STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WESTMINSTER TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. WESTMINSTER SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-424 PERB Decision No. 277 December 31, 1982
WESTMINSTER SCHOOL DISTRICT, Charging Party, v. WESTMINSTER TEACHERS ASSOCIATION, CTA/NEA, Respondent.	)	Case No. LA-CO-69

Appearances; Paul Crost, Attorney (Reich, Adell, Crost & Perry) for Westminster Teachers Association, CTA/NEA; David C. Larsen, Attorney (Rutan & Tucker) for Westminster School District.

Before: Tovar, Jaeger, Morgenstern and Jensen, Members.*

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Westminster School District (District) to the attached hearing officer's proposed decision dismissing the unfair

*Chairperson Gluck did not participate in the determination of this matter.

practice charges which the District filed alleging that the Westminster Teachers Association (Association) failed to meet and negotiate in good faith and failed to participate in the impasse procedures in good faith in violation of subsections 3543.6(c) and (d), respectively, of the Educational Employment Relations Act (EERA or Act).l

FACTS

The Board has reviewed the record in light of the District's exceptions. We find the hearing officer's findings of fact to be free from prejudicial error and adopt them as the findings of the Board.

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[1]EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code, unless specified otherwise.

Section 3543.6 provides in pertinent part as follows:

> It shall be unlawful for an employee organization to:
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> . . . . . .
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> (c) Refuse or fail to meet and negotiate in good faith with a public school employer or any of the employees of which it is the exclusive representative.
>
> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with section 3548).

The Association did not except to the hearing officer's dismissal of its charge alleging that the District violated subsection 3543.5(a) by requiring teachers to distribute to students documents which reported the status of negotiations and set forth the Association's bargaining positions. No exception having been filed, that dismissal is not before us and is, therefore, affirmed.

ISSUES

1. Did the Association violate its duty to negotiate in good faith and to participate in good faith in the impasse procedures by:

a. Refusing to accept and respond to a written offer from the District?

b. Addressing the school board regarding negotiations at a public meeting?

2. Is a strike prior to completion of impasse procedures a per se violation of EERA?

3. Is the District entitled to damages for costs incurred on the day of the work stoppage?

DISCUSSION

Refusal to Accept and Respond to an Offer

The District asserts that the Association, through its agent, Bill Henry, violated its duty to negotiate in good faith by refusing to accept and respond to a District proposal on January 10, 1979.

On that date, the mediator informed the Association bargaining team that, if he found the District's offer insufficient to settle the entire agreement, he would ask to speak to only one of the Association representatives which would be a signal for the rest of the team to leave and end mediation for the evening. Later that evening, the mediator declined to carry the District's proposal to the Association

and instead returned to the room in which Association representatives were waiting, requested that Bill Henry personally receive the District's offer, and indicated that the other members of the Association team could leave.

Accompanied by the mediator, Bill Henry went to the room where the District team was meeting and received their offer. The offer included concessions on leaves of absence, noontime supervision, fringe benefits and sabbatical leaves but did not modify the District's position on class size, released time, binding arbitration, or agency shop nor contain contingency language on wages, which the Association considered the most important issue. Henry informed the District's negotiators that, as far as he was concerned, he hadn't received an offer. He later asked the Association negotiating team if they wished to consider the offer. The team refused because the mediator had not transmitted it.

To determine whether a party has negotiated in good faith, the Board, following federal precedent, generally applies a "totality of the conduct" test wherein it considers the parties' actions in context to ascertain whether they have bargained with the subjective intent of reaching an agreement. Fremont Unified School District (6/19/80) PERB Decision No. 136. See, e.g., NLRB v. Stevenson Brick and Block Co. (4th Cir. 1968) 393 F.2d 234 [68 LRRM 2086], modifying (1966) 160 NLRB 198 [62 LRRM 1605].

The hearing officer concluded that, viewed in context, Henry's conduct did not indicate an intent to obstruct the negotiation or mediation process since: (1) it was consistent with the Association's prearranged understanding with the mediator; and (2) the Association subsequently requested additional meetings and continued to seek a meaningful response from the District on salaries. We agree. Cases cited by the District, allegedly in support of its position, are distinguishable. All involve conduct more grievous than the single refusal to accept and respond to a proposal evidenced here.[2] The District has cited no case in which such conduct, by itself, has been found to constitute a refusal to negotiate in good faith. Nor does this conduct rise to the level of a violation when considered in conjunction with the other conduct complained of by the District and discussed below.

Appearance at School Board Public Meeting

The District asserts that, by addressing the school board regarding negotiations on January 18, 1979, the Association's representatives attempted to bypass and undermine the District's chosen bargaining representative and negotiate

[2]See NLRB v. Mayes Bros., Incorporated (5th Cir. 1967) 383 F.2d 242 (employer had a duty to respond to an unacceptable union proposal where employer had led union to believe they had reached agreement); NLRB v. Reisman Bros., Inc. (2d Cir. 1968) 401 F.2d 771 (employer could not refuse to meet with union unless the union reduced its demands where the employer had met with the union only once and ignored the union's request for a counteroffer).

directly with the school board in violation of its duty to negotiate in good faith and to participate in good faith in the impasse procedure.

The comments objected to include those of Robert Mann, president of the Association, who said, in pertinent part:

> . . . We feel there's no reason why we can't settle our dispute now, with or without the mediator. Teachers have to believe that you haven't heard our positions or you don't understand them. . . . We want to settle it. We want to settle it now, but we want a fair agreement and we want to return to the table now. We're willing to do it with the Board tonight if that's possible. We want to settle the agreement, but we want a fair agreement.

The president of the board of trustees, Dewey Wiles, responded to Mann's remarks. He stated that the mediator had established guidelines for setting a mediation date, that the board of trustees had to follow those procedures,[3] and that it would be a misdemeanor ". . . if we try to negotiate outside that."

Thereafter, Bar Kaelter made his statement to the board. He said, in part:

> . . . The statement has been made by Mr. Wiles that under the provisions of the Educational Employment Relations Act we

[3]No evidence was presented at the hearing that the mediator had instructed the parties or suggested that they not meet for direct face-to-face negotiations in his absence. However, the District's negotiating team emphatically told the Association's negotiating team at the outset of mediation that it would not meet with the Association without the mediator.

> could not negotiate without the mediator. I would like to set the record straight. . . . We can negotiate right now. We do not need a mediator. The mediator does not need to be present. . . . We believe that if we could sit down with the school Board or with the Board sitting in on negotiations, we could reach a settlement tonight. We're willing to meet tonight, tomorrow, Saturday, Sunday, any time you're willing to meet. Meet with us and settle this.

In San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230, the Board considered the question of what limitations may be imposed on the content of an exclusive representative's address to a District in public meetings. There, the Board found that the District violated EERA by denying the Association president an opportunity to address the school board, pursuant to its policy prohibiting Association representatives from speaking on matters under negotiation, grievances, arbitrations or personnel matters.

The Board noted that the collective negotiation process, including that established by EERA, gives parties the right to appoint their own negotiators and forbids the parties from dictating who the representatives of the other side may be. The Board stated, at pp. 16-17, that, "Bypassing the authorized negotiators, for example, by going straight to the school board of trustees with proposals or concessions, would subvert the statutory scheme and arguably violate the good-faith obligations of collective bargaining just as the employer's effort to bypass the union's negotiators by seeking direct

access to the membership has been condemned", citing General Electric (1964) 150 NLRB 192 [57 LRRM 1491]; Morris, Developing Labor Law, p. 305. The Board further noted that EERA expressly exempts negotiations from the usual public meeting laws and allows the bargaining process to be conducted confidentially between the parties,[4] indicating that the Legislature did not intend to depart from the traditional negotiating format when it enacted EERA.

After reviewing the decision of the Supreme Court in City of Madison v. Wisconsin Employment Relations Commission (1976) 429 U.S. 167 [93 LRRM 2970] and the decision of the Court of Appeal in Henrico Firefighters Assn. v. Supervisors

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[4]Subsections 3549.1(a) through (d) of EERA list exceptions to the public meeting requirements as follows:

> (a) Any meeting and negotiating discussion between a public school employer and a recognized or certified employee organization.
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> (b) Any meeting of a mediator with either party or both parties to the meeting and negotiating process.
>
> (c) Any hearing, meeting, or investigation conducted by a factfinder or arbitrator.
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> (d) Any executive session of the public school employer or between the public school employer and its designated representative for the purpose of discussing its position regarding any matter within the scope of representation and instructing its designated representatives.

(4th Cir. 1981) 649 F.2d 237 [107 LRRM 2432],[5] both decided on First Amendment grounds, the Board, in San Ramon, supra, concluded that negotiations, but not mere advocacy, may be prohibited at a public meeting.[6]

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[5]In City of Madison, the Supreme Court overturned the WERC's decision ordering the school board to cease and desist from allowing nonexclusive representatives to address it regarding subjects under negotiation. The Court concluded that the danger of the exclusive representative being bypassed in negotiations was not serious enough to warrant the curtailment of any citizen's speech, irrespective of his employment status or the content of his speech. The Court also noted that the nonmember was not really negotiating, but was speaking as a member of the public and was not authorized to enter into an agreement nor attempting to do so. The Court recognized the difference between mere speech and negotiation when it commented:

> Regardless of the extent to which true contract negotiations between a public body and its employees may be regulated - an issue we need not consider at this time - the participation in public discussions of public business cannot be confined to one category of interested individuals. City of Madison, supra, p. 2973.

In Henrico, the court struck down a county policy which prohibited employees from addressing the board on behalf of other employees but permitted speaking on one's own behalf. Recognizing that the board was constrained by state law from negotiating with the representatives, the court noted that mere advocacy or presentation of the union's position does not constitute negotiating.

[6]This holding is consistent with a long line of cases defining the limits of employer free speech under section 8(c) of the National Labor Relations Act (NLRA) which provides that:

> The expressing of any views, argument or opinion, or the dissemination thereof, whether in written, printed, graphic, or

Here, the remarks of Mann and Kaelter cannot be fairly characterized as negotiating. Mann merely summarized and explained the Association's most recent proposal, adding nothing which had not been presented and discussed at the bargaining table. His language was too general to be

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> visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

Under federal law, an employer may, consistent with a good faith effort to negotiate, inform employees of the status of negotiations, or of proposals previously made to the union, or of its version of a breakdown in negotiations, Proctor & Gamble Mfg. Co. (Post Ivory) (1966) 160 NLRB 334, 340; Wantagh Auto Sales, Inc. (1969) 177 NLRB 150, as long as the employer's speech does not contain a threat of reprisal or promise of benefit; does not seek to induce employees to withdraw their support from the union, Gorman, Labor Law (1976), p. 382; does not offer to employees a proposal which exceeds that made at the bargaining table, or one on which there has been no meaningful negotiation, NLRB v. J. H. Bonck Co. (5th Cir. 1970) 424 F.2d 634; and does not seek to determine the degree of support, or lack thereof, which exists for the stated position of the employees' bargaining agent, Obie Pacific, Inc. (1972) 196 NLRB 458, 459 [80 LRRM 1169].

A few cases have applied similar rules to union free speech. See NLRB v. Local 964, Carpenters (1971) 78 LRRM 2167 (union coerced employer to abandon bargaining through multi-employer association); Local 375, IBPO and Town of South Hadley (1980) 6 MLC 2003 (union, by initiating district attorney investigation of Town's negotiator, coerced Town in its choice of negotiator).

The PERB has stated that, although the EERA contains no provision parallel to section 8(c), the same guarantee of free expression is implicit in the EERA. Muroc Unified School District (12/15/78) PERB Decision No. 80; Rio Hondo Community College District (5/19/80) PERB Decision No. 128.

considered realistically as an offer. Such statements at a public meeting require no direct response from the board and cannot be viewed as substitutes for the give and take of negotiations.

In addition, both Mann and Kaelter expressed the Association's willingness to negotiate and participate in mediation and urged the board to become directly involved in the negotiation and mediation process. They did not, however, refuse to meet with the board's negotiator or other representative.

The record shows that in 1977, board members became involved in negotiations, and significant progress was made. Mann and Kaelter were hopeful that such participation would again be helpful in resolving the current dispute. Thus, we find Mann's statement that, "We want to settle it. . . . We're willing to do it with the Board tonight if that's possible" and Kaelter's statement that, "We believe that if we could sit down with the school Board or with the Board sitting in on negotiations, we could reach a settlement tonight," do not indicate an attempt to bypass or undermine the District's designated negotiator. Nothing was said to disparage the District's negotiator or to undermine the board's confidence in him.[7] These comments expressly offer to meet "with the Board

[7]Safeway Trails, Inc. (1977) 233 NLRB 1078 [96 LRRM 1614] relied on by the District is distinguishable. There, the

sitting in on negotiations," not conducting them, and are clearly intended to include the negotiator as spokesperson for the "sitting in" board.

Similarly, when Mann stated, "There is no reason why we cannot settle now with or without mediation" and when Kaelter stated that, "We do not need a mediator," they were not attempting to obstruct or forego mediation but were clarifying that it was not legally necessary for a mediator to be present and emphasizing that mediation should not be an obstacle to the parties reaching agreement themselves.

In sum, the statements of the Association representatives evidence no intent to obstruct the negotiation and mediation process but, rather, indicate a good faith desire to facilitate and expedite it. In fact, the statements were successful in moving the mediation session upward from January 29 to January 19. In these circumstances, we find no refusal to bargain or participate in impasse.

The Strike

The District alleges that the one-day strike by its employees on January 23, 1979, is a per se violation of

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employer "conducted an entire campaign to undermine and remove the Union's negotiator" by repeatedly sending letters to employees stating that the Union's negotiator was "not prepared" at negotiating meetings, was lacking in "responsibility and sincerity," had misrepresented a number of items to the membership, changed proposals every time they had a meeting and, generally, was the primary impediment to reaching a contract.

subsection 3543.6(d) of the EERA, which states that it is unlawful for an employee organization to "refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with section 3548)."

Article 9 of the EERA, which is entitled "Impasse Procedures," provides, in section 3548, that either party " . . . may declare that an impasse has been reached . . . in negotiations over matters within the scope of representation and may request the board to appoint a mediator. . . ." If PERB determines that an impasse exists, it shall, within five working days, appoint a mediator who will meet with the parties either jointly or separately and use any steps deemed appropriate to persuade the parties to resolve their differences. Nothing precludes the parties from agreeing to their own mediation procedure. A dispute may be submitted to factfinding if the mediator is unable to effect a settlement of the controversy within 15 days and declares that factfinding is appropriate. The mediator may continue mediation efforts on the basis of the findings of fact and recommended terms of settlement contained in the factfinding report.

In San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, the Supreme Court reviewed these extensive impasse procedures and concluded that, "The impasse procedures almost certainly were included in the EERA for the purpose of heading

off strikes." The Court stated, at pp. 8-9:

> Since [the impasse procedures] assume deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in the impasse procedures in good faith and thus an unfair practice under section 3543.6, subdivision (d).

Similarly, PERB itself has recognized a legislative intent to defer public school employee strikes until completion of the statutory impasse procedures. PERB's regulation governing requests for injunctive relief in cases of work stoppages or lockouts, codified at section 38100 of title 8 of the California Administrative Code, provides, in pertinent part, as follows:

> . . . . . .
>
> The EERA imposes a duty on employers and exclusive representatives to participate in good faith in the impasse procedure and treats that duty so seriously that it specifically makes it unlawful for either an employer or an exclusive representative to refuse to do so. The Board considers those provisions as strong evidence of legislative intent to head off work stoppages and lockouts until completion of the impasse procedure . . . . (Exp. 9/20/82.)

PERB has considered work stoppages occurring prior to completion of the statutory impasse procedures in Fremont Unified School District (6/19/80) PERB Decision NO. 136 and Fresno Unified School District (4/30/82) PERB Decision No. 208.

While strikes are not unlawful per se under EERA (Fremont), a strike prior to the completion of impasse "create[s]

something similar to a rebuttable presumption" of an unlawful refusal to negotiate and/or to participate in impasse (~~Fresno~~). The presumption of illegality is rebuttable, however, by proof that the strike was provoked by employer conduct and that the union in fact negotiated and participated in impasse in good faith (Fremont). Absent such evidence, the presumption stands, and a violation is established (Fresno).

As discussed in Fremont, where an employer has upset the bargaining process by engaging in provocative conduct, then a strike in response to, and in protest of, that conduct does not conclusively demonstrate bad faith on the part of the union.[7a] Rather, it is then necessary to consider the totality of the union's conduct to determine the union's subjective good or bad faith.

However, where, as in Fresno, no employer provocation is shown and a strike is motivated solely by economic considerations to gain concessions at the bargaining table, then the strike itself amounts to a refusal to negotiate. If undertaken prior to the onset of impasse, such strike violates the duty to negotiate in good faith. If undertaken during impasse, such a strike also violates the duty to participate in good faith in the impasse procedures.

In the instant case, as in Fresno, the Association has neither alleged nor proved that its pre-impasse strike was provoked by the District's conduct. The Association admits in

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[7a]In an unpublished opinion, the Court of Appeal reversed the Board's finding that the District committed an unfair practice. However, it did not disturb the rule of law stated therein nor the Board's finding that the strike was protected. See Fremont Unified School District (3/25/82) PERB Decision No. 136a.

its brief that, "the primary purpose of the job action was to pressure the Board to reach a mutually agreeable contract through developing greater community awareness of the labor-management problems in the District." Thus, the work stoppage was clearly an economic strike intended to gain concessions at the bargaining table.[8]

The Association argues that it was compelled to call the strike by strong strike sentiment among its members. It claims that Association members were becoming increasingly frustrated and exerted pressure, including threats to resign their Association membership, in order to compel the Association to call a strike. Events cited as contributing to this sense of frustration include: the stalled state of negotiations, the imposition of noontime supervisory duties, the confiscation of teachers' school keys, the assignment of certain teachers to special education programs and, finally, the misunderstood conversation of January 22 which led Association members to believe that they had been deceived regarding when the District would meet to respond to its proposal.

The Association did not charge the District with unfair practices for this conduct. Nor do these events constitute reasonable provocation for the work stoppage here.

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[8]The Association seeks to distinguish its one-day strike from "the kind of economic strike where employees cease work until such time as an agreement is reached." This distinction, while perhaps significant in some circumstances, is not determinative here.

In the absence of employer provocation which itself upsets the bargaining process, an association must be strictly held to its duty under EERA to press its demands at the bargaining table and through the statutory impasse procedures. Here, we have determined that the strike conducted by the Association prior to the completion of the statutory impasse procedures was solely economic in nature, in that it was intended to press its bargaining demands outside of, and as an alternative to, negotiating. We, therefore, find the strike to be a refusal to negotiate and to participate in impasse, in violation of subsections 3543.6(c) and (d).

Damages

The District seeks to recover $4,816.73 in damages allegedly caused by the strike, as well as its costs and attorney's fees in an unspecified amount.

The record indicates that the District accrued approximately $21,000 in salary savings not paid to striking teachers on January 23, the day of the strike. The District's alleged damages result from the difference between this amount and the District's total claimed expenses exceeding $26,000. In its itemization of costs, the District includes approximately $18,000 for substitute teachers on the day of the strike, $1,500 for printing and mailing letters to parents informing them of the strike, $6,000 for a substitute training session held on January 9, and $600 in overtime for

certificated employees who staffed a telephone tree during early morning hours from January 8 through January 22 in order to communicate with school principals in the event of a strike.

It is a fundamental principle that in order to be recoverable, damages must be the natural and proximate consequence of the act complained of. Anderson v. Taylor (1880) 56 C 131. Causes which are merely incidental, or are the instruments of some other controlling agency, are not proximate within purview of the law. Reliance Acceptance Corp. v. Hoover-Holmes Bureau (1934) 134 Cal.App. 607, 34 P.2d 762. Thus, for example, where, due to a strike, an employer decided to abandon a construction project, loss resulting from the abandonment was not recoverable since the loss was the direct result of the employer's own decision and was only indirectly related to the strike. Lewis v. Benedict Coal Corp. (6th Cir. 1958) 259 F.2d 346 [43 LRRM 2237], modified on other grounds 361 U.S. 459, 80 S.Ct. 489.

Here, the District argues that its expenditures for substitute training and for the strike telephone tree, while preceding the strike and in preparation for it, constitute proper mitigation of its damages in that the training permitted the District to provide "a smooth educational program on the day of the strike," and the telephone tree "greatly aided in handling the surprise strike."

These alleged benefits are highly speculative and incapable of quantification. While such preparation may have mitigated the emotional or psychological damage to the District during the strike, there is no evidence that it mitigated its monetary damages, as it contends. The District did not demonstrate that either the substitute training or the telephone tree in any way served to obtain substitutes or otherwise insure student attendance and compensation therefor. In fact, the District had ample substitutes prior to the training session, and the majority of substitutes who worked on the day of the strike did not participate in the training. Moreover, these costs were the direct result of the District's own decision and were only indirectly related to the strike since they would have been incurred whether or not a strike occurred.

Authorities cited by the District fail to support its position. They indicate that expenses incurred in mitigation are recoverable where they "succeed in preventing a still greater loss," W. C. Cooke & Co. v. White Truck (1932) 124 Cal.App. 721, or prevent "damage greater in extent than that which would ordinarily have resulted," 23 Cal.Jur.3d, Damages, section 42. That is not the case here.

Therefore, we find that the claimed expenses for substitute training and for the telephone tree were neither the consequence of the strike nor proper mitigation measures and are not properly chargeable to the Association. Deducting

these impermissible costs from the District's total expenses, it is evident that the District saved more on striking teachers' salaries than it expended on substitute teachers and letters to parents.[9] Thus, the District suffered no compensable loss as a result of the strike. Therefore, we need not decide whether this Board has the authority under EERA to assess an employee organization for damages resulting from a strike.[10] Full consideration of this weighty issue must await a case in which the question is fairly raised by the facts. That is not the case before us.

Legal costs requested by the District are denied. The Association had not engaged in repeated and flagrant violations of the law, nor was its defense against the charges frivolous and unwarranted, King City Joint Union High School District

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[9]The Association also objects to the District's claim for reimbursement for letters to parents on the grounds that (1) the two letters sent prior to the strike primarily concerned the District's bargaining proposals and only incidentally referred to the strike; (2) the letter sent on the day of the strike was useless since the strike was for one day only; and (3) the use of the mails, as opposed to the usual practice of delivery by students, was wasteful and a failure to mitigate. Because we have found that, even including the cost of these letters, the District incurred no damages, we need not resolve the specific issues raised by the Association.

[10]In Fresno, supra, the Board declined to award reimbursement of costs incurred during a strike because the District there did not seek to mitigate its losses or bring about the termination of the strike by requesting that PERB seek an injunction against it. As in the instant case, the facts did not require a determination of the Board's statutory authority to assess damages in a strike.

(3/3/82) PERB Decision No. 197. See also Heck's, Inc. (1974) 215 NLRB 765 [88 LRRM 1049] and Tidee Products (1972) 194 NLRB 1234 [79 LRRM 1175].

REMEDY

Pursuant to the authority vested in it by subsection 3541.5(c),[11] the Board finds it appropriate in this case to order the Association to cease and desist from refusing to negotiate in good faith and refusing to participate in good faith in the statutory impasse procedures by engaging in a concurrent strike. It is necessary that all unit employees be fully informed of this Decision and thereby understand that the strike which occurred here violated EERA. The Westminster Teachers Association, CTA/NEA, will be required to post the attached Notice at all places throughout the District where notices are customarily placed and, additionally, to distribute copies of the Notice to all employees in the unit through the District's internal distribution system if that is the customary method of distributing Association literature. Otherwise, the Association shall mail a copy of the Notice to

[11]Section 3541.5(c) provides as follows:

> The board shall have 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.

the home of each member and each other employee in the unit, provided the employer gives nonmember addresses to the Association.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the Public Employment Relations Board, pursuant to subsection 3541.5(c) of the Government Code, hereby ORDERS that the Westminster Teachers Association, CTA/NEA, shall:

A. CEASE AND DESIST FROM:

Violating subsections 3543.6(c) and (d) by refusing to negotiate in good faith and refusing to participate in good faith in the statutory impasse procedures by engaging in a strike during the course of mediation.

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

(1) Within thirty (30) workdays of service of this Decision, post at all school sites and all other work locations, upon those bulletin boards where the Westminster Teachers Association's notices are customarily placed, copies of the attached Notice to Employees (Appendix A). Such posting shall be maintained for a period of thirty (30) workdays.

In addition, the Association shall distribute copies of the Notice to all unit employees through the District's internal distribution system if that is the customary method of

distributing Association literature. Otherwise, the Association shall mail a copy of the attached Notice to each unit employee's home, provided the District provides the Association with such addresses of unit employees who are not members of the Association.

(2) At the end of the posting period, notify the Los Angeles regional director of the Public Employment Relations Board, in writing, of the steps taken by the Westminster Teachers Association, CTA/NEA, to comply with this Order. Continue to report in writing to the regional director periodically thereafter as directed. All reports shall be served concurrently on all parties.

The Board further ORDERS that the remaining subsection 3543.6(c) charges filed against the Westminster Teachers Association, CTA/NEA, in Case No. LA-CO-69 are DISMISSED.

The Board further ORDERS that the subsection 3543.5(a) charge filed against the Westminster School District in Case No. LA-CE-424 is hereby DISMISSED.

Members Tovar, Jaeger and Jensen joined in this Decision.

Appendix A

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 Nos. LA-CE-424 and LA-CO-69, Westminster Teachers Association, CTA/NEA v. Westminster School District, in which all parties had a right to participate, it has been found that the Westminster Teachers Association, CTA/NEA, violated the Educational Employment Relations Act, subsections 3543.6(c) and (d) by engaging in a strike during mediation. As a result of this conduct, we have been ordered to post this Notice and abide by the following: We will:

A. CEASE AND DESIST FROM:

Refusing to negotiate in good faith and refusing to participate in good faith in the statutory impasse procedures by engaging in a strike during the course of mediation.

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

Post and distribute copies of this Notice to all unit employees.

WESTMINSTER TEACHERS ASSOCIATION,
CTA/NEA

Dated: _____ By _____
Authorized Agent

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

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

WESTMINSTER TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. WESTMINSTER SCHOOL DISTRICT, Respondent.	Unfair Practice Case Nos. LA-CE-424-78/79 LA-CO-69-78/79 PROPOSED DECISION (May 15., 1980)
WESTMINSTER SCHOOL DISTRICT, Charging Party, v. WESTMINSTER TEACHERS ASSOCIATION, CTA/NEA, Respondent.	

Appearances: Paul Crost (Reich, Adell, Crost & Perry), Attorney for Westminster Teachers Association, CTA/NEA; David C. Larsen (Rutan & Tucker), Attorney for Westminster School District.

Decision by Stephen H. Naiman, Hearing Officer.

PROCEDURAL HISTORY

On January 5, 1979, the Westminster Teachers Association, CTA/NEA (hereafter Association) filed an unfair practice charge with the Public Employment Relations Board (hereafter PERB) against the Westminster School District (hereafter District). On January 29, 1979, the District filed its answer. That same day, the District filed an unfair practice charge against the

Association. On April 9, 1979, the Association filed its answer.

Both charges were amended prior to the hearing, and again on the first and second days of hearing. As amended, the Association's charge alleges that the District violated section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA)[1] by requiring teachers to distribute documents which their students were required to take home to their parents. The documents reported the status of negotiations, and set forth the Association's bargaining positions.

As amended, the District's charge alleges that the Association violated section 3543.6(c) and (d) of the EERA.[2]

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[1]Government Code section 3540 et seq. Unless otherwise noted, all references are to the Government Code.

Sec. 3543.5(a) provides that it shall be unlawful for a public school employer to:

> (a)Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

2Sec. 3543.6(c) and (d) provide that it shall be unlawful for an employee organization to:

> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the

The District's charge alleges:

1. The Association's authorized agent refused to acknowledge receipt of or convey a bona fide offer from the District to the Association during the January 10, 1979 mediation session.

2. Association representatives attempted to bypass the District's negotiating team and negotiate directly with the board of trustees at the January 18, 1979 public meeting.

3. During the mediation session of January 19, 1979, the Association presented a proposal containing provisions and demands greater than those presented to the board of trustees on January 18, 1979.

4. The Association organized, called and implemented a District-wide teacher strike on January 23, 1979, when the parties were still engaged in the mediation process.

Informal conferences were held on February 6 and March 21, 1979. The disputes were not resolved, and a formal hearing was held on May 22, 23, 25 and June 5, 1979 before another hearing officer.[3] Following the hearing, attorneys for the District

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exclusive representative.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

[3]This case has been reassigned under the authority of Cal. Admin. Code, tit. 8, sec. **32168(b).**

and the Association filed a series of posthearing briefs and the matter was submitted on August 21, 1979.

FINDINGS OF FACT

The District is a kindergarten through eighth grade elementary school district located in northwest Orange County, California. It is comprised of 17 primary schools and 3 intermediate schools with a student enrollment of approximately 9,359.4 The Association is the exclusive representative of a negotiating unit of approximately 360 certificated employees, of whom 330 are classroom teachers.

A. Negotiations for a New Contract Begin and the Parties Discuss the Possibility of a Strike.

The District and the Association were parties to a collective bargaining agreement which covered the period of July 1977 through December 31, 1978. Just prior to the termination of their agreement, the parties commenced preparation for negotiations; and on November 20, 1978, they began bargaining for a successor agreement. Between November 20 and December 13, 1978, the parties met 13 times. However, no tentative agreements of any substance were reached.

The possibility of a strike was discussed by Dr. Ricketts, District superintendent, and Robert Mann, Association president. While no direct threats or confirmation of strike

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[4]This information was obtained from the 1979 Public School Directory, published by the California State Department of Education.

activity were expressed by the Association, on December 11, 1978 the Association sent out letters to substitutes requesting that they support a strike by withholding services. The District was aware of this letter and the board of trustees and its administration adopted certain policies and procedures known as policy 3030 which would provide for premium rates of pay for substitutes, require verification of absences, and affect Association rights.[5]

B. The Parties Declare Impasse and the Association Takes a Strike Vote.

On or about December 12, 1978, just prior to the beginning of the Christmas vacation, impasse was declared. A mediator was assigned and met with the parties in an attempt to resolve their dispute.

On Friday, January 5, the members of the Association voted to authorize Mr. Mann to call a strike. Mann announced to the media that he would not inform the District on what day he would call the strike. At the hearing, Mr. Mann reiterated that the Association's intent was to keep the District off balance, to keep it from being prepared.

On Monday, January 8, 17 of the 23 regular teachers at one of the intermediate schools were out. The absentee rate is

[5]The record indicates that policy 3030 was adopted, in part, because the District was concerned about its ability to obtain substitute teachers. Huntington Beach Union High School District, which would draw upon the same pool of substitutes, was facing a strike at or about this same time.

generally 2 or 3 per day. The District's charge, as amended at the hearing, does not allege that the Association was responsible for this large absentee rate, and the Association does not admit any responsibility for it. However, upon learning of the situation at the intermediate school, Dr. Ricketts contacted Bar Kaelter, the assistant executive director of the West Orange County United Teachers, a regional association which handles negotiations and grievances for the Association and four other neighboring teacher associations. Dr. Ricketts advised Mr. Kaelter that he would implement policy 3030 unless the Association let the District know when it would be going on strike. Ricketts also stated that if the Association would tell the District when it was going on strike, he would wait until then to implement policy 3030. Mr. Kaelter remained noncommittal. Dr. Ricketts implemented the policy effective January 8.

The threat of a strike continually existed. In addition to the statements by Mr. Mann, Mr. Kaelter and William Bianchi, the executive director of the West Orange County United Teachers, the teachers by their conduct kept the District personnel in doubt as to when a strike might occur. Thus, employees would picket their schools in the morning, get in their cars, drive off, drive around the block, park, and then walk through the back door two or three minutes before school began. Similar conduct also occurred during lunch breaks.

On January 10, Dr. Ricketts received third-hand information that if no agreement was reached at that evening's mediation session, a strike would occur the next day. On January 11, teachers brought sack lunches to eat at various parks. At 12:30 p.m. there was a radio announcement that 80 percent of the teachers were on strike. They were not. A letter written the same day by one of the teachers and sent to many parents indicated that the teachers were prepared to go on strike. For all of these reasons, Dr. Ricketts anticipated a strike from moment to moment.[6]

C. The District's Offer to Bill Henry on January 10, 1979.

Mediation sessions were held on January 9 and 10, 1979. Prior to the January 10 session, the mediator spoke with the board of trustees and the District's negotiating team together. Afterwards, he asked Patricia Griggs, the District's chief negotiator, to come up with a new proposal.

The mediator then spoke with Mr. Bianchi and Bill Henry, a consultant to the Association's negotiating team. The mediator told them that he had asked the District to make a new offer, and that he had told the board what minimum movement would be

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[6]Ricketts kept policy 3030 in effect through January 15. However, on January 16, he rescinded the policy because the premium pay for the normal substitute coverage was too costly. The policy was reinstated for January 23, the day the teachers did strike.

required in order to avoid a strike. The mediator said to the Association representatives that he had told the District that if it did not come pretty close to the minimums he felt were necessary for movement towards a settlement, he would refuse to carry the proposal to the Association and that he would consider the Association's last proposal as the last offer on the table. The mediator told Mr. Bianchi and Mr. Henry that if he felt it was a substantial offer he would present it to the Association. But if he came to the Association's conference room and asked for either Mr. Henry or Mr. Kaelter to come out, that would be the signal that mediation was over for the evening. Then the three of them met with the other members of the Association's negotiating team and explained the procedure which would be used.

The mediator returned to the District's meeting room. Ms. Griggs verbalized an offer to him. The mediator stated that the offer would not settle the contract.[7] He told Ms. Griggs to put it in writing and give it directly to the Association.

[7]The District's offer met the Association's demand on leaves of absence and noontime supervision and improved the previous offer on fringe benefits and sabbatical leaves although these two items did not meet Association demands. In all other respects, including binding arbitration, class size and salaries, the District's offer remained unchanged.

The mediator then went back to the Association's room and told the Association's representatives to go home. He returned to the District's room with Mr. Henry.

Mr. Henry stated to the District's representatives that the mediator had already told him about the proposal. In response to a question posed by David Larsen, the District's attorney and a member of its negotiating team, Mr. Henry acknowledged that he was an agent of the Association.

Ms. Griggs then prepared a written offer by making annotations on the District's offer of January 9. She gave Mr. Henry a copy of the proposal. Mr. Henry rolled it up and said, "As far as I'm concerned, I've never received this offer, and I'm not going to give it to WTA [Westminster Teachers Association]."

Mr. Henry had not given any indication prior to that moment that he would not consider the District's proposal to be a bona fide offer. Mr. Larsen said, "You told us you were the agent of WTA. As far as we're concerned you're their agent, you've received it, WTA has received it." Then Mr. Henry left the room with the mediator.

Later that evening, at the Association's offices, Mr. Henry told the other members of the Association's negotiating team that the mediator had asked him if he wanted to hear the District's offer as a professional courtesy.

Mr. Henry told his colleagues that it was not an official offer if he did not tell them about it, but it would be if he did tell them. Mr. Henry asked them if they wanted to receive an offer outside of the mediation process. Their response was "no," the mediator had instructed them that he did not want to carry the offer.

The Association was apprised of the contents of the District's offer the next morning, when the District distributed a letter in the teachers' mailboxes.

D. Association Representatives Speak at the January 18 Board Meeting.

A mediation session was held on January 16. Another session was scheduled for January 29. A public meeting of the board of trustees was held on January 18. Mr. Mann and Mr. Kaelter, as well as several other members of the public, spoke at that meeting. Mr. Mann was one of the first speakers. He said, in part:

> . . . We feel there is no reason why we can't settle our dispute right now, with or without the mediator. Teachers have to believe that you haven't heard our positions or you don't understand them. For example, . . . » Salary: We are asking for the 5-1/2 percent which was frozen in our last contract, and we realize we'll have to wait for the Supreme Court decision to see whether or not we will get it. Now, that's for this year. For next year the District has consistently told us that they don't expect any new monies from the state. We said "fine." We want a fair share of those new monies if you get them. We don't understand the problem with that proposal if

> the District's business people consistently tell us that you're not going to get more money. So, we'll take a chance. If you get no more new money, we don't expect to get very much of a raise. But if you do get increased monies from the state over and above the current level, we expect to get a fair cost-of-living increase. . . . We want to settle it. We want to settle it right now, but we want a fair agreement and we want to return to the table now. We're willing to do it with the Board tonight if that's possible. We want to settle the agreement, but we want a fair agreement.

The President of the Board of Trustees, Dewey Wiles, responded to Mr. Mann's remarks. He stated that the mediator had established the guidelines for setting a mediation date for January 29 and that the board of trustees had to follow those procedures.[8] Mr. Wiles responded to a subsequent speaker that he understood it would be a misdemeanor "if we try to negotiate outside that." He also said that the board had given directions pursuant to which the District's negotiating team was to operate and that the team understood those directions.

Sometime thereafter, Mr. Kaelter made his statement to the board. He said, in part:

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[8]No evidence was presented at the hearing that the mediator had instructed the parties or even suggested that they not meet for direct face-to-face negotiations in his absence. However, the District's negotiating team emphatically told the Association's negotiating team at the outset of mediation that it would not meet with the Association without the mediator.

> The statement has been made by Mr. Wiles that under the provisions of the Educational Employment Relations Act we could not negotiate without the mediator. I would like to set the record straight. We can negotiate right now. We do not need a mediator. The mediator does not need to be present . . . . We believe that if we could sit down with the School Board or with the Board sitting in on negotiations, we could reach a settlement tonight. We're willing to meet tonight, tomorrow, Saturday, Sunday, anytime you're willing to meet. Meet with us and settle this.

Attorney Larsen responded to these comments by stating that the District felt it was incumbent upon it not to obstruct the mediator's efforts to help the parties reach a settlement.

E. The January 19 Mediation Session.

Following the January 18 board meeting, District negotiator Griggs called the mediator to see if the January 29 mediation date could be moved up. A mediation session was scheduled for Friday, January 19.

The Association's proposal on January 19 was the same as it had been on January 10. Based on Mr. Mann's statement relating to a contingency salary plan the previous night, the District felt that the Association was escalating its proposals.

After the parties "met in separate rooms, the mediator held a conference with Mr. Bianchi, Mr. Kaelter, Ms. Griggs, and Mr. Larsen. The group discussed several issues, including the concept of a proposal which would make salaries contingent upon the receipt of certain state monies by the District.

Mr. Larsen stated that he was very concerned that the Association was holding onto so many major issues so late in the game of negotiations. He stated that if contingency language could settle the matter, they would go back and try to sell the concept to the board. He further stated that if contingency language would not settle the matter, the Association should tell him so that he would not waste his time or jeopardize his credibility with the board. The preponderance of the evidence establishes that the parties left the mediation session with the understanding that a good solid contingency formula for wages would settle the negotiations.

The District negotiators said that they did not know how the board would react to the concept and that they would meet with the board following the regular January 24 Board meeting. Mr. Bianchi and Mr. Kaelter said that the Association was receiving a great deal of pressure for some action and that they did not know whether they could hold their members back. They urged Mr. Larsen and Ms. Griggs to get feedback from the board prior to January 24.

Mr. Larsen responded that if there was a strike by the Association it would be extremely difficult to get the board to consider contingency language. He agreed to try to meet with the board prior to January 24.

F. The events of January 22, 1979.

The Association announced to its membership that the District would respond to the contingency proposal on January 24, 1979. By January 22, 1979, the teachers began to pressure the Association for an earlier response from the school board. Association President Mann asked Bill Bianchi to contact the District's attorney, David Larsen, in order to set up a meeting with the board earlier than Wednesday, January 24. Unbeknownst to Bianchi or Mann, Larsen had scheduled a meeting with the board to take place at 5:00 p.m. on January 22, 1979.

Pressed by Mr. Mann, Bianchi called Larsen's office to ask if he had been successful in meeting with the board. Larsen was unavailable at the time but did return the call at or about 4:00 p.m. Bianchi asked whether Larsen had met with the board and had any information to give them. Larsen replied that he had nothing to give them. Mr. Bianchi said that it was very, very important for Mr. Larsen to try to meet with the board because the Association did not know whether it could hold the teachers back from any kind of concerted activity. Mr. Larsen responded that if anything did happen, that "all bets were off." Larsen never mentioned that he would be meeting with the board at 5:00 p.m.

Mann was present while Bianchi was speaking with Larsen. When Bianchi concluded his conversation he indicated to Mann

that it appeared that the board would not be meeting until January 24. At or about this same time, a number of teachers came to the Association office and reported that the District board of trustees was in fact meeting right at the moment with attorney Larsen.

When Mann stated to the members in the Association office that the District would not be meeting until January 24, 1979, he was met with an irate response. The members responded, "What's up here? We know that the District and the board members and the attorney are meeting right now." One entire school faculty, frustrated by the confusion and chaos of mixed reports in the progress of negotiations, threatened to resign from the Association because the Association was not doing anything.

This loss of credibility plus the increasing pressure from the teachers as a result of their frustrations over negotiations and other incidents caused Mr. Mann to call a one-day strike for January 23, 1979.[9]

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[9]Specific causes mentioned by Mr. Mann of teacher frustrations since the beginning of the school year included: (1) the involuntary transfer of several teachers to special education teaching positions; (2) the District's requirement that teachers perform noon duty supervision, something which had not been required in several years; (3) the collecting of classroom keys by the District prior to Christmas vacation; (4) the District's refusal to agree to make the forthcoming arbitration decision on noon duty supervision binding; and (5) the reaction of some teachers, who felt that teachers had not been treated fairly at the January 18 board meeting.

G. The Teachers Strike for One Day on January 23, 1979 and the School Board Asks that the Mediator Certify the Matter for Factfinding.

The Association did not give any advance warning about the strike. It did contact the media as early as 6:00 a.m. on January 23. Dr. Ricketts first learned of the strike at 7:30 a.m. In its contacts with the media, the Association represented that the strike was a one-day protest. Its leaflets carried the same message. At each school there was at least one picket sign which said that the strike was a one-day protest.

Notwithstanding all of this, Superintendent Ricketts testified that he did not become aware that the strike was only for one-day until he received a letter to that effect from Mr. Mann. The preponderance of the evidence establishes that Mr. Mann's secretary delivered this letter at approximately 11:00 a.m., to a District employee who works in the same building as Dr. Ricketts.

The teachers returned to the classroom on January 24. No evidence was presented at the hearing that the Association has threatened or engaged in any strike, work stoppage or slow down since January 23.

At the January 24 board meeting, the board directed chief negotiator Griggs to request the mediator to certify the parties to factfinding. The board had not made any decisions regarding contingency language when it met at Mr. Larsen's

office on January 22. As a result of the strike, the board's attitude was that there was no need to consider it further. It felt that the trust relationship had been destroyed and that the Association did not want to settle. However, the board made no effort to determine whether the Association was still interested in settling the dispute with contingency language.

On January 25, the mediator certified the matter for factfinding.

Based on these facts, the District contends the Association failed to negotiate and/or participate in mediation in good faith.[10]

H. The Association Charges that the District Unlawfully Required the Teachers to Distribute Material Concerning the Status of Negotiations.

The events relating to the Association's charge of unlawful conduct against the District occurred in mid-December 1978 and early January 1979. On December 15, 1978, teachers were asked to distribute to students in their classrooms a copy of a periodic District publication entitled "Challenge." On January 2, 1979, teachers were asked to distribute a letter to parents.

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[10]The record contains evidence relating to the District's claim for damages resulting from the strike. Because it is concluded that the District's claim must be dismissed, no findings with respect to damages are included in this decision.

Both of these documents were one page in length and were given to students for distribution to their parents. Both publications state that the parties are in mediation. The publications summarize the District's latest proposal on salary, health and welfare benefits, class size and length of the workday. The January 2 letter lists the Association's latest proposal on each of these above items. In both cases, the District characterizes the Association's proposals as "unreasonable demands which are not within the District's financial ability to meet."

In the past, the District has distributed some of its communications to parents by having teachers give the documents to their students to take home. These have included "Challenge," "The Board Review" and educational update articles written by the superintendent. The District utilizes this method of distribution because it saves mailing costs.

In 1977, when the parties were in mediation over their first contract negotiations under the EERA, the District similarly distributed communications relating to the status of negotiations. Those communications also set out the parties' proposals, the District maintaining that its proposals were fair, but not characterizing the Association's proposals as "unreasonable demands."

No objection was raised by the Association to the 1977 communications, because at the time they were distributed

negotiations were about to reach a successful conclusion. However, teachers had voiced concern to the Association at that time that the distributed material might be interpreted by some parents as the teachers' viewpoints. During the current round of negotiations, the president of the Association had received telephone calls from parents evidencing some confusion about the Association's negotiating positions.

The Association utilized various methods to communicate with parents, such as walking house-to-house, leafleting, telephone calls and mailings. It also established a strategy team to contact parents and enlist community support.

Based upon the above conduct, the Association contends that the District violated the EERA by requiring the teachers to distribute materials relating to the District's position in negotiations, thereby interfering with employees' rights to be free from coercion and restraint in their right to form, join and participate in the activities of an employee organization.

ISSUES

1. Whether the one-day strike which occurred during impasse mediation on January 23, 1979 is a per se violation of the EERA section 3543.6(d).

2. Whether the Association violated the EERA section 3543.6(c) and (d) by certain conduct related to

negotiations and mediation occurring between January 10 and 23, 1979, including a strike.

3. Whether the District violated section 3543.5(a) of the EERA by requiring teachers to distribute District communications about negotiations to their students to be taken home to their parents.

CONCLUSIONS OF LAW

A. A Strike by Employees During Impasse Mediation does not per se Constitute a Refusal to Participate in Impasse in Good Faith.

The District alleges that the one-day strike by its employees on January 23, 1979 is per se a violation of section 3543.6(d) of the EERA. Section 3543.6(d) states that it is unlawful for an employee organization to "refuse to participate in good faith in the impasse procedure set forth in article 9 (commencing with section 3548)."

Article 9 of the EERA, which is entitled "Impasse Procedures," provides, either party "may declare that an impasse has been reached . . . in negotiations over matters within the scope of representation and can request that PERB appoint a mediator." If PERB determines that an impasse exists, it shall, within five working days, appoint a mediator who will meet with the parties either jointly or separately

and use any steps he deems appropriate to persuade the parties to resolve their differences. Nothing precludes the parties from agreeing to their own mediation procedure. (See Gov. Code section 3548.) As part of the impasse procedure of article 9, section 3548.1, section 3548.2 and section 3548.3 set out the procedures for submission of a dispute to factfinding if the mediator is unable to effect a settlement of the controversy within 15 days after his appointment and declares that factfinding is appropriate. Section 3548.4 provides, "Nothing in this article shall be construed to prohibit the mediator appointed pursuant to Section 3548 from continuing mediation efforts on the basis of the findings of fact and recommended terms of settlement made pursuant to Section 3548.3."

1. Strikes are not expressly outlawed by the EERA.

On its face, section 3543.6(d) does not make a strike an unfair practice. The language of that section speaks in terms of good faith participation in mediation. Further, nowhere in the EERA are strikes expressly stated to be an unfair practice. The numerous court of appeal decisions cited by respondent and by the Supreme Court in San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1 as holding that public employees have no right to strike, were generated

at a time when either the EERA had not yet become law[11] or arose in cases in which the employees and conduct in question were not covered by the provisions of the EERA.[12] Thus, court decisions which hold that strikes by public employees are illegal are not dispositive of the issue of whether strikes are unfair practices or otherwise unlawful under the EERA. Whether strikes by public employees are illegal under some interpretation of common law or statutory authority, they do not necessarily constitute an unfair practice under the EERA by virtue of this external illegality.

However, the EERA does not expressly sanction the right to strike by public employees. Put another way, this means that strikes by public employees are not expressly protected under

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[11]Pasadena Unified School District v. Pasadena Federation of Teachers (1977) 72 Cal.App.3d 100, 105, 114, 107 [140 Cal.Rptr. 41]; Los Angeles Unified School District v. United Teachers (1972) 24 Cal.App.3d 142, 145, 146 [100 Cal.Rptr. 806]; Trustees of Cal. State Colleges v. Local 1352 S. F. State, etc. Teachers (1970) 13 Cal.App.3d 863, 867 [92 Cal.Rptr. 134]; City of San Diego v. American Federation of State, etc. Employees (1970) 8 Cal.App.3d 308 [87 Cal.Rptr. 258]; Almond v. County of Sacramento (1969) 276 Cal.App.2d 32 [80 Cal.Rptr. 518]; cf. Los Angeles Met. Transit Authority v. Brotherhood of Railway Trainmen (1960) 54 Cal.2d 684, 687, 688 [8 Cal.Rptr. 1, 355 P.2d 905].

[12]Stationary Engineers Local 39 v. San Juan Suburban Water District (1979) 90 Cal.App.3d 796; City and County of San Francisco v. Evankovich (1977) 69 Cal.App.3d 41.

the provisions of the EERA.[13] Conduct which is not statutorily protected is not necessarily prohibited, and the strike in this case was purely an economic strike and not one originally protected because it was in support of independent unfair practices. (See footnote 9 at p. 15, supra.)

This analysis explains the language in section **3549** which provides that the enactment of the EERA shall not be construed as making section 923 of the Labor Code applicable to public school employees. By this statutory reservation, the Legislature merely expressed its desire not to extend to public employees the statutory protection of concerted activities guaranteed in the private sector by section 923 of the Labor Code.

2. The EERA Standard of "Good Faith" Derived From the NLRA.

Respondent herein argues that a strike by public school teachers during the statutory impasse process constitutes a per se violation of section 3543.6(d) as a refusal to participate in mediation in good faith. PERB in Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51, citing Sweetwater Union High School District (11/23/76) EERB Decision

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[13]See section 7 of the National Labor Relations Act in which employee concerted activities are protected. That section provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

No. 4, has held that the good faith requirement for purposes of negotiation found in the EERA may be analyzed by reference to interpretations of similar provisions of the National Labor Relations Act, as amended.[14] (See also PERB's recent decisions in San Mateo County Community College District (6/8/79) PERB Decision No. 94, at pp. 8-10 and fn. 8; San Francisco Community College District (10/12/79) PERB Decision No. 105 at p. 9; Davis Unified School District, et al. (2/22/80) PERB Decision No. 116.)

Under the NLRA, a duty is imposed on an employer and an employee organization to bargain in good faith. This duty is found by a combined reading of NLRA section 8(a)(5) or 8(b)(3) and section 8(d). (29 USC 158(a)(5); 29 USC 158(b)(3) and 29 USC 158(d). In reference to those sections, it is concluded that all aspects of negotiations in the private sector are covered by the requirement of good faith. Therefore, section 8(d) of the NLRA applies not merely to negotiations at the bargaining table but to the extension of those negotiations through voluntary mediation and up to the reduction to writing of a collective bargaining agreement.

In enacting the separate sections of the EERA which require an employer and an employee organization to participate in both

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[14]The National Labor Relations Act, as amended, is found at 29 USC 151 et seq. (hereafter referred to as NLRA).

negotiations and the mandated impasse procedures in good faith, it appears that the California Legislature was adopting the National Labor Relations Act's standard for good faith and expressly making it applicable to the impasse procedures in the public sector. Under the EERA, impasse has been expressly carved out as a procedure which the parties in negotiations should follow rather than as a culmination of bargaining where the parties need go no farther.[15] Thus, it is concluded that the NLRA definition of good faith covers the negotiations and mediation as well as factfinding in the EERA. This being so, it is fair to turn to the federal standards for good faith and as applied by PERB to bargaining in order to ascertain the meaning of participation in mediation in good faith.

3. The Per Se Refusal to Bargain in Good Faith.

Ordinarily, a refusal to bargain in good faith is proved by objective evidence of the state of mind of the party alleged to be unlawfully refusing to bargain. However, PERB in consonance with the United States Supreme Court has found that certain

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[15]Under the NLRA, the parties may be still in the negotiations process utilizing the services of a mediator because they have not yet reached a point where there is nothing further to talk about. Impasse under the EERA merely envisions a breakdown of negotiations. Compare definition of impasse at 3540.1(f) which states in part:

> "Impasse" means a point in meeting and negotiating at which . . . differences in positions are so substantial or prolonged that future meetings would be futile.

conduct is so inherently destructive of the bargaining relationship and so clearly constitutes a refusal to negotiate that it is per se a violation of the obligation to confer in good faith without regard to proof of state of mind.

Thus, PERB has followed NLRB v. Katz where the Supreme Court upheld an NLRB decision that an employer's unilateral change in conditions of employment within the scope of representation prior to the conclusion of bargaining was a per se refusal to bargain over those matters which were unilaterally changed. Without regard to whether the employer had a desire to reach an overall agreement with the union, the Supreme Court in Katz held that the unilateral action by the employer changing existing terms and conditions of employment was "in fact" a refusal to negotiate as to those matters. The Court refused to look at any evidence concerning the employer's subjective good faith. (See NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177, 2180]; cf. similar holdings of PERB in San Mateo County Community College, supra, PERB Decision No. 94 at pp. 12-14; San Francisco Community College District, supra, PERB Decision No. 105; Davis Unified School District, et al., supra, PERB Decision No. 116.)

On the other hand, the Supreme Court and the NLRB have never found that a strike by employees during negotiations constitutes a refusal to confer in good faith. Indeed, the express question was raised with the Supreme Court in NLRB v.

Insurance Agents International Union (1960) 361 U.S. 477. There, the NLRB concluded that certain conduct by the union involving strike tactics which allegedly were not traditionally appropriate, constituted bad faith on the part of the union in participating in the negotiation process. The Supreme Court rejected this argument, holding that such conduct external to negotiations did not indicate bad faith on the part of the association and the Court and the board ought not involve themselves in the quality of the association's economic activity. However, Insurance Agents was decided under NLRA which protects concerted activities and, as such, does not help the inquiry in this case.

In this case, the District argues that the Supreme Court in Teachers Association v. Superior Court, supra, concluded that a strike prior to the exhaustion of impasse was outlawed in order that the parties could exhaust the impasse procedures before taking economic action. This interpretation is not unreasonable based upon certain language in the Supreme Court's decision in San Diego, supra. There, the court said:

> **An unfair practice consisting of, "refus[al] to participate in good faith in the impasse procedure" (section 3543.6, subd. (d)) could be evidenced by a strike that otherwise was legal . . . .**
>
> **The impasse procedures almost certainly were included in the EERA for the purpose of heading off strikes. (Citation omitted.)**

> Since they [impasse procedures] assume deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in impasse procedures in good faith and thus an unfair practice under section 3543.6 subd. (d). (24 Cal.3d, at 8-9.)

On the other hand, it can equally be argued that if the Legislature had meant to outlaw strikes until the conclusion of impasse, it would have expressly said so. Instead, the Legislature merely adopted the same language found in the NLRA regarding good faith and made it applicable to EERA impasse procedures. The Supreme Court's decision is inconclusive in terms of whether a strike prior to the conclusion of impasse is per se a violation of the obligation to participate in mediation. Indeed, were one to conclude that a strike is per se a violation of 3543.6(d), one would be left with the ambiguity in the Supreme Court's decision which seems to indicate that a strike is not per se a refusal to negotiate or a violation of 3543.6(c). (San Diego Teachers Association v. Superior Court, supra, 24 Cal.3d, at p. 8) Thus, it is hard to understand how the court could conclude on the one hand that a refusal to bargain in good faith would be based upon an analysis of "genuine desire to reach agreement . . . " and a failure to participate in impasse, which must necessarily encompass the obligation to bargain, would be evidenced merely by a strike prior to the completion of impasse procedures. (Id.) If in fact it is a per se violation of 3543.6(d) to

strike prior to the exhaustion of impasse procedures, it must necessarily be a per se violation of 3543.6(c) since a strike during negotiation would equally be a strike prior to the exhaustion of the impasse procedures.[16]

Thus while a strike may be strong evidence of bad faith participation in impasse procedures because of its obstructive quality, there is no reason to conclude that a strike itself prior to completion of impasse is so inherently destructive of the mediation process that it must in fact constitute a refusal to bargain without further analysis of the subjective intentions of the alleged wrongdoer.

It is concluded that a strike by public school employees is not per se a violation of section 3543.6(d). (Cf. PERB's decision in Modesto City Schools (3/10/80) PERB Decision No. IR-11; Modesto City Schools (3/12/80) PERB Decision No. IR-12, at pp. 2-3; San Francisco Unified School District (10/29/79) PERB Decision No. IR-10.)

B. The Strike as Strong Evidence of Association Bad Faith in Negotiations or Mediation.

Although it has been concluded above that a strike is not per se a violation of section 3543.6(d) , the question remains open whether a strike prior to the exhaustion of statutory impasse procedures, in this case, established that the

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[16]The District does not contend that the strike in this case is a per se violation of section 3543.6(c).

Association was motivated by bad faith in fulfilling its statutory obligation to negotiate and/or mediate the contractual dispute. In order to resolve this question, one must look at the specific facts in this case. (Contrast NLRB v. Insurance Agents, supra.)

While it is tempting to conclude that the strike caused the District to abandon mediation and move to the next statutory procedure of factfinding, such an analysis would be erroneous. The conduct of one party in negotiations in reacting to the conduct of another cannot be dispositive of the motivation of the party alleged to be acting in bad faith. Indeed, in this case the District had the option of responding to the one-day strike by giving the union the meaningful counterproposal which the mediator and the union had been demanding for several days prior to that time. Alternatively, the District had the option to give the union some signal that it was going to meaningfully consider a counterproposal. Instead, the District chose in reprisal for the strike to indicate that it would no longer participate in mediation and urged that the parties go to factfinding.[17]

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[17]It should be noted here that the District is not being charged with a violation of 3543.5(c) or (e) of the EERA. However, a question is raised as to whether a response such as was given here is in fact evidence of bad faith on the part of the employer itself.

Thus, having concluded that the employer's response in this matter is not indicative of the Association's bad faith, one must look at the Association's conduct in mediation to determine whether the one-day strike on January 23, 1979 can be an objective manifestation of subjective bad faith. (See Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9, 25.) It is concluded that, apart from the additional allegations of Association misconduct discussed below, the strike on January 23, in the context of the Association's negotiating activity in mediation, does not indicate bad faith.

The facts in this case reveal that the Association and the District negotiated 13 times between November 20 and December 12, 1978. The parties agreed that the matter should be referred to a mediator, and the Association at no time avoided its obligation to participate in mediation sessions. Throughout the mediation sessions, the Association sought to elicit from the employer a response to its proposal which would be meaningful in terms of salary and fringe benefits. Indeed, the Association had acknowledged the employer's difficulty in predicting its finances with the uncertainties created by Proposition 13 and the need for cooperation. The Association agreed that it would compromise and asked the District only to consider a contingency formula for salaries.

The District was asked to respond within a reasonable amount of time. When asked as to what the District was doing in response to the Association's request, the District negotiators did not reveal that they were in fact meeting at the very time when the Association was pressing the District for an answer to its requested proposal in mediation. When the District's representative gave the Association a vague and ostensibly inconsistent answer to the question whether the board was meeting to consider the contingency salary proposal, the Association determined that a one-day strike would indicate the seriousness with which it was making its proposals in mediation. The fact that mediation did not continue following the strike was not in any way the fault of the Association but, rather, the District's choice to move the process into factfinding.

The Association, on the other hand, participated in factfinding. At no time following the strike on January 23 did the Association, by its conduct, manifest an intention to disrupt the impasse proceedings.

It is, therefore, concluded that the strike on January 23 in and of itself does not indicate the Association's bad faith in participation in the impasse procedures. Rather, it was the Association's intent by its conduct to move the District quickly to respond to its request to come up with a moderate formula which would reflect both the District's concerns as to

its fiscal uncertainty and the employees' desires to have a wage package finalized. The strike, in this case, does not indicate a lack of desire to participate in impasse procedures. (Placentia Fire Fighters v. City of Placentia, supra.)

C. Totality of the Union's Conduct during Negotiations and Impasse does not Indicate that the Union Violated Section 3543.6(c) or (d).

Under the NLRA, the courts have looked to the totality of a party's conduct in negotiations to determine whether on balance that party was participating in negotiations in good faith. The totality of the conduct again involves an analysis of a party's objective conduct which would reveal subjective good or bad faith. This concept of the totality of the conduct is not unlike the analysis which would occur in a charge of surface bargaining. (Cf. NLRB v. Virginia Electric & Power Co. (1941) 314 U.S. 469 [9 LRRM 405]; Rhodes-Holland Chevrolet Co. (1964) 146 NLRB 1304, 1305 [56 LRRM 1058]; see also Morris, Developing Labor Law (1971 ed.) p. 287.)

As has been observed above, bad faith in negotiations and bad faith participation in impasse should be viewed by the same test. While the charge here alleges both bad faith of the Association in negotiations as well as participation in

impasse, the conduct remains identical and the analysis purposes of this section will be the same.[18]

The District alleges four independent acts by the Association which allegedly establish the bad faith of this entity in bargaining and impasse. First, the District alleges that the conduct of Association representative Bill Henry, in refusing to take back an offer, was evidence of bad faith. Second, the District alleges that the Association addressed the board on January 18 in an attempt to circumvent the District's negotiators. Third, the District alleges that the Association's proposal on January 19 constituted demands greater than those of January 18 and, therefore, indicated bad faith. Fourth, the strike on January 23, when added to these other events, indicated a course of conduct upon which it could be concluded that the Association participated in negotiations and/or impasse in bad faith. Each of these arguments will be dealt with briefly below.

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[18]Also relevant in this analysis is the PERB test for surface bargaining which has been set forth in the Muroc Unified School District (12/15/78) PERB Decision No. 80. There PERB held: "It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Footnote omitted.) Specific conduct of the charged party, which when viewed in isolation may be wholly proper, may, when placed in the narrative history of negotiations, support a conclusion that the charged party was not negotiating with the requisite subjective intent to reach agreement. (Footnote omitted.) Such behavior is the antithesis of negotiating in good faith."

1. The Failure to Carry Back the District's Proposal Given Directly to a Union Representative.

The record indicates, without question, that Bill Henry was an agent of the Association. Further, the record shows that during mediation, certain understandings were reached with the mediator to indicate to the parties, by signal or otherwise, the nature of the proposals which would be carried from the District to the Association on January 10. (See Gov. Code, section 3548 et seq.) The record seems to bear uncontradicted evidence which shows that the mediator was looking for a settlement of the entire agreement. The mediator indicated that if such an offer was not forthcoming, he would ask to speak to only one of the Association representatives which would be a signal for the rest of the team to go home and end mediation for the evening.

On the evening of January 10, the mediator received a partial offer from the District, went to the room in which Association representatives were waiting and indicated that they could leave. No offer was transmitted to any of the Association team. Rather, the mediator determined Bill Henry should go to the District's room and receive an offer by the District. Based upon the signals and discussions which occurred before, Henry determined that the offer was not being made to the entire negotiating team.

Whether Henry incorrectly decided not to transmit this offer to the negotiating team, the totality of the conduct of the Association at this time would indicate that Henry was not trying to obstruct the negotiations or the mediator's progress. It appears that what the mediator was doing was permitting the District to make its partial offer to Henry. When viewed in context, the fact that Henry did not respond to the offer nor transmit it to the Association does not indicate an intent to obstruct the negotiation or the mediation process. The failure to transmit the proposal was consistent with the prearranged understanding. The Association continued to press for a total resolution of the agreement and there is no indication that the Association, by its conduct, intended to abandon the bargaining table and resort to some unlawful means of bringing the contractual negotiations or mediation to an end. The subsequent conduct of the Association in requesting additional meetings and seeking a meaningful proposal to its concerns over salaries would indicate that it was trying to elicit from the District some positive response in negotiations.

2. The Address to the Board on January 18, 1979.

The District contends that the Association representatives' address to the board on January 18, 1979 was an attempt to circumvent the District's negotiators and to negotiate directly with the board of trustees. While it is

true that it may be unlawful to attempt to force one party to abandon its chosen negotiator and/or to circumvent the authority given to that negotiator, the record in this case does not support these allegations of wrongdoing.

It is found that neither Association representative, Mann nor Kaelter, manifested any intention or by their conduct acted to bypass the District's negotiating team and to negotiate directly with the board of trustees. The allegation that the Association presented a new salary proposal to the District at the January 18 meeting is not supported by the evidence. Rather, as Association president Mann testified, he was merely summarizing the Association's most recent contract proposal as of January 10. The record supports Mann's testimony. Thus, his statement about a 5-1/2 percent increase corresponds to sections of the Association's earlier proposal. His remaining statements are all consistent with the Association's position as of January 10. Further, Mann clearly indicated that his statement to the board was a reiteration of previous positions. Thus, he stated to the board, "Teachers have to believe that you haven't heard our positions or that you don't understand them . . . ." A review of his statements to the board indicates that they are too general to be realistically considered an offer. Thus, it is concluded that Mann was not making a proposal to the board on salaries. Rather, he was trying to enlist board support

and educate the members as to the Association's position in negotiations.

While it is found that Mann by his statements was seeking to have the board become directly involved in negotiations and the mediation process, this was not designed to obstruct the progress of the parties or to circumvent the board's designated negotiating authority. Rather, the record shows that in 1977, board members became involved in negotiations and significant progress was made once they became part of the process. The record shows that Mann was indeed hopeful that such participation would again be helpful in resolving the current contract dispute. It is thus found that when Mann stated, "There is no reason why we cannot settle now with or without mediation," he was not suggesting that the board forego mediation but rather asking the board to participate in negotiations even at that very time.

It is found that Kaelter's statement to the board that, "We do not need a mediator," was directly aimed at refuting the board president's statement that it was legally necessary to use the mediator. Kaelter was merely stating that a mediator was a vehicle for resolving the dispute. Kaelter emphasized that the mediator should not be an obstacle to the parties reaching an agreement themselves. Indeed, Kaelter reiterated Mann's plea for the board to become involved through mediation.

While it might be argued Mann and Kaelter were urging the board to avoid using the mediator since the next session for mediation was not until January 29, 1979, it is doubtful that this request can be viewed as an attempt to bypass mediation. Rather, the request was an attempt to accelerate the process of mediation. (See Gov. Code, section 3548.)

Lastly, school boards which are accessible only through public meetings must be held to expect and openly invite addresses by their employees and their representatives who are also members of the public. There can be no limitation on the public's right to be heard based upon the fact that the parties are in negotiations. The statements to the board at a public meeting require no response by the board and cannot be viewed as a substitute for the give and take of negotiations.

Thus, it is found that the address to the board on January 18 was not at all inconsistent with good faith motivation of the Association to bring their controversy to a successful resolution as quickly as possible by urging the parties and the principals to move in a direction of a viable settlement. In this regard, it is noted that the statements to the board were successful in moving the mediation session from January 29 to January 18. It is hard to understand how this conduct could in any way be construed as circumvention of the mediation process.

3. The January 19 Mediation Session,

The District further contends that the Association exhibited bad faith by accelerating its demands on January 19 from the position taken before the board on January 18. As found above, the Association was not stating a negotiating position to the board in the form of a concrete proposal. Rather, the Association's address to the board on January 18 was merely a summary of the employees' negotiating position coupled with an attempt to demonstrate to the board that the Association was not taking a hard-line approach in its request for a salary increase. The statements to the board viewed in context were an attempt to show board members where the employees might be flexible in their demands. At the formal mediation session, the Association merely returned to the table with its last proposal made in mediation on January 10. While the District's negotiators may have construed the restatement of the January 10 proposal as an acceleration of the position taken by Mann before the board of trustees, the finding that Mann's statements to the board were not in fact a proposal but merely a statement of flexibility refutes this theory of the District.

4. The January 23, 1979 Strike.

As discussed above, the strike on January 23, 1979 does not, in and of itself, indicate objective evidence of subjective bad faith on the part of the Association. (See

pages 30-33, supra.) Thus, the strike can only be evidence of bad faith in violation of EERA section 3543.6(c) or (d) if, when viewed in totality, the conduct demonstrates an unwillingness to meaningfully participate in negotiations and/or mediation.

5. The Totality of the Conduct.

The four instances of alleged refusal to negotiate or participate in impasse reviewed above fail to indicate severally or together subjective bad faith on the part of the Association. Rather, when analyzed in context, the four incidents indicate that the Association was attempting to elicit from the District, either through its board, its negotiators, or the mediator, a response to its compromise positions. The Association was at all times attempting to move the parties to a resolution of a dispute and to reach an agreement and, as such, it is found that each of these acts was designed to advance the parties in mediation, impasse and the attendant negotiations. On the basis of the discussion above, it is found that the Association in the totality of its conduct exhibited an intent to reach agreement and conclude negotiations and impasse consistent with its statutory obligations. Therefore, the charge of the District that the Association violated section 3543.6(d) by calling a strike on January 23, 1979 and/or violated section 3543.6(c) or (d) of

the EERA by the totality of its conduct, including the strike on January 23, 1979, should be dismissed.

D. The Charge that the District Violated 3543.5(a) by Requiring Teachers to Distribute to Parents via their Students Certain Materials Relating to Negotiations.

Section 3543.5(a) of the EERA states in relevant part that it shall be unlawful for a public school employer to:

> impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Section 3543 of the EERA spells out the rights of employees. That section states in relevant part:

> Public school employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall have the right to refuse to join or participate in the activities of employee organizations . . . .

Charging party alleges that the District unlawfully coerced or otherwise infringed upon rights of employees protected by the EERA when it required teachers to distribute via their students certain materials to be carried to the parents of those students. The thrust of the Association's argument is that by requiring teachers to distribute materials relating to negotiations against their will, the District forced the employees to work against their own union, to hand

out anti-union letters and to create the impression that they were in favor of the District's proposal. Such conduct would allegedly infringe upon the right of employees to be free of employer coercion in participating in an employee organization.

The record in this case indicates that on two occasions, December 15, 1978 and January 2, 1979, the teachers were required to distribute two single-page documents from the district to parents via their students. The documents essentially set forth the position of the Association and the District in negotiations and were designed to inform the parents of the status of negotiations at that time. Nothing in the communications indicated that the Association endorsed the position of the District. Nor would these documents lead one to reasonably believe that the teachers distributing them were in some fashion working against the interests of the Association or the position which it was taking in bargaining.

The Association did show that in the past, some inquiries from the parents of students raised question as to whether the teachers by distributing such materials were in fact endorsing the District's position. On the other hand, there is no showing that even if the parents did believe that the teachers were distributing these materials in support of the District, that would have any impact on the outcome of negotiations or the diminished strength of the Association and its members in

maintaining their bargaining demands.[19] (Compare and contrast, Allied Aviation Service Co. (1980) 248 NLRB No. 26 [103 LRRM 1454]; Community Hospital of Roanoke Valley (1975) 220 NLRB 217, 220 [90 LRRM 1440] enfd. (4th Cir. 1976) 538 F.2d 607 [92 LRRM 3158].)

Thus, it is concluded that, at worst, the requirement that the teachers distribute the letters in question resulted in only slight harm to employee rights guaranteed under the EERA.

PERB has announced that in determining violations of section 3543.5(a) of the EERA, "a single test shall be applicable in all instances." (See Oceanside-Carlsbad Federation of Teachers, Local 1344, CFT/AFT v. Carlsbad Unified School District (1/30/79) PERB Decision No. 89.) The Board's test set forth in Oceanside-Carlsbad requires an analysis of the degree to which employee rights have been harmed, if any, and an analysis of the employer's justification for the conduct. PERB has stated that:

> [W]here the harm to the employees' rights is slight and the employer offers justification

[19]That is not to say that in a different factual situation, public support in the face of an economic strike and/or contract proposal would not have an impact upon the eventual outcome of negotiations. Rather, on the facts of this case, there is no showing that even were the parents to have believed the teachers agreed with the District's position that it would have made any difference in the outcome of negotiations or employees' rights to be represented by or participate in a labor organization.

> based on operational necessity, the competing interests of the employer and the rights of employees will be balanced and the charge resolved accordingly.

(Oceanside-Carlsbad Federation of Teachers v. Oceanside Unified School District, supra, PERB Decision No. 89 at pp. 10-11.)[20]

As discussed above, the harm to employee rights to participate in their employee organization is only slight. On the other hand, the employer has shown a history of utilizing the teachers as a conduit for distributing materials to parents via their students. The District argues that to mail directly to parents, although feasible, is costly. The District further argues that in asking the teachers to be the conduit for the distribution of District materials, this is no different than the teachers utilizing the District mail system as a conduit for distribution of organizational materials. (See Richmond Unified School District (8/1/79) PERB Decision No. 99.)

The argument of the District that the teachers' distribution of materials is parallel to the use of the District's mail system is rejected here. The Board in

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[20]**The cases relied upon by the Association in support of the alleged wrongdoing are not relevant and are not helpful in resolving this issue. (See John Swett School District (12/29/78) Proposed Decision SF-CE-53; Didde-Glaser, Inc. (1977) 233 NLRB No. 115 [97 LRRM 1089, 1090].)**

deciding Richmond, supra, there found that use of the district's mail system was a part of the statutory right given to employee organizations to reach their members by other means of communication. (See Richmond Unified School District, supra, at p. 10-13.) In this case, there is no commensurate right granted to districts to utilize employees for distribution of district materials. Therefore, the District can only prevail if it shows a business justification.

However, it is found, on the facts of this case, there is sufficient justification on the part of the District as balanced against the minimal injury to employee rights to justify the District's conduct in this case. The cost of mailing coupled with a past practice of District communication with parents by means of teacher distributions to their students constitute sufficient justification to outweigh the slight harm which employees might sustain by virtue of the possibility that parents would misconstrue their conduct as antithetical to their Association. It is therefore concluded that the charge of violation of section 3543.5(a) of the District should be dismissed.

PROPOSED ORDER

Based upon the findings of fact and the conclusions of law and the entire record of this case:

1. The unfair practice charges filed by Westminster School District against the Westminster Teachers Association

alleging violations of Government Code section 3543.6(d) and (c) are hereby DISMISSED;

2. The unfair practice charge filed by Westminster Teachers Association against Westminster School District alleging violation of Government Code section 3543.5(a) is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 4, 1980 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. The statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on June 4, 1980 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. (See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

Dated: May 15 , 1980

Stephen H. Naiman
Hearing Officer

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

WESTMINSTER TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. WESTMINSTER SCHOOL DISTRICT, Respondent.	Unfair Practice Case Nos. LA-CE-424-78/79 LA-CO-69-78/79 PROPOSED DECISION (May 15,, 1980)
WESTMINSTER SCHOOL DISTRICT, Charging Party, v. WESTMINSTER TEACHERS ASSOCIATION, CTA/NEA, Respondent.	

Appearances; Paul Crost (Reich, Adell, Crost & Perry), Attorney for Westminster Teachers Association, CTA/NEA; David C. Larsen (Rutan & Tucker), Attorney for Westminster School District.

Decision by Stephen H. Naiman, Hearing Officer.

PROCEDURAL HISTORY

On January 5, 1979, the Westminster Teachers Association, CTA/NEA (hereafter Association) filed an unfair practice charge with the Public Employment Relations Board (hereafter PERB) against the Westminster School District (hereafter District). On January 29, 1979, the District filed its answer. That same day, the District filed an unfair practice charge against the

Association. On April 9, 1979, the Association filed its answer.

Both charges were amended prior to the hearing, and again on the first and second days of hearing. As amended, the Association's charge alleges that the District violated section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA)[1] by requiring teachers to distribute documents which their students were required to take home to their parents. The documents reported the status of negotiations, and set forth the Association's bargaining positions.

As amended, the District's charge alleges that the Association violated section 3543.6(c) and (d) of the EERA.[2]

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[1]Government Code section 3540 et seq. Unless otherwise noted, all references are to the Government Code.

Sec. 3543.5(a) provides that it shall be unlawful for a public school employer to:

> (a)Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

2Sec. 3543.6 (c) and (d) provide that it shall be unlawful for an employee organization to:

> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the

The District's charge alleges:

1. The Association's authorized agent refused to acknowledge receipt of or convey a bona fide offer from the District to the Association during the January 10, 1979 mediation session.

2. Association representatives attempted to bypass the District's negotiating team and negotiate directly with the board of trustees at the January 18, 1979 public meeting.

3. During the mediation session of January 19, 1979, the Association presented a proposal containing provisions and demands greater than those presented to the board of trustees on January 18, 1979.

4. The Association organized, called and implemented a District-wide teacher strike on January 23, 1979, when the parties were still engaged in the mediation process.

Informal conferences were held on February 6 and March 21, 1979. The disputes were not resolved, and a formal hearing was held on May 22, 23, 25 and June 5, 1979 before another hearing officer.[3] Following the hearing, attorneys for the District

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exclusive representative.

(d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

[3]This case has been reassigned under the authority of Cal. Admin. Code, tit. 8, sec. 32168(b).

and the Association filed a series of posthearing briefs and the matter was submitted on August 21, 1979.

FINDINGS OF FACT

The District is a kindergarten through eighth grade elementary school district located in northwest Orange County, California. It is comprised of 17 primary schools and 3 intermediate schools with a student enrollment of approximately 9,359.4 The Association is the exclusive representative of a negotiating unit of approximately 360 certificated employees, of whom 330 are classroom teachers.

A. Negotiations for a New Contract Begin and the Parties Discuss the Possibility of a Strike.

The District and the Association were parties to a collective bargaining agreement which covered the period of July 1977 through December 31, 1978. Just prior to the termination of their agreement, the parties commenced preparation for negotiations; and on November 20, 1978, they began bargaining for a successor agreement. Between November 20 and December 13, 1978, the parties met 13 times. However, no tentative agreements of any substance were reached.

The possibility of a strike was discussed by Dr. Ricketts, District superintendent, and Robert Mann, Association president. While no direct threats or confirmation of strike

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[4]This information was obtained from the 1979 Public School Directory, published by the California State Department of Education.

activity were expressed by the Association, on December 11, 1978 the Association sent out letters to substitutes requesting that they support a strike by withholding services. The District was aware of this letter and the board of trustees and its administration adopted certain policies and procedures known as policy 3030 which would provide for premium rates of pay for substitutes, require verification of absences, and affect Association rights.[5]

B. The Parties Declare Impasse and the Association Takes a Strike Vote.

On or about December 12, 1978, just prior to the beginning of the Christmas vacation, impasse was declared. A mediator was assigned and met with the parties in an attempt to resolve their dispute.

On Friday, January 5, the members of the Association voted to authorize Mr. Mann to call a strike. Mann announced to the media that he would not inform the District on what day he would call the strike. At the hearing, Mr. Mann reiterated that the Association's intent was to keep the District off balance, to keep it from being prepared.

On Monday, January 8, 17 of the 23 regular teachers at one of the intermediate schools were out. The absentee rate is

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[5]The record indicates that policy 3030 was adopted, in part, because the District was concerned about its ability to obtain substitute teachers. Huntington Beach Union High School District, which would draw upon the same pool of substitutes, was facing a strike at or about this same time.

generally 2 or 3 per day. The District's charge, as amended at the hearing, does not allege that the Association was responsible for this large absentee rate, and the Association does not admit any responsibility for it. However, upon learning of the situation at the intermediate school, Dr. Ricketts contacted Bar Kaelter, the assistant executive director of the West Orange County United Teachers, a regional association which handles negotiations and grievances for the Association and four other neighboring teacher associations. Dr. Ricketts advised Mr. Kaelter that he would implement policy 3030 unless the Association let the District know when it would be going on strike. Ricketts also stated that if the Association would tell the District when it was going on strike, he would wait until then to implement policy 3030. Mr. Kaelter remained noncommittal. Dr. Ricketts implemented the policy effective January 8.

The threat of a strike continually existed. In addition to the statements by Mr. Mann, Mr. Kaelter and William Bianchi, the executive director of the West Orange County United Teachers, the teachers by their conduct kept the District personnel in doubt as to when a strike might occur. Thus, employees would picket their schools in the morning, get in their cars, drive off, drive around the block, park, and then walk through the back door two or three minutes before school began. Similar conduct also occurred during lunch breaks.

On January 10, Dr. Ricketts received third-hand information that if no agreement was reached at that evening's mediation session, a strike would occur the next day. On January 11, teachers brought sack lunches to eat at various parks. At 12:30 p.m. there was a radio announcement that 80 percent of the teachers were on strike. They were not. A letter written the same day by one of the teachers and sent to many parents indicated that the teachers were prepared to go on strike. For all of these reasons, Dr. Ricketts anticipated a strike from moment to moment.[6]

C. The District's Offer to Bill Henry on January 10, 1979.

Mediation sessions were held on January 9 and 10, 1979. Prior to the January 10 session, the mediator spoke with the board of trustees and the District's negotiating team together. Afterwards, he asked Patricia Griggs, the District's chief negotiator, to come up with a new proposal.

The mediator then spoke with Mr. Bianchi and Bill Henry, a consultant to the Association's negotiating team. The mediator told them that he had asked the District to make a new offer, and that he had told the board what minimum movement would be

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[6]Ricketts kept policy 3030 in effect through January 15. However, on January 16, he rescinded the policy because the premium pay for the normal substitute coverage was too costly. The policy was reinstated for January 23, the day the teachers did strike.

required in order to avoid a strike. The mediator said to the Association representatives that he had told the District that if it did not come pretty close to the minimums he felt were necessary for movement towards a settlement, he would refuse to carry the proposal to the Association and that he would consider the Association's last proposal as the last offer on the table. The mediator told Mr. Bianchi and Mr. Henry that if he felt it was a substantial offer he would present it to the Association. But if he came to the Association's conference room and asked for either Mr. Henry or Mr. Kaelter to come out, that would be the signal that mediation was over for the evening. Then the three of them met with the other members of the Association's negotiating team and explained the procedure which would be used.

The mediator returned to the District's meeting room. Ms. Griggs verbalized an offer to him. The mediator stated that the offer would not settle the contract.[7] He told Ms. Griggs to put it in writing and give it directly to the Association.

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[7]The District's offer met the Association's demand on leaves of absence and noontime supervision and improved the previous offer on fringe benefits and sabbatical leaves although these two items did not meet Association demands. In all other respects, including binding arbitration, class size and salaries, the District's offer remained unchanged.

The mediator then went back to the Association's room and told the Association's representatives to go home. He returned to the District's room with Mr. Henry.

Mr. Henry stated to the District's representatives that the mediator had already told him about the proposal. In response to a question posed by David Larsen, the District's attorney and a member of its negotiating team, Mr. Henry acknowledged that he was an agent of the Association.

Ms. Griggs then prepared a written offer by making annotations on the District's offer of January 9. She gave Mr. Henry a copy of the proposal. Mr. Henry rolled it up and said, "As far as I'm concerned, I've never received this offer, and I'm not going to give it to WTA [Westminster Teachers Association]."

Mr. Henry had not given any indication prior to that moment that he would not consider the District's proposal to be a bona fide offer. Mr. Larsen said, "You told us you were the agent of WTA. As far as we're concerned you're their agent, you've received it, WTA has received it." Then Mr. Henry left the room with the mediator.

Later that evening, at the Association's offices, Mr. Henry told the other members of the Association's negotiating team that the mediator had asked him if he wanted to hear the District's offer as a professional courtesy.

Mr. Henry told his colleagues that it was not an official offer if he did not tell them about it, but it would be if he did tell them. Mr. Henry asked them if they wanted to receive an offer outside of the mediation process. Their response was "no," the mediator had instructed them that he did not want to carry the offer.

The Association was apprised of the contents of the District's offer the next morning, when the District distributed a letter in the teachers' mailboxes.

D. Association Representatives Speak at the January 18 Board Meeting.

A mediation session was held on January 16. Another session was scheduled for January 29. A public meeting of the board of trustees was held on January 18. Mr. Mann and Mr. Kaelter, as well as several other members of the public, spoke at that meeting. Mr. Mann was one of the first speakers. He said, in part:

> . . . We feel there is no reason why we can't settle our dispute right now, with or without the mediator. Teachers have to believe that you haven't heard our positions or you don't understand them. For example, ... Salary: We are asking for the 5-1/2 percent which was frozen in our last contract, and we realize we'll have to wait for the Supreme Court decision to see whether or not we will get it. Now, that's for this year. For next year the District has consistently told us that they don't expect any new monies from the state. We said "fine." We want a fair share of those new monies if you get them. We don't understand the problem with that proposal if

> the District's business people consistently tell us that you're not going to get more money. So, we'll take a chance. If you get no more new money, we don't expect to get very much of a raise. But if you do get increased monies from the state over and above the current level, we expect to get a fair cost-of-living increase. . . . We want to settle it. We want to settle it right now, but we want a fair agreement and we want to return to the table now. We're willing to do it with the Board tonight if that's possible. We want to settle the agreement, but we want a fair agreement.

The President of the Board of Trustees, Dewey Wiles, responded to Mr. Mann's remarks. He stated that the mediator had established the guidelines for setting a mediation date for January 29 and that the board of trustees had to follow those procedures.[8] Mr. Wiles responded to a subsequent speaker that he understood it would be a misdemeanor "if we try to negotiate outside that." He also said that the board had given directions pursuant to which the District's negotiating team was to operate and that the team understood those directions.

Sometime thereafter, Mr. Kaelter made his statement to the board. He said, in part:

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[8]NO evidence was presented at the hearing that the mediator had instructed the parties or even suggested that they not meet for direct face-to-face negotiations in his absence. However, the District's negotiating team emphatically told the Association's negotiating team at the outset of mediation that it would not meet with the Association without the mediator.

> The statement has been made by Mr. Wiles that under the provisions of the Educational Employment Relations Act we could not negotiate without the mediator. I would like to set the record straight. We can negotiate right now. We do not need a mediator. The mediator does not need to be present . . . . We believe that if we could sit down with the School Board or with the Board sitting in on negotiations, we could reach a settlement tonight. We're willing to meet tonight, tomorrow, Saturday, Sunday, anytime you're willing to meet. Meet with us and settle this.

Attorney Larsen responded to these comments by stating that the District felt it was incumbent upon it not to obstruct the mediator's efforts to help the parties reach a settlement.

E. The January 19 Mediation Session.

Following the January 18 board meeting, District negotiator Griggs called the mediator to see if the January 29 mediation date could be moved up. A mediation session was scheduled for Friday, January 19.

The Association's proposal on January 19 was the same as it had been on January 10. Based on Mr. Mann's statement relating to a contingency salary plan the previous night, the District felt that the Association was escalating its proposals.

After the parties met in separate rooms, the mediator held a conference with Mr. Bianchi, Mr. Kaelter, Ms. Griggs, and Mr. Larsen. The group discussed several issues, including the concept of a proposal which would make salaries contingent upon the receipt of certain state monies by the District.

Mr. Larsen stated that he was very concerned that the Association was holding onto so many major issues so late in the game of negotiations. He stated that if contingency language could settle the matter, they would go back and try to sell the concept to the board. He further stated that if contingency language would not settle the matter, the Association should tell him so that he would not waste his time or jeopardize his credibility with the board. The preponderance of the evidence establishes that the parties left the mediation session with the understanding that a good solid contingency formula for wages would settle the negotiations.

The District negotiators said that they did not know how the board would react to the concept and that they would meet with the board following the regular January 24 Board meeting. Mr. Bianchi and Mr. Kaelter said that the Association was receiving a great deal of pressure for some action and that they did not know whether they could hold their members back. They urged Mr. Larsen and Ms. Griggs to get feedback from the board prior to January 24.

Mr. Larsen responded that if there was a strike by the Association it would be extremely difficult to get the board to consider contingency language. He agreed to try to meet with the board prior to January 24.

F. The events of January 22, 1979.

The Association announced to its membership that the District would respond to the contingency proposal on January 24, 1979. By January 22, 1979, the teachers began to pressure the Association for an earlier response from the school board. Association President Mann asked Bill Bianchi to contact the District's attorney, David Larsen, in order to set up a meeting with the board earlier than Wednesday, January 24. Unbeknownst to Bianchi or Mann, Larsen had scheduled a meeting with the board to take place at 5:00 p.m. on January 22, 1979.

Pressed by Mr. Mann, Bianchi called Larsen's office to ask if he had been successful in meeting with the board. Larsen was unavailable at the time but did return the call at or about 4:00 p.m. Bianchi asked whether Larsen had met with the board and had any information to give them. Larsen replied that he had nothing to give them. Mr. Bianchi said that it was very, very important for Mr. Larsen to try to meet with the board because the Association did not know whether it could hold the teachers back from any kind of concerted activity. Mr. Larsen responded that if anything did happen, that "all bets were off." Larsen never mentioned that he would be meeting with the board at 5:00 p.m.

Mann was present while Bianchi was speaking with Larsen. When Bianchi concluded his conversation he indicated to Mann

that it appeared that the board would not be meeting until January 24. At or about this same time, a number of teachers came to the Association office and reported that the District board of trustees was in fact meeting right at the moment with attorney Larsen.

When Mann stated to the members in the Association office that the District would not be meeting until January 24, 1979, he was met with an irate response. The members responded, "What's up here? We know that the District and the board members and the attorney are meeting right now." One entire school faculty, frustrated by the confusion and chaos of mixed reports in the progress of negotiations, threatened to resign from the Association because the Association was not doing anything.

This loss of credibility plus the increasing pressure from the teachers as a result of their frustrations over negotiations and other incidents caused Mr. Mann to call a one-day strike for January 23, 1979.[9]

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[9]Specific causes mentioned by Mr. Mann of teacher frustrations since the beginning of the school year included: (1) the involuntary transfer of several teachers to special education teaching positions; (2) the District's requirement that teachers perform noon duty supervision, something which had not been required in several years; (3) the collecting of classroom keys by the District prior to Christmas vacation; (4) the District's refusal to agree to make the forthcoming arbitration decision on noon duty supervision binding; and (5) the reaction of some teachers, who felt that teachers had not been treated fairly at the January 18 board meeting.

G. The Teachers Strike for One Day on January 23, 1979 and the School Board Asks that the Mediator Certify the Matter for Factfinding"!

The Association did not give any advance warning about the strike. It did contact the media as early as 6:00 a.m. on January 23. Dr. Ricketts first learned of the strike at 7:30 a.m. In its contacts with the media, the Association represented that the strike was a one-day protest. Its leaflets carried the same message. At each school there was at least one picket sign which said that the strike was a one-day protest.

Notwithstanding all of this, Superintendent Ricketts testified that he did not become aware that the strike was only for one-day until he received a letter to that effect from Mr. Mann. The preponderance of the evidence establishes that Mr. Mann's secretary delivered this letter at approximately 11:00 a.m., to a District employee who works in the same building as Dr. Ricketts.

The teachers returned to the classroom on January 24. No evidence was presented at the hearing that the Association has threatened or engaged in any strike, work stoppage or slow down since January 23.

At the January 24 board meeting, the board directed chief negotiator Griggs to request the mediator to certify the parties to factfinding. The board had not made any decisions regarding contingency language when it met at Mr. Larsen's

office on January 22. As a result of the strike, the board's attitude was that there was no need to consider it further. It felt that the trust relationship had been destroyed and that the Association did not want to settle. However, the board made no effort to determine whether the Association was still interested in settling the dispute with contingency language.

On January 25, the mediator certified the matter for factfinding.

Based on these facts, the District contends the Association failed to negotiate and/or participate in mediation in good faith.[10]

H. The Association Charges that the District Unlawfully Required the Teachers to Distribute Material Concerning the Status of Negotiations.

The events relating to the Association's charge of unlawful conduct against the District occurred in mid-December 1978 and early January 1979. On December 15, 1978, teachers were asked to distribute to students in their classrooms a copy of a periodic District publication entitled "Challenge." On January 2, 1979, teachers were asked to distribute a letter to parents.

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[10]The record contains evidence relating to the District's claim for damages resulting from the strike. Because it is concluded that the District's claim must be dismissed, no findings with respect to damages are included in this decision.

Both of these documents were one page in length and were given to students for distribution to their parents. Both publications state that the parties are in mediation. The publications summarize the District's latest proposal on salary, health and welfare benefits, class size and length of the workday. The January 2 letter lists the Association's latest proposal on each of these above items. In both cases, the District characterizes the Association's proposals as "unreasonable demands which are not within the District's financial ability to meet."

In the past, the District has distributed some of its communications to parents by having teachers give the documents to their students to take home. These have included "Challenge," "The Board Review" and educational update articles written by the superintendent. The District utilizes this method of distribution because it saves mailing costs.

In 1977, when the parties were in mediation over their first contract negotiations under the EERA, the District similarly distributed communications relating to the status of negotiations. Those communications also set out the parties' proposals, the District maintaining that its proposals were fair, but not characterizing the Association's proposals as "unreasonable demands."

No objection was raised by the Association to the 1977 communications, because at the time they were distributed

negotiations were about to reach a successful conclusion. However, teachers had voiced concern to the Association at that time that the distributed material might be interpreted by some parents as the teachers' viewpoints. During the current round of negotiations, the president of the Association had received telephone calls from parents evidencing some confusion about the Association's negotiating positions.

The Association utilized various methods to communicate with parents, such as walking house-to-house, leafleting, telephone calls and mailings. It also established a strategy team to contact parents and enlist community support.

Based upon the above conduct, the Association contends that the District violated the EERA by requiring the teachers to distribute materials relating to the District's position in negotiations, thereby interfering with employees' rights to be free from coercion and restraint in their right to form, join and participate in the activities of an employee organization.

ISSUES

1. Whether the one-day strike which occurred during impasse mediation on January 23, 1979 is a per se violation of the EERA section 3543.6(d).

2. Whether the Association violated the EERA section 3543.6(c) and (d) by certain conduct related to

negotiations and mediation occurring between January 10 and 23, 1979, including a strike.

3. Whether the District violated section 3543.5(a) of the EERA by requiring teachers to distribute District communications about negotiations to their students to be taken home to their parents.

CONCLUSIONS OF LAW

A. A Strike by Employees During Impasse Mediation does not per se Constitute a Refusal to Participate in Impasse~Tn Good Faith.

The District alleges that the one-day strike by its employees on January 23, 1979 is per se a violation of section 3543.6(d) of the EERA. Section 3543.6(d) states that it is unlawful for an employee organization to "refuse to participate in good faith in the impasse procedure set forth in article 9 (commencing with section 3548)."

Article 9 of the EERA, which is entitled "Impasse Procedures," provides, either party "may declare that an impasse has been reached . . . in negotiations over matters within the scope of representation and can request that PERB appoint a mediator." If PERB determines that an impasse exists, it shall, within five working days, appoint a mediator who will meet with the parties either jointly or separately

and use any steps he deems appropriate to persuade the parties to resolve their differences. Nothing precludes the parties from agreeing to their own mediation procedure. (See Gov. Code section 3548.) As part of the impasse procedure of article 9, section 3548.1, section 3548.2 and section 3548.3 set out the procedures for submission of a dispute to factfinding if the mediator is unable to effect a settlement of the controversy within 15 days after his appointment and declares that factfinding is appropriate. Section 3548.4 provides, "Nothing in this article shall be construed to prohibit the mediator appointed pursuant to Section 3548 from continuing mediation efforts on the basis of the findings of fact and recommended terms of settlement made pursuant to Section 3548.3."

1. Strikes are not expressly outlawed by the EERA.

On its face, section 3543.6(d) does not make a strike an unfair practice. The language of that section speaks in terms of good faith participation in mediation. Further, nowhere in the EERA are strikes expressly stated to be an unfair practice. The numerous court of appeal decisions cited by respondent and by the Supreme Court in San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d[1] as holding that public employees have no right to strike, were generated

at a time when either the EERA had not yet become law[11] or arose in cases in which the employees and conduct in question were not covered by the provisions of the EERA.[12] Thus, court decisions which hold that strikes by public employees are illegal are not dispositive of the issue of whether strikes are unfair practices or otherwise unlawful under the EERA. Whether strikes by public employees are illegal under some interpretation of common law or statutory authority, they do not necessarily constitute an unfair practice under the EERA by virtue of this external illegality.

However, the EERA does not expressly sanction the right to strike by public employees. Put another way, this means that strikes by public employees are not expressly protected under

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[11]Pasadena Unified School District v. Pasadena Federation of Teachers (1977) 72 Cal.App.3d 100, 105, 114, 107 [140 Cal.Rptr. 41]; Los Angeles Unified School District v. United Teachers (1972) 24 Cal.App.3d 142, 145, 146 [100 Cal.Rptr. 806]; Trustees of Cal. State Colleges v. Local 1352 S. F. State, etc. Teachers (1970) 13 Cal.App.3d 863, 867 [92 Cal.Rptr. 134]; City of San Diego v. American Federation of State, etc. Employees (1970) 8 Cal.App.3d 308 [87 Cal.Rptr. 258]; Almond v. County of Sacramento (1969) 276 Cal.App.2d 32 [80 Cal.Rptr. 518]; cf. Los Angeles Met. Transit Authority v. Brotherhood of Railway Trainmen (1960) 54 Cal.2d 684, 687, 688 [8 Cal.Rptr. 1, 355 P.2d 905].

[12]Stationary Engineers Local 39 v. San Juan Suburban Water District (1979) 90 Cal.App.3d 796; City and County of San Francisco v. Evankovich (1977) 69 Cal.App.3d 41.

the provisions of the EERA.[13] Conduct which is not statutorily protected is not necessarily prohibited, and the strike in this case was purely an economic strike and not one originally protected because it was in support of independent unfair practices. (See footnote 9 at p. 15, supra.)

This analysis explains the language in section 3549 which provides that the enactment of the EERA shall not be construed as making section 923 of the Labor Code applicable to public school employees. By this statutory reservation, the Legislature merely expressed its desire not to extend to public employees the statutory protection of concerted activities guaranteed in the private sector by section 923 of the Labor Code.

2. The EERA Standard of "Good Faith" Derived From the NLRA.

Respondent herein argues that a strike by public school teachers during the statutory impasse process constitutes a per se violation of section 3543.6(d) as a refusal to participate in mediation in good faith. PERB in Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51, citing Sweetwater Union High School District (11/23/76) EERB Decision

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[13]See section 7 of the National Labor Relations Act in which employee concerted activities are protected. That section provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

No. 4, has held that the good faith requirement for purposes of negotiation found in the EERA may be analyzed by reference to interpretations of similar provisions of the National Labor Relations Act, as amended.[14] (See also PERB's recent decisions in San Mateo County Community College District (6/8/79) PERB Decision No. 94, at pp. 8-10 and fn. 8; San Francisco Community College District (10/12/79) PERB Decision No. 105 at p. 9; Davis Unified School District, et al. (2/22/80) PERB Decision No. 116.)

Under the NLRA, a duty is imposed on an employer and an employee organization to bargain in good faith. This duty is found by a combined reading of NLRA section 8(a)(5) or 8(b)(3) and section 8(d). (29 USC 158(a)(5); 29 USC 158(b)(3) and 29 USC 158(d). In reference to those sections, it is concluded that all aspects of negotiations in the private sector are covered by the requirement of good faith. Therefore, section 8(d) of the NLRA applies not merely to negotiations at the bargaining table but to the extension of those negotiations through voluntary mediation and up to the reduction to writing of a collective bargaining agreement.

In enacting the separate sections of the EERA which require an employer and an employee organization to participate in both

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[14]The National Labor Relations Act, as amended, is found at 29 USC 151 et seq. (hereafter referred to as NLRA).

negotiations and the mandated impasse procedures in good faith, it appears that the California Legislature was adopting the National Labor Relations Act's standard for good faith and expressly making it applicable to the impasse procedures in the public sector. Under the EERA, impasse has been expressly carved out as a procedure which the parties in negotiations should follow rather than as a culmination of bargaining where the parties need go no farther.[15] Thus, it is concluded that the NLRA definition of good faith covers the negotiations and mediation as well as factfinding in the EERA. This being so, it is fair to turn to the federal standards for good faith and as applied by PERB to bargaining in order to ascertain the meaning of participation in mediation in good faith.

3. The Per Se Refusal to Bargain in Good Faith.

Ordinarily, a refusal to bargain in good faith is proved by objective evidence of the state of mind of the party alleged to be unlawfully refusing to bargain. However, PERB in consonance with the United States Supreme Court has found that certain

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[15]Under the NLRA, the parties may be still in the negotiations process utilizing the services of a mediator because they have not yet reached a point where there is nothing further to talk about. Impasse under the EERA merely envisions a breakdown of negotiations. Compare definition of impasse at 3540.1(f) which states in part:

> "Impasse" means a point in meeting and negotiating at which . . . differences in positions are so substantial or prolonged that future meetings would be futile.

conduct is so inherently destructive of the bargaining relationship and so clearly constitutes a refusal to negotiate that it is per se a violation of the obligation to confer in good faith without regard to proof of state of mind.

Thus, PERB has followed NLRB v. Katz where the Supreme Court upheld an NLRB decision that an employer's unilateral change in conditions of employment within the scope of representation prior to the conclusion of bargaining was a per se refusal to bargain over those matters which were unilaterally changed. Without regard to whether the employer had a desire to reach an overall agreement with the union, the Supreme Court in Katz held that the unilateral action by the employer changing existing terms and conditions of employment was "in fact" a refusal to negotiate as to those matters. The Court refused to look at any evidence concerning the employer's subjective good faith. (See NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177, 2180]; cf. similar holdings of PERB in San Mateo County Community College, supra, PERB Decision No. 94 at pp. 12-14; San Francisco Community College District, supra, PERB Decision No. 105; Davis Unified School District, et al., supra, PERB Decision No. 116.)

On the other hand, the Supreme Court and the NLRB have never found that a strike by employees during negotiations constitutes a refusal to confer in good faith. Indeed, the express question was raised with the Supreme Court in NLRB v.

Insurance Agents International Union (1960) 361 U.S. 477. There, the NLRB concluded that certain conduct by the union involving strike tactics which allegedly were not traditionally appropriate, constituted bad faith on the part of the union in participating in the negotiation process. The Supreme Court rejected this argument, holding that such conduct external to negotiations did not indicate bad faith on the part of the association and the Court and the board ought not involve themselves in the quality of the association's economic activity. However, Insurance Agents was decided under NLRA which protects concerted activities and, as such, does not help the inquiry in this case.

In this case, the District argues that the Supreme Court in Teachers Association v. Superior Court, supra, concluded that a strike prior to the exhaustion of impasse was outlawed in order that the parties could exhaust the impasse procedures before taking economic action. This interpretation is not unreasonable based upon certain language in the Supreme Court's decision in San Diego, supra. There, the court said:

> An unfair practice consisting of, "refus[al] to participate in good faith in the impasse procedure" (section 3543.6, subd, (d)) could be evidenced by a strike that otherwise was legal . . . .
>
> The impasse procedures almost certainly were included in the EERA for the purpose of heading off strikes. (Citation omitted.)

> Since they [impasse procedures] assume deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in impasse procedures in good faith and thus an unfair practice under section 3543.6 subd. (d). (24 Cal.3d, at 8-9.)

On the other hand, it can equally be argued that if the Legislature had meant to outlaw strikes until the conclusion of impasse, it would have expressly said so. Instead, the Legislature merely adopted the same language found in the NLRA regarding good faith and made it applicable to EERA impasse procedures. The Supreme Court's decision is inconclusive in terms of whether a strike prior to the conclusion of impasse is per se a violation of the obligation to participate in mediation. Indeed, were one to conclude that a strike is per se a violation of 3543.6(d), one would be left with the ambiguity in the Supreme Court's decision which seems to indicate that a strike is not per se a refusal to negotiate or a violation of 3543.6(c). (San Diego Teachers Association v. Superior Court, supra, 24 Cal.3d, at p. 8) Thus, it is hard to understand how the court could conclude on the one hand that a refusal to bargain in good faith would be based upon an analysis of "genuine desire to reach agreement . . . " and a failure to participate in impasse, which must necessarily encompass the obligation to bargain, would be evidenced merely by a strike prior to the completion of impasse procedures. *(Id_.)* If in fact it is a per se violation of 3543.6(d) to

strike prior to the exhaustion of impasse procedures, it must necessarily be a per se violation of 3543.6(c) since a strike during negotiation would equally be a strike prior to the exhaustion of the impasse procedures.[16]

Thus while a strike may be strong evidence of bad faith participation in impasse procedures because of its obstructive quality, there is no reason to conclude that a strike itself prior to completion of impasse is so inherently destructive of the mediation process that it must in fact constitute a refusal to bargain without further analysis of the subjective intentions of the alleged wrongdoer.

It is concluded that a strike by public school employees is not per se a violation of section 3543.6(d). (Cf. PERB's decision in Modesto City Schools (3/10/80) PERB Decision No. IR-11; Modesto City Schools (3/12/80) PERB Decision No. IR-12, at pp. 2-3; San Francisco Unified School District (10/29/79) PERB Decision No. IR-10.)

B. The Strike as Strong Evidence of Association Bad Faith in Negotiations or Mediation.

Although it has been concluded above that a strike is not per se a violation of section 3543.6(d), the question remains open whether a strike prior to the exhaustion of statutory impasse procedures, in this case, established that the

[16]The District does not contend that the strike in this case is a per se violation of section 3543.6(c).

Association was motivated by bad faith in fulfilling its statutory obligation to negotiate and/or mediate the contractual dispute. In order to resolve this question, one must look at the specific facts in this case. (Contrast NLRB v. Insurance Agents, supra.)

While it is tempting to conclude that the strike caused the District to abandon mediation and move to the next statutory procedure of factfinding, such an analysis would be erroneous. The conduct of one party in negotiations in reacting to the conduct of another cannot be dispositive of the motivation of the party alleged to be acting in bad faith. Indeed, in this case the District had the option of responding to the one-day strike by giving the union the meaningful counterproposal which the mediator and the union had been demanding for several days prior to that time. Alternatively, the District had the option to give the union some signal that it was going to meaningfully consider a counterproposal. Instead, the District chose in reprisal for the strike to indicate that it would no longer participate in mediation and urged that the parties go to factfinding.[17]

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[17]It should be noted here that the District is not being charged with a violation of 3543.5(c) or (e) of the EERA. However, a question is raised as to whether a response such as was given here is in fact evidence of bad faith on the part of the employer itself.

Thus, having concluded that the employer's response in this matter is not indicative of the Association's bad faith, one must look at the Association's conduct in mediation to determine whether the one-day strike on January 23, 1979 can be an objective manifestation of subjective bad faith. (See Placentia Fire Fighters v. City of Placentia (1976) 57 Cal.App.3d 9, 25.) It is concluded that, apart from the additional allegations of Association misconduct discussed below, the strike on January 23, in the context of the Association's negotiating activity in mediation, does not indicate bad faith.

The facts in this case reveal that the Association and the District negotiated 13 times between November 20 and December 12, 1978. The parties agreed that the matter should be referred to a mediator, and the Association at no time avoided its obligation to participate in mediation sessions. Throughout the mediation sessions, the Association sought to elicit from the employer a response to its proposal which would be meaningful in terms of salary and fringe benefits. Indeed, the Association had acknowledged the employer's difficulty in predicting its finances with the uncertainties created by Proposition 13 and the need for cooperation. The Association agreed that it would compromise and asked the District only to consider a contingency formula for salaries.

The District was asked to respond within a reasonable amount of time. When asked as to what the District was doing in response to the Association's request, the District negotiators did not reveal that they were in fact meeting at the very time when the Association was pressing the District for an answer to its requested proposal in mediation. When the District's representative gave the Association a vague and ostensibly inconsistent answer to the question whether the board was meeting to consider the contingency salary proposal, the Association determined that a one-day strike would indicate the seriousness with which it was making its proposals in mediation. The fact that mediation did not continue following the strike was not in any way the fault of the Association but, rather, the District's choice to move the process into factfinding.

The Association, on the other hand, participated in factfinding. At no time following the strike on January 23 did the Association, by its conduct, manifest an intention to disrupt the impasse proceedings.

It is, therefore, concluded that the strike on January 23 in and of itself does not indicate the Association's bad faith in participation in the impasse procedures. Rather, it was the Association's intent by its conduct to move the District quickly to respond to its request to come up with a moderate formula which would reflect both the District's concerns as to

its fiscal uncertainty and the employees' desires to have a wage package finalized. The strike, in this case, does not indicate a lack of desire to participate in impasse procedures. (Placentia Fire Fighters v. City of Placentia, supra.)

C. Totality of the Union's Conduct during Negotiations and Impasse does not Indicate that the Union Violated Section 3543.6(c) or (d).

Under the NLRA, the courts have looked to the totality of a party's conduct in negotiations to determine whether on balance that party was participating in negotiations in good faith. The totality of the conduct again involves an analysis of a party's objective conduct which would reveal subjective good or bad faith. This concept of the totality of the conduct is not unlike the analysis which would occur in a charge of surface bargaining. (Cf. NLRB v. Virginia Electric & Power Co. (1941) 314 U.S. 469 [9 LRRM 405]; Rhodes-Holland Chevrolet Co. (1964) 146 NLRB 1304, 1305 [56 LRRM 1058]; see also Morris, Developing Labor Law (1971 ed.) p. 287.)

As has been observed above, bad faith in negotiations and bad faith participation in impasse should be viewed by the same test. While the charge here alleges both bad faith of the Association in negotiations as well as participation in

impasse, the conduct remains identical and the analysis purposes of this section will be the same.[18]

The District alleges four independent acts by the Association which allegedly establish the bad faith of this entity in bargaining and impasse. First, the District alleges that the conduct of Association representative Bill Henry, in refusing to take back an offer, was evidence of bad faith. Second, the District alleges that the Association addressed the board on January 18 in an attempt to circumvent the District's negotiators. Third, the District alleges that the Association's proposal on January 19 constituted demands greater than those of January 18 and, therefore, indicated bad faith. Fourth, the strike on January 23, when added to these other events, indicated a course of conduct upon which it could be concluded that the Association participated in negotiations and/or impasse in bad faith. Each of these arguments will be dealt with briefly below.

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[18]Also relevant in this analysis is the PERB test for surface bargaining which has been set forth in the Muroc Unified School District (12/15/78) PERB Decision No. 80. There PERB held: "It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is Weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (Footnote omitted.) Specific conduct of the charged party, which when viewed in isolation may be wholly proper, may, when placed in the narrative history of negotiations, support a conclusion that the charged party was not negotiating with the requisite subjective intent to reach agreement. (Footnote omitted.) Such Behavior is the antithesis of negotiating in good faith."

1. The Failure to Carry Back the District's Proposal (Given Directly to a Union Representative.

The record indicates, without question, that Bill Henry was an agent of the Association. Further, the record shows that during mediation, certain understandings were reached with the mediator to indicate to the parties, by signal or otherwise, the nature of the proposals which would be carried from the District to the Association on January 10. (See Gov. Code, section 3548 et seq.) The record seems to bear uncontradicted evidence which shows that the mediator was looking for a settlement of the entire agreement. The mediator indicated that if such an offer was not forthcoming, he would ask to speak to only one of the Association representatives which would be a signal for the rest of the team to go home and end mediation for the evening.

On the evening of January 10, the mediator received a partial offer from the District, went to the room in which Association representatives were waiting and indicated that they could leave. No offer was transmitted to any of the Association team. Rather, the mediator determined Bill Henry should go to the District's room and receive an offer by the District. Based upon the signals and discussions which occurred before, Henry determined that the offer was not being made to the entire negotiating team.

Whether Henry incorrectly decided not to transmit this offer to the negotiating team, the totality of the conduct of the Association at this time would indicate that Henry was not trying to obstruct the negotiations or the mediator's progress. It appears that what the mediator was doing was permitting the District to make its partial offer to Henry. When viewed in context, the fact that Henry did not respond to the offer nor transmit it to the Association does not indicate an intent to obstruct the negotiation or the mediation process. The failure to transmit the proposal was consistent with the prearranged understanding. The Association continued to press for a total resolution of the agreement and there is no indication that the Association, by its conduct, intended to abandon the bargaining table and resort to some unlawful means of bringing the contractual negotiations or mediation to an end. The subsequent conduct of the Association in requesting additional meetings and seeking a meaningful proposal to its concerns over salaries would indicate that it was trying to elicit from the District some positive response in negotiations.

2. The Address to the Board on January 18, 1979.

The District contends that the Association representatives' address to the board on January 18, 1979 was an attempt to circumvent the District's negotiators and to negotiate directly with the board of trustees. While it is

true that it may be unlawful to attempt to force one party to abandon its chosen negotiator and/or to circumvent the authority given to that negotiator, the record in this case does not support these allegations of wrongdoing.

\ It is found that neither Association representative; Mann nor Kaelter, manifested any intention or by their conduct acted to bypass the District's negotiating team and to negotiate directly with the board of trustees. The allegation that the Association presented a new salary proposal to the District at the January 18 meeting is not supported by the evidence. Rather, as Association president Mann testified, he was merely summarizing the Association's most recent contract proposal as of January 10. The record supports Mann's testimony. Thus, his statement about a 5-1/2 percent increase corresponds to sections of the Association's earlier proposal. His remaining statements are all consistent with the Association's position as of January 10. Further, Mann clearly indicated that his statement to the board was a reiteration of previous positions. Thus, he stated to the board, "Teachers have to believe that you haven't heard our positions or that you don't understand them . . . ." A review of his statements to the board indicates that they are too general to be realistically considered an offer. Thus, it is concluded that Mann was not making a proposal to the board on salaries. Rather, he was trying to enlist board support

and educate the members as to the Association's position in negotiations.

While it is found that Mann by his statements was seeking to have the board become directly involved in negotiations and the mediation process, this was not designed to obstruct the progress of the parties or to circumvent the board's designated negotiating authority. Rather, the record shows that in 1977, board members became involved in negotiations and significant progress was made once they became part of the process. The record shows that Mann was indeed hopeful that Such participation would again be helpful in resolving the current contract dispute. It is thus found that when Mann stated, "There is no reason why we cannot settle now with or without mediation," he was not suggesting that the board forego mediation but rather asking the board to participate in negotiations even at that very time.

It is found that Kaelter's statement to the board that, "We do not need a mediator," was directly aimed at refuting the board president's statement that it was legally necessary to use the mediator. Kaelter was merely stating that a mediator was a vehicle for resolving the dispute. Kaelter emphasized that the mediator should not be an obstacle to the parties reaching an agreement themselves. Indeed, Kaelter reiterated Mann's plea for the board to become involved through mediation.

While it might be argued Mann and Kaelter were urging the board to avoid using the mediator since the next session for mediation was not until January 29, 1979, it is doubtful that this request can be viewed as an attempt to bypass mediation. Rather, the request was an attempt to accelerate the process of mediation. (See Gov. Code, section 3548.)

Lastly, school boards which are accessible only through public meetings must be held to expect and openly invite addresses by their employees and their representatives who are also members of the public. There can be no limitation on the public's right to be heard based upon the fact that the parties are in negotiations. The statements to the board at a public meeting require no response by the board and cannot be viewed as a substitute for the give and take of negotiations.

Thus, it is found that the address to the board on January 18 was not at all inconsistent with good faith motivation of the Association to bring their controversy to a successful resolution as quickly as possible by urging the parties and the principals to move in a direction of a viable settlement. In this regard, it is noted that the statements to the board were successful in moving the mediation session from January 29 to January 18. It is hard to understand how this conduct could in any way be construed as circumvention of the mediation process.

3. The January 19 Mediation Session.

The District further contends that the Association exhibited bad faith by accelerating its demands on January 19 from the position taken before the board on January 18. As found above, the Association was not stating a negotiating position to the board in the form of a concrete proposal. Rather, the Association's address to the board on January 18 was merely a summary of the employees' negotiating position coupled with an attempt to demonstrate to the board that the Association was not taking a hard-line approach in its request for a salary increase. The statements to the board viewed in context were an attempt to show board members where the employees might be flexible in their demands. At the formal mediation session, the Association merely returned to the table with its last proposal made in mediation on January 10. While the District's negotiators may have construed the restatement of the January 10 proposal as an acceleration of the position taken by Mann before the board of trustees, the finding that Mann's statements to the board were not in fact a proposal but merely a statement of flexibility refutes this theory of the District.

4. The January 23, 1979 Strike.

As discussed above, the strike on January 23, 1979 does not, in and of itself, indicate objective evidence of subjective bad faith on the part of the Association. (See

(pages 30-33, supra;). Thus, the strike can only be evidence of bad faith in violation of EERA section 3543.6(c) or (d) if, when viewed in totality, the conduct demonstrates an unwillingness to meaningfully participate in negotiations and/or mediation.

5. The Totality of the Conduct.

The four instances of alleged refusal to negotiate or participate in impasse reviewed above fail to indicate severally or together subjective bad faith on the part of the Association. Rather, when analyzed in context, the four incidents indicate that the Association was attempting to elicit from the District, either through its board, its negotiators, or the mediator, a response to its compromise positions. The Association was at all times attempting to move the parties to a resolution of a dispute and to reach an agreement and, as such, it is found that each of these acts was designed to advance the parties in mediation, impasse and the attendant negotiations. On the basis of the discussion above, it is found that the Association in the totality of its conduct exhibited an intent to reach agreement and conclude negotiations and impasse consistent with its statutory obligations. Therefore, the charge of the District that the Association violated section 3543.6(d) by calling a strike on January 23, 1979 and/or violated section 3543.6(c) or (d) of

the EERA by the totality of its conduct, including the strike on January 23, 1979, should be dismissed.

D. The Charge that the District Violated 3543.5(a) by Requiring Teachers to Distribute to Parents via their Students Certain Materials Relating to Negotiations.

Section 3543.5(a) of the EERA states in relevant part that it shall be unlawful for a public school employer to:

> impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

Section 3543 of the EERA spells out the rights of employees. That section states in relevant part:

> Public school employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall have the right to refuse to join or participate in the activities of employee organizations . . . .

Charging party alleges that the District unlawfully coerced or otherwise infringed upon rights of employees protected by the EERA when it required teachers to distribute via their students certain materials to be carried to the parents of those students. The thrust of the Association's argument is that by requiring teachers to distribute materials relating to negotiations against their will, the District forced the employees to work against their own union, to hand

out anti-union letters and to create the impression that they were in favor of the District's proposal. Such conduct would allegedly infringe upon the right of employees to be free of employer coercion in participating in an employee organization.

The record in this case indicates that on two occasions, December 15, 1978 and January 2, 1979, the teachers were required to distribute two single-page documents from the district to parents via their students. The documents essentially set forth the position of the Association and the District in negotiations and were designed to inform the parents of the status of negotiations at that time. Nothing in the communications indicated that the Association endorsed the position of the District. Nor would these documents lead one to reasonably believe that the teachers distributing them were in some fashion working against the interests of the Association or the position which it was taking in bargaining.

The Association did show that in the past, some inquiries from the parents of students raised question as to whether the teachers by distributing such materials were in fact endorsing the District's position. On the other hand, there is no showing that even if the parents did believe that the teachers were distributing these materials in support of the District, that would have any impact on the outcome of negotiations or the diminished strength of the Association and its members in

maintaining their bargaining demands.[19] (Compare and contrast, Allied Aviation Service Co. (1980) 248 NLRB No. 26 [103 LRRM 1454]; Community Hospital of Roanoke Valley (1975) 220 NLRB 217, 220 [90 LRRM 1440] enfd. (4th Cir. 1976) 538 F.2d 607 [92 LRRM 3158].)

Thus, it is concluded that, at worst, the requirement that the teachers distribute the letters in question resulted in only slight harm to employee rights guaranteed under the EERA.

PERB has announced that in determining violations of section 3543.5(a) of the EERA, "a single test shall be applicable in all instances." (See Oceanside-Carlsbad Federation of Teachers, Local 1344, CFT/AFT v. Carlsbad Unified School District (1/30/79) PERB Decision No. 89.) The Board's test set forth in Oceanside-Carlsbad requires an analysis of the degree to which employee rights have been harmed, if any, and an analysis of the employer's justification for the conduct. PERB has stated that:

> [W]here the harm to the employees' rights is slight and the employer offers justification

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[19]That is not to say that in a different factual situation, public support in the face of an economic strike and/or contract proposal would not have an impact upon the eventual outcome of negotiations. Rather, on the facts of this case, there is no showing that even were the parents to have believed the teachers agreed with the District's position that it would have made any difference in the outcome of negotiations or employees' rights to be represented by or participate in a labor organization.

> based on operational necessity, the competing interests of the employer and the rights of employees will be balanced and the charge resolved accordingly.

(Oceanside-Carlsbad Federation of Teachers v. Oceanside Unified School District, supra, PERB Decision No. 89 at pp. 10-11.)[20]

As discussed above, the harm to employee rights to participate in their employee organization is only slight. On the other hand, the employer has shown a history of utilizing the teachers as a conduit for distributing materials to parents via their students. The District argues that to mail directly to parents, although feasible, is costly. The District further argues that in asking the teachers to be the conduit for the distribution of District materials, this is no different than the teachers utilizing the District mail system as a conduit for distribution of organizational materials. (See Richmond Unified School District (8/1/79) PERB Decision No. 99.)

The argument of the District that the teachers' distribution of materials is parallel to the use of the District's mail system is rejected here. The Board in

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[20]The cases relied upon by the Association in support of the alleged wrongdoing are not relevant and are not helpful in resolving this issue. (See John Swett School District (12/29/78) Proposed Decision SF-CE-53; Didde-Glaser, Inc. (1977) 233 NLRB No. 115 [97 LRRM 1089, 1090].)

deciding Richmond, supra, there found that use of the district's mail system was a part of the statutory right given to employee organizations to reach their members by other means of communication. (See Richmond Unified School District, supra, at p. 10-13.) In this case, there is no commensurate right granted to districts to utilize employees for distribution of district materials. Therefore, the District can only prevail if it shows a business justification.

However, it is found, on the facts of this case, there is sufficient justification on the part of the District as balanced against the minimal injury to employee rights to justify the District's conduct in this case. The cost of mailing coupled with a past practice of District communication with parents by means of teacher distributions to their students constitute sufficient justification to outweigh the slight harm which employees might sustain by virtue of the possibility that parents would misconstrue their conduct as antithetical to their Association. It is therefore concluded that the charge of violation of section 3543.5(a) of the District should be dismissed.

PROPOSED ORDER

Based upon the findings of fact and the conclusions of law and the entire record of this case:

1. The unfair practice charges filed by Westminster School District against the Westminster Teachers Association

alleging violations of Government Code section 3543.6(d) and (c) are hereby DISMISSED;

2. The unfair practice charge filed by Westminster Teachers Association against Westminster School District alleging violation of Government Code section 3543.5(a) is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 4, 1980 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. The statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on June 4, 1980 in order to be timely filed. (See California Administrative Code, title 8, part III, section 32135.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. (See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

Dated: May 15 , 1980

Stephen H. Naiman
Hearing Officer