STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION, CTA/NEA, Charging Party,	)	Case No. SF-CE-1809
v.	)	PERB Decision No. 1240
FREMONT UNIFIED SCHOOL DISTRICT, Respondent.	)	December 4, 1997

Appearances; California Teachers Association by Priscilla Winslow, Attorney, for Fremont Unified District Teachers Association, CTA/NEA; Breon, O'Donnell, Miller, Brown and Dannis by David A. Wolf, Attorney, for Fremont Unified School District.

Before Caffrey, Chairman; Johnson and Dyer, Members.

DECISION

DYER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Fremont Unified School District (District) to a PERB administrative law judge's (ALJ) proposed decision (attached). In his decision, the ALJ concluded that the District violated section 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA)[1] when it unilaterally changed its past

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, in relevant 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

practice for rehiring temporary teachers without providing the Fremont Unified District Teachers Association, CTA/NEA (Association) with notice or an opportunity to meet and confer over the change.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, the District's exceptions, and the Association's response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free from prejudicial error and adopts them as the decision of the Board itself, consistent with the following discussion.

DISTRICT'S EXCEPTIONS

The District filed thirty exceptions to the proposed decision.[2] Despite the breadth of its pleading, the District's exceptions essentially challenge the ALJ's interpretation of Article 16 of the parties' 1992-95 collective bargaining agreement (CBA) (Article 16).[3] The District contends that

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> 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.

[2]The Board finds that the ALJ properly addressed the bulk of the issues which the District raises on appeal and deems it unnecessary to reiterate the ALJ's discussion herein.

[3]Article 16 provides, in relevant part:

> 16.1 Temporary unit members and the District shall have all rights provided them in Sections 44918 and 44954, as amended, in the Education Code. These rights shall hereby be

Article 16 conflicts with Education Code sections 44918 and 44954.[4] Because of this conflict, the District argues, the

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incorporated into this agreement.

16.2 By March 15, qualified temporary unit members shall be placed on a re-hire list for permanent and temporary positions, based on seniority, provided the unit member has worked or will have worked seventy-five (75%) percent of the school year in the District as a temporary and/or substitute unit member.

16.3 Temporary unit members, in order to be deemed "qualified" for reemployment pursuant to [Education Code] section 44918, must be recommended for reemployment by the principal to whom he/she was assigned while on the temporary contract, in addition to serving seventy-five (75%) percent of school days.

[4]Section 44918 provides, in relevant part:

(a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.

(b) Any such employee shall be reemployed for the following school year to fill any vacant positions in the school district unless the employee has been released pursuant to subdivision (b) of Section 44954.

(c) If an employee was released pursuant to subdivision (b) of Section 44954 and has nevertheless been retained as a temporary or substitute employee by the district for two consecutive years and that employee has served for at least 75 percent of the number of days the regular schools of the district were maintained in each school year and has

Education Code preempts the District's obligation to rehire temporary teachers pursuant to Article 16 of the CBA.

ASSOCIATION'S RESPONSE

The Association responds that Article 16 can be harmonized with the Education Code. Further, the Association contends, had the District wished to modify its practice for rehiring temporary teachers, it should have done so during negotiations.

DISCUSSION

It is well established that a unilateral change in a term or condition of employment within the scope of representation is a per se refusal to negotiate. (San Mateo County Community College

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> performed the duties normally required of a certificated employee of the school district, that employee shall receive first priority if the district fills a vacant position, at the grade level at which the employee served during either of the two years, for the subsequent school year. In the case of a departmentalized program, the employee shall have taught in the subject matter in which the vacant position occurs.

Section 44954 provides:

> Governing boards of school districts may release temporary employees requiring certification qualifications under the following circumstances:
>
> (a) At the pleasure of the board prior to serving during one school year at least 75 percent of the number of days the regular schools of the district are maintained.
>
> (b) After serving during one school year the number of days set forth in subdivision (a), if the employee is notified before the end of the school year of the district's decision not to reelect the employee for the next succeeding year.

District (1979) PERB Decision No. 94 at p. 12; Pajaro Valley Unified School District (1978) PERB Decision No. 51 at p. 5.) A unilateral change is a deviation from established policy. (Grant Joint Union High School District (1982) PERB Decision No. 196 at p. 8 [noting that policy may be established by agreement or derived from the parties' past practice].) To be actionable, a unilateral change must have a generalized effect or continuing impact on the terms and conditions of employment. (Id. at p. 9.)

Article 16 of the CBA sets forth the relevant policy in this case. Article 16.1 incorporates the Education Code's provisions for reelection and non-reelection of temporary teachers. (See secs. 44918, 44954.) Articles 16.2 and 16.3 establish the District's procedure for rehiring temporary teachers for the following school year.

Under Articles 16.2 and 16.3, each District principal submits an annual list of the temporary teachers that the principal deems "qualified" to work during the following year. (Art. 16.3.) The District combines these lists into a District-wide "qualified rehire list" (QRL). (Art. 16.2.) In hiring temporary teachers for the following school year, the District exhausts the QRL before resorting to outside teachers.[5]

The District followed the foregoing procedure in rehiring temporary teachers for the 1993-94 and 1994-95 school years. In

[5]Because Article 16 is clear and unambiguous, we find that the ALJ's discussion of past practice and bargaining history, while accurate, is unnecessary. (Temple City Unified School District (1990) PERB Decision No. 841 at proposed decision, p. 24 (Temple City USD).)

the spring of 1995, although the District again prepared a QRL based on the recommendations of its principals, it did not utilize the QRL in rehiring temporary teachers for the 1995-96 school year. Such a change would ordinarily constitute an obvious and unlawful unilateral change. (Temple City USD at proposed decision, pp. 24-25.) Here, however, the District argues that Articles 16.2 and 16.3 are inconsistent with Article 16.1. Because Article 16.1 incorporates rights from the Education Code, the District contends that Article 16.1 preempts the parties' use of the QRL. We disagree.

As the ALJ found, Articles 16.2 and 16.3 do not interfere with the District's discretion to release temporary teachers. (See Trustees of the California State University (1996) PERB Decision No. 1174-H at p. 7; Riverside Community College District (1992) PERB Order No. Ad-229 at pp. 3-4 [noting that the Board will construe a written agreement to give effect to every part thereof].) Instead, Articles 16.2 and 16.3 set forth a procedure through which the District exercises its discretion to rehire temporary teachers. Nothing in Article 16.2 or 16.3 limits the District's discretion in determining, on an annual basis, which temporary teachers are "qualified" for reemployment. Because Articles 16.2 and 16.3 do not conflict with either Article 16.1 or the Education Code, the District's preemption argument fails. (San Mateo City School Dist, v. Public Employment Relations Bd. (1983) 33 Cal.3d 850, 864-866 [191 Cal.Rptr. 800]; see Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal.4th 269,

285-286 [52 Cal.Rptr.2d 115].) Accordingly, the District violated EERA section 3543.5(a), (b), and (c) when it unilaterally abandoned its practice of rehiring temporary teachers based on the QRL.

ORDER

Upon the findings of fact, conclusions of law and the entire record in this case, it is found that the Fremont Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b), and (c) when it unilaterally changed its past practice for rehiring temporary teachers.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to negotiate with the Fremont Unified District Teachers Association, CTA/NEA (Association) by unilaterally changing a contract procedure for reemploying temporary teachers.

2. Denying the Association the right to represent its members in their employment relations with the District.

3. Denying bargaining unit temporary employees the right to be represented by the Association in their employment relations with the District.

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

1. Upon request by the Association, restore the status quo ante by returning to the procedure for reemploying temporary teachers that existed prior to March 1995.

2. Upon request by the Association, make adversely affected employees whole for losses incurred as a result of the District's unlawful action, including offer of reemployment pursuant to the terms of the reestablished procedure and interest at the rate of seven (7) percent per annum.

3. Within thirty-five (35) days following the date that 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, altered, defaced, or covered by any other material.

4. Written notice 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. Continue to report in writing to the regional director periodically thereafter as directed. All

reports to the regional director shall be served concurrently on the Association.

Member Johnson joined in this Decision.

Chairman Caffrey's concurrence begins on page 10.

CAFFREY, Chairman, concurring: I concur in the finding that the Fremont Unified School District (District) violated the Educational Employment Relations Act (EERA) when it unilaterally changed the procedure for rehiring temporary teachers without providing the Fremont Unified District Teachers Association, CTA/NEA (Association) with notice or the opportunity to bargain over the change.

This case requires the Public Employment Relations Board (PERB or Board) to interpret a provision within the parties' collective bargaining agreement (CBA). Article 16 of the CBA, dealing with temporary unit members, states in pertinent part:

> 16.1 Temporary unit members and the District shall have all rights provided them in Sections 44918 and 44954, as amended, in the Education Code. These rights shall hereby be incorporated into this agreement.
>
> 16.2 By March 15, qualified temporary unit members shall be placed on a re-hire list for permanent and temporary positions, based on seniority, provided the unit member has worked or will have worked seventy-five (75%) percent of the school year in the District as a temporary and/or substitute unit member.
>
> 16.3 Temporary unit members, in order to be deemed "qualified" for reemployment pursuant to EC [Education Code] section 44918, must be recommended for reemployment by the principal to whom he/she was assigned while on the temporary contract, in addition to serving seventy-five (75%) percent of school days.

The Education Code sections cited in Article 16.1 essentially give a school district the right to release, or not reelect, temporary certificated employees at the pleasure of the district. Because this authority is specifically incorporated

into the parties' CBA, the District argues that it clearly and unambiguously supersedes the temporary unit member rehire procedure described in Articles 16.2 and 16.3. On the contrary, however, the very fact that this case is before the Board due to the conflicting interpretations of the sections of Article 16 leads to the conclusion that the article is far from clear and unambiguous.

Ascertaining the intent of the parties at the time of contracting is the paramount rule governing contract interpretation. (Cal. Civ. Code sec. 1636.) Accordingly, public employment CBAs are enforceable contracts which should be interpreted to execute the mutual intent and purposes of the parties. (Glendale City Employees' Assn., Inc. v. City of Glendale (1975) 15 Cal.3d 328, 339 [124 Cal.Rptr. 513] cert, denied 424 U.S. 943 [96 S.Ct. 1411].) As noted by the administrative law judge (ALJ), it simply cannot be concluded from the record in this case that it was the intent of the parties in agreeing to Article 16 that section 16.1 would allow the District to ignore the process described in sections 16.2 and 16.3 when rehiring temporary unit members.

In interpreting a contract, the whole of it must be taken together to give every part effect if reasonably practicable. (Cal. Civ. Code sec. 1641.) Therefore, the Board must seek a reasonably practicable interpretation of Article 16 which gives effect to sections 16.1, 16.2 and 16.3. In my view, such an interpretation readily presents itself.

While the overall subject of Article 16 is "Temporary Unit Members," the specific subject matter of Article 16.1 is distinct from that addressed by Articles 16.2 and 16.3. Article 16.1 provides the District with the authority embodied in the cited Education Code sections, to not reelect temporary certificated employees. Articles 16.2 and 16.3 describe the process the District uses in rehiring them. A reasonably practicable interpretation of Article 16 leads to the conclusion that the District is free to not re-elect its temporary teachers pursuant to section 16.1, but if it rehires them, it has agreed to follow the process described in sections 16.2 and 16.3.

This interpretation harmonizes and gives effect to each of the various sections of Article 16. Equally importantly, it provides the District with the authority intended by the cited Education Code sections while giving full effectiveness to the provisions of the parties' CBA, which they arrived at through good faith negotiations under EERA. Accordingly, since the subsections may readily be harmonized, the issue of Education Code pre-emption, asserted by the District, does not present itself. The court's analysis in Board of Education v. Round Valley Teachers Assn. (1996) 13 Cal.4th 269, 285-286 [52 Cal.Rptr.2d 115], which rested on the inability to harmonize the Education Code and contractual provisions, is inapplicable here.

The facts of this case indicate that the District exercised its authority under both Article 16.1 and the Education Code by

sending nonrenewal notices for the 1995-96 school year to all temporary teachers. The District then proceeded with a temporary teacher rehire process. However, it unilaterally adopted a rehire process other than that which it had negotiated with the Association, embodied in Articles 16.2 and 16.3. When it did so, the District committed a unilateral change in violation of the EERA.

I wish to comment briefly on other arguments offered by the District in its exceptions to the ALJ's proposed decision.

The ALJ concluded that the instant dispute is properly within PERB's jurisdiction, even though the parties' CBA contains a grievance and binding arbitration procedure. That procedure, however, indicates that "arbitrators may not award remedies which require a direct money payment (payout) by the District of more than $20,000 to the grievant . . . ." (CBA Art. 6.22.) The ALJ noted that the alleged damages suffered by the teachers in this case exceed that $20,000 limit.

The District does not dispute the ALJ's estimate of damages, but argues that Article 6.22 conflicts with the statutory limit on PERB's jurisdiction contained in EERA section 3541.5(a)(2) .*

Section 3541.5 states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
>
> (2) Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and

The District states that "no statutory basis exists to allow PERB to exercise jurisdiction over a matter otherwise properly-deferrable to arbitration."

In discussing the statutory requirement that PERB defer to a contractual arbitration procedure, the Board has noted that the application of that requirement must be:

> . . . consistent with the fundamental principle that the jurisdiction to resolve a dispute must carry with it the authority to order an appropriate remedy for unlawful conduct. [State of California (Department of Corrections) (1995) PERB Decision No. 1100-S.]

Accordingly, where the arbitrator lacks authority to resolve the dispute, the Board will find resort to the contractual procedure to be futile and will not defer to it. (California State University (1984) PERB Decision No. 392-H.)

This is the circumstance in the case at bar. The arbitrator is unable to order an appropriate remedy and, therefore, lacks a fundamental component of the authority to resolve the dispute. Resort to the contractual procedure under these circumstances would be futile, and PERB must maintain jurisdiction over the case.

The District also argues that temporary teachers are not included in the PERB exclusive representation certification

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> covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary.

document, dated December 1976, which describes the bargaining unit represented by the Association. Therefore, the District asserts that temporary teachers are not in the unit and PERB has no jurisdiction over the instant dispute.

This argument is without merit. The contractual provision over which the instant dispute arises describes the affected employees as "temporary unit members." It is clear from the record that the parties for many years have engaged in negotiations over terms and conditions of employment affecting these temporary unit members. I find this conduct to be a compelling statement of the fact that these employees are members of the bargaining unit, despite the District's presentation of a 20-year-old PERB document that does not specifically refer to temporary teachers.

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-1809, Fremont Unified District Teachers Association, CTA/NEA v. Fremont Unified School District, in which all parties had the right to participate, it has been found that the Fremont Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b), and (c).

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to negotiate with the Fremont Unified District Teachers Association, CTA/NEA (Association) by unilaterally changing a contract procedure for reemploying temporary teachers.

2. Denying the Association the right to represent its members in their employment relations with the District.

3. Denying bargaining unit temporary employees the right to be represented by the Association in their employment relations with the District.

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

1. Upon request by the Association, restore the status quo ante by returning to the procedure for reemploying temporary teachers that existed prior to March 1995.

2. Upon request by the Association, make adversely affected employees whole for losses incurred as a result of the District's unlawful action, including offer of reemployment pursuant to the terms of the reestablished procedure and interest at the rate of seven (7) percent per annum.

Dated: _____ FREMONT UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

FREMONT UNIFIED DISTRICT TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Unfair Practice Case No. SF-CE-1809
v.	)	PROPOSED DECISION (8/23/96)
FREMONT UNIFIED SCHOOL DISTRICT,	)	
Respondent.	)	

Appearances: Priscilla Winslow, Attorney, for Fremont Unified District Teachers Association, CTA/NEA; Breon, O'Donnell, Miller, Brown and Dannis, by Gregory Dannis and David Wolf, Attorneys, for Fremont Unified School District.

Before' Fred D'Orazio, Administrative Law Judge.

PROCEDURAL HISTORY

A teachers union contends here that a school district unilaterally changed the procedure for rehiring temporary teachers; the procedure, the union argues, was agreed to by the parties in their collective bargaining agreement and also reflected in a past practice developed under that agreement. The district argues in response that the employment of temporary teachers is preempted by the Education Code, it had no duty to negotiate about its decision, and in any event the union waived its right to bargain.

The Fremont Unified District Teachers Association, CTA/NEA (Association) commenced this action on June 5, 1995, by filing an unfair practice charge against the Fremont Unified School District (District). On December 14, 1995, the Office of General Counsel of the Public Employment Relations Board (PERB or Board)

issued a complaint alleging the District unilaterally changed the procedure for reelecting temporary teachers. This conduct, the complaint also alleges, violated the Educational Employment Relations Act (EERA) section 3543.5(a), (b), and (c).[1]

The District answered the complaint on December 29, 1995, generally denying the allegations and asserting a number of affirmative defenses. Denials and defenses will be addressed below, as necessary.

An informal settlement conference was conducted by a PERB agent on February 6, 1996, but the dispute was not resolved. A formal hearing was conducted by the undersigned in San Francisco, California on May 7-9, 1996. With the receipt of the final brief on July 24, 1996, the case was submitted for decision.

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[1]EERA is codified at Government Code section 3540 et seq. In relevant part, section 3543.5 states:

> 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.

JURISDICTION

The Association is the exclusive representative of an appropriate unit of the District's certificated employees (including temporary teachers) within the meaning of section 3540.l(e). The District is a public school employer within the meaning of section 3540.1(k). At all relevant times, the District and the Association have been parties to a collective bargaining agreement; as more fully explained below, the dispute raised by the instant unfair practice charge is not subject to binding arbitration under that agreement.

FINDINGS OF FACT

The District employs temporary teachers to fill in for permanent teachers who are on leaves of absence or other assignments. Article 16 of the 1989-1992 collective bargaining agreement covered the employment of temporary teachers. In relevant part, it states as follows:

> 16.1 Temporary unit members and the District shall have all rights provided them in the Education Code. These rights shall hereby be incorporated into this Agreement.
>
> 16.2 By March 15, qualified temporary unit members shall be placed on a re-hire list for permanent and temporary positions, based on seniority, provided the unit member has worked or will have worked seventy-five (75%) percent of the school year in the District as a temporary and/or substitute unit member.
>
> 16.3 Temporary unit members, in order to be deemed "qualified" for reemployment pursuant to [Education Code] section 44918, must be recommended for reemployment by the principal to whom he/she was assigned while on a temporary contract, in addition to serving seventy-five (75%) percent of school days.

District and Association witnesses alike agreed that a longstanding practice concerning reemployment of temporary teachers has existed since approximately 1984. Pursuant to that practice, which existed under Article 16 since at least 1989, temporary teachers who were recommended by their principals for reemployment and who worked at least 75 percent of the school year were placed on a rehire list in order of seniority. Teachers on the so-called "Qualified Rehire List" (QRL) were rehired ahead of "outsiders" (teachers who had not worked in the District) into vacant positions for which they were credentialed. To be deemed "qualified" under section 16.3, a temporary teacher had to receive a recommendation for reemployment by his or her principal. Temporary teachers who were not placed on the QRL were given letters indicating they would not be employed by the District in the next school year.

This dispute is largely about the relationship between Article 16 and two key Education Code sections that also apply to employment of temporary teachers. These are sections 44918 and 44954.

At the time the parties negotiated their 1989-1992 contract, sections 44918 and 44954, in relevant part, read as follows.

> Section 44918. Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in such school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a

probationary employee for the following school year.

Any such employee shall be employed for the following school year to fill any vacant positions in the school district for which the employee is certified and qualified to serve.

For purposes of this section, "qualified to serve" shall be defined to mean the possession of an appropriate credential plus completion of appropriate academic preparation or experience in the subject matter in which the vacant position occurs.

For purposes of this section, "vacant position" means a position in which the employee is qualified to serve and which is not filled by a permanent or probationary employee. It shall not include a position which would be filled by a permanent or probationary employee except for the fact that such employee is on leave.

Any employee classified as a substitute or temporary employee who has rendered the service required to qualify under this section but who has not been reemployed due to a lack of a vacant position shall be reemployed as a substitute or temporary employee for the following school year.

Section 44954. Governing boards of school districts may dismiss temporary employees requiring certification qualifications at the pleasure of the board. A temporary employee who is not dismissed during the first three school months, or in the case of migratory schools during the first four school months of the school term for which he was employed and who has not been classified as a permanent employee shall be deemed to have been classified as a probationary employee from the time his services as temporary employee commenced.

In January 1991, the First District Court of Appeal issued a major decision affecting temporary teachers. (Kalamaras v. Albany Unified School District (1991) 226 Cal.App.3d 1571 [277

Cal.Rptr. 577] (Kalamaras).) Interpreting Education Code section 44918 as it existed at that time, the court held that a temporary employee (a school librarian in that case) who served at least 75 percent of a school year was entitled to a vacancy the following year provided the employee possessed the required credential, even though the employee had received unsatisfactory evaluations. The decision was widely interpreted as granting temporary teachers overly broad reemployment rights and unduly limiting the flexibility of school districts in replacing permanent teachers who were on leave.

Prompted by the decision in Kalamaras, the Legislature acted to amend Education Code sections 44918 and 44954.[2] Effective January 1, 1993, the new sections provide, in relevant part, as follows:

> Section 44918. (a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, shall be deemed to have served a complete school year as a probationary employee if employed as a probationary employee for the following school year.[3]
>
> (b) Any such employee shall be reemployed for the following school year to fill any

[2]Introduced by Senator Alfred Alquist, the bill that ultimately amended Education Code sections 44918 and 44954 was SB 1281.

[3]This section remained substantially the same as the first paragraph in former section 44918.

vacant positions in the school district unless the employee has been released pursuant to subdivision (b) of Section 44954.

(c) If an employee was released pursuant to subdivision (b) of Section 44954 and has nevertheless been retained as a temporary or substitute employee by the district for two consecutive years and that employee has served at least 75 percent of the number of days the regular schools of the district were maintained in each school year and has performed the duties normally required of a certificated employee of the school district, that employee shall receive first priority if the district fills a vacant position, at the grade level at which the employee served during either of the two years, for the subsequent school year. In the case of a departmentalized program, the employee shall have taught in the subject matter in which the vacant position occurs.

Section 44954. Governing boards of school districts may release temporary employees requiring certification qualifications under the following circumstances:

(a) At the pleasure of the board prior to serving during one school year at least 75 percent of the number of days the regular schools of the district are maintained.

(b) After serving during one school year the number of days set forth in subdivision (a), if the employee is notified before the end of the school year of the district's decision not to reelect the employee for the next succeeding year.

After SB 1281 was signed into law but before it became effective on January 1, 1993, the District and the Association commenced negotiations for a successor agreement to the 1989-1992 contract. Article 16 of the 1992-1995 agreement, ratified by the District on December 3, 1992, remained the same except for section 16.1. The new section 16.1 states:

> 16.1 Temporary unit members and the District shall have all rights provided them in sections 44918 and 44954, as amended, in the Education Code. These rights shall hereby be incorporated into this agreement.

As the negotiations unfolded, both parties were aware that new versions of sections 44918 and 44954 would take effect on January 1, 1993. Despite the conflict the new laws would eventually cause between the Association and the District, the Education Code changes received surprisingly little attention at the bargaining table.[4]

Peter Haberfeld, then the Association's executive director, attended all negotiating sessions where Article 16 was discussed. He testified that the District proposed the new language, and there was not much discussion about it. "It was like clearing up something in a technicality," he said.

The "gist" of the limited discussion at the table, according to Mr. Haberfeld, was to "acknowledge that there [were] amended versions [of sections 44918 and 44954] that would take effect in January '93," and that the changes were, "in the minds of the parties, in harmony with the rights, the contract rights of temporary members that were in this contract as they had been in the previous contract." The District never proposed elimination

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[4]An initial Association proposal would have modified section 16.3 to read as follows: "Temporary unit members shall be granted preferential rehire rights pursuant to [Education Code] Section 44918." If adopted, this proposal would have eliminated the principal's recommendation as a qualifying factor to place a temporary employee on the QRL. However, when the parties began discussing Article 16, the Association quickly retreated from this position.

of sections 16.2 or 16.3, nor was there any discussion indicating that the new language would eliminate the past practice, Mr. Haberfeld testified. Had such a proposal been made, Mr. Haberfeld said, the Association would have rejected it.

The District's version of the bargaining history is not much different. Barbara Render, the District's assistant superintendent for human resources and affirmative action at the time of the negotiations, did not attend any bargaining sessions. However, she testified that she told the District's chief spokesperson, Paul Loughlin, that she wanted the new agreement to reflect the Education Code changes that, in her view, gave the District "more flexibility" in dealing with temporary employees.

Mr. Loughlin agreed that Ms. Render indicated she wanted flexibility in dealing with temporary employees, but his recollection of the discussions at the table is more in line with Mr. Haberfeld's. The discussions at the table were minimal, he agreed. They were aimed at "cleaning up" the agreement, and the reference to Education Code sections 44918 and 44954 accomplished that goal, according to Mr. Loughlin. Asked if the practice concerning rehiring temporary employees remained in the new agreement, Mr. Loughlin responded "that's correct."

The agreement was signed by the parties on December 3, 1992. The practice concerning rehiring temporary teachers saw no change in the 1993-1994 or the 1994-1995 school years.

In May 1994, the District's Citizens' Advisory Committee on Ethnic/Race Relations (Committee) issued its report.[5] Among other things, the Committee recommended the District establish a policy under which notices of nonrenewal would routinely be issued to all temporary teachers on March 15. The underlying reason for the recommendation was to increase the District's hiring flexibility and enhance the overall effort to attract minority teachers early in the recruiting process.

Ms. Rahman testified that the Committee discussed the collective bargaining agreement as an impediment to hiring minority teachers. Although she lodged protests against the recommendation, she did not exercise her right as a Committee member to file a written dissent. The Association's executive board had decided that a formal dissent would suggest the union opposed affirmative action and it did not want to be seen in that light. Also, the executive board concluded the collective bargaining agreement and the past practice would protect temporary teachers from any infringement on existing rights.

Diane Coehlo, who was the Association's president in 1994, also attended meetings of the Committee and closely followed its progress. After evaluating a preliminary draft of the report, Ms. Coehlo objected to the implication that the Association prevented the District from hiring minority teachers and to the

[5]The Committee was charged with the task of developing a draft plan to identify and address racial issues in the District. It was made up of District, Association, and community members. Association representatives on the Committee were Peggy Rahman, Hal Christy, and Mary O'Connell.

notion that the collective bargaining agreement had a negative impact on such hiring. Ms. Coehlo credibly testified that at one Committee meeting the recommendation concerning rehiring temporary teachers was discussed at length, and she was "assured repeatedly" that "it no way affects the rehire of temporaries."

In May 1994, the District adopted the report. At about the same time, Ms. Render retired and, effective August 1994, Douglas Gephart replaced her as assistant superintendent for human resources and affirmative action. On the Association side, Lucy Rideout had taken over for Mr. Haberfeld as the Association's executive director, and John Gunn had taken over for Ms. Coehlo as president of the Association.

At meetings in early 1995, Mr. Gephart informed Ms. Rideout and Mr. Gunn that he intended to recommend blanket nonrenewal notices be sent to all temporary teachers.[6] The purpose of his recommendation, Mr. Gephart explained, was to improve staff diversity and to maximize efforts to hire the best qualified teachers. Mr. Gephart also said that his decision was based on the Committee's recommendation and on the District's authority to take such action under the Education Code. Ms. Rideout and Mr. Gunn indicated in their respective meetings that they opposed the recommendation as a violation of the collective bargaining agreement.

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[6]The meeting with Ms. Rideout occurred in "late" January 1995, and the meeting with Mr. Gunn was held during the first week of March 1995.

On March 8, 1995, the District's governing board adopted Mr. Gephart's recommendation. Although the District compiled a QRL of temporary teachers who had worked 75 percent of the school year and had received positive recommendations from their principals,[7] on March 9 it sent all temporary teachers nonrenewal notices for the 1995-1996 school year. This was the first time since at least 1984 that the District had issued a "blanket" notice of nonrenewal to temporary teachers.[8]

All temporary teachers, including those who had been placed on the QRL, were informed in the letter that they were eligible to apply and compete for vacant positions in the upcoming school year. Contrary to past practice, temporary teachers who were on the QRL received no priority consideration for employment in the 1995-1996 school year.

As a practical matter, the impact of the District's decision was not felt until September 1995, when school began. At that time a number of temporary teachers who would have been rehired under the prior practice found themselves unemployed by the District.[9]

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[7]Mr. Gephart testified that the District prepared the QRL because seniority is used to apply other provisions in the contract in the event temporary teachers are rehired for the following school year.

[8]A similar notice covering the 1996-1997 school year was sent to temporary teachers in March 1996.

[9]The District employed approximately 100 temporary teachers during the 1994-1995 school year. Approximately 79 teachers were placed on the QRL and 58 were hired off the QRL for the 1995-1996 school year. Approximately 19 temporary teachers on the QRL were not rehired by the District. According to a District survey,

On March 20, 1995, the Association filed a grievance challenging the District's action. The grievance was rejected, but it was not pursued to arbitration because the monetary aspect of the remedy placed it outside the scope of the arbitration clause in the collective bargaining agreement. Section 6.22 of the agreement provides that ".arbitrators may not award remedies which require direct money payment (payout) by the District of more than $20,000 to the grievant or other unit members similarly situated even if they were not grievants."

Five temporary teachers who were on the QRL and applied unsuccessfully for vacant positions in the District for which they were credentialed testified in this proceeding about the monetary damages they suffered as a result of the District's decision. Damages suffered by these teachers in the aggregate exceed $20,000.

Legislative History

The floor statement regarding SB 1281 states that the bill is designed to "clarify the Education Code on the rehiring of temporary certificated employees, and to ensure that school districts are able to maintain the maximum hiring flexibility in replacing permanent teachers that are on leave." The stated goal

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about eleven of the 19 teachers who were not reemployed were employed in less than full-time positions elsewhere, while the remaining teachers were either not employed in any capacity or their status is unknown. Mr. Gephart conceded that "most if not all" of the 19 temporary teachers could have been rehired by the District for the 1995-1996 school year based on the credentials they held at the time. Instead, these positions were filled by teachers new to the District.

of SB 1281 was to "ensure that classroom teachers are well qualified." The statement also states that SB 1281 was introduced to address the situation created by the Kalamaras decision "by utilizing the same language currently used for the reelection of permanent probationary employees."[10]

In addition, the "staff analysis" of SB 1281 by the Senate Committee on Education contained four comments. First, it observed that "in removing the guarantee of rehire for temporary employees who have worked at least 75% of the school year, [the bill] puts first year probationary teachers and temporary teachers on more consistent footing with regard to rehiring." Second, the analysis noted that current law requires no consideration of performance when determining whether to reelect a temporary or probationary teacher, and SB 1281 does not change existing law in this regard. Third, the staff analysis said the new law changes existing law that precluded school districts from nonreelecting a temporary teacher whose performance it determined to be unsatisfactory, if the teacher had served at least 75 percent of the school year. Forth, the analysis stated that "the measure eliminates the special status for temporary teachers and places them on equal footing for hire with candidates who may have no experience within the district."[11]

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[10]However, as noted later in this proposed decision, SB 1281 does not contain the identical language as used for reelection of permanent probationary teachers.

[n]The Assembly Committee on Education analysis of SB 1281 is substantially similar to the Senate committee's analysis.

SB 1281 was supported by numerous school districts throughout the state. Teachers' unions, including the California Teachers Association and its Fremont chapter, opposed the bill.

Individual Employment Contract

The individual employment contract used by the District to employ temporary teachers tracks Education Code section 44954.[12] In paragraph two, it provides that a temporary teacher "may be terminated under the following circumstances":

> a. At the pleasure of the Board of Education prior to serving during this school year at least 75 percent of the number of days the regular schools of the District are maintained; or
>
> b. After serving during this school year the number of days set forth in "a" above, the District notifies you for the next succeeding year; or
>
> c. Loss, surrender or other failure to obtain or retain any credential (without advance written District permission).

Paragraph five of the contract states:

> By accepting this offer, you specifically acknowledge and understand that this offer does not establish any right to probationary or permanent employment status. Employee further acknowledges that the District may terminate the temporary employment on any basis specified in paragraph 2 above, without any obligation to provide a statement of reasons, evidence of cause, or a right to a

[12]The individual employment contract is attached to the parties 1992-1995 collective bargaining agreement as Appendix JI. However, the parties stipulated that the individual contract was not the product of negotiations. The District has at all times taken the position that individual employment contracts are beyond the scope of representation, and this particular contract was attached to the agreement solely for "informational purposes."

> hearing. Employee further acknowledges that this agreement does not establish any right to reemployment in any status beyond the term of this agreement.

Between October 1991 and January 1993 the parties exchanged a series of letters concerning a number of disputes they had about the wording of the contract. Beginning in August 1992, this correspondence began to focus on the relationship between the pending changes in the Education Code, the individual employment contract, and the collective bargaining agreement.

In a September 18, 1992 letter, Association counsel Gene Huguenin informed District counsel David Wolf that his office was studying the Education Code changes for the purpose of advising the Association concerning any impact the changes might have on existing law or individual employment contract.

In a September 22, 1992, letter, Mr. Wolf advised Mr. Huguenin that the modified version of the individual employment contract to be used during the 1992-1993 school year would reflect the changes in Education Code sections 44918 and 44954, above.

Mr. Huguenin responded that he was still consulting with Association representatives about wording in the individual contracts. However, he suggested that the following language be inserted into the contracts for temporary teachers.

> This offer of employment is also subject to the collective bargaining agreement between the Board of Education of the District and the exclusive representative of certificated employees. Upon employment you will be provided a copy of that collective agreement.

In a September 29, 1992, letter to Mr. Huguenin, Mr. Wolf set forth "some concerns" not relevant to this dispute. Conceding that Article 16 applies to temporary teachers and "without waiving any of its rights and as a courtesy to [the Association]," Mr. Wolf proposed the following language be inserted into the individual employment contract.

> For your information, the District's temporary teachers are part of the Fremont Unified District Teachers' Association collective bargaining unit. You may obtain a copy of the collective bargaining agreement between the District and the Fremont Unified District Teachers' Association from the Certificated Personnel Office.

In a December 16, 1992, letter to Superintendent Ralph Belluomini, Mr. Haberfeld took the position that the individual employment contracts "are subject to the terms and conditions of the collective bargaining agreement." Mr. Haberfeld also indicated that the Association would address the matter during negotiations.

ISSUE

Did the District breach its obligation to negotiate in good faith under the EERA when, after establishing a QRL, it unilaterally sent nonreelection notices to all temporary teachers and hired new teachers to fill vacant positions instead of teachers on the QRL who held valid credentials for those positions?

CONCLUSIONS OF LAW

Unilateral Change

The Association argues that the District has unilaterally changed the procedure for rehiring temporary teachers, a matter within the scope of representation under the EERA. This procedure, the Association contends, is found in Article 16 of the parties' collective bargaining agreement and is reinforced by an undisputed past practice that reaches back to 1984.

It is axiomatic that an employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and violative of EERA section 3543.5(c). (Pajaro Valley Unified School District (1978) PERB Decision No. 51.)

To prevail on a complaint of unilateral change, the Association must establish by a preponderance of the evidence that (1) the District breached or altered a written agreement or an established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy (i.e., having a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196; see also Pajaro Valley Unified School

District, supra, PERB Decision No. 51; Davis Unified School District, et al. (1980) PERB Decision No. 116.)

It is undisputed that the District, pursuant to a recommendation made by Mr. Gephart, changed the way it rehired or chose not to rehire temporary teachers. Prior to the action that spawned this unfair practice charge, temporary teachers who were recommended by their principals for reemployment the following year and who had worked at least seventy-five percent of the school year were placed on the QRL based on seniority and rehired ahead of teachers from outside the District into vacant positions for which they were credentialed. Only temporary teachers who were not placed on the QRL were given letters of nonreemployment.

Beginning in March 1995, the District no longer followed this practice. Although it established a seniority-based QRL for temporary teachers, the District sent blanket nonreemployment notices to all temporary teachers. The new policy's ultimate effect was that some temporary teachers who were placed on the QRL and who held credentials qualifying them to teach in vacant positions were not rehired for those positions, as in the past. Instead, teachers new to the District were hired in their place. Approximately 19 temporary teachers were adversely affected in this way.

Absent a valid defense, a unilateral change in working conditions of the type described here is a breach of the obligation to negotiate in good faith. The District, however, sees this case in a far different light than does the

Association. Accordingly, it has raised a number of specific defenses in support of its general position that it has not breached its obligation to negotiate with the Association.

Education Code and Preemption Defense

The District's main line of defense encompasses two related claims: (1) Education Code sections 44918 and 44954 -- which, in effect, overruled parts of the Kalamaras decision -- limit reemployment rights of temporary teachers and give the District broad authority over the employment of such teachers; and (2) because the contractual reemployment rights for temporary teachers claimed here by the Association are not an enumerated item under section 3543.2[13] and are preempted by Education Code

[13]In relevant part, Section 3543.2 states:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22515 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code. . . All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating . . .

sections 44918 and 44954, they are not within EERA's scope of representation.

In support of its preemption argument, the District sets forth in detail authority given to school districts by the Legislature in sections 44954 and 44918. It points out, for example, that section 44954 permits districts to release (without a statement of reasons or hearing) temporary employees who have not served 75 percent of the school year, as well as temporary employees who have served 75 percent of the school year, provided the employee is notified prior to the end of the school year. The District also points out that section 44918(c) gives certain reemployment rights to temporary employees who received nonreemployment notices but nevertheless were reemployed for a second consecutive year; employees in this category, the District states, would be deemed a second year probationary employee under section 44918(c). The rights embodied in sections 44918 and 44954, the District concludes, effectively overruled the controversial Kalamaras decision and "ensure that school districts have discretion and flexibility in the employment of temporary teachers."

There is little to disagree with in the District's description of rights conferred by sections 44918 and 44954. However, this case is not strictly about the interpretation of the Education Code. If that were the case, PERB would have no jurisdiction, for the Board is authorized to interpret the

Education Code only for the purpose of adjudicating unfair practices that are within its jurisdiction. (Barstow Unified School District (1996) PERB Decision No. 1138a, p. 9.)

When the relevant Education Code sections are considered in this broader context -- primarily in conjunction with Article 16, the past practice, and bargaining history -- they are cast in a different light. In my view, Education Code sections 44919 and 44954, in the circumstances presented here, do not confer unfettered rights on the District in deciding whether to rehire temporary teachers.

Before squarely facing the District's preemption argument, however, it is necessary as a threshold matter to determine the meaning of Article 16, beginning with the 1989-1992 agreement. Section 16.1 in the 1989-1992 agreement provided that temporary teachers and the District "shall have all rights provided them in the Education Code." Given the breadth and scope of the Education Code, I do not find that this cryptic statement of rights rings with clarity. Its meaning is further clouded when it is considered in conjunction with sections 16.2 and 16.3, providing for the creation of a QRL and defining the term "qualified." Indeed, the positions taken by the parties in this dispute are perhaps the best indicators that Article 16 is not facially clear and unambiguous. Therefore, it is appropriate to look to extrinsic evidence to determine the meaning the parties attached to it. (Marysville Joint Unified School District (1983) PERB Decision No. 314, pp. 9-10; The Regents of the University of

California (1989) PERB Decision No. 771-H, p. 3, fn. 2; Lake Elsinore School District (1986) PERB Decision No. 563, p. 4.)

A well established past practice sheds light on the meaning of Article 16, especially sections 16.2 and 16.3. Under these sections, a practice developed whereby temporary teachers whom the District put on the QRL based on their performance were rehired in order of seniority, ahead of teachers from outside the District, into vacant positions for which they held credentials. The most logical conclusion to draw from this evidence is that the parties interpreted Article 16 in the 1989-1992 agreement as encompassing this practice. The key question to be decided, however, is whether the parties agreed in the 1992-1995 negotiations to change the contract in a way that modified the procedure.

The District's basic argument in this regard is that the 1992-1995 agreement, incorporating newly enacted Education Code sections 44918 and 44954, released it from the obligation to negotiate about the procedure used to rehire temporary teachers. For the reasons that follow, I find this argument unconvincing.

Granted, section 16.1 was changed in the 1992-1995 agreement to provide that temporary employees and the District "shall have all rights provided them in sections 44918 and 44954." Placed in context, however, section 16.1 did not give the District the sweeping rights over temporary employees it now claims. While section 16.1 is not as ambiguous as its counterpart in the prior agreement, neither is it a model of clarity; and this is

especially true when it is again considered in conjunction with the entire article. Hence, to derive the meaning of Article 16, it is appropriate to consider the article as a whole, along with the negotiating history that produced it.

Article 16 contains rights in addition to those found in section 16.1. Section 16.2 creates a QRL for the purpose of rehiring credentialed temporary teachers in order of seniority. And section 16.3 gives the District the discretion over who is placed on the list. Moreover, it was sections 16.2 and 16.3 that formed the basis for the practice that existed for years. Adoption of the District's interpretation of Article 16 would render sections 16.2 and 16.3 superfluous, a result that runs counter to widely accepted canons of contract interpretation. (Elkouri and Elkouri, How Arbitration Works, 4th Edition, pp. 352-354.)

The most plausible interpretation of sections 16.2 and 16.3 is the one given them beginning at least with the negotiation of the 1989-1992 agreement. Thus, while Education Code sections 44918 and 44954, standing alone, give the District the broad authority to release temporary teachers from employment, the District in my view has agreed to a modification of that authority, or, more accurately, a procedure to exercise its authority.

The bargaining history reinforces the conclusion that the 1992-1995 agreement did not alter the fundamental meaning of Article 16 and thus it did not modify the procedure used to

rehire temporary teachers. The discussions about Article 16 that occurred at the table, or, more importantly, the absence of such discussions, tend to support the Association's construction of Article 16. In this regard, it is noteworthy that sections 16.2 and 16.3 were key parts of the reemployment procedure. Yet the District never proposed to eliminate these sections during negotiations for the 1992-1995 agreement. Its failure to do so severely undercuts the interpretation it now places on Article 16.[14]

In addition, the parties never discussed Article 16 in any depth at the bargaining table during negotiations for the 1992-1995 agreement. Ms. Render may have informed Mr. Loughlin that she wanted the agreement to reflect the added flexibility school districts gained from the Education Code amendments. However, she did not participate in the negotiations at the table. As far as the true bargaining history is concerned, the testimony given by Mr. Haberfeld is basically consistent with that given by Mr. Loughlin. Both negotiators testified that there was minimal discussion about Article 16, and what little discussion occurred was geared toward "cleaning up" the agreement to reflect the changes to Education Code sections 44918 and 44954. At no time did the parties openly discuss the possibility that the new

[14]In view of the way Article 16 has been administered in the past, Mr. Gephart's testimony that the QRL was prepared to determine seniority ranking for other contract benefits is not persuasive. Mr. Gephart was not present for any of the negotiations, and the evidence is overwhelming that the QRL was primarily for the purpose of rehiring credentialed temporary teachers based on seniority.

language was put in section 16.1 to give the District expanded powers over reemployment rights of temporary teachers.

Under these circumstances, it cannot be concluded that there was a meeting of the minds to change Article 16 along the lines now claimed by the District. Nor can it be concluded that the Association, by agreeing to the 1992-1995.contract, waived rights established in the prior agreement and practice that developed under that agreement, as they relate to reemployment of temporary teachers. A waiver of bargaining rights will not be lightly inferred. It will be found only when a party indicates in "clear and unmistakable" terms that it relinquishes its right to negotiate. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.) To find a waiver, moreover, evidence must show that the employment of temporary teachers was "fully discussed" or "consciously explored" and the Association "consciously yielded" its interest in the matter. (See Los Angeles Community College District (1982) PERB Decision No. 252, p. 13.) Plainly, the record in this case does not support such a conclusion.

The next question to be addressed is whether -- contract, past practice, and bargaining history aside -- the Education Code preempts negotiations about the reemployment of temporary teachers.

The appropriate test in resolving conflicts between EERA's scope of representation and. the Education Code is found in San Mateo City School District v. Public Employment Relations Board

.(1983) 33 Cal.3d 850 [191 Cal.Rptr. 800] (San Mateo). In that case, the California Supreme Court affirmed the Board's test in resolving such disputes.

> Unless the statutory language [of the Education Code] clearly evidences an intent to set an inflexible standard or insure immutable provisions, the negotiability of a proposal should not be precluded. (San Mateo, 33 Cal.3d 850, 864-865; see also Healdsburg Union High School District (1984) PERB Decision No. 375, pp. 6-7.)

Stated another way, the court observed that the Education Code preempts collective bargaining agreements only if mandatory provisions of the code would be "replaced, set aside or annulled" by the agreement. (San Mateo at pp. 864-866.) Recently, in Board of Education of the Round Valley Unified School District et al. v. Round Valley Teachers Association (1996) 13 Cal.4th 269 [52 Cal.Rptr.2d 115] (Round Valley), the Supreme Court reaffirmed the San Mateo test in a case involving. reelection of probationary teachers.

In arguing in favor of preemption, the District in this case relies primarily on Round Valley, which held that a contract provision[15] designed to give greater procedural rights to

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[15]The agreement in Round Valley provided that "prior to any notice of [dismissal or decision not to reelect] any probationary teacher, the Superintendent shall give notice to the employee no less than thirty (30) days prior to the final notice of [dismissal/decision not to reelect]." The agreement required that the notice inform the employee that he or she had 15 days to appeal. "The proposed specific reasons for the [dismissal or decision not to reelect] as they relate to the teacher's alleged incompetency to teach (including copies of summary evaluations upon which the decision was based)," were also mandated by the agreement. Lastly, the court noted, the agreement provided that "'just cause' is required for dismissal or decision not to

probationary teachers than exist in Education Code section 44929.21(b) was preempted by operation of section 3540.[16] The Association, in response, argues that Round Valley is a narrowly crafted decision that applies only to probationary teachers. Therefore, it does not control the outcome of this dispute.

In order to address the arguments raised by the parties, it is useful to first put the Round Valley case in perspective. To accomplish this, a synopsis of the various components of that ruling is necessary.

Prior to 1983, former Education Code section 13443 governed nonreelection of probationary teachers. It required school districts to give notice by March 15 and provide an opportunity for a hearing at which the district was required to demonstrate good cause for its decision to not reelect a probationary teacher. In 1983, the Education Code was amended and section 13443 was replaced by section 44924.2Kb).

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reelect probationary teachers." (Round Valley at p. 273.)

[16]In relevant part, Section 3540 states:

> This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

Round Valley deals with rights of probationary teachers under Education Code section 44929.21(b). In relevant part, that section provides that probationary teachers who have served two consecutive years in a position requiring certification, and are reelected for the third year, become permanent employees of the district. Section 44929.21(b) provides further that

> [t]he governing board shall notify the employee, on or before March 15 of the employee's second complete consecutive school year of employment by the district in a position or positions requiring certification qualifications, of the decision to reelect or not reelect the employee for the next succeeding school year to the position. In the event that the governing board does not give notice pursuant to this section on or before March 15, the employee shall be deemed reelected for the next succeeding school year.

The court emphasized that section 44929.21(b) mandates only a notice. It does not require a hearing or statement of reasons in the event a probationary employee is not reelected.

Since the 1983 amendments to the Education Code, school districts have been permitted to choose not to reelect a probationary teacher without any showing of cause, statement of reasons, or administrative hearing or other appeal, provided the district gives the probationary teacher notice of nonreelection before March 15 of the employee's second year of employment. (See Grimsley v. Board of Trustees (1987) 189 Cal.App.3d 1440 [235 Cal.Rptr. 85].) Also since 1983, courts have held that "school districts have the absolute right to decide not to reelect probationary teachers without providing cause or other

procedural protections to the terminated employees, and without regard to contrary provisions in a collective bargaining agreement." (Round Valley at p. 281; Fontana Teachers Association v. Fontana Unified School District (1990) 201 Cal.App.3d 1517 [247 Cal.Rptr. 761]; Bellflower Education Association v. Bellflower Unified School District (1991) 228 Cal.App.3d 805 [279 Cal.Rptr. 179].)

It was against this background that the court in Round Valley concluded the Legislature "determined that the due process protection enjoyed by permanent certified employees should not apply to probationary employees, and that the state's interest in discharging unsuitable teachers in the first two years of employment outweighs any due process rights sought by these teachers. The collective bargaining provisions in this case contravene this legislative scheme, and therefore violate Government Code section 3540's injunction that collective bargaining agreements in public schools not supersede provisions of the Education Code." (Round Valley at p. 285.)

Hence, the court found that Education Code section 44929.21(b) and the contractual provisions at issue in Round Valley could not be "harmonized." Validating those provisions, the court concluded, would necessarily result in "replacing or setting aside a nonnegotiable and mandatory provision of the Education Code." (Round Valley at pp. 285-286.)

Although there are arguably similarities between Round Valley and the present unfair practice charge, there are also

significant differences that control the outcome here. This case deals with employment rights of temporary teachers under Education Code sections 44918 and 44954, not with rights of probationary teachers under Education Code section 44929.21(b). While these statutes may be similar in some general respects, it cannot be ignored that the Legislature has not used identical language when framing the rights of these separate categories of teachers.

It is true, as the District argues, that the Legislature intended SB 1281 to limit rights of temporary teachers, while giving districts more flexibility in dealing with them. It is also true, that rights of temporary teachers were decreased under SB 1281, while the flexibility afforded school districts was increased. The legislative history is clear on this point. But the restrictions on the rights of temporary teachers and the flexibility given districts are not nearly as great as the District may rightly claim in the context of this record. Unlike the situation in Round Valley, the statutory language covering temporary employees may be harmonized with Article 16.

Section 44918(b) provides that temporary teachers "shall be employed" for the following school year, "unless the employee has been released pursuant to [section 44954]." Therefore, it is the District's authority under the latter section that is key to the District's preemption argument.

Legislative history notwithstanding, a close reading of section 44954 indicates the Legislature chose not to draft that

section in the mandatory terms required to support a preemption argument under either Round Valley, San Mateo, or, as more fully discussed below, PERB case law. Section 44954 provides, in nonmandatory terms, that school districts "may" release temporary teachers under certain circumstances. But the Legislature, in its effort to give districts greater flexibility in dealing with temporary teachers, has not defined the method(s) for exercising that authority. Hence, districts are vested with a measure discretion in this area. The question for consideration here is whether the discretionary authority vested in the District under section 44954(a) and (b) can be harmonized with Article 16.

Under section 44954(a), a district may release a temporary teacher "at the pleasure of the board" prior to the teacher having served 75 percent of the school year. Article 16 does not impact this right. Under section 44954(b), a district may release a temporary employee after the employee has served 75 percent of the school year by notifying the employee before the end of the school year. Article 16 does not usurp the District's authority under this provision to terminate an individual teacher it deems unsatisfactory.

Article 16 only sets forth a procedure for rehiring temporary teachers the District itself determines to be "qualified" based on performance. It does not create an automatic right to reemployment for temporary teachers, nor does it prevent the District from exercising its right to dismiss a temporary employee prior to the time he or she serves at least 75

percent of the school year, as provided for in section 44954(a). Similarly, nothing in Article 16 prevents the District from deciding not to reemploy a temporary teacher who has worked at least 75 percent of the school year. This may be accomplished under sections 16.2 and 16.3 by issuing performance-based nonrenewal notices to teachers before the end of the school year and not placing them on the QRL.

Accordingly, it is difficult to construe this legislative directive as an "inflexible standard" or an "immutable provision" that precludes negotiations in this area; nor has Article 16 "replaced, set aside or annulled" the Legislature's underlying purpose in enacting section 44954. (San Mateo at pp. 864-865.) Thus, when the District has exercised its authority in the form of a contractually agreed upon procedure, it may not ignore that procedure.

In addition, the argument advanced by the Association here is consistent with a long line of PERB decisions applying the San Mateo test to Education Code preemption issues. Interpreting the supersession language of section 3540, the Board has long held that an Education Code provision will not limit the scope of representation so long as it merely "authorizes a certain policy but falls short of [creating an] absolute obligation." (Mt. Diablo Unified School District (1983) PERB Decision No. 373, pp. 30-31.)

PERB cases in this area tend to fall into two general categories. When the Legislature has written statutes in

mandatory terms, leaving no discretion or room at the school district level for flexibility, the Board has found the particular statute preempts collective bargaining under EERA. (See e.g., Kern Community College District (1983) PERB Decision No. 337, pp. 10-12; Mt. Diablo Unified School District, supra. PERB Decision No. 373, pp. 27-36; Healdsburg Union High School District, supra, PERB Decision No. 375; Oakland Unified School District (1983) PERB Decision No. 326, pp. 31-32.)

Conversely, when the Legislature has crafted statutes in permissive or discretionary terms, leaving school districts with the discretion and flexibility to act in a particular area, the Board has declined to find the area is preempted, provided of course the matter is otherwise negotiable. (See e.g., Holtville Unified School District (1982) PERB Decision No. 250, p. 11; San Bernardino City Unified School District (1982) PERB Decision No. 255, pp. 9-10; Mt. San Antonio Community College District (1983) PERB Decision No. 297, pp. 5-6 Brawley Union High School District (1982) PERB Decision No. 266; Calexico Unified School District (1982) PERB Decision No. 265.)

A close reading of PERB preemption cases confirms that the Board, in addressing preemption arguments, has chosen to pay great attention to the language used by the Legislature when enacting the relevant Education Code sections. Indeed, Board decisions in this area are controlled by the precise statutory language advanced by the proponent of a preemption argument. As the Board has noted, if the "mere existence of a statutory

provision precluded negotiability,, many issues of central employee concern would be excluded from negotiations." (Brawley Union High School District, supra, PERB Decision No. 266, pp. 10-12.)

In conclusion, it bears repeating that mandatory statutory language will remove a subject from EERA's bargaining obligation, while permissive or discretionary statutory language will have the opposite result, provided the subject is otherwise negotiable. As I have explained above, sections 44918 and 44954 place no mandatory obligation on the District as far as the reemployment rights of temporary teachers at stake here, and thus Article 16 is not preempted.

In a related argument, the District contends that, because reemployment rights of temporary teachers is not an enumerated item in section 3543.2(a), such rights are reserved to the employer and thus nonnegotiable. The Association, in response, argues that the absence of an item from the list of topics in section 3543.2(a) does not automatically render it nonnegotiable, and reemployment rights of temporary teachers falls within the scope of representation under well established PERB precedent.

PERB has found that a subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject matter is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate

means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission. (Anaheim Union High School District (1981) PERB Decision No. 177, pp. 4-5.) The so-called Anaheim test was affirmed by the California Supreme Court in San Mateo and left undisturbed in Round Valley.

The reemployment rights at stake here are logically and reasonably related to several enumerated items. Article 16 affects the wages and hours of temporary teachers who are rehired, as well as those who are not rehired. The evaluation process used to decide which teachers are placed on the QRL is also implicated here. And temporary teachers who are rehired may be transferred to other schools or reassigned. Plainly, many topics enumerated in section 3543.2(a) are related to Article 16.

As the present dispute indicates, reemployment rights of temporary teachers is of great concern to the District, the Association, and the teachers. The parties have experienced conflict about the rights at stake here in the form of a grievance and this unfair practice charge, and collective negotiations is the well established mechanism to resolve such disputes. In fact, the parties in this case have long negotiated about reemployment rights of temporary teachers, as evidenced by the inclusion of Article 16 into the past two agreements.

The question remains whether negotiating about reemployment rights of temporary teachers would significantly abridge the District's managerial prerogatives essential to achievement of its mission. In my view, this question must be answered in the negative.

As I have already found, Article 16 does not unduly interfere with the District's authority to dismiss temporary teachers who have performed unsatisfactorily. To accomplish this, the District need only decline to place such teachers on the QRL. The agreement struck by the parties in Article 16 is, in essence, only a procedural device to afford rehire rights in appropriate circumstances to teachers the District has already determined to be qualified. This type of procedure does not usurp the District's right to hire and hardly involves the kind of core managerial decision, recognized by the Board in the past, which goes to the heart of the District's ability to formulate policy and carry out its overall mission.[17] (See e.g., Stanislaus County Department of Education (1985) PERB Decision No. 556; State of California (Department of Personnel Administration) (1986) PERB Decision No. 574-S.) Nor did the District's decision to modify the procedure involve the type of "change in the nature, direction or level of service" necessary to remove a topic from the scope of representation. (See Arcata

[17]Indeed, the practice of rehiring temporary teachers off the QRL has existed since 1984 and there is no evidence that it interfered with the District's hiring authority until the present case.

Elementary School District (1996) PERB Decision No. 1163, p. 8.)

Mr. Gephart testified that his recommendation to change the procedure for reemploying temporary teachers was based on the need for added flexibility in hiring more minority teachers, as well as the best qualified teachers. While these are laudable goals, they do not rise to the level of a management prerogative that removes the subject at issue here from the scope of representation. Reemployment rights traditionally have been recognized as a negotiable topic. In fact, the Board has found that similar proposals dealing with selection "criteria" for reemployment fall within the scope of representation. (See Oakland Unified School District (1982) PERB Decision No. 275, pp. 11-15, 19; See also Healdsburg Union High School District, et al. supra, pp. 61-62.)[18]

Waiver

The District raises a number of arguments aimed at showing that the Association, by its inaction at key points, waived its right to negotiate.

First, the District points out that the Association has always known the individual employment contract currently in use

[18]In this regard, it is noteworthy that the Board has long looked to private sector precedent for guidance in defining the management prerogative. (See Arcata Elementary School District, supra, PERB Decision No. 1163, pp. 4-5, and cases cited therein.) The National Labor Relations Board has said it is "axiomatic" that the method of rehiring employees is a negotiable topic. (Allen W. Bird: Caravelle Boat Co. (1977) 227 NLRB 1355, 1357 [95 LRRM 1003]; see also Double A Coal Co. (1992) 307 NLRB 689, 698 [141 LRRM 1245]; Quality Packaging Inc. (1982) 265 NLRB 1141, 1149 [112 LRRM 1283]; Hamilton Electronics Co. (1973) 203 NLRB 206, 209 [83 LRRM 1097].)

closely tracks the language of Education Code section 44954. Despite this knowledge and the fact that the parties exchanged correspondence between 1991 and 1993 about the individual contracts, the Association never formally objected to their use.

Second, the District argues that Association representatives on the Ethnic and Race Relations Committee acquiesced in the recommendation concerning the rehire rights of temporary teachers. While Association representatives may have disagreed with the recommendation, the District notes that they never formally opposed it.

Third, the District contends the Association waived its right to bargain when it failed to request negotiations after Mr. Gephart informed Ms. Rideout and Mr. Gunn of his intention to recommend a change in the procedure for reemploying temporary teachers.

The Association argues, in response, that the collective bargaining agreement and the past practice prohibited the District from implementing a new procedure for reemploying temporary employees. Therefore, it had no obligation to request negotiations in order to maintain rights already protected by the agreement.

It has already been found that the agreement, in Article 16, established the procedure for reemploying temporary teachers. In addition, the 1992-1995 agreement contained a standard zipper

clause.[19] As the Board has observed, "the purpose of a zipper clause is to foreclose further requests to negotiate regarding negotiable matters, even if not previously considered, during the life of a contract. It does not, however, cede to the employer the power to make unilateral changes in the status quo." (Los Angeles Community College District (1982) PERB Decision No. 252, p. 11; see also Los Rios Community College District (1988) PERB Decision No. 684.)

Therefore, the District was not free to change the terms of Article 1G during the life of the 1992-1995 agreement, nor was the Association obligated to request negotiations after receiving notice that the District intended to modify the procedure for reemploying temporary teachers, as reflected in Article 16 and the past practice.[20] The procedure was fixed in the contract,

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[19]Article 26 of the agreement, in relevant part, provides:

> Except as specified above, during the term of this Agreement Fremont Unified District Teachers Association and Fremont Unified School District herewith clearly and unequivocally waive the right to meet and negotiate with respect to any subject or matter whether referred to or covered in this Agreement or not, even though such subject or matter may not have been within the knowledge of [sic] contemplation of either or both the District or Association at the time they met and negotiated on and executed this Agreement, and even though such subjects or matters were proposed and later withdrawn.

[20]This is the position the Association has repeatedly taken in its dealings with the District. During correspondence with Superintendent Belluomini about the individual employment contracts, Mr. Haberfeld wrote the contracts are "subject to the terms and conditions of the collective bargaining agreement." Upon receiving notice from Mr. Gephart that the District intended

and, absent mutual agreement, the only proper way to change it was through the next round of negotiations.

District Rights

The District rights clause, found in Article 4 of the collective bargaining agreement, provides:

> 4.1 The right to manage the school district and to direct its employees and operations is vested in and reserved by the District and shall be unrestricted except that exercise thereof may not diminish any lawful right or benefit expressly provided for in this Agreement.
>
> 4.2 This Agreement supersedes any past practice except as specifically provided for in this contract and it supersedes any previous agreement, oral or written, between any of the parties hereto or between any of them and any unit members and such is not grievable or admissible in evidence in any except P.E.R.B. or court proceedings.
>
> 4.3 Practices of the District or Association in operating under this Agreement may infer rights and prerogatives not contained in this Agreement. However, such practices, unless specifically provided in this Agreement, may not be asserted in grievance proceedings or other proceedings as limiting the District's or the Association's right to change practice at any time, so long as such change does not diminish express rights and benefits contained in this Agreement.

The District argues that section 4.1, coupled with the express reservation of Education Code rights under section 16.1, confirms its unfettered right to not rehire temporary teachers.

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to change the procedure for reemploying temporary teachers, Ms. Rideout and Mr. Gunn opposed the change as a violation of the collective bargaining agreement. And when Ms. Coehlo objected to the Committee's recommendation concerning temporary teachers, she was assured that "it no way affects the rehire of temporaries."

In addition, the District argues, sections 4.2 and 4.3 render the past practice of rehiring temporary teachers off the QRL nonbinding because it conflicts with express contract terms to the contrary, and the practice is not found in the agreement.

The Association, in response, argues that such "boilerplate clauses" cannot "trump" more specific provisions in a contract. It is only where a management rights clause specifically addresses a specific term or condition of employment that it constitutes a waiver. The District rights clause in this case does not accomplish that task, the Association contends.

To prevail on this argument, the District must show that the Association, by agreeing to Article 4, waived its right to negotiate about reemployment of temporary teachers in "clear and unmistakable" terms. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.) The District has not made this showing.

A generally-worded management rights clause will- not be construed as a waiver of statutory bargaining rights. (San Jacinto Unified School District (1994) PERB Decision No. 1078, adopting proposed decision of administrative law judge at 18 PERC Para. 25059, p. 188; see also Mammoth Unified School District (1983) PERB Decision No. 371.) As a leading labor law treatise also states, when a management rights clause is the source of the asserted waiver, it is normally scrutinized to determine whether it affords justification for the "specific" unilateral action at

issue. (Hardin, Developing Labor law, Third Edition, Vol. I, pp. 703-704.)

Section 4.1 is a broadly worded management rights clause that lacks the requisite specificity to establish waiver. The reservation by the District of the right to "direct its employees and operations" plainly does not withstand scrutiny under PERB precedent that requires "clear and unmistakable" waiver.

Nor do the relevant portions of sections 4.2 and 4.3 fare any better as a waiver defense. Section 4.2 provides that the "Agreement supersedes any past practice except as provided for in this contract." However, I have previously found that the past practice at issue here does not stand alone. It is embedded in Article 16, and therefore the practice concerning rehiring of temporary teachers is not superseded by section 4.2

A similar conclusion applies to section 4.3. As I understand that section, it addresses the legal effect only of practices that "may infer rights and prerogatives not contained in this Agreement." Once again, because the practice at issue here is reflected in Article 16, section 4.3 has no applicability to the present case.

Therefore, the general language in Article 4 does not override the specific rights found in Article 16.

Moreover, it bears repeating that the parties had specific (although limited) discussions about Article 16 during negotiations for the 1992-1995 agreement. To establish a waiver of reemployment rights that existed under the 1989-1992 contract

and the lengthy practice, it must be shown that the subject was "fully discussed" or "consciously explored" and the Association, by agreeing to Article 4, "consciously yielded" its interest in the matter. (Los Angeles Community College District, supra, PERB Decision No. 252.) As I have already found, this did not occur.

Statute of Limitations

The District asserts that the temporary teacher contract, which tracks Education Code section 44954 and has been in use since the 1993-1994 school year, constituted notice to the Association of the decision to implement the change that lies at the center of this dispute. It was at that time, the District argues, that the statute of limitations began to run. Therefore, the instant charge, filed on June 5, 1995, is untimely.

The Association sees this argument as disingenuous. Because the District has at all times claimed individual employment contracts are not negotiable, the Association argues, it cannot at this late stage fault the Association for failing to negotiate about a unilateral change related to the implementation of the contracts.

The statute of limitations defense must fail for a number of reasons. As explained elsewhere in this proposed decision., paragraphs two and five of the individual employment contract, essentially incorporating section 44954, may be read in harmony with Article 16. Thus, the individual employment contract itself cannot be construed as a valid notice. And the correspondence between the parties about the wording of the contract reveals no

clear statement by the District that it intended to make the change that prompted this unfair practice charge. While the letters sent by the District to the Association certainly discuss changes in the Education Code, they cannot fairly be construed as notice of a "clear intent" the District planned to send nonrenewal notices to all temporary teachers and wholly abandon a reemployment practice that existed since 1984. (The Regents of the University of California (1990) PERB Decision No. 826-H, pp. 7-8.)

However, even if the correspondence concerning individual employment contracts constituted valid notice, this charge is not time-barred. PERB has held that the period during which an employee organization may challenge an alleged unilateral change in a negotiable topic "begins to run on the date the charging party has actual or constructive notice of the respondent's clear intent to implement a unilateral change in policy, providing that nothing subsequent to that date evinces a wavering of that intent." (Ibid.)

Much of the correspondence concerning the individual employment contract occurred at about the same time the parties were engaged in negotiations for the 1992-1995 agreement. Yet there was no significant discussion at the table that can reasonably be construed as indicating the District was considering anything like the recommendation that would be made by Mr. Gephart and adopted by the governing board in March 1995. The lack of discussion, coupled with the retention of

sections 16.2 and 16.3 in the agreement, more accurately suggests the District was planning no major changes in the reemployment of temporary teachers.

In addition, during the proceedings of the Committee on Ethnic and Race Relations, the topic of reemployment rights surfaced again. This time it was presented as a possible recommendation to the governing board that arguably could undercut Article 16 rights of temporary employees. But the Association objected (even if only informally) and, more importantly, Ms. Coehlo was assured that Article 16 rights would not be affected.

Even assuming that the Association had an obligation to request negotiations, and the earlier correspondence about individual employment contracts constituted valid notice, the Association was justified in thinking the District had wavered in its intent to change reemployment rights of temporary teachers.

The first true notice of the change at issue here was given by Mr. Gephart to Ms. Rideout in "late" January 1995 and to Mr. Gunn during the first week of March 1995. Because this charge was filed on June 5, 1995, these notices fall within the six-month statute of- limitations and thus this case is not time-barred.[21]

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[21]It is noteworthy that Mr. Gephart took the position that the District had the right to alter reemployment rights of temporary teachers under the Education Code, and the District has never modified that position. Thus, even assuming a requirement to request negotiations existed, the request would have been futile. (Oakland Unified School District (1982) PERB Decision No. 236, pp. 16-17.)

REMEDY

The Board 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.

It has been found that the District breached its obligation to negotiate by unilaterally changing a contractual provision containing a procedure for reemploying temporary teachers, in violation of section 3543.5(c). By the same conduct, the District denied the Association the right to represent its members, in violation of section 3543.5(b). The conduct also denied temporary teachers the right to be represented by their chosen representative in their employment relations with the District, in violation of section 3543.5(a). It is, therefore, appropriate to order the District to cease and desist from such activity in the future and, upon request by the Association, return to the status quo that existed in March 1995 when the governing board changed the established contractual procedure for reemploying temporary teachers.

It is also appropriate that the District be ordered to make adversely affected employees whole. Therefore, unless otherwise agreed to by the parties, the District shall be required to make adversely affected employees whole for losses incurred as a result of the District's unlawful activity, including offer of

reemployment pursuant to the terms of the reestablished procedure.[22]

It is also appropriate that the District be required to post a notice incorporating the terms of the Order. The Notice shall 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 and reasonable effort will be taken to insure that it is not altered, covered by any material or defaced and will be replaced if necessary. Posting such a notice will inform employees 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 District's readiness to comply with the ordered remedy. (Davis Unified School District, et al., supra, PERB Decision No. 116; see 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, and pursuant to the Educational Employment Relations Act (Act), Government Code section 3541(c), it is hereby ordered that the Fremont Unified School District (District) and its representatives shall:

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[22]The rate of interest to be paid on any monetary aspect of this remedy shall be 7 percent. (San Francisco Unified School District v. San Francisco Classroom Teachers Association (1990) 222 Cal.App.3d 146 [272 Cal Rptr. 38].)

A. CEASE AND DESIST FROM:

1. Failing and refusing to negotiate with the Fremont Unified District Teachers Association (Association) by unilaterally changing a contractual provision containing a procedure for reemploying temporary teachers.

2. Denying the Association the right to represent its members in their employment relations with the District.

3. Denying bargaining unit temporary employees the right to be represented by the Association in their employment relations with the District.

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

1. Upon request by the Association, restore the status quo ante by returning to the procedure for reemploying temporary teachers that existed prior to March 1995.

2. Upon request by the Association, make adversely affected employees whole for losses incurred as a result of the District's unlawful action, including offer of reemployment pursuant to terms of the reestablished procedure and interest at the legal rate.

3. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other 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, altered, defaced or covered by any other material.

4. Within five (5) workdays of service of a final decision in this matter, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code Regs., tit. 8, sec. 323 00.) 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 Gal. Code Regs., tit. 8, secs, 32300, 32305 and 32140.)

Fred D'Orazio

FRED D'ORAZIO
Administrative Law Judge