STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SADDLEBACK VALLEY UNIFIED SCHOOL DISTRICT, Charging Party, v. CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER 616, Respondent.	Case No. LA-CO-1461-E PERB Decision No. 2329 October 3, 2013

Appearances: Atkinson, Andelson, Loya, Ruud & Romo by Mark R. Bresee, Attorney, for Saddleback Valley Unified School District; Charmaine L. Huntting, Attorney, for California School Employees Association and its Chapter 616.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION[1]

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Saddleback Valley Unified School District (District) from the dismissal (attached) of its unfair practice charge. The District's charge, as amended, alleges that the California School Employees Association and its Chapter 616 (CSEA) engaged in surface bargaining in violation of section 3543.6(c) of the Educational Employment Relations Act (EERA).[2] The Office of the General Counsel dismissed the charge for failure to state a prima

[1] PERB Regulation 32320(d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code of Regs., tit. 8, § 31001 et seq.)

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

facie case. The District filed a timely appeal from the dismissal. CSEA filed a timely opposition.

We have reviewed the record, including the charge and the amended charge, CSEA's respective position statements, the Office of the General Counsel's warning and dismissal letters, the District's appeal and CSEA's response to the appeal, in light of relevant law.[3] Based on this review, we determine that the Office of the General Counsel's warning and dismissal letters are supported by the record, well-reasoned and, except as noted below, in accordance with applicable law. Accordingly, except as noted, we adopt the warning and dismissal letters as the decision of the Board itself.

PROCEDURAL HISTORY

On January 20, 2011, the District filed its initial unfair practice charge with PERB. On February 28, 2011, CSEA filed its position statement responding to the charge. On November 3, 2011, the Office of the General Counsel issued a warning letter informing the District that its charge did not state a prima facie case.

On January 17, 2012, the District filed an amended charge. On March 14, 2012, CSEA filed its position statement responding to the amended charge. On April 12, 2012, the Office of the General Counsel dismissed the charge.

On June 19, 2012, the District timely filed its appeal of the dismissal. On July 9, 2012, CSEA timely filed its opposition to the District's appeal.

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[3] At this stage of the proceedings, we assume, as we must, that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.)

FACTUAL SUMMARY

We describe the parties bargaining calendar drawn from the discussion of the facts set forth in the attached warning letter.

Pre-Impasse Negotiations (October 2009 to early January 2010)

The parties commenced negotiations on 2009-2010 reopeners in mid-October 2009. The District's initial proposal was for economic concessions valued at $4.5 million per year. CSEA initially proposed economic improvements. After nine sessions, CSEA declared impasse, which PERB certified on January 4, 2010. (Warning ltr., at pp. 1-2.)

Impasse Period (January 4, 2010 through August 31, 2010)

Mediation commenced on February 18, 2010. The District presented a last, best and final offer at the second mediation session on March 11, 2010. After a total of five mediation sessions on May 27, 2010, the mediator certified the dispute to fact-finding. In June, the parties exchanged proposals twice prior to fact-finding. On June 30, 2010, the parties' collective agreement expired. (Warning ltr., at pp. 2-3.)

In early July, the fact-finding panel heard the parties' presentations, and on August 16, 2010, the panel issued its report and recommendation, which included a pay cut, ten to fifteen furlough days, and increased employee contributions for their health benefits. On August 19 and 20, 2010, party representatives met. CSEA made two proposals. Neither was accepted. The District responded with an alternative offer, either the fact-finding panel's recommendation or the District's last, best pre-fact-finding offer of June 25, 2010. No agreement was reached. (Warning ltr., at pp. 3-4.)

On August 24, 2010, CSEA made a third proposal. On August 26, 2010, the District rejected the CSEA proposal, and informed CSEA that on August 31, 2010, the District would

recommend to its governing board that it adopt the fact-finding panel's recommendation. On August 30, 2010, CSEA made another proposal, which the District then rejected. (Warning ltr., at p. 4.)

On August 31, 2010, the District's governing board adopted the fact-finding panel's recommendation, as well as, major portions of the then-expired collective agreement. (Warning ltr., at pp. 4-5.)

Post-Implementation Period (After August 31, 2010)[4]

On September 17, 2010, the party representatives met again. No agreement was reached. On September 20, 2010, CSEA made a proposal for a three-year agreement. On September 22, 2010, the party representatives met again. The District commented on CSEA's proposal, but made no counter proposal. No agreement was reached. On October 27 and 29, 2010, party representatives met again. No agreement was reached. On November 19, 2010, party representatives met again. No agreement was reached. (Warning ltr., at pp. 5-6.)

DISTRICT CONTENTIONS

The District contends that the Office of the General Counsel erred by: (1) applying a narrower legal standard for what constitutes surface bargaining than the standard called for under the Board's precedents; (2) resolving factual and legal disputes in favor of CSEA rather than permitting the District to present to an administrative law judge its contentions that CSEA engaged in surface bargaining; and (3) concluding that certain District allegations regarding CSEA's conduct were time-barred.

[4] The District appeals only from dismissal of its allegations of conduct occurring on or before August 31, 2010.

CSEA RESPONSE

CSEA responds that: (1) the Office of the General Counsel applied the appropriate legal standard for surface bargaining; (2) the District's appeal fails to comply with PERB Regulation 32635(a), because the appeal must, but does not, identify either: (a) those charge allegations claimed to establish indicia of surface bargaining that the dismissal wrongly ignored, or (b) that page or part of the dismissal being challenged; (3) the dismissal properly relies on the District's allegations and undisputed facts provided by CSEA, and does not improperly resolve factual and legal disputes; and (4) the dismissal properly deemed certain allegations time-barred, the timely allegations relied on for revival were not sufficient to establish a prima facie violation.

DISCUSSION

Introduction

The District's charge alleges bargaining conduct commencing in Fall 2009 and continuing through Fall 2010. The District contends that throughout this period, CSEA failed to bargain in good faith. The Office of the General Counsel's analysis treats the allegations as follows: (1) Pre-impasse negotiations, conduct preceding January 4, 2010; (2) Post-impasse negotiations, conduct from January 4, 2010 through imposition on August 31, 2010, and (3) Post-implementation negotiations, conduct after August 31, 2010.

Appeal Standards

Pursuant to PERB Regulation 32635(a), an appeal must:

> (1) State the specific issues of procedure, facts, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

An appeal must sufficiently place the Board and respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H; *City & County of San Francisco* (2009) PERB Decision No. 2075-M.) An appeal that does not reference the substance of the dismissal fails to comply with PERB Regulation 32635(a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381; *Lodi Education Association (Hudock)* (1995) PERB Decision No. 1124; *United Teachers – Los Angeles (Glickberg)* (1990) PERB Decision No. 846.) An appeal that fails to identify that page or part of the dismissal to which appeal is taken, does not comply with PERB Regulation 32635(a). (*American Federation of State, County, and Municipal Employees, Local 2620 (McGuire)* (2012) PERB Decision No. 2286-S; *California School Employees Association & its Chapter 198 (Bruce)* (2006) PERB Decision No. 1858.)

District Contentions on Appeal

1. District's Claim that the Office of the General Counsel applied a narrower legal standard for assessing surface bargaining than required under the Board's precedents

The warning and dismissal letters identify and discuss those allegations in the District's charge and amended charge which constitute traditional indicia of surface bargaining within PERB's precedents. (Warning ltr., at pp. 7-10; Dismissal ltr., at pp. 2-9.) We concur with this discussion.

The District urges that "the record in this case reveals" that the Office of the General Counsel discounted and improperly failed to assess other conduct of CSEA alleged by the District, which the District asserts likewise constitute indicia of surface bargaining. However, the District fails to identify those portions of the amended charge which allege these contentions, and likewise fails to identify those indicia of surface bargaining which it claims the Office of the General Counsel erred in failing to discuss.

We conclude that as to the District's claim that the warning and dismissal letters improperly applied too narrow a standard of surface bargaining, the District's appeal fails to comply with our appeal standards. The appeal fails to identify either those allegations which the District claims were inappropriately omitted from the Office of the General Counsel's analysis, or the page or part of the dismissal where the Office of the General Counsel improperly failed to consider these allegations. The burden of a party taking an appeal is to identify that portion of the dismissal to which the appeal is taken. Here, the District does neither. Thus, this aspect of the District's appeal fails on this basis alone.

We also conclude that the Office of the General Counsel properly analyzed all the District's allegations, that the analysis was properly made on the basis of the Board's traditional "totality of circumstances" test for surface bargaining (see Warning ltr., at pp. 6-7; Dismissal ltr., at p. 2.), and that the analysis was not unduly or inappropriately narrow.[5] We therefore reject the District's claim that its allegations of CSEA's conduct were erroneously subjected to an unduly narrow reading of PERB's surface bargaining standards.

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[5] We disapprove that portion of the dismissal (Dismissal ltr., at p. 4.) which, in reliance on *Regents of the University of California* (2010) PERB Decision No. 2094-H (*Regents*), suggests that in a surface bargaining analysis, an objection by a union or employer to the content of the opponent's proposal is sufficient to render a subsequent proposal with the same content "predictably unacceptable" and thus evidence of failure to bargain in good faith. *Regents* concerned a union's claim that an employer refused per se to bargain over a mandatory subject, viz., staffing ratios, when it refused to counter propose to the union's proposal to incorporate staffing ratio statutes and regulations verbatim into the collective bargaining agreement. (*Id.* at pp. 2, 14, 16.) The employer "adamantly insisted on a bargaining position [opposed to such inclusion which it] supported by rational arguments communicated to [the union] at the bargaining table." (*Id.* at p. 24) The union's continued proposals for such inclusion were thus "predictably unacceptable" to the employer. (*Ibid.*) The Board ruled that by responding as it did to the union's original proposal for such inclusion, the employer did not refuse per se to bargain over staffing ratios, but rather lawfully maintained an adamant position opposed to such inclusion. (*Ibid.*) Authorities relied on by the Board in *Regents* similarly approve a negotiating party's adamant insistence on a position fairly maintained. (*Oakland Unified School District* (1981) PERB Decision No. 178, at p. 10; *Oakland Unified School District* (1982) PERB Decision No. 275, pp. 15-20; *N.L.R.B. v. Herman Sausage Co., Inc.* (5th Cir. 1960) 275 F.2d 229.)

2. District's Claim that the Office of the General Counsel improperly resolved disputed factual and legal issues in favor of CSEA

The Office of the General Counsel's warning and dismissal letters discuss at length the District's allegations and explain the standards of review utilized in assessing a charging party's allegations. (Warning ltr., at pp. 4, 10; Dismissal ltr., at pp. 8-9.) The Office of the General Counsel accepted as true all District factual allegations. We concur with the standards of review articulated and implemented by the Office of the General Counsel.

In its appeal, the District contends that the Office of the General Counsel inappropriately resolved factual or legal disputes. The District cites *Lake Tahoe Unified School District* (1993) PERB Decision No. 994 (*Lake Tahoe*) for the proposition that the Office of the General Counsel does not judge the merits of the parties' dispute. As far as it goes, this is correct. However, PERB regulations require that the respondent "shall be apprised of the [charging party's] allegations, and may state its position on the charge during the course of the [Office of the General Counsel's] inquiries." (PERB Reg. 32620(c).) The Office of the General Counsel may consider additional facts provided by a respondent when these additional facts are provided under oath in compliance with PERB regulations, complement without contradicting the facts alleged in the charge, and are undisputed by the charging party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M; *Lake Tahoe*; *Riverside Unified School District* (1986) PERB Decision No. 562a.)

The District points to factual assertions contained in CSEA's position statement filed with PERB, contends that the District was entitled to an evidentiary hearing to controvert these assertions, and claims that by refusing to issue a complaint, PERB's Office of the General Counsel improperly denied the District a hearing on CSEA's assertions. We disagree.

PERB's charge investigation process is concerned not with providing a charging party a forum to litigate disputes with a respondent, but with determining whether a charging party has alleged facts sufficient to establish a prima facie case. In making this assessment, the Office of the General Counsel presumes the charging party's factual assertions to be true, whether or not they are contested by the respondent. At this stage of the process, PERB is concerned only with whether the charging party itself can allege a prima facie case, not with affording a charging party a hearing in which to controvert assertions of the respondent.

The District claims that the Office of the General Counsel should have, but did not, issue a complaint to permit the District to controvert with witnesses and documentary evidence assertions made by CSEA. We conclude the District's claim lacks merit.

3. District's Claim that the Office of the General Counsel improperly determined that alleged conduct occurring prior to the limitations period was time-barred

The Office of the General Counsel concluded that CSEA's alleged pre-impasse bargaining conduct in late 2009 was time barred because it is alleged to have occurred prior to the six-month limitation period. (Warning ltr., at p. 8.) The charge was filed in January 20, 2011. The limitation period thus commenced on July 20, 2010, and allegations of earlier conduct were time-barred. The Office of the General Counsel likewise concluded in the dismissal that the District's first amended charge failed to cure this defect. (Dismissal ltr., at p. 2; *Compton Community College District* (1991) PERB Decision No. 915 (*Compton*).)

The District claims that it did allege conduct within the limitations period reflecting CSEA's failure to bargain in good faith, thus reviving its otherwise stale allegations. We disagree.

As the Board stated in *Compton*, "a violation is a continuing one if the violation has been revived by subsequent unlawful conduct within the six-month statute of limitations." (*Compton*, at p. 4.)

> [A] continuing violation would only be found where active conduct . . . occurred within the limitations period that independently constituted an unfair practice. . . . [A] continuing violation would not be found where the [party's] conduct during the limitations period constituted an unfair practice only by its relation to the original offense.

(*Id.* at p. 5, quoting *El Dorado Union High School District* (1984) PERB Decision No. 382.)

The limitations period for the District's charge spanned from July 20, 2010 until January 20, 2011. The Office of the General Counsel concluded, properly in our view, that none of CSEA's bargaining conduct alleged to have occurred during that period constituted an independent unfair practice. Thus, there was no continuing violation for surface bargaining or bad faith participation in impasse procedures by CSEA.

CONCLUSION

For all the foregoing reasons, we conclude that the Office of the General Counsel properly assessed the factual and legal issues presented, to wit, whether the District alleged a prima facie case of surface bargaining, and properly determined that the District had failed to do so.

ORDER

The unfair practice charge in Case No. LA-CO-1461-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

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

April 2, 2012

Margaret A. Chidester, Attorney
Margaret A. Chidester & Associates
17762 Cowan, First Floor
Irvine, CA 92614

Re: *Saddleback Valley Unified School District v. California School Employees Association & its Chapter 616*
Unfair Practice Charge No. LA-CO-1461-E
DISMISSAL LETTER

Dear Ms. Chidester:

The Saddleback Unified School District (District) filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board) on January 20, 2011. The District alleged that the California School Employees Association & its Chapter 616 (CSEA) violated section 3543.6(c) of the Educational Employment Relations Act (EERA or Act)[1] by engaging in surface bargaining.

On November 3, 2011, a PERB Board agent (Agent) informed Charging Party in the attached Warning Letter that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, Charging Party should amend the charge.

On November 9, 2011, Charging Party requested and obtained an extension of time until December 23, 2011 to amend the charge. On December 20, 2011, Charging Party requested and obtained a further extension of time until January 17, 2012 to amend the charge. On January 17, 2012, Charging Party filed a First Amended Charge.

The November 3, 2011 Warning Letter framed the analysis of the Unfair Practice Charge in the following time periods:

(A) Pre-Impasse Negotiations: Conduct before the January 4, 2010 Impasse;
(B) Post-Impasse Negotiations: Conduct from January 4, 2010 Impasse to the District's August 31, 2010 Implementation of its Last, Best and Final Offer; and
(C) Post-Implementation Negotiations: Conduct after August 31, 2010.

[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.

A. Deficiencies Concerning Alleged Violations During Pre-Impasse Negotiations

In the November 3, 2011 Warning Letter, the Agent provided legal authority and explained PERB applies the "totality of the circumstances" test where a party alleges bad faith or surface bargaining. The Agent listed several indicia of surface bargaining and concluded the charge, as presented, failed to demonstrate surface bargaining. The Agent further explained the charge failed to show CSEA adopted a "take-it-or-leave it" attitude, cancelled meetings, delayed negotiations, reneged on tentative agreements or made regressive offers during the Pre-Impasse negotiations. The Agent went on to further state that even if the charge stated a prima facie violation under the totality of circumstances test, the claim was time barred as the Pre-Impasse conduct occurred before January 4, 2010, which was more than six months before the Unfair Practice Charge was filed.

In the District's First Amended Charge (FAC) Charging Party cites *Compton Community College District* (1991) PERB Decision No. 915 and other PERB decisions for the proposition that claims regarding conduct occurring more than six months before the Unfair Practice Charge is filed may be "revived" if a violation of the same type occurred within the statute of limitations period. Revival, therefore, depends upon a finding of an unfair practice of the same type occurring within six months prior to the date the District filed its Unfair Practice Charge. As explained below, no violation was found to have occurred within the six-month period preceding the Unfair Practice Charge filing, and for that reason, there is no basis upon which PERB may revive time barred allegations.

B. Deficiencies Concerning Alleged Violations During Post-Impasse Negotiations

Charging Party alleged violations occurring after Impasse. The PERB Agent's Warning Letter also concluded that the Unfair Practice Charge failed to state a prima facie bad faith or surface bargaining violation of EERA during the post-impasse period. The Agent explained the test for bad faith bargaining during impasse is the same test applied during pre-impasse negotiations. The Agent noted that none of the conduct alleged by Charging Party during the Post-Impasse period demonstrated regressive bargaining or delay, or established that CSEA just "went through the motions," or otherwise evidenced bad faith or surface bargaining. The Agent explained that although CSEA's offer of $1.75 million in concessions, *after* CSEA had offered $2.1 million in concessions on April 23, 2010, might have been regressive, the facts did not demonstrate regressive bargaining since the District never moved toward the $2.1 million offer.

On further analysis of the facts as alleged by Charging Party (FAC, pp. 21 et seq.), it is evident that the $1.75 million concession by CSEA on August 19, 2010, was on the table for a few hours and was replaced by CSEA's proposal later that day offering $3 million in concessions. Throughout this day the District held its position that it would implement its Last, Best and Final Updated Proposal of June 25, 2010 or the recommendations of the fact-finding report.

Individually regressive proposals must be viewed in the context of the entire package of proposals. (*Ventura County Community College District* (1998) PERB Decision No. 1264.)

The entire context here shows CSEA made a $2.1 million concession offer on April 23, 2010 and the District never moved toward the offer. On August 19, 2010, CSEA made an offer that included $1.75 million in concessions and, after a few hours, CSEA proposed yet another offer that contained $3.0 million in concessions. Again, the District did not move toward any of these offers and maintained its position that it would impose its Last, Best and Final Proposal or the fact finder's recommendations. Viewed in the context of the entire package of proposals, the facts do not evidence regressive or bad faith bargaining on the part of CSEA. (*Ibid.*)

Charging Party added further information regarding Post-Impasse Negotiations in its First Amended Charge:

- On page 20 of the First Amended Charge, Charging Party alleges CSEA Labor Relations Representative Alan Aldrich's statements, that "CSEA wanted to reach an agreement, but 'would be foolish not to prepare for the alternative,' and [that] CSEA intended to 'do what unions do' and exercise their First Amendment rights, evidence a lack of intent to reach an agreement showing CSEA's persistence in surface bargaining and a lack of good faith participation in impasse procedures."

CSEA Representative Aldrich's comments stating CSEA's rights and obligations do not evidence a "take-it-or-leave-it" attitude (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736), recalcitrance in scheduling meetings (*Oakland Unified School District* (1983) PERB Decision No. 326, p. 34), canceling meetings (*ibid.*), a negotiator's lack of authority that delays and thwarts the bargaining process (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 25), reneging on tentative agreements (see *Charter Oak Unified School District* (1991) PERB Decision No. 873, pp. 14-15 (*Charter Oak*)), or making "regressive" offers that move the parties away from agreement. (See *Id.* at p. 17.) Without any indicia of bad faith, the allegation fails to demonstrate these comments amounted to bad faith.

- On page 22 of the First Amended Charge, Charging Party alleges CSEA "abruptly" ended the negotiation session at 10:45 to attend a previously scheduled member event commencing at 11:00 a.m., thereby demonstrating CSEA's bad faith.

Charging Party's complaint implies the District did not know CSEA had scheduled an informational BBQ for members that day. This cannot be the case as the District's original unfair practice charge explained the District knew about the BBQ and complained, "The District reminded Ms. Vega de Garcia that classified employees do not have two-hour lunch breaks." Given the fact the District knew about the BBQ, it is not clear why CSEA's departure from negotiations at 10:45, for a member event commencing at 11:00, was "abrupt." Nor do Charging Party's allegations demonstrate CSEA cancelled meetings or created delay, or that its departure on August 18 was in bad faith.

- On page 23, Charging Party alleges Mr. Aldrich "insisted" that because three members of CSEA's team were absent, CSEA could not reach an agreement that day, thereby illustrating that CSEA never intended to reach an agreement.

Charging Party's assertion in the context of the negotiations does not evidence CSEA's negotiators lacked authority and acted in bad faith. In context, CSEA had been meeting with the District for more than one year. The parties were already at impasse and had a fact finder's report. The fact that CSEA would have to take any proposal back to other bargaining team members in this context does not evidence bad faith and, on the contrary, despite unavailability of three members that day, CSEA made two proposals to the District.

- On page 23 and carrying over to page 24, Charging Party's First Amended Charge complains CSEA's use of HR 1586 funds in its proposals is contrary to the fact finder's statement that the parties should discuss the potential impact on this unit if and when the District receives such monies. The District complains CSEA's inclusion of these funds evidences bad faith.

Since CSEA and the District disagreed whether the impending legislative funds should be considered by the parties and the fact finder suggested the parties should discuss those funds if and when the District receives such monies, this allegation could demonstrate CSEA was making predictably unacceptable proposals when it included the impending funds in their proposals. (*Regents of the University of California* (2010) PERB Decision No. 2094-H [employer that had already objected to proposals that included certain ratios was not required to make counterproposal when exclusive representative's proposal continued to include the ratios].) However, assuming CSEA's inclusion of impending funds amounted to predictably unacceptable offers, it would be just one indicia of bad faith and one indicia, by itself, is not enough to demonstrate CSEA's conduct was in bad faith. (*Chino Valley Unified School District* (1999) PERB Decision No. 1326; *Ventura County Community College District* (1998) PERB Decision No. 1264; *State of California (Department of Education)* (1996) PERB Decision No. 1160-S; *Oakland Unified School District* (1996) PERB Decision No. 1156, p. 2.)

- On pages 25 and 26, Charging Party states on August 26, 2010, CSEA's membership flyer misrepresented that the District refused to negotiate with CSEA and "[t]his conduct shows CSEA's determination not to reach agreement and its failure to participate in the impasse process in good faith."

The facts, as alleged by Charging Party, are that CSEA had made two proposals on August 19 and made a third post fact finding proposal on August 26. According to the First Amended Charge, the District responded to the third proposal with yet another offer to negotiate "if CSEA wished to make another proposal to meet the target." It appears from the facts that the District refused to negotiate unless CSEA made *another* proposal that *met* with the District's target. Given this, the facts do not demonstrate CSEA made a "misrepresentation" when it stated the District refused to negotiate.

- On pages 26 to 27, Charging Party complains that CSEA's proposal for retroactive salary reduction "was incongruous with the assertion made by Mr. Aldrich in his August 30, 2010 letter, that the District's retroactive proposal violated the EERA and National Labor Relations Board precedent [and] is also further evidence of the totality

> of conduct that constitutes surface bargaining and CSEA's failure to participate in impasse procedures in good faith."

Mr. Aldrich's letter, attached as exhibit 7 to the FAC, provides at page 4:

> If implemented unilaterally, the "Memorandum of Understanding with CSEA" in whole and in portions will constitute additional violations of EERA.... [U]nilateral implementation will be unlawful in that the employer has neither bargained in good faith nor with the requisite intention of reaching agreement. Specifically, the MOU calls for retroactive implementation of a 2.8% salary reduction....Pursuant to long adopted National Labor Relations Board precedent...an employer may not unilaterally impose terms prior to the period of time of impasse procedure exhaustion.

The letter demonstrates Mr. Aldrich contended a *unilateral* retroactive salary reduction, and any other unilaterally imposed provisions prior to impasse procedure exhaustion, would violate the law. The letter does not state that a retroactive salary reduction, in and of itself, is unlawful. The District's claim that CSEA's subsequent proposal containing a retroactive salary reduction evidenced bad faith is not supported by the FAC and its exhibit 7.

None of the additional information in Charging Parties First Amended Charge demonstrates, under the totality of the circumstances, that during the Post-Impasse negotiations, CSEA adopted a "take-it-or-leave it" attitude, cancelled meetings, delayed negotiations, reneged on tentative agreements or made regressive offers. Furthermore, to the extent the conduct occurred prior to July 20, 2011, such claims are outside of the statute of limitations and are thus barred.

C. Deficiencies Concerning Alleged Violations During Post-Implementation Negotiations

As to alleged violations occurring after Implementation (August 31, 2010), the PERB Agent informed Charging Party that the Unfair Practice Charge failed to state a prima facie bad faith or surface bargaining violation of EERA. The Agent explained the obligation to bargain ended when the parties exhausted impasse and the District implemented its final offer. The Agent further explained the duty to bargain can be revived when one party proposes a concession from its earlier bargaining position. The Agent concluded that the duty to bargain was never revived because post implementation proposals by the party(ies) did not demonstrate either party was retreating from an earlier bargaining position. The Agent went on to explain that even if it is assumed one party made significant concessions—thereby reviving the duty to bargain—then the question would be whether CSEA engaged in surface bargaining.

Assuming for the sake of analysis that the duty to bargain was revived, the Agent rejected the District's contention that CSEA's second post-implementation proposal was "regressive"

because the District made no counter offer to CSEA's first post-implementation proposal and it was therefore hard to discern what part of CSEA's second post-implementation proposal moved the parties away from agreement. The District's First Amended Charge offers no additional information about the District making or not making a counter offer to CSEA's first proposal. Instead the District's First Amended Charge provides the following additional information concerning Post-Implementation Negotiations:

- The District alleges at pages 28 to 29 of its First Amended Charge that on August 31, 2011 its Implementation of Memorandum of Understanding included a provision describing further negotiation parameters:

> Start of 2012-13 Negotiations
> The parties will submit their 2012-13 initial proposals by October 2011 and will hold at least six (6) negotiations sessions prior to December 7, 2011.

The District further alleges in its First Amended Charge, that, on September 7, 2011:

> [Mr. Aldrich wrote to the District and] continued to assert that the District acted in bad faith during post-fact-finding negotiations. [Mr. Aldrich] stated that CSEA "welcome[d] an independent evidentiary review of [their] arguments," indicating that CSEA's local leadership directed him to file a "series of amended and new allegations against the [District] for violations of EERA...." [Citation omitted.] He demanded that, "the district [*sic*] clarify its view why negotiations should occur." Mr. Aldrich's comments evidence the arrogance with which CSEA approached post-fact-finding negotiations, demonstrating CSEA's surface bargaining course of conduct and belief that it is not required to engage in good faith negotiations and/or impasse procedures with the District. [¶] That day Mr. Aldrich separately emailed new District Superintendent Dr. Clint Harwich, instead of contacting the District's designated lead negotiator, Ms. Margarett Lewis, stating, "The CSEA team will work with you and your team if you have an interest in restoring some order and respect for your classified unit here." Mr. Aldrich's attempt to circumvent the District's bargaining team and pressure the new Superintendent into accepting a deficient proposal is further evidence of CSEA's lack of intent to bargain and participate in impasse procedures in good faith.

The fact that CSEA filed or amended an Unfair Practice Charges does not evidence bad faith in bargaining. To the contrary, both employers and exclusive representatives have the right to file an Unfair Practice Charge, and engaging in a protected activity does not evidence bad faith in bargaining. (See, e.g., *Oakland Unified School District* (1983) PERB Decision No. 326

[District Chief Labor Negotiator's assumption that Unfair Practice Charge filed by exclusive representative meant that exclusive representative was not going to bargain anymore was "stupid and naïve"].)

The District asserts that Mr. Aldrich's email to the new Superintendent improperly circumvented the bargaining team and put pressure on the new Superintendent to accept a "deficient proposal." In *Westminster School District* (1982) PERB Decision No. 277, PERB determined an exclusive representative's advocacy to the School Board at a public meeting did not bypass designated District negotiators and was not a refusal to bargain in good faith. PERB noted that the exclusive representative's statements to the School Board summarizing the representative's most recent proposal, which added nothing which had not been presented and discussed at the bargaining table, could not be considered an offer, did not require a response and could not be viewed as a substitute for the give and take of negotiations. Further, the representative urged Board of Supervisors members to become directly involved in the negotiation and mediation process but the representative did not refuse to meet with the District's negotiator(s). PERB found the exclusive representative's statements did not evidence bad faith; rather, they evidenced a good faith desire to facilitate and expedite negotiations.

CSEA's communication to the new Superintendent complained of here, accepting all the District's factual allegations, did not involve a proposal. Rather, CSEA stated it would work with the Superintendent and his team. Under the analysis in *Westminster*, Mr. Aldrich's e-mail message does not demonstrate by-passing or bad faith.

- The District alleges at pages 29 and 32 to 33 of its First Amended Charge that it grew concerned CSEA's regional office and not the Saddleback Valley Unified School District's classified bargaining team "was determining negotiations" and "control[ing] the terms of the proposals" and that such "control" was further evidence of bad faith. The District's theory is that the bargaining team had no real authority to reach agreement because a CSEA Field Representative "explicitly stated that the local chapter could not enter into an agreement without review by, and acceptance of, the regional office." (FAC, p. 47.) Charging Party further complains Mr. Aldrich prepared proposal language and dictated the local leadership's "BRL" language. (FAC, p. 47.)

The state CSEA and its Chapters have been held to constitute the same employee organization (*Fairfield-Suisun Unified School District* (1980) PERB Decision No. 121); thus, these allegations fail to demonstrate bad faith by CSEA.

- The District alleges, at pages 37 to 38 and page 57 of its First Amended Charge, that on September 20, 2011, CSEA violated its duty to meet and negotiate in good faith by refusing to submit its 2012-2013 bargaining proposals by October 2011. The District is referring to the October 2011 deadline it unilaterally implemented on August 31, 2011. Charging Party complains CSEA's September 20, 2011 letter stating CSEA will not submit a proposal during October 2011 and instead would submit a proposal by March

> 31, 2012 per the terms of the expired agreement, illustrates a "per se" violation of Government Code section 3543.6(c).

The District complains CSEA did not negotiate on the schedule the District unilaterally imposed in its last, best, and final proposal implementation. The District, however, is prohibited from implementing a limitation of CSEA's right to bargain. (*Rowland Unified School District* (1994) PERB Decision No. 1053 ["[A]n employer may not, following impasse, unilaterally impose a waiver/limitation of an exclusive representative's statutory right to bargain. Such a waiver/limitation of the statutory right to bargain may only occur within the context of a mutually agreed collective bargaining agreement"].)

- The District alleges at pages 40 to 41 that CSEA acted in bad faith by serving the unfair practice charges and/or amendments thereto on the new Superintendent. The District complains CSEA knew it should serve Ms. Lewis (District's Lead Negotiator) or District's counsel Ms. Chidester.

PERB Regulation 32142, "Proper Recipient for Filing or Service," provides:

> Whenever a document is required to be "filed" or "served" with any of the below listed entities, the proper recipient shall be:
> ...
> (c) An employer
>
> (1) in the case of a public school employer: the superintendent, deputy superintendent, or a designated representative of a school district; or to the school board at a regular or extraordinary meeting;
> ...

Under Regulation 32142, subdivision (c)(1), the exclusive representative has four choices of whom to serve and in this case, accepting Charging Party's allegations, CSEA chose to serve the Superintendent. Nothing in this choice demonstrates a violation of PERB Regulations. The service of an unfair practice charge does not involve bargaining, thus, nothing in CSEA's service of an unfair practice charge demonstrates bad faith.

None of the additional information in Charging Parties First Amended Charge demonstrates, under the totality of the circumstances, that during the Post-Implementation period, CSEA adopted a "take-it-or-leave it" attitude, cancelled meetings, delayed negotiations, reneged on tentative agreements or made regressive offers. The First Amended Charge fails to demonstrate CSEA acted in bad faith or engaged in surface bargaining.

Lastly, Charging Party asserts that "In deciding whether to issue a Complaint, PERB must accept the Charging Parties [*sic*] facts as true and may not consider outside information." Charging Party's assertion is contrary to the law. In *Golden Plains Unified School District* (2002) PERB Decision No. 1489, PERB explained:

> 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.) 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.)

If Charging Party's contention were accurate, that PERB "may not consider outside information," then disputes of fact, which are always resolved in Charging Party's favor prior to hearing on the merits, would never arise and the rule in *Golden Plains* would be pointless. Indeed, PERB Regulation 32620, subdivision (c), which requires the Respondent be apprised of the allegations and allowed to state its position during the course of the inquiries, would be rendered meaningless. Contrary to Charging Party's assertion, PERB agents are authorized to consider positions articulated by Respondent. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M [board agent is not required to ignore undisputed facts provided by Respondent and to only consider the facts provided by Charging Party]; see also, *Santa Monica Community College District* (2012) PERB Decision No. 2243; *Office of Professional Employees International Union, Local 29, AFL-CIO & CLC (Fowles)* (2012) PERB Decision No. 2236-M; *Baldwin Park Education Association (Hayek, et al.)* (2011) PERB Decision No. 2223.) As shown above, this Agent, after accepting all factual allegations provided in Charging Party's First Amended Charge as true, is unable to find that the Charge states a prima facie violation of EERA.

Right to Appeal

Pursuant to PERB Regulations,[2] 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

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

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

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 _____
Mary Weiss
Senior Regional Attorney

Attachment

cc: Charmaine L. Huntting

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor
PUBLIC EMPLOYMENT RELATIONS BOARD
Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8384
Fax: (916) 327-6377

November 3, 2011

Margaret A. Chidester, Attorney
Margaret A. Chidester & Associates
17762 Cowan, First Floor
Irvine, CA 92614

Re: *Saddleback Valley Unified School District v. California School Employees Association & its Chapter 616*
Unfair Practice Charge No. LA-CO-1461-E
WARNING LETTER

Dear Ms. Chidester:

The Saddleback Unified School District (District) filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board) on January 20, 2011. The District alleges that the California School Employees Association & its Chapter 616 (CSEA) violated section 3543.6(c) of the Educational Employment Relations Act (EERA or Act)[1] by engaging in surface bargaining during (1) pre-impasse negotiations; (2) post-impasse negotiations; and (3) post-implementation negotiations.

BACKGROUND AS ALLEGED

1. Pre-Impasse Negotiations

CSEA is the exclusive representative of the District's classified employees. The parties' most recent collective bargaining agreement expired on June 30, 2010. The parties began bargaining a successor agreement on October 15, 2009. Margaret Lewis was the District's chief negotiator. Nathan Banditelli was CSEA's chief negotiator, at least during the pre-impasse negotiations.

The parties met nine times between October 15, 2009 and January 4, 2010.[2] At the parties' first meeting, Lewis told CSEA that the District wanted CSEA to agree to $4.5 million in concessions. At the second meeting, CSEA proposed pay raises. During subsequent meetings, the District proposed numerous combinations of pay cuts, furloughs, and other concessions, all geared to achieving the District's "required target" of $4.5 million in concessions. CSEA

[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.

[2] The parties met on October 15, November 4, November 9, November 16, November 19, December 3, December 10, December 17, 2009, and January 4, 2010.

made counterproposals. The charge is not clear about the exact contents of those counterproposals. Nevertheless, it appears they contained at least some concessions, because the charge describes them as falling "short" of CSEA's "required" target of $4.5 million. On January 4, 2010, PERB, in response to a request from CSEA, determined that the parties had reached impasse. At that time, the District still held firm to its demand for $4.5 million in concessions, a position it never relinquished.

2. Post-Impasse Negotiations

a. Mediation

The mediator offered four dates in January 2010. (All subsequent references are to 2010, unless otherwise noted.) CSEA claimed it could not meet on any of the four dates. Eventually, the parties met with the mediator at least five, and perhaps as many as seven, times between February 18, and June 25.[3] At the first mediation session, the District repeated its demand for $4.5 million in concessions.[4] On March 11, the District gave CSEA its "last, best, and final offer," which included $4.5 million in concessions.[5] At some point prior to the third mediation session on April 23, CSEA offered $2.1 million in concessions. In the words of the charge, this left CSEA "far short of" its "required" concessions.

It appears that prior to May 13, CSEA proposed an "early retirement plan" as a way to save money. Apparently, CSEA claimed the proposal would save $2 million. On May 13, CSEA presented "data" to the District to support its proposal. The District said "further analysis" of the plan "was needed." During the meeting, the mediator, according to the charge,

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[3] The parties clearly met with the mediator on five occasions: February 18, March 11, April 23, May 13, May 20. Although the mediator certified the parties for factfinding on May 27, the parties exchanged additional proposals on June 11 and June 25. It is unclear whether the mediator assisted with these last two exchanges.

[4] Pat Preziozo is a CSEA Field Director. On March 10, Preziozo "proclaimed," apparently to Lewis, that he—or at least the CSEA Regional Office—would have to approve any tentative agreement the parties might reach. The relevance of this assertion is unclear. After all, employers and unions alike can establish their own *internal* procedures for approving tentative agreements. (See *Houchens Mkt. v. NLRB* (6th Cir. 1967) 375 F 2d 208, 212 *enforcing* 155 NLRB 729 [employer's proposal that union members ratify agreement as a condition precedent was outside scope of representation]; see *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616 [PERB can rely on NLRB precedent].) Moreover, in this case the parties never reached—and thus Preziozo never disapproved—a tentative agreement.

[5] In its discussion of the meeting on March 11, the charge does not use the term "last, best, and final offer." However, the charge describes a District proposal dated June 25, as an "updated" version (adjusted for the passage of time) of the District's "last, best, and final offer" dated "March 11, 2010."

"inaccurately estimated" that CSEA was proposing concessions of $3 million, not $2 million. The charge does not allege that CSEA was in any way responsible for the mediator's alleged inaccuracy.

On May 20, the District "demonstrated" that *the best case scenario* for CSEA's early retirement proposal was that it would take five years to produce a limited savings of $673,014. This savings was, in the words of the charge, "far short" of CSEA's "erroneous" projection of $2 million in savings. In response, the District proposed a "bifurcated agreement" in which CSEA would take three furlough days in 2009-2010 and "place the remaining issues into factfinding." CSEA rejected the proposed furlough days, unless "the District gave something in exchange."

On May 27, the mediator certified the parties for factfinding. Notwithstanding the pending factfinding, CSEA sent the District a proposal on June 11. CSEA proposed a "sliding scale" of between 12 and 15 furlough days, but without other concessions such as pay cuts or increased medical contributions. The District apparently rejected the proposal because it "fell far short" of the District's "required target" of $4.5 million in concessions.

On June 25, the District sent CSEA an "updated" version of its "last, best and final offer of March 11." The offer apparently contained $4.5 million dollars in concessions, but because CSEA had "squandered" time in negotiations, the concessions were now spread over two years, rather than three. In making the proposal, the District told CSEA what it had "repeatedly" told CSEA since October 2009: the District's "target" of $4.5 million in concessions "remained" unchanged.

b. Post-Factfinding Negotiations

It appears the factfinding panel (panel) met on July 7. The panel issued its advisory recommendations on August 16 (factfinding report). Among other things, the panel recommended pay cuts, ten to 15 furlough days, and increased employee contributions for health coverage. It appears the panel recommended $4.5 million in concessions spread over two years.

The parties met on August 19. Lewis said the District's "target for reductions remained essentially the same since October 2009," except for certain limited "credits" against the $4.5 million that the District had previously given to CSEA. Alan Aldrich, speaking for CSEA, said he wanted to reach agreement, but he would be foolish "not to prepare for the alternative." Aldrich "admitted" that CSEA's then-pending proposal (first post-factfinding proposal) "represented concessions of only $1.75 million spread over two years" and that this was "far below" the District's demands. This statement indicates that at some point CSEA changed its offer from $2.1 million to $1.75 million. The charge does not, however, allege what, if anything, CSEA said when it changed its proposal.

Following a caucus, Lewis said the District would offer CSEA a choice of two last, best, and final offers. They included (1) the District's offer dated June 25, or (2) the factfinding report.

CSEA apparently said it was not interested in either package and "ended" the session approximately "one hour" earlier than the parties had otherwise allotted for negotiations.

Later that same day, CSEA sent the District a second post-factfinding proposal in which it increased its proposed concessions from $1.75 million to $3 million.

The parties agreed to meet at eight a.m. on August 20. CSEA arrived 30 minutes late. Aldrich said the parties could not reach a tentative agreement that day because three of CSEA's team members were missing. Lewis rejected CSEA's second post-factfinding proposal. Aldrich raised the issue of "one-time federal job monies." Lewis said the factfinding report had recommended that the parties not discuss that issue until the District actually received the funds. Lewis again stated that CSEA could "choose between the District's two final offers," i.e., the District's offer dated June 25, or the panel's factfinding report.

On August 24, CSEA sent the District a third post-factfinding proposal. The charge describes in detail a number of ways in which CSEA's third post-factfinding proposal differed from its second post-factfinding proposal. The charge nevertheless alleges that the two proposals were essentially "similar" because, based on the District's calculations, each contained only $3 million in concessions.

On August 26, Lewis rejected CSEA's third factfinding proposal because it missed the District's required "target" by $1.5 million. Lewis informed CSEA that the parties remained at impasse. She told CSEA that the District's Board of Education had scheduled a special meeting for August 31. Lewis said she intended to recommend to the Board of Education that it adopt and implement the factfinding report as the District's last, best, and final offer.

On August 30, CSEA sent the District a fourth post-factfinding proposal. The charge describes in detail a number of ways in which CSEA's fourth post-factfinding proposal differed from its third. The charge nevertheless alleges that the two proposals were essentially "similar" because, based on the District's calculations, each contained only $3 million in concessions.[6]

On August 31, the District's Board of Education voted to adopt the factfinding report as the District's final offer, but leaving unaltered those parts of the expired contract that the parties had not raised at the table (hereafter "the implemented terms"). Presumably, the implemented

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[6]PERB must accept the charge's *alleged facts* as true, including the allegation that CSEA's fourth post-factfinding proposal contained only $3 million in concessions. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6.) In a related case, CSEA *alleged* that its fourth post-factfinding proposal contained significant concessions that "met" the District's oft-repeated, long-standing, and apparently non-negotiable "target" of $4.5 million. (See PERB Case No. LA-CE-5467-E.) Thus, in PERB Case No. LA-CE-5467-E, the *alleged* facts showed that CSEA "broke" the impasse *before* the District implemented its last, best, and final offer. In contrast, the *alleged facts* in this case show that the parties were still at impasse when the District acted.

terms included the District's "required target" of $4.5 million in concessions spread over two years.

3. Post-Implementation Negotiations[7]

The parties met on September 17. Lewis told CSEA the parties had reached impasse in "December 2009." She said, in essence, that despite the District's best efforts, and despite having exhausted the statutory impasse procedures, the impasse remained "unbroken" on August 31, and thus, the District lawfully imposed the implemented terms.[8] Notwithstanding the new status quo, Lewis told CSEA that the District "still desired to reach a settlement" or agreement concerning the implemented terms. In response, CSEA raised the possibility of a three-year contact. The District said the idea "presented a number of problems" because the implemented terms were, pursuant to the factfinding report, spread over two years. CSEA then claimed the District had a six-percent reserve fund it could spend on the CSEA bargaining unit. Lewis "reiterated that the District needed reductions" and the meeting apparently ended at that point. Neither the District nor CSEA passed any formal proposals during the meeting.

On September 20, CSEA sent the District a proposal (first post-implementation proposal). Among other things, CSEA proposed (1) a three-year contract and (2) a decrease in the employees' share of medical costs. In the words of the charge, CSEA's proposal "would have met" the District's "required target," but it would have taken three years to do so, and was thus unsatisfactory.

The parties met on September 22. CSEA was 70 minutes late. Lewis told CSEA that its three-year contract proposal was "problematic." Lewis also said that the District would "need" to "continue" the employees' medical contributions at their current levels. The District apparently rejected CSEA's formal proposal, but did not make a counterproposal of its own. The parties met on October 27. Lewis proposed to reemploy several laid-off employees. CSEA "agreed" to one part of the proposal, but "rejected" another part.

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[7] The charge uses the term "post-factfinding negotiations" to describe events *before* and *after* August 31. But the District implemented its final offer on August 31. Thus, the term "post-implementation" best describes the events *after* August 31. (*State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S, p. 7; *Rowland Unified School District* (1994) PERB Decision No. 1053, p. 7 (*Rowland*) [implementation following impasse suspends duty to bargain until circumstances change].)

[8] As noted in footnote 6, for purposes of this charge only, it must be accepted as true that CSEA's fourth post-factfinding proposal, like its third post-factfinding proposal, contained only $3 million in concessions, thus leaving the parties at impasse. Accordingly, based on the *alleged facts in this charge*, Lewis was correct to assert that the impasse remained "unbroken" on August 31, thus giving the District the right to implement.

The parties met on October 29. Lewis presented some "costing" information related to, reemploying the laid-off employees. She also proposed to "to give each high school one Library Media Clerk for eight hours a day, five days a week," but "CSEA declined, insisting on returning two Library Media Clerks at eight hours a day, or four clerks at six hours per day." The meeting ended without an agreement and apparently the parties never discussed this issue again.

The parties met on November 19 to discuss the District's "desire" that CSEA "agree" to the implemented terms. The District presented some financial information. Among other things, CSEA presented its second post-implementation proposal. It appears this second proposal spread some, but not all of the District's "required" concessions, over two years, leaving the third year concessions to be negotiated at a later, and perhaps financially better, time. In the words of the charge, the proposal "fell short" of the District's "required target" and thus the District rejected it as "regressive." There is no indication the parties met after November 19.

DISCUSSION

On October 15, 2009, the District established a "target" of $4.5 million in concessions that CSEA was "required" to meet. The theory of the case is that CSEA engaged in bad faith, or surface bargaining, by failing to agree to the District's "required" target in a timely manner.

Parties are obligated to bargain in good faith about matters within the scope of representation. (Gov. Code, § 3543.3.) A party violates that obligation when it engages in bad faith or "surface bargaining" during negotiations. (Gov. Code, § 3543.5(c); *Muroc Unified School District* (1978) PERB Decision No. 80, p. 13 (*Muroc*) [party cannot just go through the motions of bargaining].) The obligation to bargain in good faith does not, however, require a party to reach agreement or make concessions. (*Placentia Firefighters v. City of Placentia* (1976) 57 Cal.App.3d 9, 22; *Oakland Unified School District* (1982) PERB Decision No. 275, pp. 15-16 (*Oakland*).) Nor is a party required to yield a position fairly maintained. (*NLRB v. Herman Sausage Co.* (5th Cir. 1960) 275 F.2d 229, 232.) Rather, a party may lawfully maintain a firm position on any issue—such as the District's unchanging demand for $4.5 million in concessions—without necessarily breaching its duty to bargain in good faith. (*Oakland, supra*, PERB Decision No. 275, pp. 15-16.)

At some point during negotiations, PERB can—at the request of one or both parties—determine that "an impasse exists" (Gov. Code, § 3590) and require the parties to participate in the "statutory impasse procedures." (See Gov. Code, §§ 3548-3548.8 [mediation, fact-finding, etc.].) Once PERB determines that an impasse exists, the negotiations that lead to the impasse determination "come to an end." (*Moreno Valley Unified School District v. Public Employment Relations Board* (1983) 142 Cal.App.3d 191, 202 (*Moreno Valley*).) Although negotiations "end" with PERB's impasse determination (*ibid.*), the parties must then "participate in good faith in the [statutory] impasse procedures." (Gov. Code, §§ 3543.5(e) [employers], 3543.6(d) [unions].) The failure to (a) bargain in good faith during pre-impasse negotiations and (b) to participate in good faith in the statutory impasse procedures are "*separate* unlawful practices." (*Moreno Valley, supra*, 142 Cal.App.3d at p. 202 [emphasis in

original].) Additionally, if the parties exhaust the statutory impasse procedures without breaking the impasse, then the obligation to bargain *ends* and "the employer is free to implement changes reasonably comprehended within its last, best and final offer." (*State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S, p. 7 (*DPA*); *Rowland, supra*, PERB Decision No. 1053, p. 7; *Modesto City Schools* (1983) PERB Decision No. 291, p. 39.)

Given the three distinct stages described above, it is necessary in this case to analyze CSEA's conduct: (1) before PERB declared impasse (*Moreno Valley, supra*, 142 Cal.App.3d at p. 202); (2) after PERB declared impasse (*ibid.*; *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2017-S (*Department of Personnel Administration*) [adopting Board Agent's Partial Warning Letter, p. 8, fn. 5]); and (3) after the District implemented its final offer. (*Rowland, supra*, PERB Decision No. 1053, p. 7.)

A. Conduct During Pre-Impasse Negotiations

Where, as here, a party alleges surface bargaining during negotiations, PERB applies the "totality of the circumstances" test. (*Oakland, supra*, PERB Decision No. 275, pp. 15-16.) Stated differently, PERB weighs all of the facts to determine whether the conduct at issue "indicates an intent to subvert the negotiating process or is merely a legitimate position adamantly maintained." (*Ibid.*)

The indicia of surface bargaining are many and include, among other things, a "take-it-or-leave-it" attitude (*General Electric Co.* (1964) 150 NLRB 192, 194, enf. 418 F.2d 736), recalcitrance in scheduling meetings (*Oakland Unified School District* (1983) PERB Decision No. 326, p. 34), canceling meetings (*ibid.*), a negotiator's lack of authority that delays and thwarts the bargaining process (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 25), reneging on tentative agreements (see *Charter Oak Unified School District* (1991) PERB Decision No. 873, pp. 14-15 (*Charter Oak*)), and making "regressive" offers that move the parties away from agreement. (See *Id.* at p. 17.)

In this case, the parties began their pre-impasse negotiations on October 15, 2009. The District demanded $4.5 million in concessions and CSEA responded by proposing pay raises. By the time PERB declared impasse on January 4, the District was holding firm to its "required target," although it showed some flexibility about how CSEA could reach that target. CSEA, on the other hand, had made several "counterproposals." The exact contents of those counterproposals are unclear. Nevertheless, it appears they contained at least some concessions, because the charge describes them as falling "short" of CSEA's "required" target. Thus, the charge shows that CSEA made *some* movement during the pre-impasse negotiations.

There is, however, no indication that CSEA adopted a "take-it-it leave-it" attitude (*General Electric Co., supra*, 150 NLRB 192, 194), cancelled meeting (*Oakland Unified School District, supra*, PERB Decision No. 326, p. 34), delayed negotiations (*ibid.*), reneged on tentative agreements (*Charter Oak, supra*, PERB Decision No. 873, pp. 14-15), or made regressive

offers during the pre-impasse negotiations. (*Ibid.*) Accordingly, the charge fails to show that CSEA engaged in surface bargaining during this stage of negotiations.

However, if it is assumed for the sake of discussion that CSEA acted in bad faith during the pre-impasse negotiations, those negotiations "[came] to an end" on January 4, the day PERB determined that an impasse existed. (*Moreno Valley, supra*, 142 Cal.App.3d at p. 202.) The District did not, however, file a charge until January 21, 2011—which was more than a year after those negotiations ended. PERB is prohibited from issuing a complaint based on conduct that occurred more than six months before the charge was filed. (Gov. Code, § 3541.5(a)(1); *Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1077.) Thus, even if CSEA acted in bad faith during pre-impasse negotiations, the statute of limitations prohibits PERB from issuing a complaint based on that conduct.

B. Conduct During Post-Impasse Negotiations

Although a party's conduct during negotiations and a party's conduct during impasse proceedings must be analyzed as "separate" events (*Moreno Valley, supra*, 142 Cal.App.3d at p. 202; *Department of Personnel Administration, supra*, PERB Decision No. 2017-S), the test of "bad faith" is the same in both circumstances. (*Temple City Unified School District* (2008) PERB Decision No. 1972, p. 13, citing *Ventura County Community College District* (1998) PERB Decision No. 1264 (*Ventura*).)

PERB declared impasse on January 4, and the District, after exhausting the statutory impasse procedures, unilaterally implemented its last, best and final offer on August 31. During that period, CSEA altered its monetary goal several times. Although it had started negotiations by asking for pay raises, by April 23, it was offering $2.1 million in concessions. On some unspecified date, CSEA decreased that offer to $1.75 million in concessions, and then, on August 19, it increased its offer to $3 million. In the meantime, the District remained adamantly firm about its own monetary goal: it wanted $4.5 million in concessions, nothing more and nothing less.

The District, perhaps, contends that CSEA's one-time, interim package offer of $1.75 million was "regressive." (See *Ventura, supra*, PERB Decision No. 1264 [conduct that moves parties away from agreement is regressive].) But the District had not moved *towards* CSEA's prior offer of $2.1 million. Nor did it move *towards* CSEA's subsequent offer of $3 million. Because the District never moved *at all* on the amount of concessions, it cannot be said that CSEA's interim offer moved the parties away from each other.

The charge also alleges that CSEA was not available for the first four dates offered by the mediator, thereby delaying the start of mediation until February 18. There is, however, no indication that the District was available on the first four dates offered by the mediator. It is thus not clear that CSEA was solely responsible for this short delay in the mediation process.

Thus, as to the post-impasse negotiations, the charge fails to show that CSEA adopted a "take-it-it leave-it" attitude (*General Electric Co., supra*, 150 NLRB 192, 194), cancelled meeting (*Oakland Unified School District, supra*, PERB Decision No. 326, p. 34), significantly or unilaterally delayed negotiations (*ibid.*), reneged on tentative agreements (*Charter Oak, supra*, PERB Decision No. 873, pp. 14-15), or made regressive offers. (*Ibid.*) Thus, there is no indication that CSEA just went "through the motions" during the post-impasse negotiations.

C. Conduct During Post-Implementation Negotiations

Once parties exhaust the statutory impasse procedures, the obligation to bargain *ends* and "the employer is free to implement changes reasonably comprehended within its last, best and final offer." (*DPA, supra*, PERB Decision No. 2130-S, p. 7; *Rowland, supra*, PERB Decision No. 1053, p. 7; *Modesto City Schools* (1983) PERB Decision No. 291, p. 39.) In this case, the parties exhausted the statutory impasse procedures and—on August 31—the District implemented its final offer, thereby ending the obligation to bargain. (*Rowland, supra*, PERB Decision No. 1053, p. 7.)[9] The duty to bargain does not, however, end permanently; it can be revived "when one party proposes a concession from its earlier bargaining position which indicates that agreement may be possible." (*Rowland, supra*, PERB Decision No. 1053, p. 7.) Thus, the question presented is whether one of the parties proposed a significant concession after August 31.

Although Lewis said, on September 17, that she still wanted to reach a "settlement," she never proposed any concessions. Indeed, on November 19, Lewis made it clear what she meant by a settlement: CSEA would have to "agree" to the implemented terms. CSEA at least identified some issues, when, for instance it "raised" the idea of a three-year contract on September 22. But this was not a concession. To the contrary, CSEA had raised, and the District had rejected, the issue *before* the District implemented its final offer. Similarly, CSEA "raised" the idea that the District not increase employee medical contributions. But again, CSEA had raised, and the District rejected, the same idea *before* August 31. Thus, once the District implemented its final offer, neither the District nor CSEA retreated from their earlier bargaining positions. (*Rowland, supra*, PERB Decision No. 1053, p. 7.) Accordingly, CSEA's duty to bargain about the implemented terms never revived. (*Ibid.*)

Nevertheless, if it is assumed that one party made significant concessions—thereby reviving the duty to bargain—then the question is whether CSEA engaged in surface bargaining after that duty revived. Again, as with the first two stages of negotiations, there is no indication that once the District implemented its final offer, CSEA adopted a "take-it-it leave-it" attitude (*General Electric Co., supra*, 150 NLRB 192, 194), cancelled meeting (*Oakland Unified*

[9] The conclusion that the parties remained at impasse on August 31 is based on the *factual allegation in this case*, that CSEA's fourth post-factfinding proposal dated August 30, did *not* contain significant concessions. Again, in PERB Case No. LA-CE-5467-E, CSEA *alleged* that its fourth post-factfinding proposal substantially "met" the District's "required" demand of $4.5 million in concessions.

School District, supra, PERB Decision No. 326, p. 34), delayed negotiations (*ibid.*) or reneged on tentative agreements. (*Charter Oak, supra*, PERB Decision No. 873, pp. 14-15.)

The District alleges that CSEA's second post-implementation proposal was "regressive" because, unlike CSEA's first offer, which spread all of the District's "required" concessions over three years, this proposal spread some (but not all) of the District's "required" concessions over two years. But the District did not make a counter offer to CSEA's first post-implementation proposal, so it is hard to tell what part of CSEA's second post-implementation proposal moved the parties *away* from agreement. (See *Charter Oak, supra*, PERB Decision No. 873, p 17.) Indeed, the District seems to assert that it was entitled to stand pat while CSEA was *required* to move continually toward the District's implemented terms—and that anything less than continual movement by CSEA constituted "regressive" bargaining.

Further, assuming for the sake of discussion that CSEA's second post-implementation proposal was regressive, that is but one indicia of bad faith. PERB has long held that one indicia of bad faith bargaining is not enough to demonstrate a prima facie case of surface bargaining. (*Chino Valley Unified School District* (1999) PERB Decision No. 1326; *Ventura County Community College District* (1998) PERB Decision No. 1264; *State of California (Department of Education)* (1996) PERB Decision No. 1160-S; *Oakland Unified School District* (1996) PERB Decision No. 1156, p. 2.)

Accordingly, there is no indication that CSEA engaged in surface bargaining during the post-implementation negotiations.

CONCLUSION

Based on the reasons discussed above, the charge fails to establish that CSEA (1) bargained in bad faith during the pre-impasse negotiations, (2) bargained in bad faith during the post-impasse negotiations, or (3) bargained in bad faith once the District implemented its final offer. Accordingly, the charge, as presently written, does not state a prima facie violation of the duty to bargain.[10]

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

[10] 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.*)

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 November 28, 2011,[11] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Harry J. Gibbons
Senior Regional Attorney

HG

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