STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS HACIENDA LA PUENTE CHAPTER #115, Charging Party, v. HACIENDA LA PUENTE UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-C-235 (Unfair Practice Case No. LA-CE-3576) PERB Decision No. 1280 August 27, 1998

Appearances; California School Employees Association by Alan S. Hersh, Attorney, for California School Employees Association and its Hacienda La Puente Chapter #115; Lozano, Smith, Smith, Woliver & Behrens by Christine M. Wagner, Attorney, for Hacienda La Puente 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 the Hacienda La Puente Unified School District's (District) appeal from a Board hearing officer's proposed decision (attached) ordering the District to comply with the Board's order in Hacienda La Puente Unified School District (1997) PERB Decision No. 1184 (Hacienda La Puente).

In Hacienda La Puente, the Board adopted a PERB administrative law judge's proposed decision holding that the District violated section 3543.5(a), (b) and (c) of the

Educational Employment Relations Act (EERA)[1] when it refused to provide the California School Employees Association and its Hacienda La Puente Chapter #115 (CSEA) with information relevant and necessary to CSEA's discharge of its duty to represent unit employees. Specifically, the Board found that the District unlawfully failed to provide CSEA with a letter that CSEA believed served as the basis for the discipline of unit member Sam Ortiz (Ortiz). The Board ordered the District, inter alia, to provide CSEA with a copy of this letter.

Subsequent to the Board's decision in Hacienda La Puente, a dispute arose between the parties over whether the District had complied with the Board's order. After a formal hearing, the hearing officer issued a proposed decision finding that the District had failed to comply with the Board's order in two

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

> It shall be unlawful for a public school employer to do any of the following:
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> (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.

respects. First, the hearing officer found that the District had failed to provide CSEA with a copy of the requested information or to demonstrate good cause why it was unable to do so. Second, the hearing officer found that the District had failed to post the Notice to Employees at the Fairgrove School site. The hearing officer held that the District's actions violated the Board's order in Hacienda La Puente.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, the District's exceptions, and CSEA's response to those exceptions. The Board finds the hearing officer'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.

DISCUSSION

On appeal, the District challenges the hearing officer's authority to award attorneys' fees in this matter. The District notes that California courts have held that administrative agencies may not award attorneys' fees unless statutorily authorized to do so. (Citing Peralta Community College Dist, v. Fair Employment & Housing Com. (1990) 52 Cal.3d 40 [276 Cal.Rptr. 114]; Sam Andrews' Sons v. Agricultural Labor Relations Bd. (1988) 47 Cal.3d 157 [253 Cal.Rptr 30].) The District contends that the EERA does not specifically authorize the Board to award attorneys' fees and that the Board is precluded from making any such award. We disagree.

Although the Board is rarely presented with circumstances that justify an award of attorneys' fees and costs, we have long held that such an award is appropriate where a case is without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith or otherwise an abuse of process. (Los Angeles Unified School District (1993) PERB Decision No. 1013, p. 2; Chula Vista City School District (1990) PERB Decision No. 834, pp. 73-74; see United Professors of California (Watts) (1984) PERB Decision No. 398-H, p. 2 (awarding attorneys' fees where a party acted in defiance of a Board order); Los Angeles Unified School District (1982) PERB Decision No. 181a, p. 6.) In addition, the legislature has recently amended the EERA to grant the Board specific statutory authority to award attorneys' fees and costs incurred as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. (EERA sec. 3541.3(h); Government Code sec. 11455.30.)[2]

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[2]EERA section 3541.3 provides, in relevant part:

> The board shall have all of the following powers and duties:
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> (h) To hold hearings, subpoena witnesses, administer oaths, take the testimony or deposition of any person, and, in connection therewith, to issue subpoenas duces tecum to require the production and examination of any employer's or employee organization's records, books, or papers relating to any matter within its jurisdiction. Notwithstanding Section 11425.10, Chapter 4.5 (commencing with Section 11400) of Part 1 of Division 3 of Title 2 does not apply to a hearing by the board under this chapter, except a hearing to determine an unfair practice charge.

In Hacienda La Puente, the Board specifically ordered the District to provide CSEA with information necessary and relevant to its representational duties. The Board's order clearly identified the nature of this information and specified the timeline within which the District was to act. In response, the District made a perfunctory search of its official personnel files - a location which the District had determined did not contain the requested information. According to the testimony of its own witnesses, the District took no other steps to locate the requested information. The District made no effort, whatsoever, to contact the author of the letter, the affected employee's supervisor, or any of the several other persons likely to have possessed a copy of the letter. Far from constituting due diligence, the District's efforts were little more than an absolute refusal to comply with the Board's order in Hacienda La Puente.

California Government Code section 11455.30 provides:

> (a) The presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.
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> (b) The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding. The order is enforceable in the same manner as a money judgment or by the contempt sanction.

The District and its attorneys are no strangers to proceedings before the Board. They are, or should be, well aware of their duty to comply with a Board order. Accordingly, the Board finds it appropriate that the District reimburse CSEA for its reasonable attorneys' fees and costs both for the compliance hearing below and for this appeal.

REMEDY

Although the Board concurs in the hearing officer's finding that the District's refusal to provide the requested information compromised not only CSEA's ability to represent its membership but Ortiz' ability to effectively respond to the letter of reprimand, the Board finds it appropriate to modify the remedy in this case. In fashioning a remedy for unlawful conduct, the Board has broad authority to take action which effectuates the purposes of the EERA. (EERA sec. 3541.5(c).) The Board routinely exercises this authority to order the removal of materials from employee personnel files. (See, e.g., Oakdale Union Elementary School District (1998) PERB Decision No. 1246, pp. 21-22; Alisal Union Elementary School District (1998) PERB Decision No. 1248, p. 7.) Here, however, the record contains no indication that the District disciplined Ortiz in reprisal for his protected activities or for any other improper reason. Accordingly, the Board finds that it is not appropriate to order the District to rescind the letter of reprimand at this time.

ORDER

Upon the findings of fact and conclusions of law and the entire record in this case, it is found that the Hacienda La Puente Unified School District (District) has failed to comply with an order of the Public Employment Relations Board (PERB) in Hacienda La Puente Unified School District (1997) PERB Decision No. 1184.

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

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

1. Provide the California School Employees Association and its Hacienda La Puente Chapter #115 (CSEA) with a copy of the Julie Milan letter/incident report requested by CSEA on November 22 and December 5, 1994, and January 10, 1995 or show just cause why it is unable to do so. Additionally, within thirty (30) calendar days after the document is furnished to CSEA, upon request of CSEA or Sam Ortiz (Ortiz), allow Ortiz to file a supplemental rebuttal to the written reprimand issued to him on November 7, 1994.

2. Within ten (10) days following the date that this Decision is no longer subject to appeal, post a copy of the notice to employees attached to Hacienda La Puente Unified School District (1997) PERB Decision No. 1184 at the Fairgrove School site in an area where notices to classified employees are customarily placed. The Notice must be signed by an authorized

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

3. Pay to CSEA reasonable attorneys' fees and costs incurred relating to the conduct of the compliance hearing and appeal in this case. Such costs and fees will be awarded in an amount established by a statement, submitted by declaration and submitted to the District by CSEA, subject to review by PERB.

4. Within ten (10) days following the date that this Decision is no longer subject to appeal, post at all work locations where notices to classified employees are customarily placed, copies of the Notice attached as an Appendix hereto. The Notice must be signed by an authorized representative of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

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

Chairman Caffrey and Member Johnson joined in this Decision.

APPENDIX

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

After a compliance hearing by the Public Employment Relations Board (PERB or Board); in Case No. LA-C-235, California School Employees Association and its Hacienda La Puente Chapter #115 v. Hacienda La Puente Unified School District, in Hacienda La Puente Unified School District (1997) PERB Decision No. 1184, in which all parties had the right to participate, it has been found that the Hacienda La Puente Unified School District (District) failed to comply with the Board's decision and order.

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

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

1. Provide California School Employees Association and its Hacienda La Puente Chapter #115 (CSEA) with a copy of the Julie Milan letter/incident report requested by CSEA on November 22 and December 5, 1994, and January 10, 1995 or show just cause why it is unable to do so. Additionally, within thirty (30) calendar days after the document is furnished to CSEA, upon request of CSEA or Sam Ortiz (Ortiz), allow Ortiz to file a supplemental rebuttal to the written reprimand issued to him on November 7, 1994.

2. Post a copy of the notice to employees attached to Hacienda La Puente Unified School District (1997) PERB Decision No. 1184 at the Fairgrove School site in an area where notices to classified employees are customarily placed. The Notice must be signed by an authorized representative of the District, indicating that the District will comply with the terms of the Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

3. Pay to CSEA reasonable attorneys' fees and costs incurred relating to the conduct of the compliance hearing and appeal in this case. Such costs and fees will be awarded in an amount established by a statement, submitted by declaration and submitted to the District by CSEA, subject to review by PERB.

Dated: _____

HACIENDA LA PUENTE 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

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS HACIENDA LA PUENTE CHAPTER #115, Exclusive Representative, v. HACIENDA LA PUENTE UNIFIED SCHOOL DISTRICT, Employer.	)	Compliance Case No. LA-C-235 (Unfair Practice Case No. LA-CE-3576) PROPOSED DECISION (3/6/98)

Appearances: Alan S. Hersh, Staff Attorney, for California School Employees Association and its Hacienda La Puente Chapter #115; Lozano Smith Smith Woliver & Behrens by John J. Wagner, Attorney, for Hacienda La Puente Unified School District.

Before Jerilyn Gelt, Hearing Officer.

BACKGROUND

On February 21, 1997, the Public Employment Relations Board (PERB or Board) issued California School Employees Association and its Hacienda La Puente Chapter #115 v. Hacienda La Puente Unified School District (Decision No. 1184) involving an unfair practice charge filed by the California School Employees Association and its Hacienda La Puente Chapter #115 (CSEA) against the Hacienda La Puente Unified School District (District). The Board found the facts in the proposed decision by the PERB administrative law judge (ALJ) to be free from prejudicial error and adopted them as the decision of the Board itself. The Board also adopted the ALJ's conclusions of law which held that the District violated Educational Employment

Relations Act (EERA or Act) section 3543.5(a), (b) and (c)[1] when it failed to provide CSEA with the information which was necessary and relevant to the discharge of its duty to represent bargaining unit employees. Specifically, the District unlawfully refused to produce a document which CSEA believed was the basis for a written reprimand issued to bargaining unit employee Sam Ortiz. The document was identified in the decision as either a letter or an incident report written by unit employee Julie Milan. Additionally, the District unlawfully refused to accept or process the grievance filed by CSEA relating to the written reprimand without explaining its rationale for doing so.

In section B of the decision order, the Board ordered the District to:

> 1. Upon request, provide the Association with a copy of the Julie Milan

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Unless otherwise noted all statutory references are to the Government Code. EERA is codified at section 3540 et. seq. Section 3543.5 states, 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 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.

> letter/incident report requested by the Association on November 22 and December 5, 1994, and January 10, 1995. Additionally, within thirty (30) calendar days after the document is furnished to the Association, upon request of the Association or Sam Ortiz (Ortiz), allow Ortiz to file a supplemental rebuttal to the written reprimand issued to him on November 7,1994. [Decision No. 1184, p. 5.]

Section B of the decision order also required the District to:

> 3. . . . post at all work locations where notices to classified employees are customarily placed, copies of the Notice attached as an Appendix [to the decision]. The Notice must be signed by an authorized representative of the District, indicating that the District will comply with the terms of the Order. . . .

On March 31, 1997, I sent a letter to the District requesting it to file a statement of compliance with the Board's order no later than April 14, 1997. The letter stated that the statement of compliance must include the date the notice to employees was posted by the employer, the final date of the posting period, a copy of the notice, and a specific description of the affirmative steps taken by the District to comply with section B of the order.[2]

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[2]Section B of the order also requires that the District, upon request, provide the Association

> with timely information that explains or clarifies the District's reasons for not accepting or processing a unit member's grievance that the District initially perceives as procedurally defective.

There is no dispute regarding the District's compliance with this section of the order.

Since no response was timely filed by the District, a second letter was sent on May 1, 1997, requesting a statement of compliance no later than May 8, 1997. On May 14, 1997, this office received a letter dated May 8, 1997, from Superintendent John Kramar stating, in relevant part:

> Attached please find a copy of PERB Decision No. 1184 that I caused to be posted on March 6, 1997. The district is not in possession of the ". . .Julie Milan letter/incident report. . ." referenced in B.I. The District will accept a supplemental rebuttal should Mr. Ortiz write one.

Kramar's letter did not contain any description of the steps taken by the District to locate the Milan document, nor was his response served on CSEA as required.

On May 22, 1997, I telephoned the District requesting a proof of service of the District's May 8 letter on CSEA. In response, rather than send a copy of a proof of service as requested, the District faxed a copy of a May 8, 1997 letter it had mailed to CSEA stating that it was not in possession of the Milan letter or report and setting forth the reasons it had refused to process Ortiz's grievance.

CSEA filed a letter with PERB on June 2, 1997, asserting that the District had failed to comply with the Board's order and requesting that PERB take action to ensure compliance. In addition to the District's failure to produce the Milan document upon CSEA's request, CSEA contended that the notice to employees was not posted at the Fairgrove School site.

In order to elicit facts regarding the District's compliance efforts, a hearing was held on October 23, 1997.[3] After timely-filing of briefs, the matter was submitted for decision on December 22, 1997.

FACTS

The Milan Letter/Incident Report

During the formal hearing in the underlying unfair practice case, several witnesses testified regarding the Milan document.[4] Rudy Chavarria, District operations supervisor and Ortiz's supervisor, attested to the existence of a letter written by Milan regarding Ortiz.[5]

In response to questions from the ALJ, Assistant Superintendent of Personnel Services Barbara Koehler testified that Milan, a campus patrol officer, submitted a written document to her site supervisor concerning an incident involving Milan and Ortiz that occurred on May 18, 1994. Koehler stated that the document was not kept in the District's central office personnel files which she maintains, but that it may have been kept by the site supervisor.[6]

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[3]The hearing was originally scheduled for July 17, 1997, but was delayed to accommodate the superintendent's schedule.

[4]The hearing was held on November 22 and December 7, 1995; official notice is taken of the transcript of that hearing, as well as the entire unfair practice case file.

Reporter's Transcript, Vol. I, pp. 83-86.

Reporter's Transcript, Vol. II, pp. 99-104.

Marcelo Pantoja, a District employee and CSEA officer and job steward, testified that he was shown a letter regarding Ortiz by George Cota, maintenance and operations director, during May 1994. Pantoja stated that he did not see a signature on the letter, but that Cota told him it was from Milan.[7]

At the compliance hearing, Pantoja, Ortiz and Vern Wallery, a District employee and CSEA officer, all credibly testified regarding the Milan document which detailed the incident between Milan and Ortiz. Ortiz stated that Chavarria, his supervisor, called him into his office on June 13, 1994, to discuss the letter. During the meeting, at which Cota was also present, Chavarria read aloud portions of a letter regarding Ortiz that he stated was written by Milan.

Pantoja reiterated the testimony he gave in the unfair practice hearing, again testifying that he had been shown a copy of the letter by Cota. Although he did not see a signature on the letter, Cota told him it was from Milan.

Wallery testified that she was shown a copy of a letter regarding Ortiz by Chavarria, her supervisor, in his office in late May or early June 1994. Chavarria told her the letter was written by Milan.

Kramar testified that he had no knowledge of the whereabouts or existence of the Milan letter/incident report. In response to the PERB decision order, his inquiry regarding the document extended only to questioning Koehler concerning its whereabouts.

[7]Reporter's Transcript, Vol. II, pp. 54-57.

Koehler testified that the personnel files she keeps in the central office do not contain a Milan letter/incident report. When asked about her efforts to produce the document after the issuance of the Board's decision, she testified that she made no inquiries of any District personnel at any time to ascertain whether they were aware of the location of the document.

The District called only one witness, Cota. In response to the District's question, Cota denied meeting with Pantoja on June 13, 1994, the date on which Pantoja testified Cota showed him the Milan letter. This testimony is discredited, however, since, in response to CSEA's questions, Cota admitted to not remembering anything he did on that date or on the following date.

Posting of the Notice to Employees at Fairgrove School

Koehler testified that, to her knowledge, the notice to employees was posted throughout the District as required by the PERB order. However, she had no independent knowledge that the notice was posted at Fairgrove School. She stated that she was never informed that the notice was not posted there until the issue arose during compliance proceedings. Koehler offered confusing and evasive testimony regarding whether the school site was operational during the posting period. She indicated that the school was closed for construction at some time during the posting period, but was unclear as to the dates and extent of the closure (i.e., whether it included classrooms and/or offices). She was also unclear as to whether classified employees were working at the site during the construction.

Wallery testified that she was informed by CSEA vice president Sharon Fernandez, an employee at Fairgrove School, that the notice to employees was not posted at that site. Wallery stated that she informed Koehler of this by telephone, and that Koehler told her she would look into the matter. Wallery also testified that she telephoned and spoke to Fernandez at the site regularly during the posting period. In addition, she stated that, in her role as a clerk typist II, she sent substitute employees to Fairgrove School to replace absent employees during the posting period. Wallery's testimony was clear and unequivocal and, as such, is credited.

DISCUSSION

EERA section 3541.5(c) grants PERB the following authority:

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

PERB Regulation 32980[8] states that responsibility for determining that parties have complied with final Board orders rests with PERB's general counsel.

The District in this case argues that the burden for showing non-compliance rests with CSEA. The District is wrong. The District was ordered by PERB to take certain actions as a remedy for unfair practices it committed in violation of the EERA.

[8]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Additionally, section B of the order required the District to file written notification with PERB of the actions taken to comply with the order. Therefore, it is the District's burden to demonstrate to PERB that it has complied with the Board's order.

The Milan Letter/Incident Report

The District admitted in its May 8, 1997, response to PERB's request for a statement of compliance that it had not complied with that portion of the Board's order requiring it to give CSEA a copy of the Milan letter/incident report. Its defense for non-compliance is that CSEA has not proven that the District possesses the Milan document or that it even exists. As noted above, the District incorrectly places the burden on CSEA, when it is the District that PERB has ordered to produce the document. Furthermore, this is the first time that the District has argued that the document does not exist.

Implicit in the ALJ's proposed decision order, upheld by the Board in PERB Decision No. 1184, is a finding that the Milan letter/incident report exists. The existence of the document was never in dispute during the unfair practice hearing, nor was it raised by the District in its post-hearing briefs to the ALJ. In fact, the District affirmed the existence of the Milan document in its post-hearing reply brief when it stated that, if CSEA had requested the ALJ to issue a subpoena duces tecum for the document, "the ALJ could have reviewed the 'Milan' letter and

made a determination as to its relevance to this matter."[9] In light of this statement, it is not surprising that the District also did not raise the issue of the document's existence in its appeal to the Board of the ALJ's decision.

PERB has held that compliance hearings cannot be used to litigate defenses that were not raised at the underlying unfair practice hearing. (Brawley Union High School District (1983) PERB Decision No. 266a.) Thus, since the District did not raise the existence (or lack thereof) of the Milan letter/incident report during the unfair practice hearing, it has waived its right to raise this defense in compliance proceedings.

Even if the District had not waived this defense, however, the record in this case clearly establishes that the Milan document exists. In the unfair practice hearing, Chavarria and Koehler, District management and supervisory personnel, both attested to the existence of the document. In the compliance hearing, classified employees Ortiz, Pantoja and Wallery all testified as to their knowledge of the document. The District argues that the testimony of Ortiz, Pantoja and Wallery should be disregarded since it is hearsay. However, their testimony is relied upon only to corroborate that of competent evidence taken

[9]Respondent's reply brief, page two, footnote one, filed with PERB on April 6, 1996.

in the unfair practice hearing, and is therefore permitted under PERB Regulation 32176.[10]

Cota, called by the District to dispute testimony that he had shown the Milan letter to Pantoja, was believable only when he admitted to not remembering what he did on the day the alleged meeting took place.[11] Koehler never denied the existence of the document. Rather, she repeatedly stated that she had made no effort to locate it beyond reviewing her own files.

Posting of the Notice to Employees at Fairgrove School

The record reflects conflicting testimony regarding the posting of the notice to employees at Fairgrove School. Koehler had only general knowledge of the posting throughout the District. She asserted that the school was not in operation during the posting period, but was unable to be specific regarding the dates and extent of the closure. Wallery, on the other hand, contended that Fairgrove School was operational. In support of this contention, she testified that she provided the

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[10]PERB Regulation 32176 provides, in pertinent part:

> Compliance with the technical rules of evidence applied in the courts shall not be required. Oral evidence shall be taken only on oath or affirmation. Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

[11]If the District wished to impeach the testimony of Ortiz and Wallery, it could have called their supervisor, Chavarria, as a witness, since he is the person who purportedly either read or showed them the letter. Curiously, despite Chavarria's presence at the hearing, the District chose not to do so.

school with substitute employees during this time. Wallery also stated that she was informed by an employee who was working at Fairgrove School during the posting period that the notice was not posted.

The purpose of posting a notice of a Board decision is to inform employees that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the Board's order. The Board has found that such a posting effectuates the purposes of EERA. (Placerville Union School District (1978) PERB Decision No. 69.) Since the District failed to prove that the notice to employees was posted at the Fairgrove School, and in order to ensure that employees are informed of PERB Decision No. 1184, the District must post the notice to employees at that site according to the specifications below.

CONCLUSION

Based on the entire record in this case, I find that the District has failed to comply with the Board's order in Decision No. 1184. The District failed to produce the Milan letter/incident report both when requested by CSEA, during the initial compliance proceedings and at the compliance hearing. Moreover, the District made no good faith effort to obtain the document. Koehler's lack of diligence in attempting to find the document is particularly appalling since she testified in the unfair practice hearing that it might be in the possession of the site supervisor. Additionally, as the District's custodian of

records, Koehler was not only required to produce the Milan document to comply with the Board's order but also was required to present it at the compliance hearing pursuant to a subpoena duces tecum. In light of the above, the District's noncompliance constitutes nothing less than a refusal to comply with the Board's order. The record also supports a finding that the notice to employees attached to PERB Decision No. 1184 must be posted at Fairgrove School.

REMEDY

Section 3541.5(c) grants PERB the authority to order an offending power to cease and desist from an unfair practice and take any affirmative actions that will effectuate the policies of the Act. These actions include the removal of materials from District files. (San Diego Unified School District (1980) PERB Decision No. 137; Rio Hondo Community College District (1983) PERB Decision No. 292.)

In PERB Decision No. 1184, the Board found that the Milan document formed the basis of a written reprimand given to Ortiz on November 7, 1994. It ordered the District to give the document to CSEA, and to allow Ortiz to file a supplemental rebuttal to the reprimand. Because of the District's failure to produce the document, it is impossible for Ortiz to file a supplemental rebuttal. Under these circumstances, it is patently unfair to allow the letter of reprimand to remain in Ortiz's personnel file. Therefore, it is appropriate to order the

District to expunge the November 7, 1994, written reprimand from Ortiz's personnel file.

It is also appropriate that the District be required to post a copy of the notice to employees attached to PERB Decision No. 1184 at the Fairgrove School site.

The final issue to address is CSEA's request for attorneys fees and costs. PERB has held that an award of attorneys fees in cases which are without merit and brought in bad faith is appropriate to discourage and remedy such forms of litigiousness. (Chula Vista School District (1982) PERB Decision No. 256.) The Board has awarded costs when cases repeatedly raise nonmeritorious complaints or are vexatious, frivolous and in defiance of a Board order. (United Professors of California (Watts) (1984) PERB Decision No. 398-H; Los Angeles Unified School District/California School Employees Association (Watts) (1982) PERB Decision No. 181a.)

In this case, the District's failure not only to produce the Milan document, but even to conduct a diligent search for the document, constitutes a refusal to comply with the Board's order. The District's only defense for its failure to comply, i.e., that the Milan document never existed, is wholly without merit. Moreover, the District waived its right to raise this defense when it failed to raise it in prior proceedings. The District's actions led to the instant hearing, at a significant expense of time and money to all parties. Such an abuse of the Board's processes merits sanctions and, at the very least, the award of

fees and costs to CSEA. Therefore, it is appropriate to order the District to pay to CSEA costs and reasonable attorneys' fees to offset the expenses and time incurred by CSEA related to the compliance hearing. (United Professors of California (Watts), supra, PERB Decision No. 398-H.)

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Hacienda La Puente Unified School District (District) has failed to comply with an order issued by the Public Employment Relations Board (PERB) in California School Employees Association and its Hacienda La Puente Chapter #114 v. Hacienda La Puente Unified School District (1997) PERB Decision No. 1184 (Decision No. 1184). It is hereby ordered that the District shall:

1. Expunge from Sam Ortiz's personnel file the written reprimand issued to him on November 7, 1994.

2. Within ten (10) work days of the service of a final decision in this matter, post a copy of the notice to employees attached to Decision No. 1184 at the Fairgrove School site. The notice should be subscribed by an authorized agent of the District, indicating that it will comply with the terms of the order in Decision No. 1184. Such posting shall be maintained for a period of thirty (30) consecutive work days. Reasonable steps shall be taken to ensure that the notice shall not be reduced in size, altered, or covered with any other material.

3. Pay to the California School Employees Association (CSEA) costs and attorneys' fees incurred relating to the conduct of the compliance hearing in this case. Such costs and fees will be awarded in an amount established by a statement, supported by declaration and submitted to the District by CSEA, subject to review by PERB.

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

5. Upon issuance of a final decision in this matter, make written notification of the actions taken to comply with this order to the San Francisco Regional Director of PERB in accordance with the Regional Director's instructions. Continue to report, in writing, to the Regional Director thereafter as directed. All reports shall be concurrently served on CSEA.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within

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

Jerilyn Gelt
Hearing Officer