STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

HACIENDA LA PUENTE TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-3533
v.	)	PERB Decision No. 1187
HACIENDA LA PUENTE UNIFIED SCHOOL DISTRICT,	)	March 17, 1997
Respondent.	)	

Appearances; California Teachers Association by Charles R. Gustafson, Attorney, for Hacienda La Puente Teachers Association, CTA/NEA; Wagner & Wagner by John J. Wagner, Attorney, for Hacienda La Puente Unified School District.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

JOHNSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Hacienda La Puente Unified School District (District) of a PERB administrative law judge's (ALJ) proposed decision (attached). The ALJ dismissed the allegation by the Hacienda La Puente Teachers Association, CTA/NEA (Association) that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] when it unilaterally changed the

[1]EERA is codified at Government Code section 3540 et seq. 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

policy regarding the processing of grievances. The ALJ concluded that the District violated EERA section 3543.5(a) and (b) and (c) when it refused to provide the Association with information which was necessary and relevant to the Association's discharge of its duty to represent its employees.

The Board has reviewed the entire record in this case including the original and amended unfair practice charge, the complaint, the proposed decision and the filings of the parties. The Board affirms the ALJ's decision in part, and reverses it in part, in accordance with the following discussion.

DISCUSSION

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

The Board finds the ALJ's conclusions of law concerning the alleged unilateral change in policy regarding the processing of grievances to be free of prejudicial error and hereby adopts them as the decision of the Board itself. The Association offers no

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> 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.

exceptions to the ALJ's dismissal of its charge relating to this conduct.

The District excepts to the ALJ's consideration of an unalleged theory concerning whether the District's conduct constituted an unlawful refusal to provide the Association with information necessary and relevant to the discharge of its representational duties. The Association responds by supporting the ALJ's consideration of the unalleged theory and finding of a violation.

In Santa Clara Unified School District (1979) PERB Decision No. 104 (Santa Clara USD), the Board stated that an unalleged violation can be considered only if it is intimately related to the subject matter of the complaint, is part of the same course of conduct, has been fully litigated, and the parties have had the opportunity to examine and be cross-examined on the issue. The failure to meet any of these conditions prevents the Board from considering an unalleged violation. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.)

The ALJ concluded that the Santa Clara USD standard was met in this case, and proceeded to consider the unalleged violation. The Board disagrees.

The purpose of the Santa Clara USD standard is to insure that the Board decides a case based on an unalleged theory only when it is clear that the parties have been afforded their due process rights. The parties must have adequate notice and opportunity to litigate the issue, including the respondent's

opportunity to defend against the allegation. Therefore, when it is not clear that the parties have been given adequate notice and opportunity to fully litigate an unalleged theory, a finding that the Santa Clara USD standard has not been met must result.

A review of the record in this case reveals that there is virtually no reference prior to the ALJ's proposed decision to an EERA violation based on the theory that the District refused to provide the Association with information necessary and relevant to its representational duties. There is no reference to this unalleged theory in the Association's original and amended unfair practice charge, in the complaint issued by a Board agent, in the transcript of the hearing, or in the post-hearing briefs submitted by either the District or the Association. Instead, it is clear from the record that the parties litigated this matter exclusively as an alleged unilateral change violation.

While the same conduct may give rise to violations based on different legal theories, the arguments and defenses related to those different theories also typically differ. Parties must be given the opportunity to fully litigate each legal theory. After reviewing the record, the Board concludes that it is not clear that opportunity was provided in this case with regard to the unalleged theory that the District unlawfully refused to provide the Association with information necessary and relevant to its representational duties. Therefore, the Santa Clara USD standard has not been met and the unalleged theory should not have been used to decide the case.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-3533 are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey joined in this Decision.

Member Dyer's concurrence/dissent begins on page 6.

DYER, Member, concurring and dissenting: I agree that the Hacienda La Puente Unified School District's (District) conduct in this case does not constitute a unilateral change from its past practice. Accordingly, I concur with the majority's adoption of the Public Employment Relations Board (PERB or Board) administrative law judge's (ALJ) analysis of that issue. I write separately, however, because I disagree with the Board's dismissal of the unalleged violation found by the ALJ.

The Board may rule on an unalleged violation of the Educational Employment Relations Act in either of two circumstances. First, where an unalleged violation is distinctly separate from the charged unfair practice, the Board may rule on the unalleged violation if the respondent has adequate notice and an opportunity to defend against the violation. (Santa Clara Unified School District (1979) PERB Decision No. 104 at p. 18 (Santa Clara).) Second, where an unalleged violation is intimately related to the subject matter of the complaint, the Board may rule on the unalleged violation if: the unalleged violation is part of the course of conduct alleged in the complaint; the unalleged violation is fully litigated; and the parties have had an opportunity to examine and to be cross-examined regarding the unalleged violation. (Id. at pp. 18-19; Mt. Diablo Unified School District (1984) PERB Decision No. 373c at p. 4.)[1]

[1]I note that, in Tahoe-Truckee Unified School District (1988) PERB Decision No. 668, the Board erroneously combined the two standards set forth in Santa Clara into a single test.

This case revolves around the District's refusal to process a pair of grievances. Implicit in this conduct was the District's refusal to inform the Hacienda La Puente Teachers Association, CTA/NEA (Association), upon request, of its rationale for not processing those grievances.

The Board has long held that an exclusive representative is entitled to information sufficient to enable it to understand and intelligently discharge its duty to represent bargaining unit members. (Chula Vista City School District (1990) PERB Decision No. 834 at pp. 50-52.) Here, both District and Association witnesses testified, without contradiction, that the Association requested the District's rationale for refusing to process the grievances in question. Those same witnesses testified that, without giving any justification, the District refused to comply with the Association's request. Thus, the only issue remaining is a question of law, to wit: was the requested information necessary and relevant to the Association's representational duties? It was. (Hacienda La Puente Unified School District (1997) PERB Decision No. 1184 at p. 4.)

Despite the foregoing, the majority refuses to find the District liable for its refusal to provide information because the parties did not have the opportunity to raise the legal "arguments and defenses related to" the unalleged violation. I do not find this to be the case. I note that the parties had every opportunity to raise these arguments and defenses in their

pleadings before this Board. For the foregoing reasons, I conclude that the record in this case meets the second Santa Clara standard and that the Board should have considered the unalleged violation.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

HACIENDA LA PUENTE TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. HACIENDA LA PUENTE UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-3533 PROPOSED DECISION **(6/20/96)**

Appearances: California Teachers Association by Charles R. Gustafson, Attorney, for Hacienda La Puente Teachers Association, CTA/NEA; Wagner, Sisneros & Wagner by John J. Wagner, Attorney, for Hacienda La Puente Unified School District.

Before W. Jean Thomas, Administrative Law Judge.

INTRODUCTION

This case involves a dispute over a public school employer's refusal to accept or process written grievances filed by individual certificated employees on two separate occasions in early 1995. The union alleges that inasmuch as it tried unsuccessfully to ascertain from the employer why it perceived the grievances to be deficient, the employer's conduct amounts to a unilateral and secret change in the parties' contractual grievance machinery.

The employer maintains that the evidence shows that it has not changed the policy with respect to administration of the grievance provisions of the contract. Additionally, it argues, the two grievances at issue here were not processed because

neither was filed in accordance with the requirements of the grievance procedure.

PROCEDURAL HISTORY

The Hacienda La Puente Teachers Association, CTA/NEA (Association) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) on March 6, 1995, alleging that the Hacienda La Puente Unified School District (District) engaged in conduct that violated the Educational Employment Relations Act (EERA or Act).[1] The charge was amended on May 8, 1995.

After an investigation of the charge, the Office of the General Counsel of PERB issued a complaint on May 24, 1995, which alleged that the District unilaterally changed the policy regarding grievance processing when it refused to process a grievance in January, and later in March 1995, in accord with the grievance provisions established by the parties' collective bargaining agreement (CBA).[2] The complaint further alleged that, by this conduct, the District repudiated the contractual grievance procedure and failed and refused to bargain in good faith with the Association in violation of section 3543.5(c). The same conduct also allegedly interfered with the

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

[2]On the same date, the Board agent denied the District's request for deferral of the charge to the arbitration provisions of the CBA. At the hearing the District orally moved for deferral, and the motion was denied for the same reasons stated by the Board agent in his May 24 ruling.

representational rights of bargaining unit employees in violation of section 3543.5(a), and denied the Association its right to represent unit members in violation of section 3543.5(b).[3]

The District answered the complaint on June 13, 1995, wherein it denied all material allegations of unfair conduct.

An informal settlement conference held by PERB on July 31, 1995, did not resolve the dispute.

A formal hearing was conducted by the undersigned on November 20, 1995. Both parties filed post-hearing briefs. The last brief was filed on January 8, 1996, and the case was submitted thereafter for a proposed decision.

FINDINGS OF FACT

The parties stipulated, and it is found, that the District is a public school employer and the Association is an employee organization as those terms are defined in EERA. The

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[3]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.

Association is the exclusive representative of the District's certificated employees bargaining unit.

Since 1977, the District and the Association have been parties to a succession of CBA's which contained a grievance procedure that culminates in final and binding arbitration. The current CBA has an effective term from September 1, 1994, through August 31, 1996.

The provisions of the three-step, grievance procedure are set forth in Article VII of the CBA. The stated purpose of this procedure is

> to provide, at the lowest administrative level, a means by which a grievance may be resolved in an equitable, efficient manner in an atmosphere of courtesy and cooperation.

Article VII, paragraph F(l), defines a "grievance" as a claim by a bargaining unit member of " . . . a violation, misinterpretation or misapplication of an express provision of this agreement." Under Article VII, paragraph F(2), the Association has the right to file a grievance alleging a violation of an Association right.

The steps for grievance resolution are contained in paragraph G. The process for initiating a grievance at Step 1 reads:

> Step 1. Any grievant who knew or reasonably should have known of the circumstances which formed the basis for the grievance shall present the grievance in writing to the immediate administrator within fifteen (15) days. Failure to do so will render the grievance null and void. The written information shall include:

a. Description of the specific grounds of the grievance, including name, dates, and places necessary for complete understanding of the grievance.

b. A listing of the provisions of this agreement which are alleged to have been violated, misapplied, or misinterpreted.

c. A listing of the specific action requested of the district which will remedy the grievance.

The immediate administrator or his designee shall meet with the grievant within five (5) days. The disposition of the grievance shall be indicated in writing within five (5) days of the meeting with copies to the grievant and the association.[4]

Barbara Koehler (Koehler) is the District's assistant superintendent of personnel. Among other duties, she is responsible for overseeing the processing of all grievances filed by certificated unit employees. When a grievance is filed, Koehler normally receives a copy for review before any District action is initiated. According to Koehler, the District has had a long-standing practice of quickly reviewing any document purporting to initiate a grievance to determine if it follows the steps and procedures outlined in Article VII. If it does, a meeting is held within five days at Step 1, followed by a written response.

If a grievance appears on its face not to conform with the requirements of Article VII, paragraph G, the District will not process it as a grievance. Koehler testified that the District

[4]The time limits specified in the grievance procedure are governed by the terms of Article VII, paragraph B. References to "days" are usually working days.

has made it a practice to notify the Association of such decisions, but it does not inform the Association of the nature of the perceived deficiency.

At each level of the grievance procedure, including Step 3 (arbitration), the District insists on strict compliance with all the requirements of the grievance provisions. The CBA does not contain disclosure language, nor does' it expressly prohibit full or partial disclosure by either party.

Koehler, a 19-year District employee, has been the District's chief negotiator since 1989. Prior to 1989, she was a member of the District's negotiating team for many years. According to her, from time to time the Association has submitted proposals to make non-substantive changes in Article VII. However, none of the proposals involved paragraph G, even when the parties used the interest-based bargaining approach in 1991. Since 1977, the language of Article VII has remained substantially unchanged.

The parties have never used a standard form for grievance processing.

The Ben Harb Grievance

Banayout (Ben) Harb (Harb) has been employed by the District since 1985 as an ESL teacher in the adult education program. On December 7, 1994, Harb submitted a letter to his school administrator, Barry Altshule (Altshule), initiating a Step 1 grievance pursuant to Article VII of the CBA. This grievance was based on the District's alleged non-payment of 10 hours of work

as reflected by Harb's November 17, 1994, pay warrant. This warrant covered the two pay periods ending on October 2 and November 4, 1994.

Harb's December 7 letter did not indicate which section of the CBA he believed had been violated. He did seek a remedy of payment for the two days in question -- September 12 and October 4, 1994. Harb's letter proposed a meeting with the District and his Association representative on December 13, 1994.

Koehler responded to Harb's letter on January 6, 1995. Her letter stated in part:

> As this letter does not follow the format outlined in Article VII of the Agreement Between the Board of Education of the Hacienda La Puente Unified School District and the Hacienda La Puente Teachers Association/California Teachers Association/National Education Association, it will not be handled as a grievance.

A copy of this letter was sent to Ray Lopp (Lopp), the California Teachers Association (CTA) staff person assigned to service the Association.

Koehler testified that the statement in her January 6 letter referred to her conclusion that Harb's grievance did not meet the requirements of paragraph G, Step 1, sub-parts a, b, and c "either in part or in whole." First of all, Harb's letter did not state the section of the CBA that allegedly was violated. Additionally, Koehler concluded, his grievance with respect to the September 12, 1994, claim for non-payment was facially

untimely in that the complained-of action had occurred more than 15 working days prior to the date of his letter.[5]

When Lopp received Koehler's January 6, 1995 letter, he telephoned her to ascertain what was wrong with Harb's letter. Koehler told him to read the contract for the. answer.

After discovering the sub-part(b) omission from Harb's letter, on January 10, 1995, Lopp sent Altshule a memo/addendum to the December 7 grievance letter, adding the CBA section allegedly violated. Lopp, who has been the primary processor of unit members' grievances for a little more than five years, had initiated the preparation of Harb's grievance. He characterized the omission from the December 7 letter as "inadvertent."

Koehler responded to Lopp, by a letter dated January 27, 1995, wherein she acknowledged receipt of his January 10 memo to Altshule, and referred him to her January 6, 1995 letter which was attached. Koehler testified that the intent of her January 27 letter was to convey to Lopp that Harb's December 7 filing was still deficient despite Lopp's January 10 attempt to correct the sub-part (b) omission.

Lopp spoke with Koehler by telephone both before and after he submitted the addendum. On both occasions, Koehler took the position that since the grievance procedure made no provision for

[5]Harb maintains that he first discovered the non-payment for the two days in question when he received the November 17, 1994, pay warrant. Shortly thereafter, he verified through the District payroll office that Altshule had disallowed the 10 hours on the monthly time sheets that the teachers submit to their supervisors for the days/hours worked.

the submission of addenda to the original grievance letter, an addendum was not permissible. Lopp insisted that since Article VII did not expressly prohibit addenda, they were permissible. The parties did not resolve their differences on this issue.

Thereafter, there was no further discussion about nor attempted processing of the Harb grievance.

The Nick Giglio Grievance

Nick Giglio (Giglio) has been employed for 11 years as a teacher in the District's correctional education program. Giglio initiated a Step 1 grievance, with his site supervisor, Alice Johnson (Johnson) by a letter dated March 27, 1995. This grievance alleged the improper reduction of four hours of assigned work time per week beginning March 7, 1995. Giglio's letter listed a provision of the CBA allegedly violated by this action and sought restoration of the reduced hours and back pay or some other form of compensation for the lost hours.

After conferring with Koehler, Johnson responded to Giglio by letter on March 28, 1995, that his grievance would not be processed because it did not follow the procedures outlined in Article VII.

After he received Johnson's letter, Giglio went to Lopp and asked him to pursue the matter through some other process. Lopp instead telephoned Koehler and they had a heated discussion about the District's response to Giglio. By the end of their conversation and, despite several requests, Lopp was still unable to find out from Koehler why the District rejected the grievance.

The Association made no further attempt to pursue the Giglio grievance through the contractual grievance procedure.

Koehler testified that the grievance was rejected because the District concluded that it did not comply with the prescribed time limit specified in Article VII, paragraph G. Koehler regarded it as untimely because it was not filed within 15 working days of the date the District believed Giglio first had knowledge about the change in his assigned hours.[6]

The District's Practice Regarding Processing Other Certificated Unit Grievances

As part of its evidence to establish a practice with respect to processing grievances filed by certificated unit employees, the District presented a summary prepared by Koehler. This summary showed that 17 grievances were initiated between October 1990 and November 1995.[7]

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[6]Giglio and the District dispute when he first learned about the closure of the facility where he worked prior to March 7, 1995. Giglio admitted having a conversation with Johnson on February 28, 1995, regarding possible closure of the facility and her willingness to find him additional hours of work at another facility. But he maintained in his testimony that the employees at his former facility were not informed of the actual closure until March 6, 1995, even though there were rumors of closure for several months prior to March 6.

If Giglio's claim of notice is correct, his March 27, 1995, grievance would have been timely filed. In any event, a resolution of this factual dispute is not necessary for disposition of this case.

Johnson subsequently found three additional hours per week of assigned work for Giglio beginning May 17, 1995.

[7]This total includes the December 1994 Harb and the March 1995 Giglio grievances. However, the six grievances filed after March 1995 will not be considered as evidence of the District's past practice. It is noted, that of the six grievances which were

From October 1990 through June 1994, nine grievances were filed. Four of the nine were processed as grievances.[8] The District did not accept five filings as grievances because, according to Koehler, they were not in accord with the requirements of paragraph G of Article VII. Three of the grievances not processed were deemed to be untimely based on the District's review of the initial information presented. In the case of teacher George Ezquerro (Ezquerro) in September 1993, although the District initially decided that the grievance did not comply with the requirements of Article VII, paragraph G, the then-superintendent later decided to handle the matter as a bona fide grievance.[9]

ISSUES

When it refused to process the Harb and Giglio grievances in early 1995, did the District unilaterally change its policy regarding grievance processing and, thereby violate section 3543.5(a), (b) or (c)?

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processed between March and November 1995, one was filed by Harb on October 1995.

[8]Incidentally, three of these grievances were initiated by Harb.

[9]In connection with this case, the Association filed an unfair practice charge (Case No. LA-CE-3407) against the District on January 7, 1994. Among other things, the Association alleged that the District had refused to process Ezquerro's September 1993, grievance in violation of EERA. The charge was later withdrawn and the case closed on August 11, 1994.

CONCLUSIONS OF LAW

A. The Unilateral Change Allegation

It is well-settled that an employer who makes a 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 negotiate in good faith. (Davis Unified School District, et al. (1980) PERB Decision No. 116; State of California (Department of Transportation) (1983) PERB Decision No. 361-S.)

An established negotiable practice may be reflected in a CBA (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant)) or where the agreement is vague or ambiguous, it may be determined by an examination of bargaining history (Colusa Unified School District (1983) PERB Decision Nos. 296 and 296a) or the past practice. (Rio Hondo Community College District (1982) PERB Decision No. 279; Pajaro Valley Unified School District (1978) PERB Decision No. 51 (Pajaro).)

In order to establish a prima facie case of unlawful unilateral change in or repudiation of, a contract or past practice, the charging party must show: (1) that the respondent has breached or otherwise altered the parties' written agreement or its own established past practice; and (2) that the breach constituted a change of policy having a generalized effect or

continuing impact on the terms and conditions of employment of bargaining unit employees. (See Grant at p. 9.)

To show a change in the District practice, the Association must first establish what the existing grievance processing practice or policy was prior to Harb's December 1994 grievance. A past practice is established through a course of conduct or as a way of doing things over an extended period of time. (Pajaro; Cajon Valley Union School District (1995) PERB Decision No. 1085.)

Evidence was presented to show how the District has responded to certificated unit grievances over the four-year period just prior to December 1994.

This evidence demonstrates that the District has consistently required strict compliance with the technical requirements of the grievance procedure at every step of the parties' grievance machinery. Of the nine grievances filed between October 1990 and June 1994, the District processed four through the contractual grievance machinery to resolution. The remaining five were rejected as grievances because the District concluded that in some way they did not comply with the provisions of paragraph G of Article VII. Three of the grievances not processed were deemed to be untimely based on an initial review of the information presented in the grievance documents. In each instance, no other explanation was given for the District's refusal to process the grievance.

In one case, the District initially rejected a grievance for nonconformity with paragraph G, but later processed it anyway. This single exception, which occurred in September 1993, is insufficient to demonstrate a break or an inconsistency in the District's past course of conduct with respect to either processing or refusing to process grievances.

The District's responses to the December 1994 and the March 1995 grievance were no different from its past responses when it refused grievances. There is thus no basis for concluding that its conduct in either case was inconsistent with its past manner of refusing to accept or process unit member grievances that did not meet its very strict interpretation of the CBA grievance language.

Also, it cannot be concluded from the evidence that the District's conduct in either case amounted to a repudiation of Article VII. Whether the District's application of the provisions of Article VII are correct, or its response to either the Harb or the Giglio grievances was accurate or justified is a matter for determination through the grievance procedure itself, especially since Step 3 provides for final and binding arbitration. It is not a matter for PERB to consider through an unfair practice charge. (See Baldwin Park Unified School District (1979) PERB Decision No. 92.)

Even if the District's conduct with respect to either grievance amounted to a breach of Article VII, the evidence fails to show that such breach constituted a change of policy having a

generalized effect or continuing impact on the unit employees' terms and conditions of employment. Between March and November 1995, six unit member grievances, including one for Harb, were processed through the same contractual grievance machinery.

It is thus concluded that the Association has not met its burden of establishing a prima facie case of unilateral change. At most, the case has demonstrated a dispute over the interpretation and/or application of certain provisions of Article VII.

In Grant the Board considered a contract repudiation claim and concluded as follows:

> The Association claims that the District repudiated Article X of the agreement concerning contingency pay. However, the facts asserted by the Association actually challenge the District's application of the contract's provision. The District does not deny its contractual obligation but claims it properly implemented the provision both as to the use and the amount of the surplus funds. We find in these competing claims nothing which demonstrates a "policy change." [Id. at p. 12.]

The same theory applies in this case. The District admits its contractual obligations under Article VII, and asserts that it has maintained a pattern of implementation consistent with its established past practice. It further contends that it has a contractual right to insist on strict compliance with all of the procedural requirements of the grievance procedure. The Association argues that the District's refusal to clarify "ambiguous" responses to grievances which it deems procedurally defective or enter into productive dialogue about them is

contrary to its statutory good faith obligation to resolve issues through the parties' negotiated grievance process. These conflicting interests and attitudes do not, however, amount to a policy or practice change.

For all the reasons discussed above, it is concluded that, under the Grant standard, the Association has not proven an unlawful unilateral change in practice in repudiation of the CBA grievance article that constitutes a change in policy.

B. The Refusal to Provide Information Allegation

In the original and the amended charges, the Association referred to its attempts to find out from the District why it regarded the Harb and Giglio grievances as deficient. And that, in each case, the District refused to give any information beyond that contained in the response letters. Although the District's alleged refusal to provide information was not specifically alleged in either the charge or the amendment as independent unlawful conduct, these allegations were not withdrawn by the Association, nor dismissed by PERB when the complaint was issued. The allegations remained as conduct that formed the basis for the complaint and the hearing.

In Santa Clara Unified School District (1979) PERB Decision No. 104 (Santa Clara). the Board established the principle that unalleged violations may be entertained by PERB only when adequate notice and the opportunity to defend has been provided the respondent, and where such acts are intimately related to the subject matter of the complaint, are part of the same course of

conduct, have been fully litigated and the parties have had the opportunity to examine and be cross-examined on the issue. (Santa Clara; Eureka City School District (1985) PERB Decision No. 481; and Tahoe-Truckee Unified School District (1988) PERB Decision No. 668 (Tahoe-Truckee).) In Tahoe-Truckee the Board indicated that the failure to meet any of the above-listed requirements will prevent PERB from considering unalleged conduct as a violation of the Act. The Santa Clara standard will be applied to this case.

First, the failure to provide information referenced in the charges is inextricably intertwined with the unilateral change conduct alleged in the complaint. In fact, the crux of the Association's unilateral change allegation is that the District's refusal to explain why it would not accept the grievances amounted to a "change in the grievance . . . process which [was] not agreed to and . . . kept secret from the Association."

Although the Association did not move to amend the complaint before or during the hearing to add the failure to provide information theory as a separate basis for a violation, the District knew from the PERB complaint and the testimony of the key Association witnesses (Harb, Giglio and Lopp) that its refusal to explain or clarify why the two grievances were not acceptable for processing was the main issue in this case. Additionally, no objection to the presentation of evidence relevant to this allegation was ever raised during the hearing.

As indicated in the findings of fact, both parties presented documentary evidence and testimony about their legal theory with respect to the two attempted grievances. Each side had a full opportunity to examine and cross-examine all witnesses on the question of whether the District disclosed to the individual grievants or the Association why the grievances were rejected. In any event, there is little or no dispute about the relevant facts related to this issue.

Under this analysis, it is concluded that the Santa Clara and Tahoe-Truckee standards have been satisfied. It is therefore appropriate to consider the unalleged legal theory raised here as a separate violation of EERA. (Santa Clara; Tahoe-Truckee.)

It has been long held by both the National Labor Relations Board (NLRB) and PERB that an exclusive representative is entitled to information sufficient to enable it to understand and discharge its duty to represent bargaining unit members. Requested information must be furnished for purposes of representing employees in negotiations for future contracts and also for policing the administration of existing agreements. (Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista).)

In defining "necessary and relevant information," PERB, in Stockton Unified School District (1980) PERB Decision No. 143 (Stockton) held that information pertaining immediately to mandatory subjects of bargaining is so intrinsic to the employer-employee relationship that it is considered presumptively

relevant and must be disclosed unless the employer can establish that the information is plainly irrelevant and/or can provide adequate reasons why it cannot furnish the information. (See also Los Angeles Unified School District (1994) PERB Decision No. 1061.)

In Modesto City Schools and High School District (1985) PERB Decision No. 479 (Modesto), it was held that the exclusive representative is entitled to information during the prosecution of grievances initiated pursuant to the provisions of a CBA. In Chula Vista, the Board cited NLRB v. Acme Industrial Company (1967) 385 U.S. 432, 437-38 [64 LRRM 2069] (Acme Industrial) for the proposition that requested information must be provided in the processing of grievances:

> . . . if it likely would be relevant and useful to the union's determination of the merits of the grievance and to their fulfillment of the union's statutory representation duties.

Under the National Labor Relations Act (NLRA), a failure or refusal to provide needed information constitutes a refusal to bargain in violation of the NLRA, because it conflicts with the statutory policy to facilitate effective collective bargaining and dispute resolution within the collective bargaining framework. In Stockton PERB held that the duty to provide relevant information is encompassed within an employer's good faith negotiating obligation under EERA and a failure to provide requested information may be evidence of bad faith bargaining and a violation of section 3543.5(c).

The EERA, like the NLRA, includes provisions which encourage the settlement of disputes within the collective bargaining framework.[10] Therefore, to fulfill its statutory "meeting and negotiating" obligation, an employer subject to the EERA must, as a general rule, supply to an exclusive representative of its employees information and documents which are relevant to a pending grievance, and needed by the organization to pursue the grievance. The determination of whether requested information is relevant to the grievances filed or needed by the Association is not a decision on the merits of the contractual claim stated in the grievance. (Acme Industrial.) Instead, the standard of relevance is more liberal than that used in the civil discovery examination where the precise dispute has not yet been framed and prepared for trial. (Id. at p. 437.) Under this approach, the employer must provide the requested information if it likely would be relevant and useful to the union's grievance determination and fulfillment of its statutory representation duties. (Id. at pp. 437-438.) As the court observed,

> Arbitration can function properly only if the grievances procedures leading to it can sift out unmeritorious claims. [Ibid.]

The evidence in this case establishes that the information sought by the Association from the District was both relevant to the grievances and needed by the Association to determine whether, and how, to pursue the Harb and Giglio grievances. When

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[10]See, e.g., section 3541.5(a), 3543, 3548-3548.3, 3548.5, 3548.7 and 3548.8.

it sought information to determine why the District was rejecting each grievance, the Association was acting within the sphere of its function as the bargaining representative of Harb and Giglio. Yet, when Lopp spoke with Koehler about the Harb grievance, he was told to "read the contract," and in essence, figure it out for himself. No other explanation was provided. In the Giglio case, Koehler adamantly refused to tell Lopp why Giglio's grievance was unacceptable, despite his repeated requests for an explanation. Ultimately, the Association was unable to obtain this information until Koehler testified at the hearing.

In its defense, the District argues that (1) it has a contractual right to insist upon strict compliance with all the technical requirements of Step 1 of the grievance procedure, and (2) a strict enforcement approach benefits the District in that it does not have to wait until a grievance reaches the arbitration level to determine whether or not it is meritorious. The District also maintains that since the language of Article VII does not require it to disclose why it will not process a grievance, it has no contractual obligation to provide the Association with such information. Finally, it asserts that the Association has known of its manner and method of administering Article VII for several years, yet it has not attempted to negotiate any substantive changes in the grievance article.

There is no question that the District has the contractual right to strictly enforce all provisions of Article VII. It is also clear that no provision of the CBA requires the District to

disclose to the Association the reasons for deciding not to process a unit member's grievance. However, these rights do not supersede the District's statutory "meeting and negotiating" obligation under EERA to provide the exclusive representative of its employees with information relevant to a pending grievance in order for the union to intelligently evaluate and pursue the grievance. Koehler's refusals to respond to Lopp demonstrate how the District's "obstructionist" approach to the process denied each grievant and the Association an opportunity to assess the District's position and respond appropriately. It is well-settled that collective bargaining is not confined to the making of an agreement but is a day-to-day process in which the grievance procedure has a very important role as a continuation of the collective bargaining process. (Stockton; Jefferson School District (1980) PERB Decision No. 133.)[11]

The District's restrictive view of its disclosure obligation not only evidences a lack of good faith, but also appears to be at odds with the stated purpose of the parties' grievance procedure which contemplates grievance resolution in "an equitable manner . . . in an atmosphere of courtesy and cooperation."

Its hypertechnical attitude and practice of refusing to inform the Association about why it will not accept or process a

[11]In fact, some authorities have declared the grievance procedure to be the core of the collective bargaining agreement. (See Elkouri and Elkouri, How Arbitration Works, 4th Ed. (1985), p. 153, fn 3.)

grievance that is initially considered deficient falls short of the good faith bargaining obligation inherent in the day-to-day-administration of a CBA through its grievance machinery.

Finally, it is concluded that the District was unable to present any evidence in support of its waiver argument. An employer which asserts that an employee organization has waived its statutory rights to meet and negotiate has the burden of proof with respect to this assertion. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.) Here the District was unable to present competent evidence about any such waiver by the Association during negotiations, and there is no explicit waiver in the contract. Thus, the waiver defense is rejected.

For all the foregoing reasons, it is therefore concluded that the District's refusal to provide requested information as described above amounted to a violation of section 3543.5(c) of the Act. Further, it is concluded that, by this same conduct, the District violated section 3543.5(b) by interfering with the Association's right to administer and enforce a bargained-for CBA while representing certificated unit members in grievance processing. Finally, it is concluded that, by the same conduct, the District violated section 3543.5(a) by interfering with two certificated unit employees in their exercise of rights guaranteed by EERA.

REMEDY

Section 3541.5(c) of the Act states:

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

In order to remedy the unfair practice of the District and to prevent it from benefiting from its unfair conduct and to effectuate the purposes of the EERA, it is appropriate to order it to cease and desist from failing and refusing to provide relevant information to the Association for its grievance representation of unit employees. (Stockton.)

It is also appropriate that the District be required to post a notice incorporating the terms of the order at all sites where notices are customarily placed for certificated employees. 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 EERA that employees be informed of the resolution of the controversy and will announce the readiness of the District to comply with the ordered remedy. (See Placerville Union School District (1978) PERB Decision No. 69.) In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeals approved a similar posting requirement. (See also National Labor

Relations Board v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].)

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Hacienda La Puente Unified School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(a), (b) and (c). It is hereby ordered that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to provide the Hacienda La Puente Teachers Association, CTA/NEA (Association) with information that explains or clarifies the District's reasons for not accepting or processing a unit member grievance that the District perceives as procedurally defective.

2. Denying to the Association rights guaranteed to it by the Act, including the right to represent unit members in grievances.

3. Interfering with and restraining employees in the exercise of rights guaranteed to them by the Act, including the right to have representation on a contract grievance.

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

1. Upon request, provide the Association with timely information that explains or clarifies the District's reasons for not accepting or processing a unit member grievance that the District perceives as procedurally defective.

2. Within ten (10) working days of the service of a final decision in this matter, post at all work locations where notices to certificated employees are customarily posted, copies of the Notices attached hereto as Appendix. The Notice should be subscribed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive work days. Reasonable steps shall be taken to ensure that the Notice shall not be reduced in size, altered, or covered with any other material.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations in accordance with the Regional Director's instructions. Continue to report, in writing, to the Regional Director thereafter as directed. All reports shall be concurrently served on the charging party herein.

The allegations of unlawful unilateral change are hereby DISMISSED.

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 Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually-received before the close of business (5 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 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 Regs., tit. 8, secs. 32300, 32305 and 32140.)

W. JEAN THOMAS
Administrative Law Judge