended.

The District, however, did not reject LBCCE's grievance as untimely, but rather moved it immediately to mediation at Level 3 of the procedure. The District's actions were consistent with the final sentence of Section D.1 of the procedure, which states, "Time limits may be extended by mutual agreement of the parties." It appears that LBCCE and the District had no written or verbal agreement to extend the time limits, but again I think that what the parties did is more important than what they said. By processing LBCCE's grievance, the District effectively agreed to extend the time limits for filing a Level 1 grievance.

I therefore conclude that from at least the meeting of April 13, 2001, through the mediation session of August 2, 2001, LBCCE was utilizing the negotiated interim grievance procedure to resolve its contract dispute with the District. I further conclude that the statute of limitations was tolled during that period of time. Accordingly, I conclude that LBCCE's charge, filed on January 25, 2002, was timely.

Unilateral Change

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or the "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request

negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

In the present case, there is no question that the District imposed the 4/10 schedule on employees without negotiating that decision with LBCCE, and there is no question that work schedules are within the scope of representation. The question is whether the District's decision represented a change in policy or simply an exercise of its contractual rights.

As previously stated, the relevant contract language is from Article XII (Hours and Overtime) of the CSEA agreement:

> A. Workday
>
> 1. The workday for full-time unit employees shall be eight (8) hours, subject to the exception contained in this Agreement pertaining to the voluntary four-day and 9/80 workweek. Each unit employee shall be assigned a fixed, regular shift. The fixed shift may be changed by the District for compelling business necessity after a 22 working day notice to and consultation with the unit employee and notification to CSEA. Employees may waive the 22 working day notice.
>
> With references [sic] to the above (A.1.) the District shall ask for volunteers first. If there are no volunteers then the least senior employee(s) shall be assigned.
>
> 2. When an employee desires to have a temporary reduction or permanent reduction of hours, the employee shall notify CSEA and the District. CSEA and the District shall meet and negotiate . Any agreement to reduce hours must be approved by the District and CSEA and shall have a signed agreement. The agreement shall include such things as how work load currently being done by the employee will be handled, whether the employee will continue to receive medical benefits, and how the leave from the District will be charged.
>
> B. Workweek
>
> 1. The workweek shall be forty (40) hours for full-time unit employees. The workweek for all unit employees shall be

a fixed and regular five (5) consecutive day period except as indicated in Section A and in the following paragraph.

2. The District may, with the concurrence of the affected unit employee(s), institute a full-time workweek of four (4) fixed and regular consecutive days, at ten (10) hours per day and the 9/80 workweek. The District may abolish the four (4) and ten (10) and the 9/80 after it is established for good and sufficient reason for a specific group of unit employees after suitable notice to and consultation with the unit employee(s) affected and notice to CSEA.

   In departments where more than one person desires to work the 4/10 or the 9/80 workweeks and it is not possible to allow all employees that desire the shift to work it at the same time, employees shall be assigned alternate 4/10 or 9/80 assignments for six month periods. Assignments shall be based on seniority.

C. Notification to union to establish OR MODIFY A POSITIONS' [sic] WORK HOURS/WORKWEEK/WEEKEND SCHEDULE.

1. MANAGERS WHO DESIRE TO CHANGE A POSITIONS' [sic] WORK HOURS OR WORKWEEK WITH THE EXCEPTION OF THE 10/4 OR 9/80 WORK SCHEDULE (B.2) SHALL NOTIFY THE EXECUTIVE DEAN OF HUMAN RESOURCES BY COMPLETING A REQUEST FOR CHANGE IN A CLASSIFIED EMPLOYEE'S WORK SCHEDULE, (APPENDIX G). THIS NOTIFICATION IS ALSO REQUIRED IF AN EMPLOYEE REQUESTS THE CHANGE. THE AFFECTED EMPLOYEE(S) NEEDS TO BE NOTIFIED IN ACCORDANCE WITH A.1. OF THIS ARTICLE.

   "ARTICLE XII, SECTION C.1 WILL REMAIN IN EFFECT PER ARTICLE XXXI, SECTION C [concerning contract administration]." [Emphasis in the original.]

2. In the event the District desires to assign variable hours and/or workweek to a position/employee who was not previously so assigned, the District shall notify CSEA of their intent, and upon request from CSEA, the District shall meet and negotiate concerning the proposed assignments.

The District argues that its imposition of the 4/10 schedule was specifically authorized by Article XII, Section A.1.

Essentially, the District argues, first, that in the face of the 2000-2001 energy crisis it made a reasonable good faith determination of a "compelling business necessity" within the meaning of Article XII, Section A.1. The District further argues that, having made that determination, it was authorized by Article XII, Section A.1, to impose a 4/10 schedule on employees generally, without negotiating.

I would agree that the District's determination of a "compelling business necessity," within the meaning of Article XII, Section A.1, was reasonable and in good faith.[3] I disagree, however, that Article XII, Section A.1, authorized the District to act as it did.

Article XII, Section A.1, deals with two distinct subjects: workday and shift. Workday normally refers to "the time spent by employees at their place of employment." (Roberts' Dictionary of Industrial Relations (3d ed.1986) p. 788.) A basic workday is usually eight hours. (Id. at p. 67.) Shift, in contrast, may be defined as follows:

> A regularly scheduled period of work during the 24-hour day for a plant. The shift has a fixed beginning and ending each day.

(Id. at p. 64.) Thus the workday is how long an employee works in a day (e.g., eight hours) and the shift is when the employee works (e.g., the day shift). Article XII, Section G, uses shift in this sense in providing shift differentials for employees regularly working evening swing shifts or after-midnight graveyard shifts.

[3] The District does not argue, and I would not find, that the energy crisis was an emergency within the meaning of Article XXVI (Management Rights and Responsibilities), Section A.5, which defines an emergency as "a situation or occurrence of a serious nature developing suddenly, unexpectedly, resulting in a relatively temporary change in circumstances and demanding immediate action." The evidence at hearing did not show that the California energy crisis of 2000-2001 developed suddenly or unexpectedly or that it demanded immediate action by the District.

The first sentence of Article XII, Section A.1, deals with workday, establishing a workday for full-time employees of eight hours, subject to "the exception contained in this Agreement pertaining to the voluntary four-day and 9/80 workweek [emphasis added]." That exception is governed by Article XII, Section B.2, which emphasizes the voluntary nature of the exception by describing it as something the District may institute only "with the concurrence of the affected unit employee(s)." Article XII, Section C.1, makes it clear that Article XII, Section B.2, is controlling in this regard: it establishes a process for modifying work hours "with the exception of the 10/4 or 9/80 work schedule (B.2)."

The remaining sentences of Article XII, Section A.1, deal with shift. The second sentence requires "a fixed, regular shift" for each employee (e.g., the day shift). The third sentence then authorizes the District to change an employee's "fixed shift" to another shift (e.g., the swing shift) for "compelling business necessity," with notice and consultation but without negotiation. The third sentence does not, however, authorize the District to change the eight-hour "workday" established by the first sentence.

It would be rather extraordinary if the CSEA agreement did allow the District to require employees generally to extend their workdays from eight hours to ten hours, without negotiating (and without paying overtime compensation). Under Article XII, Section A.2, the District is required to negotiate even when an individual employee desires a temporary reduction of hours. Under Article XII, Section C.2, the District is also required to negotiate (upon request) the assignment of "variable hours and/or workweek" to an individual employee or position. It would be odd for the CSEA agreement to require negotiations for these relatively minor changes and not to require negotiations for a major change to a ten-hour workday for employees generally.

It appears that Article XII, Section A.1, was designed to give the District, when faced with compelling business necessity, some flexibility in the scheduling of shifts for specific employees, not employees generally. Thus the District is required to "ask for volunteers first" and then to assign "the least senior employee(s)." In the present case, the District neither asked for volunteers nor considered seniority; instead, it imposed the change on employees generally. This appears to be an unjustified stretch of the District's limited authority under Article XII, Section A.1.

In its post-hearing brief, the District argues that even if it violated the CSEA agreement it did not commit an unfair practice, because the violation was not "on-going" but was limited to June and July 2001. The District relies on Grant Joint Union High School District, supra, PERB Decision No. 196, in which PERB stated that a breach of contract "must amount to a change of policy" to be an unfair practice. PERB further stated, however, that a change of policy "has, by definition, a generalized effect or continuing impact" on employees. (Ibid.; emphasis added.) In the present case, the District's contract violation did have a generalized effect on employees. Furthermore, it is possible that a "compelling business necessity" may arise again, in which case the District's claim of authority under Article XII, Section A.1, may have a continuing impact on employees.

I conclude that the District did unilaterally and unlawfully change a work schedule policy, in violation of EERA section 3543.5(c). Because this conduct also interfered with the rights of employees to be represented, and denied LBCCE its right to represent them, it also violated EERA section 3543.5(a) and (b).

REMEDY

EERA section 3541.5(c) gives PERB:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter [EERA].

In the present case, the District has been found to have violated EERA section 3543.5(a), (b) and (c) by unilaterally changing a work schedule policy. It is therefore appropriate to direct the District to cease and desist from such conduct.

In California State Employees' Assn. v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923, 946 [59 CalRptr.2d 488], the court stated in part:

> Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining [unit] members' exclusive representative an opportunity to meet and confer over the decision and its effects. (See, e.g. Oakland Unified School Dist. v. Public Employment Relations Bd. (1981) 120 Cal.App.3d 1007, 1014-1015 [175 Cal.Rptr. 105].) This is usually accomplished by requiring the employer to rescind the unilateral change and to make employees "whole" from losses suffered as a result of the unlawful unilateral change.

The schedule change has already been rescinded, but it is still appropriate to direct the District to make employees whole.

In its post-hearing briefs, LBCCE argues in part that the District should be directed to pay employees overtime compensation. In the circumstances of this case, however, I find this remedy inappropriate. The CSEA agreement, at Article XII, Section E.2, requires overtime compensation only after "ten (10) hours per day in the case of four-day-workweek employees." Furthermore, at Article XII, Section B.2, the agreement allows the District to institute a 4/10 workweek "with the concurrence of the affected unit employee(s)." When surveyed by LBCCE, the great majority of employees indicated, "I can and will work the 4/10 schedule." That looks like concurrence by those employees. Also, it appears that employees who could

not or would not work ten-hour days were allowed to take two hours of vacation, compensatory time off or unpaid leave after their eight-hour days. On this record, I cannot find that employees who actually worked the 4/10 schedule did so without their "concurrence."

LBCCE also argues that the District should be directed to reinstate any vacation credits or compensatory time off that employees used to avoid working full ten-hour days. This is part of the remedy LBCCE also requested in its Level 1 grievance:

> All classified employees who would not normally have taken vacation or leave without pay between June 4 through July 27, 2001, shall be credited back vacation time and/or back pay if leave without pay was taken.

I find this remedy appropriate. Employees who used their vacation credits or compensatory time off to reduce their workdays presumably were working the 4/10 schedule without their "concurrence." They should be made whole by having those credits restored. Furthermore, employees who took leave without pay, and therefore had their pay docked, should be made whole with back pay, plus interest at the rate of seven percent per annum.

It is also appropriate to direct the District to post a notice incorporating the terms of the order in this case. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice the District has acted in an unlawful manner, is being required to cease and desist from this activity and take affirmative remedial actions, and will comply with the order. It effectuates the purposes of EERA that employees be informed both of the resolution of this controversy and of the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Long Beach Community College District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(a), (b) and (c), by changing a work schedule policy without negotiating with the Long Beach Classified Employees Association (LBCCE).

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

A. CEASE AND DESIST FROM:

1. Changing work schedule policy without negotiating with LBCCE.

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

1. Restore vacation credits and compensatory time off to those employees who used them to reduce the ten-hour workdays imposed on them in June and July 2001.

2. Pay back pay, with interest at seven percent per annum, to those employees who took leave without pay to reduce the ten-hour workdays imposed on them in June and July 2001, and therefore had their pay docked..

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to classified employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on LBCCE.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Thomas J. Allen
Administrative Law Judge