STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

INGLEWOOD UNIFIED SCHOOL DISTRICT, Charging Party, v. INGLEWOOD TEACHERS ASSOCIATION, Respondent.	Case No. LA-CO-1491-E PERB Decision No. 2290 October 29, 2012

Appearances: Atkinson, Andelson, Loya, Ruud & Romo by Joshua E. Morrison, Attorney, for Inglewood Unified School District; California Teachers Association by Robert E. Lindquist, Attorney, for Inglewood Teachers Association.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by the Inglewood Unified School District (District) of the Office of the General Counsel's dismissal (attached) of its unfair practice charge. The charge, as amended, alleged that the Inglewood Teachers Association (Association) violated the Educational Employment Relations Act (EERA)[1] by failing or refusing to meet and confer with the District. The charge alleged that this conduct constituted a violation of EERA section 3543.6, subdivision (c).

The Board has reviewed the entire record in this matter and given full consideration to the appeal and the response thereto. Based on this review, the Board finds the warning and dismissal letters to be well-reasoned, adequately supported by the record and in accordance with the applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself, as supplemented by the discussion below.

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

BACKGROUND

The Association is an affiliate of the California Teachers Association (CTA) and the National Education Association. The Association is the exclusive representative of certificated employees who are employed mainly as contract classroom teachers in kindergarten through grade level 12. The Association and the District board entered into a collective bargaining agreement (CBA) effective July 1, 2006 through June 30, 2009.

The CBA includes the following articles: Article VIII (8) governing Work Days and Hours; Article XI (11) governing Class Size; Article XII (12) governing Compensation; Article XIII (13) governing Fringe Benefits; Article XXVI (26) containing the Reopener Clause; and Article XXVIII (28) containing the Zipper Clause.

The Zipper Clause states as follows:

> The parties agree that all negotiable items have been discussed during negotiations leading to this Agreement, including salaries and benefits, leaves and transfers and therefore further agree that negotiations will not be reopened on any item during the life of this Agreement except by mutual agreement or as provided elsewhere in this Agreement.

The Reopener Clause states as follows:

> No later than April 1 of each year of this agreement the parties agree to reopen negotiations on Article 12, Compensation, and Article 13, Fringe Benefits, and one additional article per party.

On September 3, 2010, the parties entered into a tentative agreement (TA), amending certain terms and rolling over the others and extending the force and effect of the CBA through June 30, 2013.[2] The TA amended the Reopener Clause to state:

> No later than April 1 of each year of this agreement the parties agree to reopen negotiations on two (2) articles per party, exclusive of Article 12 & Article 13.

(Strike-outs and underlining omitted.)

[2] Also on September 3, 2010, the parties entered into a memorandum of understanding to reduce the school year.

As alleged by the District, on February 23, 2011, the District "provided" the Association with the Proposal for a Side Letter Agreement (Proposal). This document describes a then current deficit of $32 million and states that a "fiscal recovery plan has been initiated." It next includes a chart showing reductions that had already been approved by the District board, including the elimination of positions, the transfer of funds, the reinstatement of a revenue source and the elimination of cellular telephones with exceptions for certain administrators. It then states that there was still a large gap between the approved reductions and the deficit, as a result of which the District was to submit to the District board for approval, also on February 23, 2011, a resolution to reduce or eliminate particular kinds of services (338 full-time equivalents). It concludes with a proposal "as an option to reduce the number of full time equivalents." The option includes a chart listing certain proposals, estimated cost savings associated with each, and comments. The proposals include reinstatement of furloughs, elimination of certain fringe benefits, a salary rollback, a freeze on step in column and an increase in class size ratios and maximums with state waiver. The document concludes with: "The reductions are painful but necessary. The District is hopeful that the parties can reach an Agreement that will allow the District to emerge from this crisis fiscally solvent."

The Association filed a response to the charge on October 26, 2011 (Response).[3] The Response explains that the meeting scheduled for February 23, 2011, was one in a series of financial information meetings that were being held in response to the District's fiscal crisis and were intended to provide information regarding the District's efforts to cut costs and avoid

[3] Absent a factual dispute, PERB may rely on facts provided by the respondent in accordance with PERB Regulations (PERB Regulations are codified at Cal. Regs., tit. 8, sec. 31001 et seq.). (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.) As noted in the dismissal letter, nothing in the MMBA or PERB case law requires a Board agent to ignore the facts provided by a respondent, and to only consider the facts provided by the charging party. (Board agent's dismissal, p. 5.)

state receivership. The format of the Proposal is similar in content and format to financial information disclosures provided by the District to the Association in the course of these meetings showing how much had been reduced as of February 23, 2011, March 9, 2011, and March 23, 2011. (Response, Exhibit 5.) Also according to declarations provided by the Association, no member of the bargaining team attended these meetings, the parties agreed as a ground rule that they were not engaged in "meeting and negotiating" at these meetings, and at every such meeting the parties acknowledged the existence and operation of this ground rule.

On February 28, 2011, the District board met and adopted the District's Certificated Staffing Formula for bargaining unit and non-bargaining unit positions. The Certificated Staffing Formula carried over classroom teaching staffing ratios contained in the Proposal.[4] As alleged by the District, the president of the Association, Peter Somberg (Somberg), was present and addressed this item at the meeting. The special agenda states that the District "is implementing a fiscal recovery plan" and "[b]y approving the staffing formulas, the District will have a standardized basis in which to make staffing decisions."

The charge does not allege that the District ever provided the Association with the Certificated Staffing Formula. Nor does the charge allege that either the Proposal or the Certificated Staffing Formula was sunshined for purposes of initiating negotiations.

By letter dated April 20, 2011, District Assistant Superintendent Monalisa Hasson (Hasson) informed Somberg that the District "will be submitting its initial proposal to a reopener Agreement for 2011-12 to the Governing Board for public hearing [on April 27, 2011] pursuant to Government Code 3547" and that he should "consider this a formal demand to bargain." Hasson's letter does not refer back to the February 23, 2011, Proposal.

[4] For example, the Proposal proposed increased class size ratios for kindergarten through third grade from 30:1 to 32:1, and increases in class size ratios for other grade levels as well, in order to allow the District "to reduce certificated personnel expenditures and avoid insolvency." The Certificated Staffing Formula shows the same increased class size ratios for kindergarten through third grade from 30:1 to 32:1.

By letter dated April 26, 2011, Somberg informed Hasson that "the District's demand to bargain is untimely because Article XXVI requires the parties to reopen negotiations no later than April 1" and that the Association "declines to engage in negotiations pursuant to your request." The letter also states, "[a]s you explicitly know – because you were a party to the negotiations – the District is precluded from reopening Articles XII and XIII by operation of Article XXVI."

On April 27, 2011, the Initial Proposal for 2011-2012 Reopener Negotiations (Reopener Proposal) was sunshined. The agenda states that the Reopener Proposal was required to be sunshined "prior to the initiation of negotiations." It goes on to state, "the initial proposal submitted by the Inglewood Unified School District for reopener negotiations is recommended for adoption." The agenda further states that "[b]y approving this request, the District will be able to begin negotiations for a reopener agreement." Under fiscal impact, the agenda states that it is "subject to negotiations."[5]

Attached to the agenda is a document entitled "Proposals for a Reopener Agreement." It describes the District's implementation of a fiscal recovery plan, but states that it did not go far enough in reducing the deficit and therefore "the District will propose changes to workyear/workhours, compensation, benefits, and class-size." It concludes that "in accordance with the current bargained Agreement, the District proposes that the following contract articles be bargained for the 2011-12 year," specifically listing Articles VIII, XI, XII and XIII.

By letter dated August 5, 2011, counsel for the District informed CTA Regional Uniserve Director Jeff Good that "the District demands immediate bargaining on the collective bargaining proposals recently sunshined by the District." Attached to the letter is an amended initial proposal dated July 27, 2011. The amended proposal deletes references to Articles XII

[5] This is in contrast to the special agenda for the District board meeting of February 28, 2011, which describes the fiscal impact for the Certificated Staffing Formula as "none."

and XIII.[6] The amended initial proposal also deletes Article VIII on Work Days and Hours, maintains Article XI on Class Size and adds Article XXVI on Negotiation Procedures. The District proposed the following in regard to Article XXVI:

> Amend Article XXVI to allow either party to present unlimited reopener proposals for the 2011-12 and 2012-13 school years at any time.

The District's letter explains its goal in reopening Article XXVI:

> [O]ur goal in opening Article XXVI is to remove a barrier that arguably prevents the parties from collectively bargaining certain cost saving measures, such as adjustments to salary and/or benefits. Once this barrier has been removed, we intend to present bargaining proposals (including with respect to Articles 12 and 13) aimed at restoring the District to fiscal solvency.

By letter of August 18, 2011, CTA responded that the Zipper Clause acts as a bar to any negotiations during the term of the agreement. On September 28, 2011, the District filed the unfair practice charge.

DISMISSAL OF THE UNFAIR PRACTICE CHARGE

The Office of the General Counsel issued a warning letter on November 10, 2011, finding that the allegations regarding the Proposal and Certificated Staffing Formula were untimely. The warning letter concluded that notwithstanding the timeliness issues, the charge failed to state a prima facie case of refusal to bargain. The District filed an amended charge on November 29, 2011, alleging that although the Proposal of February 23, 2011, was not titled a

[6] Articles XII and XIII relate to Compensation and Fringe Benefits, respectively, and presumably were deleted from the District's initial proposal because, as pointed out in Somberg's letter of April 26, 2011, these articles are not subject to being reopened under the plain language of the Reopener Clause. The District acknowledged this point in its Request for Impasse Determination/Appointment of Mediator (Request), filed with PERB on August 30, 2011, of which the Board takes official notice. Attached to the Request is the Statement of Facts prepared by the District, which states "each year the District may open any two articles other than Articles 12 and 13." As for the procedural history and status of that matter, the Association filed an opposition dated September 6, 2011, and the District withdrew its request. PERB issued the notice of withdrawal and closure of case on September 7, 2011.

"reopener proposal," the document was still effective for purposes of reopening the CBA under the Reopener Clause, citing *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223. To find otherwise, alleges the District, is to elevate form over substance. The amended charge also alleged that "[w]ith respect to the topic of class size, the April 27 document relates back to the February 23, document" and that the Association "did not communicate its refusal to negotiate class size prior to March 28, 2011" and therefore "the instant Charge is timely." The Board agent dismissed the charge on December 22, 2011, addressing each of the District's newly alleged contentions, concluding that the Association was under no duty to bargain. The District filed a timely appeal from the dismissal on January 17, 2012. The Association filed a timely response on February 7, 2012.

DISCUSSION

The District's appeal raises no new issues that were not previously raised, considered and addressed with one exception. The District contends that the existence of any actual confusion[7] as to whether the Proposal created a bargaining obligation on the part of the Association under the Reopener Clause "involves factual considerations not appropriate for resolution prior to hearing."

Based on our review of the record, we do not agree that the District has made sufficient allegations upon which to conclude that there is a factual dispute concerning the parties' intent or actions in this matter. The Office of the General Counsel properly concluded that, notwithstanding the statute of limitations issues raised by the allegations of the charge, the District failed to allege sufficient facts to demonstrate that the Association was under any duty

[7] Though not cited in the District's appeal, the District may be relying on a principle discussed in *Kern Community College District* (1983) PERB Decision No. 337. In that case, the college district claimed that it was confused as to the object of the union's various requests for negotiations. The Board held that if the college district were confused, "the duty to bargain in good faith behooved it as a minimum to seek clarification of the [union's] position."

to bargain. Establishing a duty to bargain is a necessary precondition to establishing a prima facie violation of that duty.[8]

The most obvious deficiency with the charge is that it fails to allege that the parties were indeed confused about their bargaining obligations. There are no factual allegations upon which to even infer that the parties were confused. The factual context in which the Proposal was prepared was that the parties were engaged in ongoing meetings over the fiscal crisis during which the District was in the practice of providing the Association with financial disclosures in chart form showing the cost savings from certain approved reductions. The District does not dispute this fact. Nor does the District dispute the existence of a ground rule agreed to by the parties that they were not engaged in a meet and negotiate process during these meetings.

Moreover, the District did not allege that the Proposal was sunshined at a public meeting of the District board, nor is there any factual support suggesting that it was. That would have at least demonstrated that the District considered the Proposal to be a *bargaining* proposal requiring public input prior to the initiation of negotiations (even if the Association did not), as was the case with the Reopener Proposal. Further, only five days after the date of the Proposal, the board met and adopted the District's Certificated Staffing Formula, the purpose of which was to give the District "a standardized basis in which to make staffing decisions." Given the short time frame between the date of the Proposal and the adoption by the District board of the Certificated Staffing Formula with its stated purpose to allow the District to make decisions (rather than initiate negotiations) and the undisputed context in which the Proposal arose, we reject the District's contention that they have succeeded in

[8] "[I]t is axiomatic that a refusal to bargain is not an unfair practice if the refusing party had no duty to bargain." (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M.)

making a prima facie showing that the Proposal created a bargaining obligation on the part of the Association.

Furthermore, the charge does not allege elemental facts demonstrating that a demand to bargain was made, i.e., the name of the District representative who *provided* the Proposal to the Association, the means by which the District *provided* it to the Association or the agent of the Association to whom it was *provided.* Based on all of the above and ignoring the central legal issue discussed below, from a pleading perspective only, we conclude that the amended charge does not sufficiently allege facts supporting the District's case. As the Board stated in *Sylvan Union Elementary School District* (1992) PERB Decision No. 919, "[a]s a general rule, PERB case law requires that the demand be sufficient to put the other party on notice that the Association desires to bargain, or to meet and discuss, a negotiable subject."

Notwithstanding all of the above factual deficits in the charge, the central legal issue in this case is whether the District's Proposal "had the effect of reopening the CBA," as alleged by the District. In order to conclude that the District alleged a prima facie violation of the duty to bargain, it must demonstrate that the Association *had* a duty to bargain as a threshold matter.

The analysis regarding whether the Proposal "had the effect of reopening the CBA" necessarily begins with an examination of the Zipper Clause.[9] In pertinent part, it states that the parties "agree that negotiations will not be reopened on any item during the life of the Agreement except by mutual agreement or as provided elsewhere in the Agreement." Therefore, as a general operative rule, for the life of the CBA, negotiations were barred unless one of two exceptions applied.

The first exception applied in the case of a mutual agreement. There are no allegations that any such mutual agreement existed. To the contrary, the parties agreed on a ground rule

[9] PERB may interpret contract language if necessary to decide whether there has been an unfair practice. (*Inglewood Unified School District* (1991) PERB Order No. Ad-222; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

that prohibited the parties from considering the fiscal insolvency update meetings to be meet and negotiate sessions. The District does not dispute this fact.

The second exception to the Zipper Clause's bar on reopening the CBA can be found in the Reopener Clause. Under this clause, only two articles of the CBA per party, except Articles XXII and XXIII on Wages and Fringe Benefits, are subject to reopening "[n]o later than April 1."

Based on the factual allegations of the charge, we conclude that the District did not reopen the CBA in a timely fashion under the Reopener Clause. The District's attempt to reopen the CBA was through Hasson's letter of April 20, 2011, stating that the District would be submitting its "initial proposal" to a "reopener" agreement to the District board for sunshining on April 27, 2011, and that the Association should consider the letter a "formal demand to bargain." This conclusion is borne out by the board's action at the meeting of April 27, 2011, during which it accepted the District's recommendation to adopt the District's initial proposal so that the District could begin negotiations for a reopener agreement.

Despite the District's contention that Hasson's letter "relates back" to the Proposal, Hasson's letter does not even reference that document. The District is correct that *Newman-Crows Landing, supra*, PERB Decision No. 223 stands for the principle that a demand to bargain need not be in a particular form. The District is not correct that the Office of the General Counsel elevated form over substance by concluding that neither the Proposal nor Hasson's letter created a bargaining obligation on the part of the Association. It is evident from Hasson's April 20, 2011, letter that the District knew how to trigger the exception to the Zipper Clause found in the Reopener Clause. Given the April 1 deadline, its efforts were simply untimely. As there is no factual support for the District's "relates back" argument, we

reject it as an effort to recast its failure to invoke the Reopener Clause by April 1 as a factual dispute or contrary legal theory as urged by the dissent. We conclude that the absence of any factual support for the District's "relates back" argument alone is fatal to its case. At best, the District's Proposal may be construed as an offer for a mutual agreement to reopen the CBA under the first exception to the Zipper Clause. To invoke this exception, however, would have required an acceptance of the offer by the Association.

We agree with the dissent that at this stage of the proceedings it is not the function of the Board to determine whether the District's factual allegations are credible. We accept as true for purposes of determining the sufficiency of the charge the District's factual allegations. The District's central contentions --- the Proposal "had the effect of reopening the CBA" and Hasson's April 20, 2011, letter "relates back" to the Proposal --- are not factual. They are conclusory characterizations of the facts girded to no viable theory of law, and we are not bound by any precedential authority to accept them as true.

Moreover, to accept them as true would require us to ignore undisputed facts and documentary evidence filed in connection with the charge, i.e., that during the time the February 23, 2011, Proposal was developed the parties were meeting to discuss the District's fiscal crisis for informational purposes only and not as part of a negotiation process; that the parties were operating under a ground rule that specifically characterized the meetings in that way; that neither the Proposal nor the Certificated Staffing Formula was sunshined for the purpose of initiating negotiations; that the District knew how to invoke the Reopener Clause as evidenced by Hasson's April 20, 2011, letter; that the Association knew how to refuse a negotiation demand as evidenced by Somberg's April 26, 2011, letter; that neither Hasson's

letter nor the Reopener Proposal specifically *refer back* to the Proposal; and that both those documents instead use verb tense indicating the opposite.[10]

Equally important is the legal import of the Zipper Clause. Neither the District nor the dissent appears to accord the Office of the General Counsel's discussion of this subject appropriate significance. The Office of the General Counsel's analysis is consistent with the general view of how zipper clauses operate. Generally a zipper clause gives both parties the right to refuse to bargain changes in all matters covered by the terms of the clause during the life of the agreement. (*Sylvan Union Elementary School District* (1989) PERB Decision No. 780; *Los Rios Community College District* (1988) PERB Decision No. 684.)

> In practical terms, the clause purports to fix for the life of the agreement (absent mutual agreement to negotiate changes) those terms and conditions of employment established by past practice, as well as those established by the express terms of the contract: . . . [¶] Regardless of the existence of a zipper clause, neither party to a collective bargaining agreement has a duty to negotiate over any matter covered by the agreement during its term (subject, of course, to reopener provisions). . . . [¶] We do not view zipper clauses to be inherently inconsistent with any rights or obligations provided by EERA. Indeed, as long as such clauses are freely entered into, they could serve to further stabilize and harmonize bargaining relationships. [¶] [After construing the specific zipper clause at issue, the Board concluded] we construe this zipper clause as affording both parties the right to refuse to negotiate changes in the status quo as to otherwise negotiable terms and conditions of employment for the duration of the agreement (subject to reopener provisions), . . .

(*Id.* at pp. 13-15.)

[10] Hasson's letter of April 20, 2011, states that the District "**will** be submitting its initial proposal to a reopener Agreement ... for public hearing" on April 27, 2011. (Emphasis supplied.) The April 27, 2011, District board agenda refers to the Reopener Proposal as the "initial" proposal, not as a revised or amended proposal. The Reopener Proposal, attached to the agenda, states that the "District **will** propose changes to workyear/workhours, compensation, benefits, and classroom size." (Emphasis supplied.)

As applied here, the purpose of the Zipper Clause was to foreclose further negotiations regarding resolved matters within the scope of representation. (See *Los Angeles Community College District* (1982) PERB Decision No. 252.) Although neither party was precluded from making and/or agreeing to proposals outside the scope of the Reopener Clause, the Zipper Clause operated as a "shield" to protect both the District and the Association against the unwanted imposition of a duty to negotiate changes to the status quo during the term of the CBA.

In sum, based on our review of the record, we do not agree with the dissent that there is a factual dispute or contrary *viable* theory of law supporting the District's position in this matter. (See *Eastside Union School District* (1984) PERB Decision No. 466.) The Office of the General Counsel did not decide the ultimate merits, but rather determined that the District did not meet its burden of stating a prima facie case of refusal to bargain. A charge alleging a refusal or failure to bargain is necessarily predicated on establishing a duty to bargain. If a duty cannot be established, there can be no unfair practice. Contrary to the dissenting opinion, resolution of the dispute is not so much a matter of contract interpretation as it is a matter of accurately characterizing the parties' representations, at the time in which they were made, and of the parties' actions, at the time in which they occurred. Based on the District's own actions and representations in this matter during the time period in question, we conclude that the District did not make a prima facie showing that the District invoked the Reopener Clause in a timely fashion. Therefore, by existence of a binding agreement and operation of the Zipper Clause, the Association was under no duty to bargain as a threshold matter of law. We conclude that dismissal of the charge is warranted.

ORDER

The unfair practice charge in Case No. LA-CO-1491-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Huguenin joined in this Decision.

Member Dowdin Calvillo's dissent begins on page 15.

DOWDIN CALVILLO, Member, dissenting: I respectfully dissent. For the reasons set forth herein, I find that the charge alleges sufficient facts to state a prima facie case and would remand this matter to the Office of the General Counsel for issuance of a complaint.

DISCUSSION

The only issue before us is whether the charge alleges sufficient facts to state a prima facie case of refusal to bargain. Public Employment Relations Board (PERB or Board) Regulation 32615(a)(5) requires a charging party to provide a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." In determining whether an unfair practice charge alleges a prima facie case, the Board applies the following standard:

> To determine whether a charge alleges a prima facie case, the Board must assume that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12.[1]) It is not the function of the Board agent to judge the merits of the charging party's dispute. (*Saddleback Community College District* (1984) PERB Decision No. 433; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994.) Disputed facts or conflicting theories of law should be resolved in other proceedings after a complaint has been issued. (*Eastside Union School District* (1984) PERB Decision No. 466, pp. 6-7.)

(*Golden Plains Unified School District* (2002) PERB Decision No. 1489 (*Golden Plains*).)

Statute of Limitations

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College*

[1] Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

District (1996) PERB Decision No. 1177.) In a refusal to bargain case, the statute of limitations is triggered by one party's communication to the other that it will not negotiate with it. (*Berkeley Unified School District* (2008) PERB Decision No. 1976.)

In this case, the charge alleges that, on February 23 and 28, 2011, the Inglewood Unified School District (District) requested to negotiate over its proposals over class size, but that the Inglewood Teachers Association (Association) failed to communicate its refusal to bargain over those proposals prior to March 28, 2011. In finding the charge untimely as to the February 23 and 28, 2011 proposals, the majority adopts the Board agent's determination that the "conclusory allegation" that the Association failed and refused to bargain those proposals is insufficient because it is unsupported by any dates on which the Association is alleged to have so failed and refused.

I disagree. The amended charge clearly states that the Association failed to communicate its refusal to bargain these proposals prior to the limitations date of March 28, 2011. Implicit in this allegation is the allegation that the parties were, in fact, engaged in negotiations during that time period. While the majority places much emphasis on the Association's contention that the parties had agreed to a "ground rule" that they were not meeting and conferring during their February 23 and subsequent meetings, I find the nature of these meetings and particularly the nature of the February 23, 2011 Proposal for a Side Letter Agreement (Proposal) to constitute disputed issues of fact. The majority also relies on the allegations by the Association that the District did not "sunshine" its Proposal prior to a public meeting and that it met and adopted the District's Certificated Staffing Proposal only five days after it was presented. While such facts, if proven at an evidentiary hearing, may be relevant to

the ultimate determination of whether or not the Proposal gave rise to a bargaining obligation, I believe it inappropriate to resolve this issue at this stage of the proceedings. Therefore, I find that the charge alleges sufficient facts to establish the timeliness of the charge for purposes of stating a prima facie case.

Refusal to Bargain Allegations

PERB has long held that the absolute refusal to meet and confer over a matter within the scope of representation is a *per se* violation of the duty to bargain in good faith. (*Stockton Unified School District* (1980) PERB Decision No. 143; *Sierra Joint Community College District* (1981) PERB Decision No. 179 (*Sierra*).)[2] A refusal to discuss a proposal based upon a party's belief or perception that the proposal concerns a subject outside the scope of representation is a *per se* violation of the duty to bargain. (*Regents of the University of California* (2010) PERB Decision No. 2094-H; *Sierra*.) Class size is expressly enumerated among the matters specified as within the scope of representation under EERA. (EERA § 3543.2; *Sonoma County Office of Education* (1997) PERB Decision No. 1225.)

The duty to bargain is triggered by a valid request to bargain over a subject within the scope of representation. (*Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223 (*Newman-Crows Landing*); *State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S.) "While it is not essential that a request to negotiate be specific or made in a particular form . . . it is important for the charging party to

[2] In other cases involving alleged bad faith conduct during bargaining, the Board applies a "totality of the circumstances" test. (See, e.g., *Pajaro Valley Unified School District* (1978) PERB Decision No. 51.)

have signified its desire to negotiate to the employer by some means." (*Newman-Crows Landing,* at pp. 7-8.)[3] In *Newman-Crows Landing*, PERB observed:

> "[A] valid request to bargain need not be made in a particular form or in haec verba,[4] so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment." [Quoting *Al Landers Dump Truck, Inc.* (1971) 192 NLRB 207.]
>
> In other words, a valid request will be found, regardless of its form or the words used, if it adequately signifies a desire to negotiate on a subject within the scope of bargaining. . . .

As discussed above, the majority interprets the allegations and supporting evidence submitted by the charging party to conclude that the District's February 23 Proposal did not constitute a valid demand to bargain and, therefore, did not create a duty to bargain. Further, the majority concludes, the District did not reopen the collective bargaining agreement in a timely fashion under the reopener clause of the agreement. The majority finds the context in which the Proposal arose to be undisputed and rejects the District's contention that the Proposal was submitted for the purposes of bargaining, thereby creating a bargaining obligation on the part of the Association. I disagree.

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[3] The same standard for unilateral change violations by employers applies to allegations of unlawful unilateral changes by unions. (*Regents of the University of California* (2010) PERB Decision No. 2105-H; *The Regents of the University of California* (1992) PERB Decision No. 922-H.) Accordingly, the Board applies the same standard for other types of alleged *per se* violations of the duty to bargain by unions, such as the absolute refusal to bargain allegations in this case.

[4] In haec verba means "In these words; in the same words." (Black's Law Dictionary, 6th ed. (1990).)

At this stage of the proceedings, it is not the function of the Board to determine whether the facts alleged as by the District are credible, nor to ascertain the parties' interpretation of the February 23 Proposal. Unlike the majority, I find a factual dispute exists as to whether or not the February 23, 2011 Proposal constituted a valid demand for bargaining. The February 23, 2011 Proposal is entitled "PROPOSAL FOR A SIDE LETTER AGREEMENT" between the District and the Association and states that it is "respectfully submitted to the Association." The Proposal sets forth specific bargaining proposals within the scope of representation, including increases in class size ratios and class size maximums. The Proposal further concludes, "The District is hopeful that the parties can reach an Agreement that will allow the District to emerge from this crisis fiscally solvent." For purposes of establishing a prima facie case, and accepting the allegations of the charge as true, I view this language as sufficient to signify a desire to negotiate over the proposals contained therein, including the proposed increase in class size ratios and class size maximum. Because the Board has no authority to resolve the factual dispute between the parties as to whether the Proposal was intended as a request to negotiate, I would find that the charge states a prima facie case of refusal to bargain and remand the matter for issuance of a complaint to develop a full evidentiary record. (*Golden Plains, supra*, PERB Decision No. 1489.)

The majority further accepts the Association's position that that the February 23, 2011 Proposal did not constitute a valid demand to reopen the collective bargaining agreement (CBA) in light of the zipper clause contained in Article XXVIII and the reopener provisions of Article XXVI. Additionally, the Association argues that the April 27, 2011 and August 5, 2011 proposals did not constitute valid demands to negotiate because they were not made within the time frame specified in the CBA for making reopener proposals.

The Association's arguments are based upon the Association's contention that Article XXVI provided a limited contractual right to reopen the contract subject to two conditions precedent that the District failed to meet: (1) a timely demand to bargain "[n]o later than April 1 of each year of this agreement"; and (2) express notice of which two articles of the agreement the District demanded to reopen. The District, in turn, argues that, pursuant to the terms of the CBA, it was entitled to reopen the contract, that its February 23, 2011 Proposal constituted a valid demand to negotiate under the provisions of the CBA, and that its April 27, 2011 Proposal "related back" its prior February 23, 2011 Proposal.

Both parties' arguments are based upon their conflicting interpretations of the CBA between the parties, as well as their conflicting interpretations as to whether or not the February 23 Proposal constituted a valid request to bargain. Resolution of this dispute will require an interpretation of the agreement to determine the parties' intent surrounding both the reopener language in Article XXVI and the zipper clause in Article XVIII and the proper interpretation of those provisions. In addition, resolution of this dispute will require an interpretation of the parties' intent and actions surrounding the February 23 Proposal. In processing an unfair practice charge, the role of a Board agent is to investigate the charge to determine if an unfair practice has been committed, but the Board's regulations do not "empower agents to rule on the ultimate merits of a charge." (*Eastside Union School District* (1984) PERB Decision No. 466 (*Eastside*); PERB Regs. 32620 and 32640.) Thus, the Board has stated, "where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Eastside*.)

Because of the significant factual and legal disputes concerning the parties' intent and interpretation of these provisions, it is inappropriate for the Board to resolve these disputes at this juncture. (*Golden Plains, supra*, PERB Decision No. 1489.) Accordingly, I would remand this matter to the Office of the General Counsel for issuance of a complaint so that the contract interpretation issues may be resolved following a full evidentiary hearing.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820

December 22, 2011

Joshua E. Morrison, Attorney
Atkinson, Andelson, Loya, Ruud & Romo
12800 Center Court Drive, Suite 300
Cerritos, CA 90703

Re: *Inglewood Unified School District v. Inglewood Teachers Association*
Unfair Practice Charge No. LA-CO-1491-E
DISMISSAL LETTER

Dear Mr. Morrison:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 28, 2011. The Inglewood Unified School District (District or Charging Party) alleges that the Inglewood Teachers Association (Union or Respondent) violated section 3543.6(c) of the Educational Employment Relations Act (EERA or Act)[1] by failing or refusing to meet and confer with the District about several bargaining proposals.

Charging Party was informed in the attached Warning Letter dated November 10, 2011, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it on or before November 18, 2011, the charge would be dismissed. As memorialized in your letter to the undersigned dated November 21, 2011, that deadline was subsequently extended until November 30, 2011.

On November 29, 2011, Charging Party filed a First Amended Unfair Practice Charge (First Amended Charge). For the following reasons, the charge, as amended, still does not state a prima facie case. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the November 10, 2011, Warning Letter and this Dismissal Letter.

Additional Facts Alleged in the First Amended Charge

The original charge alleged that on or about February, 23, 2011, the District provided the Union with a "Proposal for a Side Letter Agreement" (February 23 Proposal). The First Amended Charge elaborates:

[1] EERA is codified at Government Code section 3540 et seq. The text of the may be found at www.perb.ca.gov.

> Although the February 23 [Proposal] was not entitled "reopener proposal," nor did that document bear other magic words . . . to that effect, PERB has held that "it is not essential that a request to negotiate be specific or made in a particular form." *Newman-Crows Landing Unified School District* (1982) PERB Dec. No. 223 [(*Newman-Crows Landing*)]. To the contrary, PERB observed:
>
> > "[A] valid request to bargain need not be made in a particular form, or in *haec verba*, so long as the request clearly indicated a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment. In other words, a valid request will be found, regardless of the form or the words used, if it adequately signifies a desire to negotiate on a subject within the scope of bargaining."
>
> *Ibid.* (quoting *Al Landers Dump Truck, Inc.* (1971) 192 NLRB 207 [(*Al Landers Dump Truck*)]).
>
> Here, the subject of class size was clearly within scope, and not barred by the applicable zipper clause or reopener provisions of the CBA. The District, moreover, clearly (and timely) signified its desire to negotiate on that subject, insofar as its bargaining demand was presented on February 23, 2011. That the District did so without specifically invoking the term "reopener" is a matter of form rather than substance.

The original charge also alleged that on or about April 27, 2011, the District sunshined pursuant to Government Code section 3547, and gave the Union notice of, an "Inglewood USD – District Initial Proposal for 2011-2012 [R]eopener [N]egotiations" (April 27 Proposal). The First Amended Charge alleges that, "[w]ith respect to the topic of class size, the April 27 [Proposal] relates back to the February 23 [Proposal]."

Finally, the First Amended Charge alleges that "[the Union] did not communicate its refusal to negotiate class size prior to March 28, 2011," and that, "[a]s such, the instant Charge is timely."

Discussion

Regarding the February 23, Proposal, the First Amended Charge merely restates facts previously alleged and otherwise consists of conclusions of law and legal argument, but does not include any new factual allegations in support the charge. Moreover, the reliance on *Newman-Crows Landing* and *Al Landers Dump Truck* in the block-quote above is misplaced.

At issue in *Newman-Crows Landing* was whether a statement by a union representative "that the subject of layoffs was negotiable and that the District had the responsibility to meet and negotiate with [the union]" constituted a valid demand to negotiate the effects of a layoff.

(*Newman-Crows Landing Unified School District*, *supra*, PERB Decision No. 223, emphasis supplied.) PERB concluded that it did not. (*Ibid.*) Just as the statement at issue in *Newman-Crows Landing* did not constitute a valid demand to negotiate the effects of the layoff, so in the present case, the February 23 Proposal also does not constitute a valid demand to negotiate pursuant to the parties' reopener clause based on the following circumstances: The February 23 Proposal (1) was labeled "Proposal for a Side Letter Agreement"; (2) did not correlate any of the proposals in it to any of the Articles of the collective bargaining agreement (CBA); (3) did not purport to reopen any of the Articles of the CBA or invoke the reopener provision of Article XXVI of the CBA; and (4) not only contained proposals relating to articles that could be reopened pursuant to the reopener clause, but also contained proposals relating to articles that could not be reopened pursuant to the reopener clause.

At issue in the case of *Al Landers Dump Truck*, was whether a union's request, shortly after its certification as the exclusive bargaining representative, "to set a date 'to continue in good faith our Collective Bargaining Agreement Negotiation as stipulated by the National Labor Relations Act'" constituted a valid demand to bargain. (*Al Landers Dump Truck*, *supra*, 192 NLRB 207.) The National Labor Relations Board found that this "was a sufficiently clear and proper request." (*Ibid.*) Not only is the February 23 Proposal not nearly as clear a request to bargain as the request at issue in *Al Landers Dump Truck*, but—unlike the employer in *Al Landers Dump Truck*—the Union here was also under no obligation to honor this request unless it was a proper request pursuant to the reopener clause contained in the parties' CBA. The only reasonable interpretation of the reopener clause places the burden on the District to inform the Union that it desires to reopen two articles pursuant to that reopener clause and to identify which two articles it desires to so reopen. Any other interpretation of the reopener clause would unreasonably shift the burden onto the Union to guess at the District's intent. This in turn would undermine the "zipper" clause in the parties' CBA, the purpose of which is to relieve the parties of the obligation to meet and confer for the life of that CBA, with the narrow exception of reopener negotiations pursuant to the reopener clause in that CBA.

Charging Party does not explain the intent behind the statement in the First Amended Charge that "[w]ith respect to the topic of class size, the April 27 [Proposal] relates back to the February 23 [Proposal]." Insofar as the intent is to show that the April 27 Proposal thereby became a timely proposal pursuant to the reopener clause in the parties' CBA, this appears to be a novel theory that has not been discussed, let alone approved, in any prior Board decision. "The 'relation back' doctrine allows for exception to the limitations period if the amended charge is sufficiently connected to the original charge." (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959.) That is not the issue here.[2] Moreover,

[2] The phrase "relates back" is also used in Board decisions to describe circumstances in which conduct that allegedly occurred within the six months limitations period "relates back" to conduct that occurred outside that period, making the former allegation untimely. (See, e.g., *State of California (Department of Corrections)* (2003) PERB Decision No. 1559-S, stating that "[a] violation is not timely where the State's conduct during the limitations period relates back to the original offense" outside that period.) That is also not the issue here.

the above-quoted statement from the First Amended Charge merely presents a legal conclusion that is incapable of showing that the April 27 Proposal, in fact, relates back to the February 23 Proposal, whatever the legal effect of that fact, if proven, might be. Insofar as the intent behind this statement is to show that the allegations regarding the February 23 Proposal were timely included in the original charge, which was filed more than six months later, the same defect is noted.

Assuming *arguendo* that, as alleged in the First Amended Charge, "[the Union] did not communicate its refusal to negotiate class size prior to March 28, 2011," and that, "[a]s such, the instant Charge is timely" regarding the February 23 and 28 Proposals, these proposals still would not constitute proper demands to bargain pursuant to the reopener clause in the parties' CBA for the reasons, unrelated to timeliness, stated above and in the November 10, 2011 Warning Letter, which is incorporated herein by this reference.

Right to Appeal

Pursuant to PERB Regulations,[3] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the PERB Regulations may be found at www.perb.ca.gov.

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Bernhard Rohrbacher
Supervising Regional Attorney

Attachment

cc: Robert E. Lindquist, Attorney

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2809
Fax: (818) 551-2820

November 10, 2011

Joshua E. Morrison, Attorney
Atkinson, Andelson, Loya, Ruud & Romo
12800 Center Court Drive, Suite 300
Cerritos, CA 90703

Re: *Inglewood Unified School District v. Inglewood Teachers Association*
Unfair Practice Charge No. LA-CO-1491-E
WARNING LETTER

Dear Mr. Morrison:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 28, 2011. The Inglewood Unified School District (District or Charging Party) alleges that the Inglewood Teachers Association (Union or Respondent) violated section 3543.6(c) of the Educational Employment Relations Act (EERA or Act)[1] by failing or refusing to meet and confer with the District about several bargaining proposals.

I. Facts as Alleged

A. The Parties' Agreements

1. The Collective Bargaining Agreement

The Union, an affiliate of the California Teachers Association (CTA), is the exclusive representative of a unit of certificated employees, including classroom teachers, within the District. The District and the Union are parties to a collective bargaining agreement (CBA) that became effective July 1, 2006 and was originally to "remain in full force and effect unless modified in accordance with the other provisions contained herein through June 30, 2009." Article XXVI, Negotiations Procedures, of the CBA originally provided in relevant part:

> No later than April 1 of each year of this agreement the parties agree to reopen negotiations on Article 12, Compensation, and Article 13, Fringe Benefits, and one additional article per party.

Article XVIII, Zipper, of the CBA provides in full:

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

> The parties agree that all negotiable items have been discussed during negotiations leading to this Agreement, including salaries and benefits, leaves and transfers and therefore further agree that negotiations will not be reopened on any item during the life of this Agreement except by mutual agreement or as otherwise provided elsewhere in this Agreement.

Among the other provisions of the CBA is Article XI, Class Size.

2. The Tentative Agreement

The District and the Union are also parties to a Tentative Agreement (TA) that revises certain provisions of the CBA and otherwise keeps it "in full force and effect unless modified in accordance with the other provisions contained herein through June 30, 2013." The TA revises Article XXVI, Negotiations Procedures, to read in relevant part as follows:

> No later than April 1 of each year of this agreement the parties agree to reopen two (2) articles per party, exclusive of Article 12 and Article 13.

The TA also revises portions of Articles XI, Class Size, and XII, Compensation. It does not revise Articles XIII, Fringe Benefits, or XVIII, Zipper.

B. The District's Bargaining Proposals

1. February 23, 2011

On or about February 23, 2011, the District provided the Union with a "Proposal for a Side Letter Agreement" (February 23 Proposal). The February 23 Proposal states that "[t]he District has an interest in remaining fiscally solvent" and lists, over three pages, "reductions" that "have been approved." It then states that "[a]lthough these reductions are significant, a large gap exists between the approved reductions and the deficit." It further states that "[a]s a result, on February 23, 2011, the District will submit a resolution for reduction or elimination of particular kinds of services, which includes a total of 338 full time equivalents, for the Governing Board's approval." It finally states that "[t]he following proposal is respectfully submitted to the Association as an option to reduce the number of full time equivalents that must be reduced in order to meet the requirements for fiscal recovery." This statement is followed by a list of seven (7) proposals to or for "Reinstate five furlough days for 2010-11," "Eliminate Standard Income Protection Plan," "Three Tier Cap on Health and Welfare," "10% Salary Rollback," "Freeze on Step in Column," "Increase in class size ratios and class size maximums," and "Additional Cuts" of several bargaining unit positions. Specifically, the February 23 Proposal proposes to increase the student-teacher ratio for grades K-3 from 30:1 to 32:1, for grades 4-6 from 30:1 to 34:1, and for grades 7-12 from 26:5 to 34:1.

The February 23 Proposal does not correlate any of these proposals to any of the Articles of the CBA, nor does it purport to reopen any of the Articles of the CBA or invoke the reopener provision of Article XXVI of the CBA.

The charge alleges that the Union "has failed and refused to bargain these proposals."

2. February 28, 2011

On or about February 28, 2011, the District's Governing Board adopted a "Certificated Staffing Formula" (February 28 Proposal) for bargaining unit and non-bargaining unit positions. According to the charge, "[t]his strategy was discussed with [the Union] . . . on or about February 16 and March 3, 2011, and [Union] President Peter Somberg was also present and addressed this item at the February 28, 2011 meeting of the District's Governing Board." The February 28 Proposal proposes to increase the student-teacher ratio for grades K-3 from the "Contractual [Staffing Ratio]" of 30:1 to a "Recommended Staffing Ratio" of 32:1, for grades 4-6 from 30:1 to 34:1, for grades 7-8 from 26.5:1 to 36:1, for Comprehensive HS City Honors grades 9-12 from 26.5:1 to 40:1, and to keep the student-teacher ratio for Continuation School grades 9-12 unchanged at 26.5:1.

The February 28 Proposal also does not correlate this proposal to any of the Articles of the CBA, nor does it purport to reopen any of the Articles of the CBA or invoke the reopener provision of Article XXVI of the CBA.

The charge alleges that the Union "has failed and refused to bargain these proposals."

3. April 27, 2011

By letter dated April 20, 2011, District Assistant Superintendent Monalisa Hasson (Hasson) informed Union President Peter Somberg (Somberg) that "[t]he District will be submitting its initial proposal to a reopener Agreement for 2011-12 to the Governing Board for public hearing pursuant to Government Code 3547" and that "[t]he public hearing will be held on April 27, 2011."

By letter dated April 26, 2011, Somberg informed Hasson that "the District's demand to bargain is untimely because Article XXVI requires the parties to reopen negotiations no later than April 1" and "[y]our notice dated April 20, 2011 fails to meet th[is] contractual condition to require [the Union] to engage in bargaining." Somberg further informed Hasson that the Union "declines to engage in negotiations pursuant to your request" (emphasis in original).

On or about April 27, 2011, the District sunshined pursuant to Government Code 3547, and gave the Union notice of, an "Inglewood USD – District Initial Proposal for 2011-2012 [R]eopener [N]egotiations" and also labeled "Proposals for a Reopener Agreement" (April 27 Proposal). The April 27 Proposal states in relevant part:

> [T]he District proposes that the following contract articles be bargained for the 2011-12 year:
>
> **Article VIII – Workdays & Hours of Employment**

Article XI – Class Size

Article XII – Compensation

Article XIII – Fringe Benefits

(Emphasis in Original.) The April 27 Proposal does not invoke the reopener provision of Article XXXVI of the CBA.

The charge alleges that the Union "has failed and refused to bargain this proposal."

4. August 5, 2011

By letter dated August 5, 2011, District Counsel Joshua E. Morrison (Morrison) informed CTA Regional UniServe Director Jeff Good (Good) that "the District demands immediate bargaining on the collective bargaining proposals recently sunshined by the District."

Attached to this letter was an "Amended Initial Proposal for 2011-2012 Reopener Negotiations," dated July 27, 2011 and also labeled "Proposals for Reopeners" (August 5 Proposal), which states in relevant part:

> On April 27, 2011, the District presented a proposal for 2011-2012 re-opener negotiations to the public. The District hereby amends the proposal presented on April 27, 2011 to delete references to Article VIII, Article XII and Article XIII and to identify in their place Article XXVI, specifically paragraph A which applies to re-opener negotiations. This proposal is authorized by Article XXVI paragraph A . . . .
>
> Accordingly, re-opener negotiations pursuant to Article XXVI, paragraph A will now address the following contract articles during the 2011-12 year:
>
> **Article XI – CLASS SIZE (THIS ARTICLE WAS PREVIOUSLY PRESENTED TO THE PUBLIC ON APRIL 27, 2011)**
>
> **Article XXVI – NEGOTIATIONS PROCEDURES**
>
> Amend Article XXVI to allow either party to present unlimited reopener proposals for the 2011-12 and 2012-13 school years at any time.

(Emphasis in original.)

The letter to which the August 5 Proposal was attached stated that "there is no language, let alone clear and unmistakable language, barring the parties from reopening the terms of Article XXVI itself" and that "[s]imilarly, there is no clear and unmistakable language barring the parties from reopening negotiations in July, 2011 with respect to the 2011-12 school year."

The charge alleges that the Union "has failed and refused to bargain this proposal."

C. Impasse Proceedings

By letter dated August 18, 2011, Good informed Morrison that "[Union] tolerance of the District's repeated demands to reopen the Agreement has reached an end" and that "[t]he parties are now at impasse over the District's proposal to reopen the Agreement."

On August 30, 2011, the District filed a Request for Impasse Determination/Appointment of Mediator (PERB Case No. LA-IM-3664-E). By letter dated September 7, 2011, the District withdrew said request without prejudice.

II. Discussion

A. The District's Burden to Allege a Prima Facie Case

PERB Regulation 32615(a)(5)[2] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

B. The District's Allegations Regarding the February 23 and 28 Proposals Are Untimely

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.)

In *Saddleback Valley Unified School District* (1985) PERB Decision No. 558, the Board held that "the six month period is to be computed by excluding the day the alleged misconduct took place and including the last day." In *Saddleback* the school employer adopted a proposal on June 20, 1984. The Board thus calculated that "the six-month period started on June 21, 1984, the day after the school board adopted the proposal, and ended at the close of business on

[2] PERB Regulations are codified at Code of Regulations, title VIII, section 31001 et seq. The text of the PERB Regulations may be found at www.perb.ca.gov.

December 20, 1984." (*Ibid.*; see also *California State University, Fullerton* (1986) PERB Decision No. 605-H.)

Here, the charge was filed on September 28, 2011. Applying the principles above, PERB is prohibited from issuing a complaint with respect to any unfair practice alleged in the charge that occurred before March 28, 2011. The charge alleges that the District provided the Union with the February 23 proposal on February 23, 2011. It further alleges that it discussed the "strategy" in the February 28 proposal with the Union on February 16 and March 3, 2011 and that Stromberg "was also present and addressed this item at the February 28, 2011 meeting of the District's Governing Board." The charge finally alleges that "[the Union] has failed and refused to bargain these proposals." This conclusory allegation, unsupported by any dates on which the Union is alleged to have so failed and refused, cannot carry the burden of demonstrating that the charge is timely filed with respect to the February 23 and 28 Proposals, i.e., that the Union first failed and refused to bargain about these proposals on or after March 28, 2011.

C. The District's Allegations Regarding the April 27 and August 5 Proposals Fail to State a Prima Facie Case of Failure or Refusal to Bargain

A union's absolute refusal to bargain with the employer about a mandatory subject of bargaining is a *per se* violation of the union's duty to meet and confer in good faith with the employer. (*Gonzales Union High School District* (1985) PERB Decision No. 480.) The union's duty to bargain is triggered by the employer's valid demand to bargain. (*State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S.) A "zipper" clause in the parties' collective bargaining agreement can waive the right to bargain if the waiver is "expressed in clear and unmistakable terms." (*Rowland Unified School District* (1994) PERB Decision No. 1053.) In the present case, the charge fails to allege that the District made a valid demand to bargain in light of the zipper clause in the parties' CBA and the reopener clause in their TA.

As stated above, Article XVIII, Zipper, of the parties' CBA provides in full:

> The parties agree that all negotiable items have been discussed during negotiations leading to this Agreement, including salaries and benefits, leaves and transfers and therefore further agree that negotiations will not be reopened on any item during the life of this Agreement except by mutual agreement or as otherwise provided elsewhere in this Agreement.

With this zipper clause, the parties waived "in clear and unmistakable terms" their right to bargain about "all negotiable items." Article XXVI, as revised in the parties' TA, is a reopener clause that establishes a narrow exception to this waiver:

> No later than April 1 of each year of this agreement the parties agree to reopen two (2) articles per party, exclusive of Article 12 [Compensation] and Article 13 [Fringe Benefits].

Having generally waived its right to bargain by agreeing to the zipper clause, the District had only a limited right to bargain pursuant to the reopener clause. To trigger the Union's duty to bargain pursuant to that clause, it had to make a valid demand to bargain pursuant to it.

Regardless of the timeliness issue addressed in the previous section of this Warning Letter, the District's February 23 and 28 Proposals did not constitute proper demands to bargain pursuant to the reopener clause. The February 23 Proposal, labeled "Proposal for a Side Letter Agreement," arguably constituted a demand to bargain about this proposal. However, it did not constitute a demand to bargain about it pursuant to the reopener clause. It did not correlate any of the proposals in it to any of the Articles of the CBA, nor did it purport reopen any of the Articles of the CBA or invoke the reopener provision of Article XXVI of the CBA. It contained proposals relating to articles that could be reopened pursuant to the reopener clause, including the proposal to increase student-teacher ratios, which are addressed in Article XI of the CBA and are therefore a possible subject for reopener negotiations pursuant to the reopener clause. But it also contained proposals relating to articles that could not be reopened pursuant to the reopener clause, including the proposals to "Eliminate Standard Income Protection Plan," for a "Three Tier Cap on Health and Welfare," and for a "10% Salary Rollback," issues that are addressed in Articles XII and XIII of the CBA, respectively, and that are therefore not possible subjects for reopener negotiations pursuant to the reopener clause. It also contained one proposal, "Reinstate five furlough days for 2010-11," regarding an issue that does not appear to be addressed anywhere in the CBA or the TA.

Because the February 23 Proposal did not purport to reopen any articles of the CBA, let alone pursuant to the reopener clause, together with the fact that it contained proposals relating to articles that could not be reopened pursuant to the reopener clause, it did not constitute a demand to bargain pursuant to the reopener clause and it therefore also did not trigger the Union's duty to bargain pursuant to that clause. The only reasonably interpretation of the reopener clause places the burden on the District to inform the Union that it desires to reopen two articles pursuant to that reopener clause and to identify which two articles it desires to so reopen. Any other interpretation of the reopener clause would unreasonably shift the burden onto the Union to guess at the District's intent. With its February 23 Proposal, the District did not carry its burden to inform the Union that it desired to reopen two articles pursuant to the reopener clause and to identify those two articles. Therefore, the February 23 Proposal did not trigger the Union's duty to meet and confer and the Union did not violate that duty when it refused to do so.

The February 28 Proposal, labeled "Proposed Staffing Formulas," did not constitute a demand to bargain, let alone a demand to bargain pursuant to the reopener clause. By the clear and unambiguous language of its cover page, the proposal was submitted to the Board of Education for "approval," not to the Union for bargaining. That "[t]his strategy was discussed with [the Union] . . . on or about February 16 and March 3, 2011," as the charge alleges, does not mean that it was submitted to the Union for bargaining on these or any other dates. That [Union] President . . . Somberg was also present and addressed this item at the February 28, 2011 meeting of the District's Governing Board," as the charge further alleges, also does not mean that that the proposal was submitted to him for bargaining on this or any other date. The

charge thus fails to allege that the District ever made a demand to bargain about the February 28 Proposal, be it pursuant to the reopener clause or otherwise. Therefore, the February 28 Proposal did not trigger the Union's duty to meet and confer and the Union did not violate that duty when it refused to do so.

The April 27 Proposal, labeled "Inglewood USD – District Initial Proposal for 2011-2012 [R]eopener [N]egotiations" and also labeled "Proposals for a Reopener Agreement," arguably constituted a demand to bargain pursuant to the reopener clause. This is so because it purported to reopen specific articles of the CBA and because it mentions "[R]eopener [N]egotitions" and a "Reopener Agreement," despite the fact that it attempted to reopen not only articles that could be reopened pursuant to the reopener clause—specifically, Articles VIII and XI—but also articles that could not be reopened pursuant to that clause—specifically, Articles XII and XIII. The Union could have remedied the latter deficiency by refusing to bargain about Articles XII and XIII, leaving two bargainable articles.

Nevertheless, the April 27 Proposal did not constitute a valid demand to bargain pursuant to the reopener clause because it was not made "[n]o later than April 1," as the reopener clause clearly and unambiguously requires. The District claims, in the letter from Morrison to Good dated August 5, 2011, that "there is no clear and unmistakable language barring the parties from reopening negotiations in July 2011 with respect to the 2011-12 school year" (emphasis supplied). The District further claims, in the same letter, that the reopener clause language allowing the parties to reopen two articles per party "[n]o later than April 1 of each year of this agreement" means that "either party may reopening [sic] bargaining in each of the three years of the agreement, so long as it does so on or before April 1." Even under this—i.e., the District's own—interpretation, the District could not reopen bargaining in the 2010-11 year of the agreement by doing so after April 1, 2011. The charge thus fails to allege that the District ever made a valid demand to bargain about the April 27 Proposal pursuant to the reopener clause. Therefore, the April 27 Proposal did not trigger the Union's duty to meet and confer and the Union did not violate that duty when it refused to do so.

The August 5 Proposal, labeled "Amended Initial Proposal for 2011-2012 Reopener Negotiations" and also labeled "Proposal for Reopeners," constituted a demand to bargain pursuant to the reopener clause. This is so because it purported to reopen specific articles of the CBA, because it mentions "[R]eopener [N]egotitions" and "Reopeners," and because it invokes the reopener clause, despite the fact that it purported to reopen not only one article that could be reopened pursuant to the reopener clause—specifically, Article XI—but also one article that, as discussed below, could not be reopened pursuant to that clause—specifically, Article XXVI. The Union could again have remedied the latter deficiency by refusing to bargain about Article XXVI.

The August 5 Proposal regarding Article XI read as follows:

> **Article XI – CLASS SIZE (THIS ARTICLE WAS PREVIOUSLY PRESENTED TO THE PUBLIC ON APRIL 27, 2011)**

(Emphasis in original.) The April 27 Proposal regarding Article XI in turn specified that the District demanded that this article "be bargained for the 2011-12 year" (emphasis supplied). Thus, the August 5 Proposal regarding Article XI also specified, by referring to the April 27 Proposal, that the District demanded that this article be bargained for the 2011-12 year. The issue is whether on July 27 or August 5, 2011, the District could demand, pursuant to the reopener clause, that Article XI be bargained for the 2011-12 year.

As stated above, the District argues, in the letter from Morrison to Good dated August 5, 2011, that "there is no clear and unmistakable language barring the parties from reopening negotiations in July 2011 with respect to the 2011-12 school year" (emphasis supplied). The District further argues, in the same letter, that the reopener clause language allowing the parties to reopen two articles per party "[n]o later than April 1 of each year of this agreement" means that "either party may reopening [sic] bargaining in each of the three years of the agreement, so long as it does so on or before April 1." Thus, according to the District, it could reopen Article XI for the 2011-12 year of the agreement at any time during that year, including July 27 or August 5, 2011, as long as it did so on or before April 1, 2012. The District concedes that, "[a]s a practical matter, it may well be that bargaining which commenced on April 1, 201[2] will not be complete by the end of the 201[1]-1[2] school year." The District counters that "[t]here is, however, no requirement that the parties wait until April 1 to commence bargaining" and that "[t]o the contrary, either party may commence reopener negotiations on any date on or before April 1 during each year of this agreement," as the District tried to do here.

While the District is correct that a party could commence reopener negotiations well before April 1 and the parties could then complete these negotiations in time for any resulting agreement to take effect for the current school year, a party could by the same token commence reopener negotiations on April 1 and the parties might then not be able to complete these negotiations in time for any resulting agreement to have an effect for the current school year. More generally, the District offers no explanation why the parties would have chosen April 1 as the cut-off date for commencing negotiations for the current school year, as opposed to an earlier cut-off date that would have given them by necessity—rather than by one party's unilateral choice of picking an earlier date in that year on which to reopen two articles—more time to complete negotiations in time for any resulting agreement to take effect in that school year. The only reasonable interpretation of the reopener clause is that the parties chose April 1 as the cut-off date not for the current school year, but for the next school year. Under this interpretation, the parties' choice of this cut-off date is easily explained as their reasonable attempt to give themselves enough time to complete negotiations in time for any resulting agreement to take effect for the next school year.

As a result, on July 27 or August 5, 2011, the District could no longer demand, pursuant to the reopener clause, that Article XI be bargained for the 2011-12 year. With respect to Article XI, the charge thus fails to allege that the District ever made a valid demand to bargain about the August 5 Proposal pursuant to the reopener clause. Therefore, and again with respect to Article XI, the August 5 Proposal did not trigger the Union's duty to meet and confer and the Union did not violate that duty when it refused to do so.

The August 5 Proposal regarding Article XXVI reads as follows:

> **Article XXVI – NEGOTIATIONS PROCEDURES**
> Amend Article XXVI to allow either party to present unlimited reopener proposals for the 2011-12 and 2012-13 school years at any time.

For the reasons stated above, on July 27 or August 5, 2011, the District could no longer demand, pursuant to the reopener clause, that Article XXVI be bargained "for the 2011-12 . . . school year[]," and the August 5 Proposal therefore did not trigger the Union's duty to meet and confer, nor did the Union violate that duty when it refused to meet and confer, about Article XXVI for the 2011-12 school year. However, the District's interpretation of the reopener clause is reasonable insofar as it maintains that it could reopen Article XXVI for the 2012-13 school year at any time during 2011-12, including July 27 or August 5, 2011, as long as it did so by April 1, 2012, and as long as it could reopen the reopener clause itself clause. The issue is whether the District could reopen the reopener clause itself.

To answer that question in the affirmative would be to allow the exception to swallow the rule. In Article XXVIII of their CBA, the parties agreed to a broad zipper clause in which they agreed that "all negotiable items have been discussed during negotiations leading to this Agreement" and that "negotiations will not be reopened on any item during the life of the Agreement except by mutual agreement or as provided elsewhere in this Agreement." In Article XXVI of their CBA, as revised in their TA, the parties agreed to a narrow exception to this rule, specifically, that in "each year of this agreement," each party would be allowed to "reopen negotiations on two (2) articles . . . , exclusive Article 12 & Article 13." They further agreed that otherwise, "[t]his Agreement shall . . . remain in full force and effect unless modified in accordance with the other provisions contained herein through June 30, 2013." As the District would have it, by reopening the reopener clause itself, it could insist until impasse that more than the two articles allowed by that reopener clause—including Articles XXII and XIII, which are expressly prohibited by the reopener clause—could be reopened for the remainder of the CBA, or that the expiration date of the CBA could be reopened. In other words, as the District would have, by reopening the reopener clause, it could effectively reopen—and ultimately cancel—the entire agreement.

Nothing in the language of Article XXVI or its bargaining history supports giving the reopener clause such sweeping effect. To the contrary: While Article XXVI as originally written in the CBA gave the parties the right "to reopen negotiations on Article 12, Compensation, and Article 13, Fringe Benefits, and one additional article per party," the parties subsequently bargained away their right to reopen Articles XXII and XIII in their TA in exchange for the right to "reopen negotiations on two (2) articles per party, exclusive of Article 12 & Article 13" (emphasis supplied). To interpret this revision to allow the District to propose and insist until impasse during the life of these agreements that it should be allowed to reopen any number of articles, inclusive of Articles XXII and XIII, would fail to give effect to this language. PERB, however, has recognized that "[u]nder California law, a contract must be interpreted to give effect to the expressed intent of the parties as of the time of agreement . . . , with effect being given to every portion of the agreement." (*Eureka City School District* (1988) PERB Decision No. 702, fn. 22;

see also Civ. Code, § 1641 stating that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.")

In *Trustees of the California State University* (2004) PERB Decision No. 1591-H, PERB rejected a similarly overbroad interpretation of another reopener clause. In that case, Article 31, Salaries, of a collective bargaining agreement provided in subsection 31.53 that "[t]he parties will reopen negotiations on Article 31, Salaries . . . for fiscal year 2000/01." The same article also provided in subsection 31.54 that "[a]dditional conditions regarding compensation for fiscal year 2000/01 shall be as provided in the Memorandum of Understanding dated June 4, 1999." The union argued that pursuant to subsection 31.53, it could reopen the memorandum of understanding referenced in subsection 31.54. PERB rejected this argument, holding that it "would render the MOU essentially ineffective." Just as in that case, the reopener clause did not reach "[a]dditional conditions" specified in the next subsection, so in the present case, the reopener clause does not reach conditions specified in the reopener clause itself, as these otherwise would be rendered ineffective. Therefore, with respect to Article XXVI, the August 5 Proposal did not trigger the Union's duty to meet and confer and the Union did not violate that duty when it refused to do so.

III. Conclusion

For these reasons the charge, as presently written, does not state a prima facie case.[3] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before Friday, November 18,

[3] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

2011,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Bernhard Rohrbacher
Supervising Regional Attorney

BR

[4] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)