STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GONZALES UNION HIGH SCHOOL TEACHERS ASSOCIATION, CTA/NEA, Charging Party,	)	Case No. SF-CE-1503
v.	)	PERB Decision No. 1006
GONZALES UNION HIGH SCHOOL DISTRICT, Respondent.	)	June 25, 1993

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for Gonzales Union High School Teachers Association, CTA/NEA; Littler, Mendelson, Fastiff, Tichy and Mathiason by Richard J. Currier, Attorney, for Gonzales Union High School District.

Before Blair, Chair; Caffrey and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Gonzales Union High School Teachers Association, CTA/NEA (Association) to the proposed decision (attached hereto) of a PERB administrative law judge (ALJ). The ALJ found that the Gonzales Union High School District (District) was under no obligation to negotiate with the Association concerning the elimination of the District's mentor teacher program. However, the ALJ determined the District's unilateral action implementing employee payroll deductions for health benefit costs over the

District's maximum contribution, violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA).[1]

On appeal, the Association argues that the ALJ erred in finding that the District's elimination of the mentor teacher program was lawfully motivated and thus could be unilaterally implemented. Further, the Association contends the ALJ should have ordered the District to reimburse employees as a remedy for the increased amount deducted from their paychecks for health benefit costs, and issued a cease and desist order barring future employee payroll deductions.

The Board has carefully reviewed the entire record, including the proposed decision, transcript, exceptions and responses thereto. The Board finds the issues raised on appeal by the Association have been adequately addressed by the ALJ in

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

> It shall be unlawful for a public school employer to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.

the proposed decision. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

Based upon the findings of fact and conclusions of law, and the entire record in this case, it has been found that the Gonzales Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing new policies regarding terms and conditions of employment which are within the scope of representation.

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

1. At the request of the Gonzales Union High School Teachers Association, CTA/NEA, make District representatives available for immediate negotiations over the issue of increased health benefit cost payments.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District,

indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

Chair Blair and Member Caffrey joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-1503, Gonzales Union High School Teachers Association, CTA/NEA v. Gonzales Union High School District, in which all parties had the right to participate, it has been found that the Gonzales Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing new policies regarding terms and conditions of employment which are within the scope of representation.

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

1. At the request of the Gonzales Union High School Teachers Association, CTA/NEA, make District representatives available for immediate negotiations over the issue of increased health benefit cost payments.

Dated:_____ GONZALES UNION HIGH SCHOOL DISTRICT

By:_____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

GONZALES UNION HIGH SCHOOL TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. GONZALES UNION HIGH SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-1503 PROPOSED DECISION (9/29/92)

Appearances; Ramon E. Romero, Attorney, for the Gonzales Union High School Teachers Association, CTA/NEA; Littler, Mendelson, Fastiff & Tichy by Richard J. Currier, and Sandra Kloster, Attorneys, for Gonzales Union High School District.

Before JAMES W. TAMM, Administrative Law Judge.

PROCEDURAL HISTORY

On September 23, 1991, the Gonzales Union High School Teachers Association, CTA/NEA (Charging Party or Association) filed this unfair practice charge against the Gonzales Union High School District (Respondent or District.) The Charging Party amended its charge on November 13, 1991. On December 2, 1991, the general counsel's office of the Public Employment Relations Board (PERB or Board) issued a complaint alleging violations of section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA or Act).[1]

[1]EERA is codified at Government Code section 3540 et seq. The pertinent portion of section 3543.5 reads:

> 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

The complaint alleges that the District eliminated a mentor teacher program because the Charging Party engaged in reopener negotiations over preparation periods for mentor teachers. A second allegation is that the District unilaterally implemented a new policy concerning payroll deductions for health insurance premiums.

On January 13, 1992, the Charging Party filed a motion to amend the complaint. After the parties had briefed the motion, it was denied on February 13, 1992.

A settlement conference was conducted, however, the matter remained unresolved. A formal hearing was conducted March 3, 4 and 31, 1992. At the conclusion of Charging Party's case-in-chief, the Respondent also rested its case without calling any witnesses. Briefs were filed and the case was submitted for decision June 30, 1992.

FINDINGS OF FACT

Mentor Teacher Program

The District has a budget of approximately $6 million. During the summer of 1990, the District's business manager, Sara Perez, forecast a budget deficit of over $640 thousand; over 10

> 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.

percent of the District's budget for the 1991-92 school year. In response to the projected deficit, the District began planning budget cuts. One area of savings the District contemplated was the possible elimination of a one-hour preparation period for the District's three mentor teachers.

The District's mentor teacher program had been established in December 1987, pursuant to Education Code section 44490 et seq. The purpose of the program was twofold; to give talented, experienced teachers an incentive to stay in teaching and to allow newer teachers the opportunity to receive guidance from more experienced mentor teachers. The mentor teachers received a stipend of $4,000, which was provided to the District by the state. The only cost to the District was an additional hour of preparation time given to each of the mentor teachers. The extra preparation period was not required by state guidelines. Although not part of the collective bargaining agreement, the extra preparation period had been part of the District's mentor teacher program throughout its life. This extra preparation period cost the District approximately $22,000, which was not reimbursed by the state.

In order to effect savings from the program, the District wanted to eliminate the extra preparation period, but keep the rest of the program. The District had been advised by its attorney that while its participation in the program was entirely within the District's discretion, elimination of the preparation period, by itself, was negotiable.

District Superintendent William Stratton contacted the Association negotiator, Jack Steadman, and sought Steadman's approval to eliminate the preparation period. Steadman testified that Stratton asked for a letter from the Association agreeing to continue the program without the preparation period. When Steadman replied that they would have to negotiate such a change, Stratton said that if the Association insisted on negotiating it, the District would cancel the program.[2]

The next day, Steadman wrote a memo to Stratton to confirm their conversation. Steadman wrote that he understood the District would cancel the program if the Association insisted on negotiating over the preparation period. Steadman asked Stratton to either confirm that understanding or correct the District's position, if Steadman had misunderstood.

Stratton replied that Steadman's understanding was not correct and that the District would be willing to negotiate the issue. Stratton then scheduled a half-day negotiation session for the following week. Steadman replied to Stratton that a partial day meeting put undue pressure on the teachers and suggested that they wait to deal with the mentor teacher program until the parties started reopener negotiations later that year.

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[2]Stratton contradicted Steadman's testimony on this issue, testifying that he did not threaten to cancel the entire program if the Association failed to agree. I credit Steadman on this issue. Stratton's intention to eliminate the program if the Association would not give up the preparation period was consistent with statements made by Stratton to other witnesses and statements made by other District officials to the Association president.

The District did not want to put the issue off that long, so the parties met on May 9, 1991. At that session, however, the parties realized that no proposals had been sunshined pursuant to public notice provisions of the Act.[3] They therefore agreed that while they should not actually begin negotiations, they could discuss the issue informally.

During their informal discussions, it became very clear to the District that the Association was not willing to give up the preparation period without the opportunity to negotiate some trade offs, such as additional medicare coverage. Although both sides indicated a willingness to negotiate over the issue, neither side made any proposals in writing, and no additional bargaining sessions were held.

During this same period, Association president, Jack Havens, spoke with District board member Barbara Robinson about the issue. Robinson told Havens that the District was not obligated to negotiate the elimination of the program. She indicated that if the Association did not accept the District's position, it would eliminate the program in order to make the savings. Havens responded that the District had to negotiate over the decision to eliminate the mentor teacher program. Havens also indicated, however, that he understood the Association could not do anything or demand to bargain until the District actually took action. Havens also reiterated the Association's position to Stratton,

[3]Section 3547 of the Act.

that the District must negotiate over any decision to eliminate the mentor teacher program.

During the budget crisis, the District established an advisory community-based budget committee. That committee, which included a representative of the Association, was created to help prioritize budget cuts. During the early stages of the budget committee meetings, the District administration specifically referred to the savings coming from the elimination of the one-hour preparation period. After it became clear to the District that the Association would not agree to drop the preparation period from the program, but wanted to negotiate over the issue, the District then referred to the cut as the elimination of the mentor teacher program entirely.

On May 28, 1991, the school board adopted a package of budget cuts, including the elimination of the mentor teacher program.

The parties engaged in reopener negotiations later in the school year. However, the subject of the mentor teacher program or the one-hour preparation period was not chosen by either party as a subject of reopener negotiations. The Association has not requested that the District negotiate the effects of its decision to eliminate the program.

Health Benefits Payroll Deductions

From July 1, 1985 through June 30, 1986, the parties' collective bargaining agreement contained the following contract language regarding health benefit payments:

> The District shall contribute up to a maximum of $3543.00 for the current 1984-85 Health and Dental Plans for all regular full-time certificated employees. This maximum amount shall cover the full cost of premiums for 1984-85, but any increase in future (years) beyond this maximum amount will be paid by employees through payroll deduction. This maximum amount is negotiable. If, in 1985-86, it appears that the amount will exceed $3543.00, the parties will negotiate over a different health plan or modify the existing health plan as quickly as possible.

The contract thus provided for a dollar amount cap for District contributions, as well as an agreement that increases beyond the cap would be paid directly by employees through payroll deductions.

That contract language, including the cap and provision for payroll deductions for any amount over the cap, was rolled over into the 86-87 collective bargaining agreement, as well as the 88-89 contract.

During the period from 1985 through 1989, the cost of benefits exceeded the cap only once. The parties were then engaged in negotiations for the 88-89 collective bargaining agreement. At that time, the District agreed to pay the increased cost as long as the District felt the parties were making progress in their negotiations. The District paid the amount over the cap for five or six months, at which time

negotiations broke down and the parties reached an impasse. When that occurred, the District began deducting the excess cost of the benefits from employees through payroll deductions.

Pursuant to an agreement with the Association, the amount of the deductions was calculated by taking the total cost of premiums over the cap and dividing by the total number of employees in the unit. Thus, the payroll deduction for each employee was the same.

During negotiations for the 89-90 contract, the Association had two main goals regarding health benefit payments. One was to eliminate the cap for District contributions. Another was to eliminate payroll deductions as a method of covering future increases.

When agreement was reached in September 1989, the Association had achieved one of its goals, but not both. The parties agreed upon the following language:

> The District shall contribute up to a maximum of the composite rate for the current Health and Dental Plans for all regular full-time certificated employees. This maximum amount shall cover the full cost of premiums for the 1989-90 school year. Any increase for the 1990-91 school year beyond this maximum amount will be paid out of the 1990-91 school year C.O.L.A. (Article IV.A.5 [Wages].) Any increase in future years will be treated in a like manner. This maximum amount is negotiable.

Thus, the parties agreed that the District's contribution would be capped at the maximum of the composite rate for the current health and dental plans for regular full-time certificated employees. While the parties changed the description of the

District's maximum contribution obligation from a dollar figure to a descriptive phrase, it remained a cap nonetheless.

The parties also agreed, however, to drop the language which, in the past, had provided for payroll deductions of any increased cost in excess of the District's maximum obligation. Instead, the parties agreed that any increases beyond the cap would be paid out of the C.O.L.A., which was being applied to the salary schedule. Therefore, any increases over the maximum contribution of the District would come out of salary schedule increases, rather than payroll deductions. The parties agreed that any increases in future years would be treated in a like manner.

Steadman testified that the District's chief negotiator, former superintendent Olson, also verbally agreed that if no C.O.L.A. was given to the District by the state, the District would pay any increases in future benefit costs during the pendency of future negotiations.[4]

In May 1991, the District learned there would be no C.O.L.A. for the 1991-92 school year. The District also learned that effective July 1, 1991, benefit rates would increase and therefore exceed the District's maximum contribution. Stratton, who had replaced Olsen as superintendent, concluded that since there was no C.O.L.A., the District should revert to what he

[4]PERB Regulation 32176 provides that hearsay evidence is admissible, but shall not be sufficient to support a finding, unless it would be admissible over objections in civil actions. This testimony would be admissible as an admission of a party pursuant to Evidence Code section 1220.

understood was the past practice of employees paying for increases through payroll deductions.

Without offering the Association an opportunity to negotiate over how to deal with the increases in the absence of a C.O.L.A., Stratton unilaterally decided to deduct the excess amount through payroll deductions. The Association learned about the payroll deductions when Perez sent a memo to all employees, along with their paychecks, indicating that there had been a payroll deduction for the benefit cost increases. The deductions were made from June 30, 1991 payroll checks and each month thereafter.

When Steadman learned of the payroll deductions, he wrote to Stratton claiming that there was no cap on the District's benefit contributions, that elimination of the cap was an important concession won by the Association, and he demanded refunds of amounts already deducted. The District, however, continued to make deductions. On January 1, 1992, the benefit costs increased again. The January 1, 1992, payroll checks reflected the second increase and the larger deductions from then on.

The deductions made were based upon the type of coverage received by each employee within a three-tier rating system, as opposed to using a composite rate. The employees had differing amounts deducted from their checks, depending upon their individual coverage. Perez testified that she chose this method of calculating deductions because Steadman had insisted upon using the three-tier individual rates, rather than the composite

rate, in calculating increases from 89-90 to the 90-91 school year.

The District and the Association had concluded their reopener negotiations on wages and benefits prior to the increased cost and payroll deductions.

ISSUES

1. Did the District eliminate the mentor teacher program in retaliation for the Charging Party seeking to negotiate over the mentor teacher preparation period?

2. Did the District unilaterally implement a new policy when it instituted employee payroll deductions for increased health benefit costs?

DISCUSSION

Mentor Teacher Program

The complaint in this case specifically alleges that the District took adverse action against employees by eliminating the mentor teacher program because the Charging Party exercised protected right. The protected right alleged to have been exercised was the engaging in reopener negotiations during the period of April 1991 through May of 1991 on the subject of preparation periods for mentor teachers.

There is simply no basis in fact for this allegation. The parties did not engage in any reopener negotiations during April 1991 through May 1991. When reopener negotiations did occur later, neither party sought to negotiate over the mentor teacher

program. Therefore, no violation is found based upon this specific allegation.

The Charging Party, however, has two additional theories of this case. One theory is based upon a retaliation claim. The other is based upon an interference claim. Both are based on an argument that the District did not have discretion to cancel the mentor teacher program once it was in place within the District. According to the Charging Party, a district can decide, for any reason, not to implement a mentor teacher program and it need not bargain over that decision. However, Charging Party argues that once a district installs a mentor teacher program, which implies that there is no fundamental managerial reason not to have one, the District may not later decide to discontinue the program without bargaining, through impasse over its decision and details of the program that are within the scope of representation prior to cancelling the program.

According to the Charging Party, this is the only way to reconcile the Board's decision in Lake Elsinore School District (1988) PERB Decision No. 696 with the Education Code. Education Code section 44494(d) states that:

> The subject of participation by a school district . . . in a mentor teacher program shall not be included within the scope of representation in collective bargaining among a public school employer and eligible employee organizations.

In Lake Elsinore, the Board held that a district's obligation to bargain on negotiable aspects of a mentor teacher program,

attaches when a district receives state approval and funding for the program.

The Education Code, however, is quite clear about a district's participation in a mentor teacher program. It is not a negotiable issue. It is non-negotiable prior to a district adopting a program, and it is non-negotiable after a program is in place within a district. There is no support for an interpretation that a District loses its discretion or that the subject of participation becomes negotiable once a program is implemented. According to the Board's holding in Lake Elsinore, once a district exercises its discretion and it receives state approval and funding for the program, then the District must negotiate over other issues, which are included within the scope of representation. But that does not suddenly make issues specifically excluded from the scope of representation (i.e., the subject of participation in a mentor teacher program itself) negotiable.[5] The District was therefore under no obligation to negotiate over its decision to stop participating in the mentor teacher program.

Although the District need not negotiate with the Association, its discretion to participate in the program is not completely unfettered. As argued by the Charging Party, the

[5]While a district may have an obligation to negotiate the effects of a non-negotiable decision (Oakland Unified School District (1985) PERB Decision No. 540), there is no evidence in this case that the Association ever requested to negotiate the effects of the District's decision to stop participating in the mentor teacher program.

District may not exercise its discretion with an unlawful motive. Charging Party cites McFarland Unified School District v. PERB (1991) 228 Cal.App.3d 166 [279 Cal.Rptr. 26] where the court upheld PERB's decision to order reinstatement of a probationary teacher despite a statute giving districts discretion to terminate probationary teachers for any reason. In McFarland, the District retaliated against a probationary teacher for exercising protected rights. There, the court held:

> [T]he District has cited no authority, nor can it, for the proposition that its power to deny tenure for any lawful reason insulates it from the scrutiny of the PERB when an unfair labor practice complaint alleges that tenure was denied in retaliation for the exercise of a protected right. (Id. at p. 169.)

The same reasoning applies here. If the District's motivation was to retaliate against the Association, it would be unlawful. While this is not a completely clear case, the preponderance of the evidence suggests that the District's motivation was to save the $22,000 resulting from elimination of the preparation period. Right from the start of the budget crisis, the District never wavered from its intention to save the $22,000. Initial internal management discussions, and statements made by Stratton to Steadman, Havens and the budget committee, as well as statements made by Robinson to Havens, suggest that the consistent motivating factor was the savings to the budget. While the District would have preferred to keep the program without the preparation time, it was quite willing to lose the entire program, rather than give up any potential savings to the

budget. The evidence does not suggest, regarding this issue, that the District was looking for ways to retaliate against the Association.[6] The decision here was made for the legitimate purpose of saving $22,000 during a budget crisis. Because the District's motivation for eliminating the program was the budget savings and not for retaliation against the Association, the Charging Party's retaliation theory fails.

The Association's final theory on this issue is that the District interfered with employee protected rights by asking employees to forego rights to negotiate in exchange for continuing the mentor teacher program.

In Carlsbad Unified School District (1979) PERB Decision No. 89, PERB held that a prima facie case of interference with the exercise of EERA protected rights is established where the Charging Party shows that the employer's conduct tends to or does result in some harm to employee rights. Where the harm to employee rights is slight, and the employer offers justification based on operational necessity, the competing interests are

[6]There was evidence presented to show that Stratton and Robinson made statements that Steadman was an ineffectual negotiator, looking out only for his own interests and unable to settle issues. These opinions, however, were not shown to be related to the District's decision to eliminate the mentor teacher program, nor were they accompanied by threats or promises. Other comments made by Stratton about Havens were attempts (albeit inappropriate and unsuccessful) at humor and also unrelated to the decision to eliminate the mentor teacher program. There was, however, credible evidence that on a different occasion, Stratton may have bypassed and sought to undermine the Association by attempting to deal directly with employees in lieu of Steadman. That, however, was not part of this complaint, was not fully litigated, and therefore, no such violation is found.

balanced. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof it was occasioned by circumstances beyond the employer's control and no alternative course of action was available. Proof of unlawful intent or motive is not required. (See also Novato Unified School District (1982) PERB Decision No. 210.)

The Charging Party cites Santa Monica Community College District (1979) PERB Decision No. 103, for the proposition that requiring employees to give up their rights as a condition to receiving beneficial treatment is inherently destructive of employee rights. Therefore, according to Charging Party, the cancellation of the mentor teacher program should be excused only if it was occasioned by circumstances beyond the employer's control and no alternative course of action was available.

Santa Monica, however, can be distinguished. In that case, the District conditioned a salary increase on a waiver of the employee's basic statutory right to negotiate wages. The Board found that when the employees refused to waive the rights, the District imposed reprisals on employees by denying the wage increase. It was the promise to give raises based upon a waiver of rights and the subsequent retaliatory denial of raises, which the Board found to be inherently destructive of employee rights. Contrary to the case at hand, the employer in Santa Monica had no clear statutory right to take the action that it took, and the action it did take was based upon retaliatory motives.

The District's action in this case (asking the Association to waive rights in exchange for the District foregoing its statutory right to cancel the program) could be seen as slight harm at most. Where harm to employee rights is slight, the employees' rights and the employer's justification is balanced. Here the balance tips in favor of the District's clear statutory right and its intent in saving money as its motivation.[7]

For the above reasons, the allegations concerning the mentor teacher program should be dismissed.

Health Benefit Payroll Deductions

The District argues that this issue is, at most, a contract dispute and should be dismissed pursuant to section 3541.5(b) which states that PERB ". . . shall not have the authority to enforce agreements between the parties . . ."

The District argues that under Grant Joint Union High School District (1982) PERB Decision No. 196, not every breach of a collective bargaining agreement also violates the Act. To constitute a violation of the Act, in addition to a default in a contractual obligation, the breach must amount to a unilateral change in policy. Since, according to the District, its actions were consistent with a reasonable interpretation of the contract, and consistent with the established policy regarding payroll

[7]Of course the District, in an attempt to save a worthwhile program, could have entered into negotiations with the Association, but it was under no legal obligation to do so. Likewise, the Association could have volunteered to drop the preparation period and thus save the program. But it also was under no legal obligation to do so.

deductions for amounts in excess of the cap, the Charging Party has failed to prove any unilateral change in policy or practice.

The Charging Party argues that the evidence supports a conclusion that the parties had shifted away from a cap and payroll deductions for excess costs, to a process where any excess costs would come from the C.O.L.A. Since the contract is silent on what would happen if no C.O.L.A. existed, the District should have paid the excess costs pursuant to an agreement with the former superintendent and the District's past practice of paying excess costs until the parties concluded negotiations.

This complaint, however, cannot be analyzed as a contract interpretation case because the contract does not cover the situation at hand. The contract is clear that a cap exists and that any excess costs over the cap should be deducted from the C.O.L.A. The contract is silent, however, about what would happen if no C.O.L.A. exists or is insufficient to cover the excess costs.

Since the contract does not cover the situation, it is necessary to look to other possible agreements or existing policies outside of the contract or to past practice within the District. Steadman testified that former superintendent Olson agreed that the District would pay any excess costs over the cap. However, for several reasons I do not find Steadman's testimony persuasive. First, it is implausible that the District would negotiate a cap, then agree to pay any cost in excess of the cap. If that were the District's intent, why would it work so hard to

negotiate a cap in the first place? Second, Steadman maintains in both his testimony and memos sent to the District, that the parties had eliminated any cap from the contract. This testimony, reflecting his understanding of the negotiations, appears contrary to the clear language of the contract, and is therefore questionable. Third, the Charging Party has provided no supporting documents reflecting any such agreement on this crucial issue. Given Steadman's proclivity to document important conversations, the absence of any such contemporaneous documentation makes his claim suspicious. Finally, during cross-examination, Steadman appeared evasive and non-responsive to questions about the conversation where this agreement was supposed to have occurred. I therefore conclude that there was no agreement between the parties obligating the District to pay increased costs of health benefits over the cap during the pendency of any negotiations.

A review of the past practice within the District is also inconclusive. The District argues that the past practice consists of the District implementing payroll deductions when costs exceeded the cap. The Charging Party argues the past practice consists of the District paying excess costs until the parties concluded their negotiations.

Neither of these positions appears to be accurate. On the single occasion where costs exceeded the cap in the past, the District continued to pay the increased cost of premiums as long as the District felt negotiations were making progress. Once

negotiations stalled, the District then decided to pass on the increased costs to employees through payroll deductions. Thus the past practice includes both the District paying the excess costs during negotiations, as well as employees paying the excess costs through payroll deductions when negotiations stalled.

Even more important regarding the past practice of payroll deductions, however, is the fact that the parties specifically eliminated this past practice and created a new practice by agreeing to take the payroll deduction language out of the contract. This was an important demand from the Association, to which the District agreed.

Therefore, we are left with a situation where there is no applicable contract language, no existing outside agreements covering the situation and no applicable past practice. In short, there is no existing policy or practice to deal with the situation that arose.

Given the fact that there was no contract, policy or practice controlling the situation, the District was under an obligation to give notice and an opportunity to negotiate over the issue to the Association as soon as it realized that the increased benefit costs would not be covered by a C.O.L.A. Both health benefit insurance and payroll deductions are clearly within the scope of representation. (Oakland Unified School District (1980) PERB Decision No. 126; affirmed Oakland Unified School District v. PERB (1981) 120 Cal.App.3d 1007 [175 Cal.Rptr 105] .) Proper notice and negotiations would have provided the

parties an opportunity to work out the method of payment for the increase. Since what occurred had not been contemplated by the parties, they might have wanted to negotiate less expensive health benefits or perhaps the Association would have been willing to trade off something else in exchange for the District agreeing to pay the increases over the cap. Of course if no agreement had been reached, the District would have been free to implement a new policy which was consistent with its last, best offer, or if justified by operational necessity, taken action prior to the completion of negotiations.

Instead, the District took unilateral action implementing a new policy regarding payroll deductions. The District's actions had a material impact on employees by reducing the amount of their paychecks. This unilateral implementation of a new policy regarding payroll deductions violated section 3543.5(a), (b) and (c) of the Act. (Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94; NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].)

CONCLUSIONS

The District's decision to eliminate the mentor teacher program was a lawful, non-negotiable decision. The allegations pertaining to the mentor teacher program should be dismissed.

Because there was no contract, no policy or agreement outside the contract and no established past practice, the District should have afforded the Charging Party notice and an

opportunity to bargain prior to implementing any policy regarding payroll deductions. The District's unilateral action implementing the employee payroll deductions for health benefit costs over the District's maximum contribution violated section 3543.5(a), (b) and (c).

REMEDY

Section 3541.5(c) of the Act empowers PERB to:

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

In this case, it is appropriate to order the District to cease and desist from unilaterally instituting new policies regarding items which are within the scope of representation.

It is also appropriate to order the District to make itself available for immediate negotiations with the Charging Party over how to deal with the increased health benefit costs (issues such as methods of obtaining the employees portion of the increased costs and whether costs should be calculated on a composite basis or a three tier basis for example).

Since I have found that the District was under no obligation to pay premium increases over its maximum contribution, it would not, however, effectuate the purposes of the Act to order the District to reimburse employees for the increased amount deducted from their paycheck. That would, in essence, require the District to pay all the increased costs of health benefits when

it was not legally obligated to do so under the contract. Requiring the District to cease and desist from deducting increased costs from employee paychecks also would not, at this stage, effectuate the purposes of the Act. More likely, it would lead to the absurd result of jeopardizing the health care coverage of the very employees the Act was designed to protect.

It is also appropriate that the District be required to post a notice incorporating the terms of the order. The Notice should be subscribed by an authorized agent of the District, indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. (Davis Unified School District, et al. (1980) PERB Decision No. 116; see Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in the case, the Gonzales Union High School District has been found to have violated the Educational Employment Relations Act, Government Code section 3543.5(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing new policies regarding terms and conditions of employment which are within the scope of representation.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT.

1. At the request of the Gonzales Union High School District Teachers Association, make District representatives available for immediate negotiations over the issue of increased health benefit cost payments.

2. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix.

3. Within ten (10) workdays of service of a final decision in this matter, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become

final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc. sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, sects. 32300, 32305 and 32140.)

James W. Tamm
Administrative Law Judge