STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HUNTINGTON BEACH ELEMENTARY TEACHERS ASSOCIATION,	)	
Charging Party,	)	Case No. LA-CE-2528
v.	)	PERB Decision No. 672
HUNTINGTON BEACH CITY SCHOOL DISTRICT,	)	June 7, 1988
Respondent.	)	

Appearance; Robert E. Lindquist, Attorney, California Teachers Association, for Huntington District Teachers Association.

Before Hesse, Chairperson; Porter and Shank, Members.

DECISION

HESSE, Chairperson: Charging party, Huntington Beach Elementary Teachers Association, appeals the Public Employment Relations Board (Board) agent's partial dismissal, attached hereto, of its charge alleging that respondent, Huntington Beach City School District, by joining the Orange County Fringe Benefits Joint Powers Authority (JPA), made certain unilateral changes in health insurance benefits in violation of sections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA).[1]

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 provides, in pertinent part, as follows:

> It shall be unlawful for a public school employer to:

Specifically, charging party appeals the dismissal of paragraphs 10, 11, 17, and 18 of its amended charge which, in essence, alleges the following:

Paragraph 10: As a consequence of joining the JPA, respondent "affected a material and significant change in the [total] amount of compensation received by the members of the bargaining unit in the form of health and welfare benefits" since:

a. The total amount of compensation provided became subject to a "non-negotiable cost assessment unilaterally established by the Unilateral Insurer."

b. The premium price and duration of insurance plans became subject to adjustment by the JPA.

c. The penalties or disincentives for a change in insurer "substantially increase[d] the cost to the union for, or place[d] significant constraints on, bargaining any change in health or welfare benefits which entails a change in insurer."

d. The basis for determining increases in premium prices changed.

(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.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

e. A foreseeable change in the amount of premium costs has occurred.

Paragraph 11: As a consequence of joining the JPA, respondent "effected a material and significant change in the amount of the contribution individual bargaining unit members must make to ensure continued eligibility for health and welfare benefits."

Paragraphs 17 and 18: Respondent attempted to "derogate and undermine [charging party's] authority [as] exclusive bargaining representative by unilaterally implementing its bargaining position on health and welfare benefits."

We have reviewed the partial dismissal and adopt that portion of the regional attorney's analysis which dismisses the allegations contained in paragraphs 10, 17, and 18 of the amended charge. As to paragraph 11 of said charge, we disagree with the regional attorney's conclusion.

For the purposes of determining the existence of a prima facie case, the essential facts alleged by the charging party are deemed true. (San Juan Unified School District (1977) PERB Decision No. 12.) On its face, paragraph 11 of the charge alleges that respondent changed the amount individual bargaining unit members must contribute to ensure continued eligibility for health and welfare coverage. We view this as more than speculative or merely an "alternate theory" as construed by the regional attorney. Rather, charging party has depicted an actual change that has happened which is alleged to

have a material and significant impact on bargaining unit employees. (Trinidad Union Elementary School District and Peninsula Union School District (1987) PERB Decision No. 629.) We find a prima facie case has been alleged, requiring this issue to be litigated. Therefore, we reverse the dismissal of paragraph 11 of the amended charge and order that the partial complaint already issued be amended to include this allegation.

ORDER

Based upon the foregoing, the Board hereby DISMISSES paragraphs 10, 17, and 18 of the amended charge, and ORDERS that the General Counsel incorporate paragraph 11 of the charge into the complaint already issued.

Members Porter and Shank joined in this Decision.

STATE Of CALIFORNIA GEORGE DEUKMEJIAN, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
LOS ANGELES REGIONAL OFFICE
3470 WILSHIRE •LVD., SUITE 1001
LOS ANGELES. CALIFORNIA 90010
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October 15, 1987

Robert Lindquist, Attorney
California Teachers Association
Post Office Box 92888
Los Angeles, CA 90009

Re: LA-CE-2528, Huntington Beach Elementary Teachers Association v. Huntington Beach City School District

Dear Mr. Lindquist:

In the above-referenced charge as originally filed, the Huntington Beach Elementary Teachers Association (Association) alleges that the Huntington Beach City School District (District) made a unilateral change in health insurance benefits by joining the Orange County Fringe Benefits Joint Powers Authority (JPA or Authority). This action was alleged to be a violation of Educational Employment Relations Act (EERA) sections 3543.5 (a), (b), and (c).

I indicated to you in my attached letter dated August 26, 1987 that the parties of the above-referenced charge did not state a prima facie case. You were advised that if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge accordingly. You were also invited to submit any legal argument. You were further advised that unless you amended the charge to state a prima facie case, or withdrew it prior to September 1, 1987, the noted portions of the charge would be dismissed.

The time within which to file an amended charge was extended to September 8, 1987. On September 9, 1987 an amended charge was received, alleging violations of EERA sections 3543.5 (a), (b), (c), and (d).

For the reasons which follow, the following allegations of the amended charge will be dismissed: Paragraphs 10, 11, 17, and 18. The allegations in paragraphs 15 and 16 have been withdrawn. Under separate cover today a complaint has issued alleging that the District's action of joining the JPA was an unlawful unilateral change because it resulted in a change in benefits and resulted in a significantly less reliable insurer.

PARAGRAPHS 10 AND 11:

Paragraph 10 (a) - Compensation in the form of health and welfare benefits:

The collective bargaining agreement provided for 1986-87 that

the District would provide fully paid employee health insurance and 75 percent of the cost of dependent coverage. It is not alleged that during the 1986-87 year the employees were required to make a contribution toward the cost of their health insurance or that the amount of employee contribution for dependent coverage increased when the District joined the JPA., as a result of the District joining the JPA.

This allegation merely restates the allegation in paragraph 11 (1) and (5) of the original charge. The allegation, as made in the amended charge and the original charge, is that the JPA, rather than the District sets the cost assessment for health and welfare benefits and therefore, the District will no longer negotiate with the Association about the amount of compensation to be provided for members of the bargaining unit in the form of health and welfare benefits.

The JPA does set the contribution rate for the District to receive health insurance coverage through the JPA. It does not necessarily follow, however, that the District must then pass on any increase assessed by the JPA to employees, or _a fortiori_, that it must do so without fulfilling its obligation to bargain with the Association. Faced with an increased contribution rate from the JPA for continued health insurance, the District can assume the increased costs; it can bargain to impasse with the Association about increasing the amount of employee contribution toward health; or it can withdraw from the JPA and seek other means of providing the bargained-for health insurance to employees.[1]

If the result of bargaining is that no increased costs can be passed on to employees and if the District doesn't wish to assume those costs, again the District can leave the JPA. It is simply _not_ an automatic consequence of an increase in the contribution rate by the JPA that the District will change the amount of compensation provided to employees in the form of

[1]The discussion in this paragraph assumes that the status quo in health insurance in the District is that employees receive health insurance without making any contribution for those benefits. An argument could be made, of course, based on the contract language, that the status quo is that the District only contributes up to the ceiling amount in the agreement, and after that the employees pay the costs of health insurance. If that were the status quo, however, to change employee contributions for health insurance would not be an unlawful unilateral action because it would not alter the status quo.

health and welfare benefits. As the Board stated in Trinidad Union Elementary School District/Peninsula Union School District (1987) PERB Decision No. 629, there must be some cogent evidence that changes have happened or will happen, which have significantly changed or will significantly change employee benefits. The fact that the JPA sets the contribution rates for insurance is not such evidence.

For these reasons and for the reasons stated in my August 26, letter relating to paragraph 11(1) and (5) of the original charge, the allegation in paragraph 10(a) of the amended charge is dismissed.

PARAGRAPH 10(b) - Premium Price and Plan Duration[2]

This allegation is also similar to those contained in paragraph 11(1) and (5) of the original charge. It adds the element of the duration of the health insurance plan, but other than that addition, it merely applies the same logic and requires the same level of speculation about how the District will respond to a change in the contribution rate by the JPA, as noted above under Paragraph 10(a).

Nor does the fact that JPA can change the premium cost at any time, or even adjust it retroactively, change the fact that the District is not required to remain in the JPA, nor is it required to unilaterally change employee contribution for health insurance even if the JPA does change the District's contribution rate to the JPA.

You argue in your October 7, 1987 letter that joining the JPA has resulted in actual changes in insurance plan duration, and that other changes are reasonably foreseeable as a result of that action. Insofar as the alleged actual and reasonably foreseeable changes relate to the cost of insurance, or other costs to the employer (whether during or after membership in the JPA), they do not form an adequate basis for a prima facie unilateral change case for the reasons stated at p. 4 of this letter, supra. Insofar as the allegations in paragraph 10(b)

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[2]You allege that the premium amount the employer pays for health insurance is a matter within scope.

The discussion of the Board's decision in Plumas, at page 5 of this letter, infra, however, demonstrates that a change in premium amount (i.e. , employer costs for health insurance) without more, is not an unlawful unilateral change.

are intended to state that the employees in the bargaining unit enjoyed the benefits of a "legally enforceable" contract of insurance prior to joining the JPA, and do not enjoy such benefits after the District joined the JPA, they do not state a prima facie case under the Board's rationale in Plumas and Trinidad, supra. In those cases the Board held that self-funding of employee insurance (whether directly or through a JPA) is not, without more, an unlawful unilateral change. Inherent in any self-funding of health insurance is the elimination of the contractual obligation of the prior insurance carrier, at least up to the stop loss amount. And those were the facts before the Board in both Trinidad and Plumas, based upon which there was found to be no unlawful unilateral change.

For these reasons, and the ones stated in my August 26 letter, in response to paragraph 11(1) and (5) of the original charge, the allegation in paragraph 10(b) is dismissed.

PARAGRAPH 10(c) - Penalty for Change in Insurer

This allegation is similar to the one contained in paragraph 11(4) of the original charge.
It alleges that as a result of joining the JPA various disincentives or penalties exist to bargaining a change in the insurer. You urge that these potential cost items are such as to "increase the cost to the Union for, or place significant constraints on, bargaining any change in health or welfare benefits which entails a change in insurer." (Amended Charge page 8, lines 4-6.) Even if one assumes the existence of each of the alleged disincentives or penalties, this allegation does not state a prima facie case. During the course of our discussions about these allegations, I pointed out that any penalties for or financial disincentives to withdrawing from the JPA prior to three years do not necessarily imply that faced with such penalties, the District will bargain in bad faith, or that the District will bargain in bad faith rather than accept such penalties. Joining the JPA is not an adequate predictor, much less a predeterminor, of the District's future bargaining behavior.

PARAGRAPH 10(d) - Basis for Determining Increases in Premium Price

For the reasons stated above relating to the other subparagraphs of Paragraph 10 of the amended charge, and for the reasons in reference to Paragraphs 10 and 11 stated below, this allegation is dismissed.

PARAGRAPH 10(e) - Total Premium Amount

This allegation is merely a restatement of the first allegation in paragraph 10(b). For the same reasons stated hereinabove under paragraph 10(b), it is dismissed.

PARAGRAPH 11

This paragraph alleges that a change in premium amounts constitutes a unilateral change on the theory that it changes the amount employees must contribute for continued eligibility in the health insurance plan. The alternate theory for how the change would affect employees does not affect the analysis. For the reasons stated hereinabove, the allegation in paragraph 11 is dismissed.

In sum the allegations in paragraphs 10 and 11 do not state a prima facie case because they assume that the District must act in an unlawful manner in response to an increase (or decrease) in contribution rate by the JPA. This is simply not so. In the event the District were to act in such a manner, a charge could then be filed, alleging an unlawful unilateral action by the District, or failure to bargain in good faith at the negotiating table.

The Board's decision in Plumas, PERB Decision No. 578 supports the dismissal of the allegations in paragraphs 10 and 11. In that case, the Plumas district unilaterally moved from a health insurance plan administered by Equitable Benefit Plan (EBP) to a self-funded plan (up to a stop-loss amount) administered by EBP. The Board's decision states that the Plumas district saved $100,000 in health insurance costs by the shift to the self-funded plan. Yet the Board found no unlawful unilateral change in negotiable terms of employment, based on that fact (and on others articulated in the decision). Thus, the Board has not found a mere insurance cost saving, without more, to be an unlawful unilateral change. The allegations in paragraph 10 rest squarely on the proposition that such a cost saving (i.e., change in the employer's premium costs), even if it has no impact on the amount of employee contribution, is an unlawful unilateral change.

During the course of our discussions about the amended charge, you cited various cases to support the issuance of a complaint based on the allegations in paragraph 10 and 11. Then on October 7, you submitted a memorandum detailing your arguments

and citing legal authorities for your position.[3] The gist of those arguments, insofar as they relate to the question of the cost of premiums, is as follows:

> Under Grant Joint Union High School District (1982) PERB Decision No. 196, two essential elements of a prima facie case of an unlawful unilateral change are first, that the change be "legally cognizable," and second, that the change be made in a matter within scope. In the health and welfare benefits area, there are two types of "legally cognizable" changes: "non-de minimis" changes in benefit coverage, or changes involving a "third party" to the negotiations which effect terms and conditions of employment. [In either kind of change, to state a prima facie case, the charging party has to state facts to show that the alleged unilateral change would either actually affect or have a "reasonably foreseeable effect" on negotiable subjects. The basis for this is found in Mt. Diablo Education Association (DeFrates") (1984) PERB Decision No. 422 and is reaffirmed by Trinidad Union Elementary School District/Peninsula Union School District (1987) PERB Decision No. 629, where the Board stated that there had to be cogent evidence that changes have occurred or will occur.]

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[3]Various ALJ decisions were cited in that memorandum. Such decisions are, of course, not precedential. PERB Regulation 32215. Additionally, none of the cited cases stand for the proposition that a change in the employer's costs of providing health insurance, without more, is an unlawful unilateral change. Even if any of the cited ALJ decisions could be so read, they have been overruled by the Board's decision in Plumas.

Numerous NLRA decisions were also cited for the proposition that the cost to the employer of providing health insurance is negotiable, and that therefore to change those costs without negotiations is an unlawful unilateral change. None of the cited cases stand for that proposition, and even if they did, PERB has declined to follow such precedent, as demonstrated by Plumas.

> Examining each of the allegations in paragraphs 10 and 11 under these standards establishes that the changes enumerated there are both legally cognizable and within the scope of representation.[4]
>
> The Board's decision in Trinidad "reaffirmed" that insurance premium costs are negotiable, "at least by implication." (October 7, 1987 letter, p. 15.) In addition, joining the JPA constituted an illegal parity agreement under the Court of Appeals analysis in Banning Teachers Association v. Public Employment Relations Board (1986) 186 Cal.App.3d 569, (Hg granted - Case No LA 32300). Finally, even under the totality of the circumstances rather than the per se test, joining the JPA is a violation of EERA section 3543.5 (c).[5]

None of these arguments, or the cited cases, are persuasive. First, whether on the basis that the claim is not legally cognizable, or because the subject itself is not within the scope of representation, the Board in Plumas Unified School District (1986) PERB Decision No. 578, found no unlawful unilateral change in a case where the employer saved $100,000 in premium costs by self-funding insurance. That case is dispositive of the issue that a mere savings in premium costs, without more, is not an unlawful unilateral change. To issue a complaint on the allegations in paragraphs 10 and 11 would be contrary to that decision.

Second, even using the "reasonably foreseeable" standard for determining whether joining the JPA is an unlawful unilateral change, facts have not been alleged that show a reasonably foreseeable change in negotiable subjects by a mere change in the cost to the District for providing the insurance. [This of course assumes that a mere change in costs is not negotiable,

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[4]The scope analysis is, first that premium costs are "wages," an enumerated subject; or even if they are not directly wages,under the Anaheim analysis, they are closely related to wages, and therefore within scope.

[5]These latter two arguments were not raised previously.

following Plumas. It is not disputed that there were premium cost savings.] Additionally, as stated hereinabove, the District's future bargaining behavior is not predetermined by its joining of the JPA.

Third, the Board's decision in Trinidad follows the earlier Plumas rationale that premium cost changes, standing alone, are not unlawful unilateral changes. This is confirmed by the following statement in Trinidad:

> In sum, the evidence in the record supports the conclusion that the Districts have improved the ability to supply benefits at a reduced cost to themselves. It is not enough to theorize whether the JPA arrangement could potentially cause problems for its members, or whether the JPA resulted in a less well-established or less reliable carrier.

Nor is that statement, "dicta." It is an integral part of the Board's discussion of the reasons it disagreed with the ALJ's determination that there had been an unlawful relinquishment of control over insurance costs to the JPA.

Fourth, entering into a joint powers agreement is not the same as an illegal parity agreement. The JPA itself acknowledges the bargaining obligations of the districts by permitting them to leave the JPA prior to the usual three-year term, if that is required as a result of collective bargaining. There is no provision in the JPA which, like the one found to be illegal by the Court of Appeals in Banning, requires the districts to negotiate the same insurance benefits for their employees as other districts in the JPA.

Fifth, whether one adjudges the allegations in paragraphs 10 and 11 on the per se or the totality of the conduct test, they do not state a prima facie case. There was no showing that this is an unlawful unilateral change, nor were facts alleged to support a finding that the conduct is one indication of bad faith bargaining.

You also argue that an inevitable effect of joining a JPA for health insurance is what you call homogenization of the benefit programs. By this term you apparently mean that there will be a tendency of this District to negotiate for the benefits that are available through the JPA and to be unwilling to agree to

other changes in benefits that the Association may seek at the negotiating table. The tendency toward homogenization, assuming for the sake of argument that it will occur, is not in and of itself indicative of bad faith bargaining. Again it is speculation that such bad faith bargaining will occur. If during the future course of negotiations about health insurance, the District fails to negotiate in good faith, that is the time to file a charge about that behavior.

For all the foregoing reasons, the allegations in paragraphs 10 and 11 of the amended charge are dismissed.[6]

PARAGRAPHS 17 and 18 - Undermining

These allegations were not made in the original charge. Assuming for the sake of this analysis that the allegations would be considered timely by the application of the relation back doctrine, they do not state a prima facie case of unlawful undermining for the following reasons.

In some instances, direct communication by the employer with the employees unlawfully undermines the exclusive representative and the collective bargaining relationship. In Muroc Unified School District (12/15/78) PERB Decision No. 80, the Board addressed the issue of communications or memoranda directed at employees as follows:

> The EERA imposes on the public school employer an obligation to meet and negotiate with the exclusive representative, and embodies the principle enunciated in federal decisions that the employer is subject to the concomitant obligation to meet and negotiate with no others, including the employees themselves. (See Medo Photo Supply Corp. v. NLRB (1944) 321 U.S. 678 [14 LRRM 581].)

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[6]Paragraph 9(b) of the amended charge could be read to make the same or similar allegations as those in paragraphs 10 and 11. I, however, read paragraphs 1-9 to be preliminary to the allegations of the manner in which the alleged unilateral change altered negotiable terms and conditions of employment, and have not therefore formally dismissed any of those allegations. Insofar as any allegations in paragraphs (1)-(9), including but not limited to paragraph 9(b), are intended to or actually restate in substance the allegations in paragraphs 10 and 11, they are also dismissed.

> Consequently, . . . actions of a public school employer which are in derogation of the authority of the exclusive representative are evidence of a refusal to negotiate in good faith. (NLRB v. Goodyear Aerospace Corp. (6th Cir. 1974)

Evidence of bad faith includes undermining the ability of the exclusive representative to act on behalf of the unit. Muroc Unified School District (12/15/78) PERB Decision No. 80; Modesto City Schools (3/8/83) PERB Decision No. 291. The charge, as presently written, fails to allege actions of the public school employer which are in derogation of the authority of the exclusive representative.
The only facts alleged here are that the employer acted to adopt the resolution to join the JPA, and that the documents embodying the action are public documents "available to, and in common knowledge among, members of the bargaining unit." These facts are alleged to show that the District undermined the authority of the Association. No cases have been cited to support the proposition that based on facts such as these, a prima facie case of undermining is stated. The allegations in paragraphs 17 and 18 are therefore dismissed.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal (California Administrative Code, title 8, section 32635(a)). To be timely filed, the original and five copies of such appeal mist be actually received by the Board itself before the close of business (5:00 p.m.), or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. Code of Civil Procedure section 1013 shall apply. (See section 32135.) The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty calendar days following the date of service of the appeal (section 32635(b)).

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See section 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail postage paid and properly addressed.

Extension of Time

A request for an extension of time in which to file a document with the Board itself must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party (section 32132).

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

JOHN SPITTLER
Acting General Counsel

By ______________________
Sandra Owens Dennison
Regional Attorney

Attachment

cc: James Romo, Attorney

STATE OF CALIFORNIA GEORGE DEUKMEJIAN Governor

PUBLIC EMPLOYMENT RELATIONS BOARD
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August 26, 1987

Robert Lindquist, Attorney
California Teachers Association
Post Office Box 92888
Los Angeles, CA 90009

Re: LA-CE-2528, Huntington Beach Elementary Teachers Association v. Huntington Beach City School District

Dear Mr. Lindquist:

In the above-referenced charge the Huntington Beach Elementary Teachers Association (Association), alleges that the Huntington Beach City School District (District) made a unilateral change in health insurance benefits by joining the Orange County Fringe Benefits Joint Powers Authority (JPA or Authority). This action is alleged to be a violation of Educational Employment Relations Act (EERA) sections 3543.5 (a), (b), and (c).

My investigation of the charge revealed the following information.

The JPA was formed on January 1, 1987, by the District and eight other public educational agencies. The District's membership was effective on that date. The District Board of Education acted to join the JPA on January 6, 1987.

The Agreement establishing the JPA provides that it was formed pursuant to Government Code sections 6500 et seq., to "jointly provide for a self-insurance program for employee health and welfare benefits." The JPA is a separate legal entity, and in accord with Article 4 of the JPA Agreement, it has only those powers which are common to the member districts and which are "in furtherance of the functions and objectives" of the Agreement. (JPA Agreement, Article 4. Section (a).) The Bylaws of the JPA give it the authority to set the annual premiums for the insurance for the member districts. (Bylaws, Article V.) The contribution for premiums is determined by at least the following factors: "cost price index (inflation factor); experience factor? cost of reinsurance; desired level of self-insured retention; desired level of reserves; and plan design." (By-Laws, Article V. Section B.1.) Premiums are to be paid to monthly or tenthly by the member districts.

Insurance companies assign insureds to experience rating pools which are used as a partial basis for determining their

insurance rates for the upcoming insurance year. Larger employers may have an experience rating pool of their own, and smaller districts may be placed in a pool with other smaller employers. This district claims that it is 100% credible, that is, it is assigned to its own experience rating pool. The Association claims that the District's experience rating pool is now that of the JPA, not the District. No facts have been provided to support that allegation. The District denies that its experience rating pool was changed when it joined the JPA.

The self-insurance aspect of the JPA funding of the health insurance benefits is limited by an aggregate stop-loss provision of 120% of the District's anticipated claims. There is also an individual stop-loss provision of $50,000 per employee. (This is not recited in the JPA Agreement or bylaws, but it is undisputed by the Association that these are the stop-loss amounts.) This stop-loss aspect of the JPA self-funding arrangement provides that the District is fully insured by Blue Shield, in the aggregate for amounts beyond 120% of its anticipated claims in a year. The JPA's reserves (from member district contributions) are established so as to cover the exposure up to 120% of the initial anticipated claims.

The Agreement which establishes the JPA provides that its members are jointly and severally liable "upon any liability which is otherwise imposed on any one of the members or upon the Authority for injury caused by a negligent or wrongful act or omission occurring in the performance of the Agreement." The Agreement requires the district to remain in the JPA for 3 years unless earlier termination is "required as a condition of collective bargaining." If a member district terminates before three years, however, there will be no refund or repayment of its contributions to the JPA.

The JPA is governed by a Board of Directors, with most decisions requiring only a majority vote. Each member district has one vote on the Board of Directors, regardless of the number of employees of the district.

The collective bargaining agreement in effect at the time the District acted to join the JPA provided in Article XV:

> 15.1 The District agrees to continue to provide current coverage for the following teacher insurance programs and assume the inflationary costs for the 1985-86 school year:
>
> 15.1.1 Medical and 75% of dependent coverage.

As a result of reopener negotiations, concluded on or about December 2, 1986, the parties agreed to continue the 1985-86 program for the 1986-87 school year. There were no discussions of the JPA during those negotiations. The carrier for health insurance at that time was, and remains, Blue Shield.

On or about January 28, 1987, the District sent out a memorandum to employees regarding health insurance. The charge alleges that in the memorandum, the District informed the employees of the following changes in benefits as a result of joining the JPA:

(1) A modification of the claims payors from Sonora Service Center to Lodi Service Center;

(2) Assignment of a new and different policy number;

(3) A delay in processing of any new Medical claims until the issuance of new Blue Shield cards are issued;

(4) modification of plan provisions regarding extension of benefits for disabled employees as dependents; and

(5) A change in the pre-existing claim form to a new and different claim form.

The only change in the claims form apparent from the January 28, 1987 memorandum is a change in the color of the form.

With respect to the "extension of benefits for disabled employees as dependents (subparagraph (4) above)," an attachment to the January 28 memorandum requires employees (or their dependents) who became totally disabled while covered under the prior medical plan to notify the District in order for benefits to be extended beyond January 31, 1987, under Insurance Code section 10128.2. The document states that if disabled employees and their dependents fail to comply with the notification requirement, they will lose their entitlement to some unspecified benefits.

The charge alleges in paragraph 11 that the District's decision to join the JPA reduced or eliminated benefits in the following ways:

(1) The determination of premium and benefits levels now has been placed within the exclusive control of the JPA and, as a consequence, Charging Party is denied the opportunity to bargain the cost of insurance coverage for its members;

(2) The JPA is a "self-funded" program, and thus, is a less reliable insurer and less able to perform than the previous carrier, Blue Shield, and as a consequence, Charging medical benefits;

(3) The JPA, rather than respondent, maintains all control over reserves, interests, premium overpayments, or rebates from insurers, thus reducing the amount of money available for negotiation with Charging Party;

(4) . JPA Rules prohibit withdrawal from membership prior to a three-year period of time With full pro-rata refund rights, thus reducing the amount of money available for negotiating with Charging Party, if such negotiations occur with in (sic) the three-year membership period;

(5) Control over retention, administrative costs, marketing costs, have been transferred from Respondent to the JPA, thus eliminating Charging Party's opportunity to bargain with Respondent over such fees and their relationships to claims payments;

(6) Respondent has transferred its claims experience pool from the District as its own claims pool to the JPA pooled claims experience, thus affecting the benefits base available for the premium rates agreed upon between Charging Party and Respondent.

PARAGRAPH 11, SUBSECTIONS (1) THROUGH (5);

For the following reasons paragraph 11, subsections (1) through (5), of the charge does not state a prima facie violation of the EERA.

In determining whether a party has violated section 3543.5(c) of EERA, the PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. Stockton Unified School District (1980) PERB Decision No. 143. Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented prior to the employer notifying the exclusive representative and giving it an opportunity to request negotiations. Walnut Valley Unified School District (1981) PERB Decision Mo. 160; Grant Joint Unified High School District (1982) PERB Decision No. 196.

The nub of the issue presented here is whether the change to self-funding of health insurance through the JPA is a matter within the scope of representation.

At the time the charge was filed, the latest PERB decision dealing with self-funding of health insurance as a potential unlawful unilateral change was Plumas Unified School District (1986) PERB Decision Mo. 578, in which the Board found the district's decision to self-fund medical insurance not to be an unlawful unilateral change. In Plumas, there was a 120% stop-loss provision in the self-funding arrangement.

Since the charge was filed, the Board has decided Trinidad Union Elementary School District and Peninsula Union School District (1987) PERB Decision Mo. 629. In that case, the Board stated unequivocally that a "change to a self-funded plan does not, without more, result in a per se violation of EERA." The Board also found that joining a JPA to self fund benefits is essentially the same as individually self-funding those benefits, and therefore not negotiable under the Plumas rationale. The Board articulated its reasons for finding the JPA self-funding to be the same as individual self-funding, as follows: first, the districts did not relinquish control over insurance to the JPA second, the JPA did not result in less reliability or greater risk; third, the lack of State regulation of the JPA is not of consequence to the reliability of the JPA; and fourth, the alleged lack of experience of the JPA Board of Directors did not have any impact on the capacity of the JPA to provide insurance coverage.

Further, in Trinidad, the Board reaffirmed that there must be some "impact on services or benefits" in order to find a (c) violation in a change in insurance carrier. Trinidad, supra, at p. 12.

The facts alleged in this charge appear to require dismissal of **paragraph** 11, subsections (1) through (5), of the charge for the same reasons which the Board stated in Trinidad. Each of the Association's alleged areas of change in insurance benefits in those subsections of paragraph 11 will be analyzed in light of **the Board's** holding in Trinidad.

Relinquishment of control

In Trinidad, the Board stated:

> In **sum,** the **evidence** in the **record** supports the conclusion **that the Districts have** improved the ability to supply benefits at a reduced cost to themselves. It is not enough to theorize whether the JPA **arrangement** could potentially **cause** problems for its **Members, or whether the JPA resulted in a less** well-established **or less** reliable carrier.[5] [1]

No- **facts have been alleged here that provide any cogent evidence that changes in control have happened or will happen, which changes would cause a significant change in employee benefits. It is merely speculation that, in the** future, **some** changes in those benefits might occur by an action of the JPA.

Risk and **Reliability**

Mo facts are alleged here that indicate that the **JPA is** less **reliable or puts employees at greater risk than they were** under the prior **arrangement** for funding health insurance. **As** in **Plumas and** Trinidad, there is a stop-loss provision which **limits the exposure** of the District, in this **case,** to 120% of the anticipated claims for the insurance **year.** Beyond that amount the District is fully insured by Blue Shield.[2] The argument is made that the joint and several liability of the Districts in the JPA for each other's acts exposes this

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[1]**In** the footnote of this quote the Board states, "There must be some cogent evidence that changes have happened or will happen, which have significantly changed or will significantly change employee benefits."

[2]Here, as in Plumas, if the stop-loss aspect of the District's health insurance coverage were cancelled, then a charge could be filed, in which some cogent evidence of a loss in reliability **and** increased risk could be presented.

district to liability for another district that might fail to make its contributions. This argument fails to take into account the fact that the JPA Bylaws provide that a member district that fails to make the required contributions to the Authority may be involuntarily terminated from the JPA, thereby eliminating or cutting short the time within which the other JPA members would arguably be incurring liability for the contributions of the defaulting member. To speculate that such exposure might continue for a long enough period of time to make the JPA funding a less reliable method than the current method, is just that, speculation. Under Trinidad, more than just speculation is required to establish a change to a less reliable insurer.

Moreover, the Board in Trinidad implicitly overruled the ALJ's determination that the joint and several liability of the member districts for each other was a factor creating increased risk and lack of reliability. In his decision the ALJ stated:

> The terms of the NCSMIG agreement and bylaws, in particular, imposed joint and several liability on the members, in accord with the statute governing joint power relationships. Small employers in the NCSMIG, including Trinidad, are now exposed to potential financial disaster by sharing in liability up to the stop-loss amount. This differs dramatically from Plumas, in which the employer's exposure was no greater after the switch to self-funding. (Trinidad Proposed Decision (11/7/86) at P. 38.)

The Board, in deciding that the JPA in Trinidad did not result in less reliability or greater risk to employees, stated, "There was no evidence produced by the Charging Parties that the JPA was not reliable . . . . The risk here was limited by the stop-loss plan as it was in Plumas." By these statements, the Board implicitly

the ALJ's finding regarding the exposure from joint and several liability. In this case, as in Trinidad, Government Code section 6508.1 permits the joint and several liability of the member districts. Here, as in Trinidad, the implication that such joint and several liability creates additional risk and lack of reliability is rejected.

Control Over Reserves

The Association claims that the JPA now has control over reserves, interests, premium overpayments, or rebates from insurers, thereby "reducing the amount of money available for

negotiations with Charging Party." The District claims that these are matters within the control of the insurers, not the District, and that the Association has never had the right under the EERA to negotiate with the District over these moneys.

Even if one assumes that the District did shift control over these matters to the JPA, however, there are no facts alleged here to show how this alleged change in control impacts on services or benefits. Without such facts, a prima facie case cannot be stated.

Prohibition against withdrawal prior to three years

The JPA agreement does provide that member districts can withdraw from membership prior to the initial three-year period if that is required as a condition of collective bargaining. (JPA Agreement, section 8). In the event of a voluntary withdrawal prior to the three-year period, however, the Bylaws provide that there will be no refund or repayment to the withdrawing member (Bylaws Article VII, Section B.) Prom these provisions the Association deduces that the amount of money available for. negotiating with Charging Party will be reduced if the negotiations occur within the three-year period. This is alleged to be one of the ways in which the District has changed the benefits of employees. Even assuming the Association's deduction to be valid, there are no facts alleged that show that the three-year membership without full pro-rata refund would materially change employee benefits. Under the Board's decision in Trinidad, facts must be stated to show such a material change in benefits by the JPA provision regarding three-year membership without refund.

Control over retention, administrative costs and marketing costs.

The Association also alleges that employee benefits have been reduced or eliminated by the transfer of control over retention, administrative costs and marketing costs from the District to the JPA.. It is not clear from the facts alleged that the District ever had control over retention, administrative costs, or marketing costs in order to transfer such control to the JPA. The District denies that it ever had such control. Assuming, however, that the District did transfer control over these items to the JPA, the issue at this level of inquiry is whether that fact would arguably demonstrate an impact on employee benefits. At most, this transfer of control could result in higher or lower costs to the District for employee benefits. A change in costs to the

employer, does not, however, necessarily imply a change in employee benefits. As in so many of the other areas of this charge, the Association theorizes about what might happen as a result of this alleged change in control. What might happen, without facts to demonstrate how it might happen and how the events would affect employee benefits, is not enough to state a prima facie case in this area.

In sum, as in Plumas and Trinidad, the facts alleged in paragraph 11, subsections (1) through (5), show merely a change by the District in the method of financing its health insurance benefits for employees. Without further facts to show how this change in the funding mechanism materially changes the benefits for employees, no prima facie case is stated by the allegations in paragraph 11, subsections (1) through (5).

PARAGRAPH 10, SUBSECTIONS (1), (2), And (5)

In addition, paragraph 10 of the charge alleges, in part, that employee benefits were changed by the District joining the JPA, in the following respects: first, a change in the location of the claims service center (subsection (1) of paragraph 10); second, the assignment of a new policy number (subsection 2 of paragraph 10), and third, by a change in claims form (subsection (5) of paragraph 10). None of these changes demonstrate any "impact on services or benefits," as the Board required in Trinidad, in order to state a prima facie unilateral change in health benefits.

First, with respect to the change in the location of the claims service center, there are no facts alleged that demonstrate some impact on services. It is not as if the location was moved a significant distance from the district, so as to arguably impact upon the time within which claims reach the claims center. Claims are mailed by employees to the claims service center. Both Lodi and Sonora are approximately the same distance from the District. Nor have any other facts have been provided that would show any other impact on services.

Second, with respect to the policy number change, no facts are alleged to show any impact on services by the change, nor is any apparent from the fact of such a change.

Third, with respect to the alleged change in claims forms, the only change apparent from the January 28, 1987 memorandum attached to the charge, is a change in the color of the form. This is not a significant change. Nor are any other facts alleged to show that this was some other change in claims forms, that would have some impact on employee services under the benefit program.

For these reasons, the allegations in paragraph 10, subsections (1), (2), and (5), and in paragraph 11, subsections (1) through (5), of the charge, as presently written do not state a prima facie case. If you feel that there are any factual inaccuracies in this letter or any additional facts which would correct the deficiencies explained above, please amend the charge accordingly. In addition, if there is legal argument which you wish to submit, I will also consider it. The amended charge should be prepared on a standard PERB unfair practice charge form clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge **must** be served on the **respondent** and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you by the close of business on September 1, 1987, I shall dismiss paragraph 10, subsections (1), (2) and (5) and paragraph 11, subsections (1) through (5) of your charge. If you have any questions on how to proceed, please call me at (213} 736-3127.

Sincerely,

Sandra Owens Dennison
Regional Attorney

cc: Bill Harju