STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,	)	
Charging Party,	)	Case No. SF-CE-1719
v.	)	PERB Decision No. 1141
REDWOODS COMMUNITY COLLEGE DISTRICT,	)	February 28, 1996
Respondent.	)	

Appearances: Arnie R. Braafladt, Attorney, for California School Employees Association; School and College Legal Services by Patrick D. Sisneros, Attorney, for Redwoods Community College District.

Before Caffrey, Chairman; Garcia and Johnson, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Redwoods Community College District (District) to a PERB administrative law judge's (ALJ) proposed decision (attached hereto). The ALJ concluded that the District violated section 3543.5(b), (c) and (e) of the Educational Employment Relations Act (EERA)[1] when, prior to completion of impasse, it unilaterally

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

> It shall be unlawful for a public school employer to do any of the following:
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in

changed the hours of security officers.

The Board has reviewed the entire record in this case, including the District's exceptions and the response thereto filed by the California School Employees Association (CSEA). 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 consistent with the following discussion.

DISCUSSION

An exclusive representative is free to negotiate a waiver of its right to bargain over certain mandatory subjects of bargaining for a specified contractual period. The waiver must be clear and unmistakable and cover all aspects of the particular matter in question. (Los Angeles Community College District (1982) PERB Decision No. 252; Amador Valley Joint Union High School District (1978) PERB Decision No. 74.) Such a waiver may authorize the employer to make unilateral changes in that mandatory subject. Here, there is no clear and unmistakable waiver of CSEA's right to negotiate following completion of the mediation process provided for in Article 4 of the parties' collective bargaining agreement. Therefore, the District's contention that it was free to unilaterally implement its final proposal upon completion of the contract mediation process is without merit.

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good faith with an exclusive representative.

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

The Board notes that parties to a collective bargaining agreement are not prohibited by this decision from negotiating alternative methods to attempt to resolve disputes. However, if the agreed upon dispute resolution process is unsuccessful, the parties are prohibited from making a unilateral change in a negotiable subject (Moreno Valley Unified School Dist, v. Public Employment Relations Bd. (1983) 142 Cal.App.3d 191 [191 Cal.Rptr. 60]) or engaging in strike activities (Westminster School District (1982) PERB Decision No. 277; Fresno Unified School District (1982) PERB Decision No. 208) until they have completed the statutory impasse procedure set out in EERA.

ORDER

Based on the findings of fact and conclusions of law and the entire record in this matter, the Board finds that the Redwoods Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(b), (c) and (e). The District violated EERA section 3543.5(c) by unilaterally changing its past practice of allowing security officers to work fixed shifts. Because this action had the additional effect of interfering with the right of the California School Employees Association (CSEA) to represent its members, the unilateral change also was a violation of section 3543.5(b). The District also violated section 3543.5(e) by refusing to participate in good faith in the impasse procedure set out in EERA.

The allegation that the District's conduct violated section

3543.5(a) and all other allegations are hereby DISMISSED.

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 changing the past practice of allowing security officers to work fixed shifts by changing their hours to rotating shifts.

2. Interfering with the right of CSEA to represent its members.

3. Refusing to participate in good faith in the impasse procedure set out in the EERA.

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

1. Within thirty-five (35) days following service of the final decision in this matter, reinstate for all security officers the fixed shifts which were in effect prior to July 10, 1994.

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 are customarily 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 insure that the Notice is not reduced in size, defaced, altered

or covered by any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Chairman Caffrey joined in this Decision.

Member Garcia's concurrence and dissent begins on page 6.

GARCIA, Member, concurring and dissenting: The majority affirms the administrative law judge's (ALJ) conclusion that the Redwoods Community College District (District) violated section 3543.5(b), (c) and (e) of the Educational Employment Relations Act (EERA) because it unilaterally changed its past practice of allowing security officers to work fixed shifts. The ALJ found that the District had not violated EERA section 3543.5(a) and dismissed that allegation and all other allegations. I concur with the dismissal of the (a) violation, but I dissent from the rest of the majority opinion and find that no violation was committed by the District, for the reasons below.

The second full paragraph on page 2 of the majority opinion is an afterthought to this dissent. It is a conclusory rationale to escape the statutory prohibition against interfering with the parties' alternative dispute resolution agreement.

BACKGROUND

Parties' Collective Bargaining Agreement

The parties in this case agreed that certain types of dispute would be resolved by a separate procedure from the impasse resolution procedure contained in EERA. Article IV of the 1991-93 agreement between the parties provides in part:

> Work week: The work week for employees shall consist of five consecutive days, eight hours of work (excluding lunch periods) per day for all employees. Each position shall be assigned a fixed, regular and ascertainable minimum number of daily hours and annual days of employment. This article shall not restrict the District's right to extend the regular work day or work week on an overtime basis when, in the opinion of the District,

such is necessary to carry on the business of the District. The District retains the right to employ and assign employees to less than full time work assignments.

4.1.1 The District has the right to seek voluntary adjustments of employees' work schedules (the hours in each day and the days of the week, not the total number of hours), directly with the employees on a non-coercive basis, without the intervention of CSEA. CSEA will accept such adjustments, voluntarily agreed upon by the employees involved, without protest.

4.1.2 In the event voluntary agreement on proposed adjustments cannot be achieved between the District and the affected employees, the issue shall be subject to negotiations between the District and CSEA. If negotiations on the issue are not successful, assistance will be requested from Humboldt Mediation Services, rather than other resource agencies available. Both the District and CSEA agree that such disputes shall **not** be submitted to a fact-finding panel under the provisions of the Educational Employment Relations Act. [Emphasis added.]

Factual Background

The District proposed to change the hours of security officers. When the California School Employees Association (CSEA) objected, in early 1994 the District invoked the alternative impasse resolution procedure quoted above. Humboldt Mediation Services attempted to resolve the dispute during a mediation session on March 23, 1994, but was not successful. CSEA was willing to continue mediation but the District declined

and, relying on the contractual procedure, on June 9 it informed CSEA that it would make the change regarding the hours effective July 10, 1994. On June 20, 1994, CSEA filed a request that PERB declare impasse and appoint a mediator.

On June 22, 1994, CSEA filed an unfair practice charge with the Public Employment Relations Board (PERB) alleging that the District had unlawfully implemented a unilateral change and its failure to participate in the statutory impasse procedure constituted a violation of EERA section 3543.5(e), (a) and (b).

On July 11, 1994, PERB made a finding that the parties were at impasse and appointed a mediator pursuant to the EERA impasse resolution procedure. Meanwhile, the District implemented the change in hours as announced on July 10. The PERB-appointed mediator conducted a single mediation session on September 13, 1994. The mediator was unable to resolve the dispute over hours but did not certify the matter to fact-finding and no fact-finding panel was appointed. The ALJ found no evidence that CSEA attempted to move the dispute to fact-finding despite the mediator's failure to certify the procedure.

Issue

The main issue in this case, as framed by the ALJ, is whether a public school employer and a labor union can waive by contract the impasse resolution procedure set out in EERA. The ALJ found that such a waiver is invalid and unenforceable. My interpretation of the law and the parties' contract results in the opposite conclusion.

Statutory Provisions Allowing Alternate Procedures

The right to use an alternative dispute resolution is expressly preserved in EERA section 3548, which states, in pertinent part:

> Nothing in this section shall be construed to prevent the parties from mutually agreeing upon their own mediation procedure and in the event of such agreement, the board shall not appoint its own mediator, unless failure to do so would be inconsistent with the policies of this chapter. [Emphasis added.]

Section 3548.1, which provides further detail on the statutory impasse resolution procedure, is phrased in permissive, rather than mandatory language. That section provides, in pertinent part, that:

> (a) If the mediator is unable to effect settlement of the controversy within 15 days after his appointment and the mediator declares that factfinding is appropriate to the resolution of the impasse, either party may, by written notification to the other, request that their differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The board shall, within five days after such selection, select a chairperson of the factfinding panel. The chairperson designated by the board shall not, without the consent of both parties, be the same person who served as

> mediator pursuant to Section 3548. [1]
> (Emphasis added.)

In view of the fact that section 3548 expressly reserves to parties the right to resolve disputes privately, my reading of these two statutes is that the Legislature did not mandate parties to use the entire statutory impasse procedure in all cases and the statute prohibits PERB from appointing a mediator.[2]

Although the majority opinion concedes that parties "are not prohibited . . . from negotiating alternative methods to attempt to resolve disputes," the majority and the ALJ treat the statutory impasse procedure as mandatory, ignoring the statutory prohibition against appointing a mediator as well as the parties' clear agreement not to employ the PERB fact-finding procedure. This interpretation erroneously compels the parties to use a confusing hybrid of the statutory procedure and their own

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[1]Section 3548.1 is written in permissive and mandatory language: i.e., in cases where the parties have not agreed to an alternate procedure, either party may request to submit their dispute to a factfinding panel pursuant to section 3548.1, and once that occurs the remainder of the process is mandatory (since the language of the statute changes to mandatory language after that point). In spite of the confusion caused by the language, the section does not impact my decision since no request to submit to fact-finding occurred.

[2]Parties may agree to substitute portions of the statutory impasse resolution procedures even after a party declares impasse; see, e.g., PERB Regulation 32791 (PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.), which provides that the parties have the right to:

> . . . mutually agree upon their own mediation procedures, including the right to arrange for a mediator of their choice, in lieu of the mediation procedure set forth in these regulations.

mediation procedure; furthermore, it conflicts with the state policy that encourages private resolution of disputes.

As their rationale for this conclusion, CSEA and the ALJ rely on San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893] (San Diego) and several PERB cases[3] as prohibiting parties from waiving the statutory impasse procedure. The ALJ refers to the San Diego case, which states that the purpose of the EERA impasse procedure is to head off strikes, which is a public benefit. Therefore, according to the ALJ, since "[t]he impasse procedure was not put into the law as a right for the primary benefit of the parties. . . . it may not be waived through an agreement of the parties."

I agree with the ALJ that the San Diego case and the other cases cited by CSEA support mandatory fact-finding when a strike is threatened. However, when no strike is threatened, the parties retain the right to employ their alternative procedure. Refusing to enforce that right absent facts that a strike is imminent renders EERA section 3548 meaningless. According to the majority interpretation, section 3548 permits, or even encourages, a useless act: although parties may make private agreements, they are destined to be found "invalid and unenforceable" when one party decides it would have been better off using the EERA procedure at PERB.

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[3]The cited PERB cases include Modesto City Schools (1983) PERB Decision No. 291 (Modesto), Charter Oak Unified School District (1991) PERB Decision No. 873 (Charter Oak), and Temple City Unified School District (1990) PERB Decision No. 841 (Temple City).

I also note that several of the cases CSEA cites in support of its no-waiver argument are factually inapposite to the case at bar in two significant ways. First, as the ALJ noted, this is a case of first impression; none of the cited cases involved interpretation of contract language specifically waiving the statutory factfinding process. Second, the cited cases tested the legality of a party's conduct where the parties had begun to use the statutory procedure but one party elected to deviate from the procedure late in the process (e.g., after fact-finding had occurred, in Modesto and Charter Oak; and after exhaustion of the statutory impasse procedure, in Temple City). The issue in those cases was whether that deviation from the process constituted an unfair labor practice, not whether the parties could (and did) validly waive the statutory process. In this case, by contrast, the District refused to take part in the statutory procedure at all in reliance on its contractual agreement.

Furthermore, it should be noted that CSEA did not object to sending the dispute to Humboldt Mediation Services in accordance with the contractual procedure and only attempted to invoke the statutory procedure later. This shows that CSEA waived the statutory procedure, and PERB is prohibited from mandating its use.

In conclusion, I find no precedent on point barring parties from waiving the EERA impasse resolution procedure in the absence of circumstances suggesting a strike is imminent. Reading EERA section 3548 and 3548.1 together confirms that EERA encourages

alternative dispute resolution by prior agreement that cannot be overridden by PERB except under the threat of a strike. That is the current state of law on this subject.

Comparing the conclusory rationale of the majority in this case to the unanimous, and legally well founded, opinion in Barstow Unified School District (1996) PERB Decision No. 1138 (Barstow USD)[4] demonstrates that their concept of waiver is arbitrarily employed to ignore the clearly stated intent of the parties here and the parties' statutory right to bypass factfinding. The parties in this case expressly waived fact-finding to arrive at a decision point (impasse) early in their dispute. Once Humboldt Mediation Services was unsuccessful in ending the dispute, the situation was the equivalent of impasse and the District was free to implement the change. The District's action was consistent with its last, best and final offer and therefore not an unfair labor practice.

[4]In Barstow USD, the Board held that the parties had validly waived by contract the union's right to negotiate over a particular topic (the District's decision to contract out transportation services). The Board, using sound legal analysis, held that the language of the contract was "clear and explicit" and constituted a "clear and unmistakable waiver" waiver of the union's right to negotiate that topic.

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-1719, California School Employees Association v. Redwoods Community College District, in which all parties had the right to participate, it has been found that the Redwoods Community College District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(c), (b) and (e). The District violated EERA when, prior to completion of the statutory impasse procedure, it unilaterally changed the hours of security officers. Because this action had the additional effect of interfering with the right of the California School Employees Association (CSEA) to represent its members, the unilateral change also was a violation of section 3543.5(b). The District also violated EERA by refusing to participate in good faith in the impasse procedure set out in EERA.

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing the past practice of allowing security officers to work fixed shifts by changing their hours to rotating shifts.

2. Interfering with the right of CSEA to represent its members.

3. Refusing to participate in good faith in the impasse procedure set out in EERA.

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

Within thirty-five (35) days following service of the final decision in this matter, reinstate for all security officers the fixed shifts which were in effect prior to July 10, 1994.

Dated: _____ REDWOODS COMMUNITY COLLEGE DISTRICT

By: _____
Authorized Representative

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

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION, Charging Party, v. REDWOODS COMMUNITY COLLEGE DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-1719 PROPOSED DECISION **(4/19/95)**

Appearances: David R. Young, Labor Relations Representative, and Arnie R. Braafladt, Attorney, for the California School Employees Association; Patrick D. Sisneros, Associate General Counsel, School and College Legal Services, for the Redwoods Community College District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

This case presents the novel question of whether a public school employer and a labor union can waive by contract the impasse resolution procedure set out in the Educational Employment Relations Act (EERA). In 1991, these parties agreed to a contractual impasse resolution procedure different from that set out in the EERA. Three years later they fell into a dispute about its application. The present action soon followed.

The dispute arose when the employer proposed to change the hours of security officers. When the union objected, the employer invoked the alternative procedure. After exhausting the alternative procedure the employer announced that it would go forward with the change in hours. Dissatisfied with this result, the union invoked the statutory procedure. The employer, relying

on the earlier agreement, went ahead with the change anyway. The statutory procedure was never completed. The union now contends that by these actions the employer failed to participate in the impasse procedure in good faith.

The California School Employees Association (CSEA or Union) commenced this action on June 22, 1994, by filing an unfair practice charge against the Redwoods Community College District (District). The general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against the District on November 4, 1994.

The complaint alleges that the District and the Union participated in a mediation session on March 23, 1994, regarding the District's proposal to implement a change in work shifts for security officers. The complaint alleges that following the mediation session the District refused to participate in additional mediation sessions. This was despite the Union's willingness to do so and despite the mediator's failure to certify that further attempts at mediation would be futile. The complaint alleges that on or about July 10, 1993, the District unilaterally implemented its proposal to assign security officers to rotating shifts rather than fixed shifts. The complaint alleges that by these acts the District failed to participate in the impasse procedure in good faith in violation of EERA section 3543.5(e), (a) and (b).

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at Government Code section 3540 et seq. In relevant part, section 3543.5 provides

The District answered the complaint on November 28, 1994, denying generally the operative allegations against it. A hearing was held on January 31, 1995, at the college campus in Eureka. With the filing of briefs, the matter was submitted for decision on April 5, 1995.

FINDINGS OF FACT

The District is a public school employer under the EERA. Continuously since 1977 and at all times relevant here, the Union has been the exclusive representative of a comprehensive unit of the District's classified employees. Included within the unit are the District's four full-time security officers. Throughout the relevant period, the parties were negotiating for a successor to the agreement which expired on December 31, 1993. They did not reach a new agreement until just before the hearing in January of 1995.

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as follows:

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

Prior to 1987, the District's security officers worked rotating shifts which means that each officer sometimes worked days, sometimes evenings and sometimes nights. In 1987, the shift assignments became fixed. From that time until the change at issue, one security officer was permanently assigned to work from 7:00 a.m. to 3:30 p.m., one was assigned from 3:00 p.m. to 11:30 p.m. and one from 11:00 p.m. to 7:30 a.m. The fourth officer, the relief officer, always worked rotating shifts to cover the days off of the three officers on fixed shifts.

Not long after Rich Rohweder became District director of public services/safety, during or about 1990, he suggested that the security officers return to rotating shifts. The officers disliked this plan and resisted the change. The proposal remained under discussion in the security department until June of 1993 when District representatives became more insistent upon the change. At that time, the security officers sought the assistance of CSEA to block the change. There followed a series of discussions between CSEA and District representatives over the proposed change. These discussions were held at informal "problem solving" meetings which take place between CSEA and District representatives every two to three weeks.

Although no agreement had been reached, Mr. Rohweder on August 10, 1993, sent a memo to the public safety officers announcing his intention to institute rotating shifts on the first Thursday in November. The memo described the change as necessary to ensure that all officers become knowledgeable about

security problems on all shifts. The memo predicted that rotating shifts would result in safety officers becoming more diversified and better experienced "to the overall benefit of the entire campus."

In response to Mr. Rohweder's memo of August 10, 1993, CSEA requested formal negotiations on the proposed change in hours. One formal bargaining session was held on September 30, 1993, but the matter was not resolved. Nevertheless, the parties continued to discuss the subject at their informal problem solving sessions and the District delayed implementation of the change past the November date which was set forth in Mr. Rohweder's memo.

The contract provision on hours states that employees in the bargaining unit shall have "a fixed, regular and ascertainable minimum number of daily hours." The contract provides further that the District may "seek voluntary adjustments of employees' work schedules" which is defined to mean "the hours in each day and the days of the week, not the total number of hours." If there is no voluntary agreement between employee and employer about a change in hours, the contract provides for negotiations between CSEA and the District. There follows the alternative procedure that is at the center of this dispute.[2]

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[2]Article IV of the 1991-93 agreement between the parties provides in relevant part as follows:

> 4.1 Work week: The work week for employees shall consist of five consecutive days, eight hours of work (excluding lunch periods) per day for all employees. Each position shall be assigned a fixed, regular and ascertainable minimum number of daily hours and annual days

Under the alternative procedure, the parties agree that if negotiations about hours are not successful, they will invite a private, community-based organization, Humboldt Mediation Services, into the dispute. If Humboldt Mediation fails, the procedure provides that the dispute "shall not be submitted to a fact-finding panel under the provisions of the Educational Employment Relations Act."

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of employment. This article shall not restrict the District's right to extend the regular work day or work week on an overtime basis when, in the opinion of the District, such is necessary to carry on the business of the District. The District retains the right to employ and assign employees to less than full time work assignments.

4.1.1 The District has the right to seek voluntary adjustments of employees' work schedules (the hours in each day and the days of the week, not the total number of hours), directly with the employees on a non-coercive basis, without the intervention of CSEA. CSEA will accept such adjustments, voluntarily agreed upon by the employees involved, without protest.

4.1.2. In the event voluntary agreement on proposed adjustments cannot be achieved between the District and the affected employees, the issue shall be subject to negotiations between the District and CSEA. If negotiations on the issue are not successful, assistance will be requested from Humboldt Mediation Services, rather than other resource agencies available. Both the District and CSEA agree that such disputes shall not be submitted to a fact-finding panel under the provisions of the Educational Employment Relations Act.

The alternative mediation procedure originally was developed in the 1987 negotiations between the parties. Cathy Dellabalma, the chief District negotiator that year, testified that at the time the parties were having many disagreements about changes in hours, in particular for security officers. She testified that the District considered the:

> . . . formal process, where we went through fact finding . . . an expensive process [and] . . . [v]ery time consuming. . . . And the rationale behind that, if we go through that whole process, at the end the District is free to implement their last best offer. By shortening that process and going with the Humboldt Mediation Services, we would -- -- the end result would be the same--that the District would be able to implement their last best offer at that point, but it would provide a forum that was much less time consuming and not as hostile and would achieve the results in a more expedient way.

Ms. Dellabalma knew of the work of Humboldt Mediation and suggested it as an alternative to the statutory process.

Following the negotiating session where Ms. Dellabalma suggested the alternative procedure, CSEA Field Representative David R. Young accepted the procedure in an August 31, 1987, letter to counsel for the District. Initially, the procedure was not written into the agreement between the parties but existed in the form of the side letter. It was written into the contract as part of the article on hours in 1991.

In early 1994, the District invoked the alternative impasse resolution procedure which is at issue. Humboldt Mediation attempted to resolve the dispute during a mediation session on

March 23, 1994, but was not successful. CSEA was willing to continue mediation but the District declined and on June 9, informed the Union that it would make the hours change effective July 10, 1994. CSEA responded to the District's announcement by filing on June 20 a request that PERB determine that the parties were at impasse and appoint a mediator. The San Francisco Regional Office of the PERB followed on July 11, 1994, with a finding that the parties were at impasse. The PERB regional office appointed a mediator.

The District meanwhile implemented the change in hours on July 10, as announced. Under the new schedule, the hours of security officers are changed every four months. An officer who begins a four-month period on days will then rotate to four months on the evening shift followed by four months at night followed by four months on the relief shift. The officer then goes back to the day shift.

The PERB-appointed mediator conducted a single mediation session, held on September 13, 1994. The mediator was unable to resolve the dispute over hours and did not certify the matter to fact-finding. There was testimony that the reason the mediator "may have" given for not authorizing fact-finding was the waiver provision in the agreement. No fact-finding panel was appointed. There is no evidence that CSEA attempted to move the dispute to fact-finding despite the mediator's failure to certify the procedure. However, given the District's insistence on the contractual procedure, CSEA reasonably could have assumed that

further attempts by it to take the dispute to fact-finding would have been futile.

LEGAL ISSUES

1) May the parties waive by agreement the impasse resolution procedure set out in the EERA?

2) If not, did the District fail to participate in the impasse procedure in good faith and thereby violate section 3543.5(e), (a) and (b) when it:

A) Implemented the change in hours prior to exhausting the statutory impasse procedure?

B) Refused to participate in further mediation and/or fact-finding?

CONCLUSIONS OF LAW

Waiver of Impasse Procedure

Whether the parties may waive statutory rights or other statutory provisions depends upon the nature of the right or provision which they seek to waive. It is clear, for example, that an exclusive representative may waive its right to negotiate about a matter within the scope of representation during the life of an agreement.[3] The only requirement is that such a contractual waiver be "clear and unmistakable." (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.) An exclusive representative also may waive its right to file a grievance in its own name, although an employer may not insist to

[3]See, generally, California Public Sector Labor Relations, Matthew Bender, 1994, at pp. 10-34 through 10-38.

impasse upon such a provision. (See Mt. Diablo Unified School District (1990) PERB Decision No. 844 and cases cited therein.)

It similarly is true that certain statutory provisions are not within the power of the parties to waive. The parties, for example, may not agree by contract upon the unit placement of employees so as to preclude PERB review through a unit modification petition. This is because "PERB is empowered to resolve any unit placement 'disputes' and the parties cannot, by agreement or otherwise, divest the Board of such jurisdiction." (Hemet Unified School District (1990) PERB Decision No. 820.) The question here is whether the EERA impasse procedure is a right which the parties may waive or a statutory requirement that is not a party right and therefore may not be waived by them.

The District argues that the parties may waive the statutory impasse resolution procedure, pointing to section 3548 which allows them to agree to a mediation procedure different from that in the EERA. The District sees in this provision legislative approval of other processes. The District also finds support for the right of the parties to institute their own impasse resolution procedure in federal cases[4] decided under the National Labor Relations Act. The District reasons that if federal cases permit a collective bargaining agreement to override federal law, public policy was not violated when these parties established an impasse procedure that differs from the EERA.

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[4]In particular, Boys Market v. Retail Clerks Union (1970) 398 U.S. 235 [74 LRRM 2257] and Buffalo Forge v. United Steelworkers of America (1976) 428 U.S. 397 [92 LRRM 3032].

The Union argues that the purported contractual waiver of the statutory impasse procedure is invalid because the EERA provision is mandatory. The Union argues that although the statute permits the parties to establish their own mediation procedure, it grants no such right to bypass the fact-finding process. The Union cites PERB and state court decisions[5] which find a legislative purpose of heading off strikes in the impasse procedure. Such a legislative purpose, the Union continues, would be undermined if parties could waive the statutory impasse procedure. Since it is undisputed that the District refused to participate in the statutory procedure, the Union concludes, the unilateral change was unlawful.

"The impasse procedures almost certainly were included in the EERA for the purpose of heading off strikes." (San Diego at p. 8.) Accordingly, it is settled law that until the impasse procedure has been completed, the employer may not make a unilateral change in a negotiable subject (Moreno Valley Unified School District v. Public Employment Relations Board (1983) 142 Cal.App.3d 191, [191 Cal.Rptr. 60]) (Moreno Valley) and the exclusive representative may not strike (Westminster School District (1982) PERB Decision No. 277 and Fresno Unified School District (1982) PERB Decision No. 208).

The EERA impasse procedure is set out in the statute's Article 9, commencing at section 3548. Under the statutory

[5]In particular, Modesto City Schools (1983) PERB Decision No. 291 and San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893] (San Diego).

impasse procedure, the Board is to appoint a mediator within five working days and the mediator shall meet with the parties "forthwith" in an effort to help resolve their differences.[6] If the mediator is unable to settle the dispute and declares that fact-finding is appropriate, either party may then move the dispute to fact-finding.[7]

"The impasse procedure of EERA contemplates a continuation of the bargaining process with the aid of neutral third parties. [citation.] Mediation is an instrument designed to advance the parties' efforts to reach agreement; fact-finding is a second such tool required by the law when mediation fails to bring about agreement. . . . [T]he fact-finder's recommendations are a crucial element in the legislative process structured to bring about peacefully negotiated agreements." (Modesto City Schools, supra, PERB Decision No. 291.)

Once the dispute has been moved to mediation, the parties do not have the choice of opting out of the process. The EERA does afford the parties a limited right to choose an alternative process. They may agree to their own mediation procedure[8] and,

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[6]Section 3548.

[7]Section 3548.1.

[8]In relevant part, section 3548 provides as follows:

> . . . Nothing in this section shall be construed to prevent the parties from mutually agreeing upon their own mediation procedure and in the event of such agreement, the board shall not appoint its own mediator, unless failure to do so would be inconsistent with the policies of this chapter. If the

within five days of when the PERB appoints the chair of a fact-finding panel, they may select their own chair.[9] But there is no provision in the EERA which grants the parties the right to substitute entirely their own impasse resolution procedure for that in the statute. Indeed, one could infer that the Legislature, when confronted with a recommendation that it grant the parties such a right, chose not to do so.

The EERA followed by two years the issuance in 1973 of The Final Report of the Assembly Advisory Council on Public Employee Relations. This report, prepared by a panel of distinguished labor law scholars, recommended the enactment of a comprehensive law to regulate employer-employee relations in the public sector. As part of the proposed law, the report recommended the creation of an impasse resolution procedure that would provide "a mechanism for protecting public health or safety if it should be jeopardized."[10] The proposed statute would have

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> parties agree upon their own mediation procedure, the cost of the services of any appointed mediator, unless appointed by the board, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be borne equally by the parties.

[9]In relevant part, section 3548.1 provides:

> (b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

[10]Final Report of the Assembly Advisory Council on Public Employee Relations. March 15, 1973, at p. 236.

allowed either party to negotiations to opt for fact-finding. The proposed statute also would have permitted strikes and lockouts under certain conditions.

The advisory council also recommended that the "parties should be permitted to avoid or abort the operation of the recommended statutory impasse procedure" if they could agree on a binding alternative. Toward this end, the council included the following provision on interest disputes in the draft statute it submitted to the Legislature:

> The provisions of this Article shall be inapplicable to any employer and recognized certified employee organization which agree to a procedure for settlement of their differences that will result in decisions that are final and binding.

The EERA, as noted above, contains no such provision. Upon a declaration by PERB that the parties are at impasse, adherence to the statutory impasse procedure is not voluntary.

It seems clear that the Legislature considered and rejected the idea that the parties should be allowed to agree upon their own alternative impasse resolution procedure. From this history, I would infer that the authors of the EERA wrote into the law the only impasse resolution procedure they intended for the parties to employ. If the parties now were permitted to write an alternative procedure, they would be substituting their judgment for that of the Legislature.

Since the impasse procedure "almost certainly" was included in the EERA "for the purpose of heading off strikes,"[11] I conclude that the procedure was designed primarily for the benefit of the public. It was intended by the Legislature to protect the public from the disruption of public employee strikes by providing a method other than a work stoppage for resolving a deadlock in bargaining. The statutory impasse resolution procedure is a tool written into the law for PERB's use in heading off strikes. The impasse procedure was not put into the law as a right for the primary benefit of the parties.

In this regard, the California procedure is entirely different from that established under federal law for the private sector. Federal law allows the parties to use their economic weapons to resolve disputes with minimal government interference. The federal cases cited by the District involve voluntary agreements by employers and unions to create their own impasse resolution devices where the government has not acted. Because California has chosen a method designed to minimize public employee strikes, I find the federal cases to be unpersuasive.

Accordingly, since the impasse procedure is not a right for the primary benefit of the parties, I conclude that it may not be waived through an agreement of the parties. The contract provision written by the District and CSEA which purports to bar the parties from employing the EERA fact-finding process is therefore invalid and unenforceable.

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[11]San Diego at p. 8.

Conduct During Mediation

If the statutory procedure is to achieve its public policy goals, the parties must use it in good faith. For this reason, the EERA makes it unlawful for a public school employer to "refuse to participate in good faith in the impasse procedure set forth in Article 9" of the EERA. (Section 3543.5(e).) A refusal to participate in good faith may occur as a unilateral change in employment conditions made after the impasse procedure has been invoked but before it has been completed. (Moreno Valley.) A violation also may occur as a flat refusal to participate in the statutory procedure.

The complaint here is based on both of these theories. It is alleged that the District made a unilateral change prior to the completion of the impasse procedure. It also is alleged that the District refused to participate in the impasse procedure to its completion. In both of these allegations, the District is accused of doing exactly what the alternative procedure was designed to allow. The contract specifically provides that:

> Both the District and CSEA agree that such disputes shall not be submitted to a fact-finding panel under the provisions of the Educational Employment Relations Act.

Ms. Dellabalma testified that the District wanted this language to avoid the "expensive" and "time consuming" process of fact-finding. She testified that the District believed that if at the end of fact-finding the District was "free to implement [its] last best offer" then why not shorten the process with "a forum that was much less time consuming and not as hostile."

It is undisputed that the District made the change in hours unilaterally and prior to the completion of the statutory-impasse procedure. However, the theory of the complaint is that the change was made after the impasse procedure had been commenced but before it was completed. Actually, the change was made before the statutory impasse procedure was commenced. It was on June 9, 1994, that the District announced a firm decision to implement the change in hours. The change went into effect on July 10, 1994. The PERB did not make a finding that the parties were at impasse until July 11, 1994, the day after the change in hours went into effect.

Since the District actually announced and made the change in hours prior to the commencement of the impasse procedure, the action could not have been a failure to participate in the impasse procedure in good faith. If the action was unlawful, it was a failure to negotiate in good faith in violation of section 3543.5(c).[12]

An employer's pre-impasse unilateral change in an established, negotiable practice violates its duty to meet and negotiate in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to

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[12]Section 3543.5(c) provides that it shall be unlawful for a public school employer to:

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

negotiate in good faith. (Davis Unified School District, et al. (1980) PERB Decision No. 116.)

The change at issue involved hours, a negotiable subject[13] under the EERA. The term "hours" includes not only the number of hours to be worked but also the time of day when they are to be worked. Thus, a change in work shifts is a change in hours and is a negotiable action. (Los Angeles Community College District (1982) PERB Decision No. 252.) Since the change affected all security officers and was permanent in nature, it is clear that it had both "a generalized effect" and a "continuing impact" on the members of the negotiating unit. (Grant Joint Union High School District (1982) PERB Decision No. 196.)

Accordingly, I conclude that the July 10 change in hours was a failure to negotiate in good faith in violation of section 3543.5(c).[14] Since the action also had the effect of denying CSEA the right to represent its members, it also was in violation of section 3543.5(b). There is no evidence that the failure to negotiate in good faith also denied to individual employees rights protected by the EERA. The allegation that the District

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[13]See section 3543.2.

[14]The District may be found in violation of section 3543.5(c) even though the complaint did not allege a violation of that section. A complaint need not meet the technical pleading requirements of private lawsuits. The critical question is whether the respondent was informed of the nature of the alleged violations. (Moreno Valley at pp. 202-204.) In this case the District was informed through the complaint that it was accused of making a unilateral change in hours. Thus, the fundamental question was placed in issue by the complaint.

violated section 3543.5(a) therefore must be dismissed. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.)

Finally, it is undisputed that in reliance upon the contractual impasse provision the District refused to participate in the statutory impasse resolution procedure after September 13. This refusal was a violation of the duty to participate in the impasse procedure in good faith in violation of section 3543.5(e).[15] The allegation that by failing to participate in the impasse procedure in good faith the District also violated section 3543.5(a) and (b) is dismissed. (Moreno Valley at pp. 205-206.)

REMEDY

The PERB in section 3541.5(c) is given:

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

Here, the District unilaterally changed the hours of security officers from fixed to rotating shifts. The District also refused to participate in the statutory impasse resolution procedure in good faith. The appropriate remedy in a unilateral

[15]I reject the District's argument that because of its agreement to the alternate procedure CSEA should be estopped from claiming that the District committed an unfair practice. Since the rights at issue are those of the public and not the parties, it was not within CSEA's power to agree to their waiver. The District cannot now use the defense of equitable estoppel to preclude a challenge to an action which neither it nor CSEA had the right to take.

change case is a return to the status quo ante. Here, this means that the District be directed to restore the fixed shifts for security officers which were in effect prior to July 10, 1994.

It is further appropriate that the District be directed to cease and desist from unilaterally changing the hours of employees and from refusing to participate in the impasse procedure in good faith. The District also should be required to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, 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 this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Redwoods Community College District (District) violated section 3543.5(c) of the Educational Employment Relations Act (Act). The District violated the Act by unilaterally changing its past practice of allowing security officers to work fixed shifts. Because this action had the additional effect of interfering with the right of the California School Employees Association (CSEA) to represent its members, the unilateral change also was a violation of

section 3543.5(b). The District also violated the act by refusing to participate in good faith in the impasse procedure set out in the Act. The allegation that the District's conduct violated section 3543.5(a) and all other allegations are hereby DISMISSED.

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing the past practice of allowing security officers to work fixed shifts by changing their hours to rotating shifts.

2. By the same conduct, interfering with the right of CSEA to represent its members.

3. Refusing to participate in good faith in the impasse procedure set out in the EERA.

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

1. Within thirty (30) workdays of the service of a final decision in this matter, reinstate for all security officers the fixed shifts which were in effect prior to July 10, 1994.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to classified employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that 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. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

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 of Civ. Pro. 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, secs. 32300, 32305 and 32140.)

Ronald E. Blubaugh
Administrative Law Judge