STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER #506, Charging Party, v. RIVERSIDE UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-2609
	)	PERB Decision No. 750 June 29, 1989
ASSOCIATED TEACHERS OF METROPOLITAN RIVERSIDE, Charging Party, v. RIVERSIDE UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-2664

Appearances: Best, Best & Krieger by Charles D. Field and Bradley E. Neufeld, Attorneys, for Riverside Unified School District; Reich, Adell & Crost by Marianne Reinhold for Associated Teachers of Metropolitan Riverside.

Before Craib, Shank and Camilli, Members.

DECISION

SHANK, Member: The above cases are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Riverside Unified School District (District) to the proposed

decision of the administrative law judge (ALJ).[1] The California School Employees Association (CSEA) alleged that on April 20, 1987,[2] the District unilaterally changed its policy regarding smoking and the use of other tobacco products by its employees, and refused to bargain the decision and effects of the policy. After issuance of a complaint by PERB, the District filed its answer and the parties submitted the matter to the ALJ on a Stipulation of Facts (Stipulation) and written briefs. The proposed decision issued on July 21, 1988. The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).[3]

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[1]Since both cases contain the same issue, the Board has consolidated Case No. LA-CE-2609, California School Employees Association and its Chapter #506 v. Riverside School District, and Case No. LA-CE-2664, Associated Teachers of Metropolitan Riverside v. Riverside School District, for the purposes of this decision.

[2]All dates hereinafter refer to 1987 unless otherwise indicated.

[3]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(a), (b) and (c) states:

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.
>
> (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.

On October 27, the Associated Teachers of Metropolitan Riverside (Association) filed a similar unfair practice charge against the District, which filed an answer and Motion to Dismiss. The motion was submitted on briefs and denied by the ALJ on May 27, 1988. The Association and the District then submitted the case to the ALJ on stipulated facts which were essentially the same as in the CSEA case. The ALJ issued a proposed decision issued on August 30, 1988, in which he came to the same conclusion he reached in the CSEA case. We reverse the ALJ for the reasons set forth below.

THE FACTS AS STIPULATED

There is a collective bargaining agreement between CSEA and the District in effect for the period September 18, 1987 to November 21, 1989. The instant complaint arose during an agreement dated November 22, 1985 to November 21, 1988, which contained the following provisions:

DISTRICT RIGHTS

> 2.0 It is agreed that the District retains all of its power of direction, management and control to the full extent of the law. Included in these powers are the exclusive rights to (a) determine its organization; (b) direct the work of its employees; (c) determine the hours of District operations; (d) determine the kinds and levels of service to be provided, as well as the methods and means of providing them; (e) establish its educational policies, goals and objectives; (f) determine staffing patterns; (g) determine the number and kinds of personnel required; (h) maintain the efficiency of District operations; (i) determine District curriculum; (j) design, build, move or modify facilities; (k) establish budget procedures and determine budgetary allocation; (1)

determine the methods of raising revenue; (m) contract out work within the limits of law, or (n) take action on any matter in the event of an emergency. In addition, the District Board retains the right to hire, classify, assign, evaluate, promote, demote, terminate, and discipline employees. The recital in no way limits other district powers as granted by law.

2.1 The exercise of the foregoing powers of direction, management, and control by the District, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by specific and express terms of this Agreement, and then only to the extent such specific and express terms are not contrary to law.

2.2 The district retains its right to amend, modify, or suspend any provision of this Agreement in cases of emergency for the reasonable period of time required by the emergency. An emergency is a serious event, or combination of circumstances beyond the control of the District which requires immediate action or remedy.

In event of any amendment, modification, or suspension the District agrees to meet and negotiate as soon as is practicable upon demand by the CSEA with regard to such action, the duration thereof, and an interim or permanent successor provision. Emergencies shall not be declared capriciously or arbitrarily.

There was a collective bargaining agreement in effect between the Association and the District for the period July 1, 1985 to June 30, 1988, which contained the following provisions:

DISTRICT RIGHTS

Section 1 - District Powers, Rights and Authority. It is understood and agreed that, except as limited by the terms of this agreement, the District retains all of its powers and authority to direct, manage, and

control to the extent allowed by the law. Included in, but not limited to, those duties and powers are the right to: Determine its organization; direct the work of its employees; determine the times and hours of operation; determine the kinds and levels of services to be provided and the methods and means of providing them; establish its educational policies, goals, and objectives; insure the rights and educational opportunities of students; determine staffing patterns; determine the number and kinds of personnel required; maintain the efficiency of District operations; determine District curriculum; design, build, move, or modify facilities; establish budget procedures and determine budgetary allocations; determine the methods of raising revenue; contract out work when present employees are not available to perform such work; and take any action on any matter in the event of an emergency as provided in Section 3 therein. In addition, the District retains the right to hire, classify, assign, evaluate, promote, demote, terminate, and discipline employees. This recital in no way limits other district powers as granted by law.

Section 2 - Limitation. The exercise of the foregoing powers, rights, authority, duties, and responsibilities by the District, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms are in conformance with law.

Section 3 - Emergencies. The District retains its right to suspend this Agreement in cases of emergency for the reasonable period of time required by the emergency. Emergencies shall include, but not be limited to, national, state, or county declared emergencies and natural disasters. Emergencies shall not be declared capriciously, arbitrarily, or in retaliation for the exercise of employee rights.

The conduct complained of on the part of the District occurred during the existence of these agreements.

The subject of smoking policies for all employees of the District had never been expressly agreed to by the parties and, before April 20, had not been promulgated in any formal written policies or rules. Prior to April 20, however, the District had maintained designated smoking areas for employees within District facilities. Thus, employees were permitted to smoke in most employee lounges, certain employer restrooms and custodial offices, teacher workrooms and other areas where staff gathered. Custodial, maintenance and groundskeeping employees were also permitted to smoke outside of District buildings. All District facility sites maintained at least one area where employees were allowed to smoke. Although there was no formal District-wide rule prohibiting employees from smoking in the general vicinity of students, some employees refrained from doing so as a matter of courtesy.

In a report to the District's governing board dated March 11, District Superintendent George C. Lantz stated:

> In December 1986, the Board of Education acted to rescind its policy on smoking areas for students in keeping with changes in the Education Code. At that time, you asked me to review the current district practices that pertain to the restriction of smoking by staff members and the public. Further, you directed me to explore the alternatives that might be feasible in increasing the stringency of those regulations in keeping with the increasing evidence about the detrimental effects of smoking and smoke inhalation.

Thereafter, the report summarized the then-current District policy permitting District employees to smoke in designated areas, noting that, "Very few of our facilities are posted as 'no smoking areas'." The report contended that the Education Code is silent as to whether or not a school board may prohibit smoking in any of its facilities and, although it cited Education Code section 35176.5,[4] it did not discuss any possible conflict that a

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[4]Section 35176.5 states:

> The governing board of every school district shall adopt policies regarding the designation of employee smoking areas or lounges at each school site. these policies may include, but not be limited to, the establishment of procedures for the determination of employee smoking areas by a majority vote of the teachers and other school employees at each school.
>
> This section shall remain in effect only until January 1. 1989 and on that date is repealed, unless a later enacted statute, which is chaptered before January 1, 1989, deletes or extends such date. (Emphasis added.)

Section 35176.6 states:

> A teacher or other school employee shall not smoke on the grounds of any public school except in the areas designated for employee smoking by the governing board of the district.
>
> This section shall remain in effect only until January 1. 1989. and on that date is repealed, unless a later enacted statutes, which is chaptered before January 1. 1989. deletes or extends such date. (Emphasis added.)

total ban on smoking within the District's facilities might have with that section.

The report suggested two alternative policies. The first policy would incorporate Education Code section 35176.5 and additionally would prohibit smoking at all scheduled and mandatory meetings held in District facilities. The second alternative would prohibit smoking, by statement of policy, within all District facilities and on the grounds of District facilities when students were present. The report recommended that if the second alternative were adopted by the governing board, it should be implemented in two stages. The District would at first implement a ban on smoking at mandatory and public meetings, and then implement the ban in all District facilities and on the grounds thereof when students are present. The report concluded that information concerning stop-smoking clinics should be distributed to District employees along with the text of any written anti-smoking policies.

In early April, CSEA discovered that the District intended to establish a smoking policy affecting all District employees. By letter dated April 14, CSEA requested that the District meet and negotiate regarding the adoption of the smoking rules and regulations, as they would apply to classified employees. On April 20, the District's governing board adopted policy #3513.3 which provides as follows:

BUSINESS/OPERATION AND MAINTENANCE

1.0 SMOKING AT DISTRICT FACILITIES

> The Board recognizes the evident health hazards in the use of tobacco products and the rising trend in society to control or eliminate the practice of the use of these products in public buildings and areas. The Board therefore, in the best interests of the district and its employees and pupils, directs the Superintendent to develop rules and regulations regarding this policy, which will become effective July 1, 1987.

Also on April 20, the District presented proposed rules and regulations regarding the smoking policy to the governing board, which approved the rules and regulations the same day. The text of these proposed rules and regulations reads as follows:[5]

RIVERSIDE UNIFIED SCHOOL DISTRICT Rules and Regulations #3513.3

(Ref. Policy #3513.3)

BUSINESS/OPERATIONS AND MAINTENANCE

1.0 SMOKING AT DISTRICT FACILITIES

> Effective July 1, 1987, smoking and the use of tobacco products is prohibited within any District building or facility. In addition, smoking or the use of tobacco products by District employees is prohibited on school grounds when pupils are in the general vicinity.
>
> 1.1 A transition period will exist between April 21, 1987 and July 1, 1987 during which smoking and the use of tobacco products will be prohibited in all meetings held in

[5]The above-referenced smoking policy and derivative rules and regulations shall be collectively referred to as "smoking policy" for the purpose of this decision.

district facilities at which employees are in attendance.

2.0 EMPLOYEE ASSISTANCE

The district will prepare and make available to employees a list of clinics and other agencies that provide programs which assist individuals who wish to stop smoking or using other tobacco products.

CSEA again requested, by letter dated April 21, that the District meet and negotiate concerning the smoking policy. At a meeting conducted on May 6, CSEA reiterated this request. The District refused to negotiate at the May 6 meeting, stating that its restrictions on smoking and the use of other tobacco products were not negotiable. By letter dated May 7, CSEA set forth the parties' positions, and stated its intent to file unfair practice charges with PERB.

By letter dated May 5, the Association requested that the District meet and negotiate concerning the smoking policy. The District informed the Association, by letter dated May 6, that it did not believe the smoking restrictions were matters within the scope of representation. On June 5, the District formally refused to negotiate with the Association.

In both cases, the parties stipulated that the new smoking policy impacted on all employees of the District and that the rules were implemented in two stages, as proposed. Employees are currently permitted to smoke and to use other tobacco products only outside District facilities and at times when students are not in the general vicinity.

THE ALJ DECISIONS

The ALJ concluded in both cases that the District had established a past practice regarding smoking and the use of other tobacco products by employees and that the April 20 smoking policy represented, in part, an unlawful unilateral change which the District was required to negotiate pursuant to EERA section 3543.2(a).[6] Citing Anaheim Union High School District (1981) PERB Decision No. 177, the ALJ found the portion of the new

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[6]Section 3543.2(a) states:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

policy, that prohibited smoking inside District facilities outside the view of students, to be a working condition reasonably related to the health and safety of all employees and, therefore, negotiable. He concluded that those portions of the rules prohibiting smoking in the view and presence of students, and during meetings in District facilities where students were present, were within the District's managerial prerogatives as relating to student's health and safety and to having employees set a positive role model for students. The ALJ found that the portion of the smoking policy he approved was related to Education Code section 48901.[7]

THE DISTRICT'S EXCEPTIONS

The District excepts generally to the ALJ's conclusion that its smoking policy is negotiable on the ground that it is carrying out a state mandated mission to discourage students from smoking. It excepts specifically to the ALJ's findings that the policy was directed primarily at the health and safety of

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[7]Education Code section 48901 states:

> (a) No school shall permit the smoking or use of tobacco, or any product containing tobacco or nicotine products, by pupils of the school while the pupils are on * * * campus, or while attending school-sponsored activities or while under the supervision and control of school district employees.
>
> (b) The governing board of any school district maintaining a high school shall take all steps it deems practical to discourage high school students from smoking.

employees on the ground that the policy was intended to protect the health of students, employees and the public.[8]

DISCUSSION

The issue raised in this case is whether the prohibition of smoking and use of other tobacco products in District buildings and facilities is a nonnegotiable fundamental educational policy or a working condition negotiable under section 3543.2 of EERA.

Whether a matter is negotiable under EERA is determined by the provisions of section 3543.2(a).[9] Section 3543.2(a) provides that matters not specifically enumerated in the statute are reserved to the employer. More specifically, the District's contracts with CSEA and with the Association contain management rights clauses under which the District expressly retains the authority to establish educational policies, goals and objectives, and to determine the kinds and levels of services to be provided and the means and methods of providing them. The contract with the Association also provides the District with the power to insure the rights of students. Both contracts give the District the right to adopt powers, rules and regulations to implement its authority. Pursuant to these retained powers, the District has implemented a smoking policy designed to further a

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[8]The District also challenges the ALJ's interpretation of the parties' stipulation of facts regarding the scope of the restriction on smoking outdoors. We do not find this factual dispute to be determinative of the issue raised in this case. The District has also requested oral argument. Said request is denied.

[9]See fn. 6, supra.

legislatively mandated goal of discouraging students from smoking and to provide a smoke-free environment for the students and the general public. As discussed in more detail below, California legislation certainly lends strong support to the District's exercise of its retained powers. The District could reasonably conclude that if it allowed teachers to smoke in building facilities, it would not be doing everything it could do to safeguard the students' right to a smoke-free environment and to provide positive role models for its students.

This is a case of first impression before PERB. Although decisions of other state boards and courts are not controlling on this Board, we find the case of Chambersburg Area School District v. Pennsylvania Labor Relations Board, et al. (1981) 430 A.2d 740 [110 LRRM 2251], instructive. In that case, a Pennsylvania court reversed a decision of the Pennsylvania Labor Relations Board which had overturned a ban on smoking in all public school buildings imposed by the Chambersburg Area School District. The Pennsylvania Supreme Court requires a balancing test[10] based on Pennsylvania statutes[11] which provide for collective bargaining over "wages, hours and other terms and conditions of

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[10]Pennsylvania Labor Relations Board v. State College Area School District, and the Board of School Directors (1975) 461 Pa. 494, 337 A.2d 262 [90 LRRM 2081].

[11]The Public Employee Relations Act of July 23, 1970 (Act 195), is codified at 43 P.S. section 1101 et. seq.

employment"[12] but preserve managerial prerogatives in the following way:

> Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours and terms and conditions of employment as well as the impact thereon upon request by public employee representatives.
> (43 P.S. section 1101.702)

The statutes essentially require that a balance be maintained between mandatory subjects of bargaining and managerial policy guided by "the public interest in providing for the effective and efficient performance or the public service in question."[13]

The court in Chambersburg, supra. applied the statutory test and upheld the District's smoking policy, stating:

> We conclude that the School District acted in furtherance of its duty to promote education when it adopted the smoking policy. . . .
>
> This conclusion, however, does not necessarily remove the policy as a subject of mandatory bargaining. We must also determine under the State College test whether the policy is a matter of fundamental concern to the interests of the employees in wages, hours and other terms and conditions of employment. We note that, based on

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[12] 43 P.S. section 1101.701.

[13] Pennsylvania Labor Relations Board, supra. 461 Pa. 506, 337 A.2d 268.

> substantial evidence, the Board found as fact that teachers and custodians had smoked in School District buildings since at least 1959. The Board, therefore, concluded that smoking had been a working condition. In State College the Supreme Court seemingly endorsed the view that "terms and conditions" are "something more than minimal economic terms of wages and hours, but something less than the basic educational policies of the board of education." State College, 461 Pa. at 506, 337 A.2d at 268 . . . . Using this definition we might conclude that smoking is not a working condition in the instant case and thus not a matter of fundamental concern to the employees' interests. Even if it is a working condition, we are convinced that in striking a balance the educational motive behind the policy outweighs any impact on the employees' interests. We repeat that the paramount consideration in reaching this balance is the public interest in providing effective and efficient education for the School District's students. We, therefore, conclude that the smoking ban is an inherent managerial policy and not a mandatory subject of bargaining.

It was apparently stipulated in the _Chambersburg_ case that the ban was imposed for the following reasons:

> 1) The ban would further the goal of consistency among ongoing school programs directed against smoking; 2) the ban would be part of a necessary regulatory scheme for students in the public schools; 3) the ban would supplement the role modeling efforts of parents who do not direct their children against smoking; 4) the total ban on smoking, by virtue of its application to School District employees and students alike, would generate respect among students for school authority, thereby improving discipline; 5) the ban would lend recognition to the plight of the non-smoker; and 6) the ban would reflect and emphasize the hazards of smoking.

In the case under consideration, the District did not articulate its reasons for implementing its smoking policy in as

much detail as did the district in Chambersburg.[14] Yet the reasons articulated by the district in Chambersburg for imposing a smoking ban are equally valid and persuasive in the instant case. Furthermore, information accumulated since 1981, when Chambersburg was decided, on the hazards of smoking to smokers and nonsmokers alike has rendered the detrimental impact of smoking in an educational environment no longer open to question. We therefore adopt the analysis of the Chambersburg court in finding that the smoking policy in question here is not a mandatory subject of bargaining.

Based upon the foregoing, we are not certain it is even necessary to apply the analysis set forth in Anaheim Union High School District, supra. PERB Decision No. 177. Applying the Anaheim test, however, we come to the same result.

In Anaheim, this Board established a three-pronged test for determining whether matters not specifically enumerated are in fact negotiable under section 3543.2. In that decision, the Board stated:

> . . . a subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that

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[14]The dissent apparently concedes that had it more clearly incorporated into its policy statement the obvious benefits to students of its non-smoking policy, the District could have legally implemented its smoking restrictions. Such an argument begs the question since the District's expressed motivation is not determinative of whether its policy actually furthers the District's educational mission and comports with legislative direction.

> conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

This test was approved by the California Supreme Court in San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850, 191 Cal.Rptr 800, 663 P.2d 523.

Applying Anaheim, the ALJ found that the smoking policy was intended by the District to relate primarily to the health and safety of District employees, rather than to students and the general public. As such, the ALJ concluded that the policy was reasonably related to "safety conditions of employment," an enumerated term in section 3542.2, and was therefore negotiable. The ALJ's position is not supported by the record. The District superintendent was specifically requested to adopt rules and regulations to implement the District board's smoking policy ". . . in the best interests of the district and its employees and pupils."[15]

It was in response to this directive that the superintendent rendered his report dated March 11, 1987, which resulted in the April 20 policy prohibiting smoking within the District facilities. Clearly, in formulating its policy, the District board had in mind not only the health interests of the employees,

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[15]The full text of the policy is set forth on page 7 of this decision.

but also those of the students and public. Thus, based on our finding that the policy was implemented to alleviate a potential health hazard to all persons who may enter public school facilities, as opposed to assuring the safety of employees only, we conclude the Association and CSEA failed to meet the first prong of the Anaheim test.

Neither is the second prong of Anaheim satisfied. The subject of smoking is not one that divides people along management-union lines, but rather tends to split smokers and nonsmokers in both camps. Additionally, as more fully explained below, the Legislature has spoken on the matter of regulation of smoking, and the District has taken action consistent with the legislative mandate. Collective negotiations between the District and employee organizations is not an appropriate means of dealing with this public health hazard.

Finally, and most significantly, the District's obligation to bargain would significantly abridge its freedom to exercise managerial prerogatives essential to the achievement of its mission. We conclude that the prohibition against smoking in District buildings and facilities and on school grounds when pupils are in the general vicinity is not a working condition or matter of fundamental concern to the employees, but is a matter of basic educational policy within the managerial prerogative of the District. Our conclusion is further supported by the clear mandate now found within California legislation aimed at alleviating the hazards of the presence and use of tobacco in the

educational environment, public buildings and on public carriers of transportation.

As a part of the California Indoor Clean Air Act of 1976 (Health and Safety Code, section 25940, et seq.), the Legislature adopted Health and Safety Code section 25940.5 which states:

> The Legislature finds and declares that tobacco smoke is a hazard to the health of the general public.

In 1987, as a part of the same Act, the Legislature enacted Article 2 relating to smoking on private and public transportation. Health and Safety Code section 25948 states:

> (a) The Legislature hereby finds and declares that the United States Surgeon General's 1986 Report on the Health Consequences of Involuntary Smoking concludes all of the following:
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> (1) Involuntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers.
>
> (2) The children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory infections, increased respiratory symptoms, and slightly smaller rates of increase in lung function as the lungs mature.
>
> (3) The simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke.
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> (b) The Legislature further finds and declares the following:
>
> (1) Nonsmokers have no adequate means to protect themselves from the damage inflicted upon them when they involuntarily inhale tobacco smoke.

(2) Regulation of smoking in public places is necessary to protect the health, safety, welfare, comfort, and environment of nonsmokers.

(c) It is, therefore, the intent of the Legislature, in enacting this article, to eliminate smoking on public transportation vehicles.

Additionally, section 25949 provides:

> It is unlawful for any person to smoke tobacco or any other plant product in any vehicle of a passenger stage corporation, the National Railroad Passenger Corporation (Amtrak) except to the extent permitted by federal law, in any aircraft except to the extent permitted by federal law, on a vehicle of an entity receiving any transit assistance from the state.

With respect to our California schools, the Legislature, by a 1986 amendment to Education Code section 48901 directed that:

> (a) No school shall permit the smoking or use of tobacco, or any product containing tobacco or nicotine products, by pupils of the school while the pupils are on campus, or while attending school-sponsored activities or while under the supervision and control of school district employees.
>
> (b) The governing board of any school district maintaining a high school shall take all steps it deems practical to discourage high school students from smoking. (Emphasis added.)[16]

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[16]Prior to the 1986 amendment, subdivision (a) of section 48901 read:

> The governing board of any school district maintaining a high school may adopt rules and regulations permitting the smoking and possession of tobacco on the campus of a high school or while under the authority of school personnel by pupils of the high school. However, those rules and regulations shall not permit pupils to smoke in any classroom

Prior authority, Education Code sections 35176.5 and 35176.6, which delegated to school boards the task of establishing smoking policies and areas by a majority vote of the teachers and employees, was repealed as of January 1, 1989.[17]

The implementation of the District's smoking policy was a direct response to the Legislature's clear message regarding the health hazards of smoking and specific direction to school districts "to take all steps [they] deem practical to discourage high school students from smoking." We believe that negotiations regarding implementation of the policy would abridge the District's rights to accomplish this legislatively mandated mission and its rights to determine general educational policy. Thus, we find the third prong of the Anaheim test is not satisfied and that the smoking policy is not negotiable under section 3543.2.

In reaching his conclusion to the contrary, the ALJ relied upon three cases decided by the New York Public Employment

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> or other enclosed facility which any student is required to occupy or which is customarily occupied by nonsmoking students.

Consistent with the amendment to section 48901, section 48900 was also amended in 1986 to clarify that possession of specified tobacco or nicotine products by students would be grounds for suspension or expulsion.

[17]See footnote 4, supra.

Relations Board.[18] Two of the cases resulted in the overturning of a smoking ban in school districts. The other case involved a partial reversal of a smoking ban in an elderly health care facility. These cases are distinguishable from the instant case because the New York Legislature has failed to enact any general policy relating to smoking except to impose a ban in certain specifically listed public areas.[19] In each of the New York PERB cases, which overturns a smoking ban, the decision relies upon the New York Legislature's failure to adopt a general non-smoking policy. In balancing the competing rights, the New York PERB, in the absence of legislative mandate, can afford to give less weight to the managerial goal of providing a smoke free environment. As noted above, such is not the case in California.

Equally unpersuasive are cases emanating from the private sector decided by the National Labor Relations Board (NLRB). (Chemtronics. Inc. and Industrial Production Employees. Local 42 (1978) 236 NLRB 178 [98 LRRM 1559]; see also Commonwealth of Pennsylvania v. Pennsylvania. Pennsylvania Labor Relations Board (1983) 74 Pa, Commw. 1, 459 A.2d 452 [113 LRRM 3052], emphasizing the difference between the school environment and the private work place.) Considering the importance of education in our society, the imposition of the smoking policy to further the

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[18] Steuben-Allecrany Boces (1980) 13 NY - PERB 4511; County of Niagara (Mount View Health Facility) (1988) 21 NY - PERB 3014; and Rush-Henrietta Employees' Association. Buildings and Grounds, Bus Mechanics Chapter. NYSUT/AFT. AFL-CIO (1988) 21 NY - PERB 3023.

[19] New York Public Health Law No. 1399.

goal of providing a smoke free educational environment is well justified. Even more significantly, the unique relationship between teacher and pupil, in which the teacher is the role model and exerts a significant influence on student behavior, supports the District's adoption of a strict standard of conduct regarding smoking.

CONCLUSION

The public endorsement of the United States Surgeon General's 1986 Report on the Health Consequences of Involuntary Smoking and the very broad and general grant of authority to school districts in Education Code, section 48901, eliminates any doubt that outright prohibition of smoking in public school buildings and facilities is a reasonable means and a proper step for the District to take to fulfill its legislatively mandated mission of discouraging high school students from smoking. By enacting the smoking policy, the District is exercising its retained rights to decide the type and level of services to be provided and to determine and implement educational policies, goals and objectives. The April 20 smoking policy still permits smoking outside the buildings when not in the vicinity of students. While the policy may incidentally create an inconvenience to employees who do smoke, the inconvenience is clearly outweighed by the legislatively sanctioned goals of the District.

ORDER

For the foregoing reason, the unfair practice charges in Case Nos. LA-CE-2609 and LA-CE-2644 are DISMISSED.

Member Camilli joined in this Decision.

Member Craib's dissent begins on page 26.

Member Craib, dissenting: I cannot agree with the analysis in the majority decision. While I am not unsympathetic to the desires of the Riverside Unified School District (District) to provide all of its employees with a smoke-free work place, I do not believe that such a result can be accomplished by District fiat.

As the majority points out, the administrative law judge (ALJ) found that the portion of the District's policy which prohibited smoking in the presence of students was within the District's managerial prerogative to maintain an orderly campus and to have its employees set positive role models for students and, thus, did not violate the Educational Employment Relations Act (EERA or Act), section 3543.5, subdivisions (a), (b) or (c).[1] To reach this conclusion, the ALJ relied on the legislative mandate found in Education Code section 48901,[2] which directs school districts to take measures necessary to discourage students from smoking. The ALJ reasoned that to permit employees to smoke in the view of students, who are prohibited pursuant to Education Code section 48901 from smoking on school property, could lead to student unrest. Additionally, he found that the District was entitled to have its employees serve as role models

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. For the complete text of section 3543.5, subdivisions (a), (b) and (c), see fn. 3 of the majority decision.

[2]For the complete text of Education Code section 48901, see fn. 7 in majority decision.

to discourage students from smoking. The "mission" of the District would, thus, be served by prohibiting smoking where and when students were present. Therefore, the ALJ concluded that the imposition of a no-smoking policy where and when students were present had only a minimal impact on employee health and safety. I agree with this analysis and would affirm the ALJ's proposed decision on this issue.

The issue that then remains to be decided is whether the prohibition of smoking in areas which are off limits to students, such as employee lounges, is a term and condition of employment as defined by the Act and, therefore, negotiable under section 3543.2.[3]

The parties are obligated by EERA to negotiate with each other over subjects within the scope of representation. (See

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[3]Section 3543.2 provides in pertinent part:

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

section 3543.3.[4]) A failure to negotiate in good faith a mandatory subject of bargaining is a violation of the Act. (Pajaro Valley Unified School District (1978) PERB Decision No. 51, at pp. 4-7.) The Board has determined that some acts

> have such a potential to frustrate negotiations and to undermine the exclusivity of the bargaining agent that they are held unlawful without any determination of subjective bad faith on the part of the employer.

(Ibid. at p. 5.) It is a general precept that "[u]nilateral changes by an employer during the course of a collective bargaining relationship concerning matters which are mandatory subjects of bargaining are normally regarded as per se refusals to bargain." (See generally 1 Morris, The Developing Labor Law (2d ed. 1983) p. 563.)

The critical question, then, is whether a smoking policy is a mandatory subject of bargaining under EERA. The Board is specifically empowered to "determine in disputed cases whether a particular item is within or without the scope of representation." (See section 3541, subd, (b).[5]) Where an item

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[4]Section 3543.3 provides in pertinent part:

> A public school employer . . . shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

[5]Section 3541.3, subdivision (b) provides:

> The board shall have all of the following powers and duties:

is not specifically enumerated in the Act itself, the Board must interpret the statutory provision defining scope of representation to determine whether a particular subject falls within one of the enumerated areas. (San Mateo City School District v. Public Employment Relations Board (1983) 33 Cal.3d 850, 856.) The California Supreme Court in San Mateo specifically approved of the Board's three-prong test to determine whether a matter is within the scope of representation. (Ibid. at pp. 858-860.)

That test provides:

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

(Anaheim Union High School District (1981) PERB Decision No. 177, at pp. 4-5.) Although the majority does not find application of the Anaheim test determinative, they nevertheless apply the test and find that the no-smoking policy does not satisfy any of the three prongs. I believe that the Anaheim test is critical to the

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. . . .

(b) To determine in disputed cases whether a particular item is within or without the scope of representation.

determination of whether the matter falls within scope and disagree with the majority's analysis on this issue.

First of all, I disagree with the majority's factual determination that the policy was implemented to protect the health and safety of not only employees, but also students and the general public. The District's policy nowhere states that it is designed to protect the general public. The District stated its policy as follows:

> The Board recognizes the evident health hazards in the use of tobacco products and the rising trend in society to control or eliminate the practice of the use of these products in public buildings and areas. The Board therefore, <u>in the best interests of the district and its employees and pupils</u>, directs the Superintendent to develop rules and regulations regarding this policy, which will become effective July 1, 1987.

(Emphasis added.) Furthermore, the District admittedly adopted its policy to contain the health hazards which arise from the use of tobacco products, and also adopted an employee assistance program aimed at providing aid to those who wish to quit smoking. My reading of the record in this case suggests that the primary motivation of the District in instituting the no-smoking policy was not to shield students from smoking but, rather, to prevent the health hazards associated with smoking. I would find that such a policy directed at reducing the health hazards of smoking directly relates to the "safety conditions of employment."

(See section 3543.2, subd, (a).[6])

The parties' Stipulated Facts reiterate that the "recognized health hazards" were the basis for the new policy. Furthermore, the superintendent, in his March 16, 1987 letter to the Board of Education, recommending the new no-smoking policy, indicated that the board had directed him to explore the alternatives to current district policy on smoking "in keeping with the increasing evidence about the detrimental effects of smoking and smoke inhalation." He also stated in the letter that:

> Our counsel advises us that the prohibition of smoking in schools is a reasonable work rule and in the <u>best interests of the</u> wellbeing [sic] of the employees. Therefore, he advises that it is not subject to negotiations.

(Emphasis added.)

Although the best interest of pupils is mentioned in the policy declaration, the clear thrust of the District's correspondence is to prevent the health hazards of smoking and smoke inhalation. In none of the documents is there any indication that the new no-smoking policy for employees was adopted to implement the Education Code prohibition on student smoking.

Despite this evidence, the majority concludes that the District's policy was implemented for the benefit of employees, students and the general public. Even if the students were peripherally benefitted by the no-smoking policy, the District's

[6] See fn. 3 for the complete text of section 3543.2, subdivision (a).

clear motivation was to address the health hazards of smoking on employees. As such, the matter is "logically and reasonably related to . . . an enumerated term and condition of employment," safety.[7] (Anaheim Union High School District, supra. PERB Decision No. 177, at pp. 4-5.) The first prong of the Anaheim test is, thus, satisfied.

The no-smoking policy also meets the second prong of the Anaheim test:

> [T]he subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict.

Obviously, smokers and nonsmokers often disagree on the issue. But that simplistic analysis does not address whether the issue is of such concern to both parties that the dispute would most appropriately be dealt with through collective bargaining. Work rule changes which affect a mandatory subject of bargaining are most appropriately dealt with collectively. Whether the District believes, albeit benevolently, that a no-smoking policy is in the best interests of its employees, that belief does not give the

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[7]As the ALJ observed, the term "safety" has often been used to encompass both health and safety concerns. Indeed, this Board, in Jefferson School District, (1980) PERB Decision No. 133, at p. 53, held that

> safety and health stand with wages as one of the more fundamental areas of concern in a collective bargaining relationship.

The National Labor Relations Board has also freely interchanged the terms "health" and "safety." (See, e.g., Colgate-Palmolive Company (1982) 261 NLRB 90 [109 LRRM 1352].)

District the right to unilaterally change a term and condition of employment. Such a ruling effectively erodes the exclusive representives' statutory rights to negotiate mandatory matters within scope.

The majority's argument that the Legislature has spoken on the matter of regulation of smoking, does not remove the issue from collective bargaining. Nothing in any of the statutes cited by the majority gives the District the right to ignore its bargaining obligation under EERA. Prohibiting smoking in District facilities, outside the view of students, is not addressed. Indeed, the Legislature directed school districts to "adopt policies regarding the designation of employee smoking areas or lounges at each school site." (Education Code section 35176.5; see also Education Code section 35176.6.[8]) That legislative mandate was in effect until January 1, 1989, and therefore, encompassed the period during which this dispute arose. The mere fact that the Legislature has spoken on this issue, does not remove it from the realm of collective bargaining. Only when there is direct conflict with a section of the Education Code would the issue of supersession arise. The Board has stated that

> incorporating a statutory mandate in the agreement, assuming the subject matter is or relates to a subject specified in section 3543.2, certainly does not constitute supersession of that statute whether it is the Education Code or any other statute. On

[8]The complete text of both sections can be found at fn. 4 in the majority opinion.

> the other hand, there is a clearly recognizable value to the "improvement of personnel management and employer-employee relations" in permitting inclusion of such matters within the negotiated contract.

(Emphasis in original, footnote omitted.) The fact that the Legislature has mandated smoking policies in no way precludes negotiations; therefore, the second prong of Anaheim is met.

Finally, to be negotiable, the District's obligation to negotiate the no-smoking policy cannot

> significantly abridge [its] freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

(Anaheim Union High School District, supra, PERB Decision No. 177, at p. 5.) Without any analysis, the majority concludes that the no-smoking policy would significantly abridge the District's freedom to exercise managerial prerogatives essential to its mission and that it is a matter of basic educational policy. As I indicated earlier, I agree that, to the extent the no-smoking policy prohibits smoking in the presence of students, the District's actions were within its managerial prerogative. However, the District's mission to prevent students from smoking, as mandated by Education Code section 48901, is not significantly furthered by the blanket policy prohibiting smoking in all District facilities. I would agree with and adopt the ALJ's conclusion:

> To the extent that smoking and the use of other tobacco products by employees not in the direct presence of students could be found to tangentially relate to the

> District's management prerogatives, it is concluded that negotiations on the subject would not significantly abridge the employer's exercise thereof. In this regard, the District has failed to demonstrate how negotiations on the subject would have such an effect.

(Proposed Decision at p. 18.)

My analysis might be different had the District adopted a policy statement similar to that stipulated to in Chambersburg Area School District v. Commonwealth of Pennsylvania, Pennsylvania Labor Relations Board, et al. (1981) 430 A.2d 740 [110 LRRM 2251, 2253]. There, the reasons for imposition of a no-smoking policy predominately addressed pupil issues, not the health hazards to employees. While these reasons might be applicable to the District in the case currently before the Board, they were not the articulated reasons for the imposition of the policy. We cannot change the motivation of the District by adopting the Chambersburg policy statement. Nor should we adopt it as the rationale for our decision. Furthermore, the District has not shown that its educational mission would be furthered by prohibiting employees from smoking out of the view of students. Such a showing is critical, for, unlike the obvious benefit derived from prohibiting smoking in the view of students, smoking outside the view of students does not obviously promote the District's educational mission.

The majority rejects the ALJ's reliance on three decisions from the New York Public Employment Relations Board (PERB). They reject the New York PERB's analysis because, they contend, the

New York Legislature failed to adopt a general no-smoking policy. The majority, thus, concludes that the New York PERB could, in the absence of legislative mandate, afford to give less weight to the managerial goal of providing a smoke-free environment. (Majority Decision at p. 22.) That conclusion does not accurately reflect the New York PERB's analysis in any of the three cases cited.

In Steuben-Allegany Boces (1980) 13 NY-PERB 3096, the New York PERB affirmed the reasoning of the hearing officer, who held that the policy restricting smoking to specified locations was a work rule dealing with a term and condition of employment. In making this determination, the hearing officer specifically relied on the fact that the area in question was not normally used by students and, therefore, the employer could not argue persuasively that the limitation was designed to influence student conduct.

In County of Niagara (Mount View Health Facility (1988) 21 NY-PERB 3014, the New York PERB rejected the employer's argument that public policy permitted it to restrict smoking in its facility. The board held that

> [s]ince there is no public policy, as yet, which requires or permits a public employer to ban smoking in the work place or in its facilities, we continue to believe that employee smoking regulations are work rules subject to the balancing test which we have previously employed to determine whether unilaterally promulgated work rules violate the Act.

I do not read the language regarding public policy to mean a general statement condemning smoking; rather, the New York PERB addresses the lack of legislation which would specifically permit or require a public employer to restrict smoking. Like New York, the California Legislature has not enacted legislation which would permit a public school employer to unilaterally implement a no-smoking policy in areas not frequented by students.

Finally, in Rush-Henrietta Employees' Association, Buildings and Grounds, Bus Mechanics Chapter, NYSUT/AFT, AFL-CIO (1988) 21 NY-PERB 3023, the New York PERB addressed precisely the issue currently before us: whether employees should be prohibited from smoking in district facilities outside the presence of students. The board held that in order to prevail, the district would have to demonstrate that there was a need related to its mission and that the restrictions did not go beyond what is needed to further its mission. The board concluded that the district failed because its decision arose out of a financial determination that it was too expensive to properly ventilate the facility. The board found that the employer failed to introduce evidence that its prohibition was necessitated by a health hazard to students.

The District has failed to meet its obligation to bargain. Its blanket no-smoking policy, to the extent that it relates to smoking by employees out of the view of students, does not significantly relate to its educational mission. I would adopt the ALJ's proposed decision, which correctly found that the District violated section 3543.5, subdivision (c) and

derivatively, subdivisions (a) and (b). The District should be required to revoke its policy and bargain with the exclusive representatives.