**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 32,<br><br>Charging Party,<br><br>v.<br><br>BELLFLOWER UNIFIED SCHOOL DISTRICT,<br><br>Respondent. | Case No. LA-CE-5784-E<br><br>PERB Decision No. 2455<br><br>September 30, 2015 |

Appearances: Charmaine L. Huntting, Staff Attorney, for California School Employees Association & its Chapter 32; Law Offices of Eric Bathen by Jordan Meyer, Attorney, for Bellflower Unified School District.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Bellflower Unified School District (District) to a proposed decision (attached) by a PERB administrative law judge (ALJ). The complaint and underlying unfair practice charge allege that the District violated the Educational Employment Relations Act (EERA)[1] by: (1) changing a policy regarding paid holiday leave contained in the parties' expired collective bargaining agreement (CBA) without notice and opportunity to bargain; and (2) failing and refusing to timely respond to requests for information. The District's conduct is alleged to have violated EERA section 3543.5, subdivision (c), which makes it unlawful for a public school employer to refuse or fail to negotiate in good faith with an exclusive representative. The District's conduct is also alleged to have derivatively

[1] EERA is codified at Government Code section 3540 et seq. All further statutory references are to the Government Code, unless otherwise stated.

interfered with guaranteed employee rights in violation of EERA section 3543.5, subdivision (a), and to have denied the exclusive representative its right to represent employees in violation of EERA section 3543.5, subdivision (b).

After a formal hearing conducted on May 30 and July 22, 2014, and upon receipt of the parties post-hearing briefs on or about September 18, 2014, the case was submitted for decision. On June 22, 2015, the ALJ issued a proposed decision concluding that: (1) deferral to the expired arbitration process, raised as an affirmative defense, was not appropriate; and (2) the District violated its duty to negotiate in good faith when it unilaterally eliminated holiday pay in the summer of 2012 for bargaining unit members in other than a 12-month assignment, and failed to timely respond to requests for information. The District timely filed exceptions,[2] and the California School Employees Association & its Chapter 32 (CSEA) timely filed a response.

The Board itself has reviewed the formal hearing record in its entirety in light of the District's exceptions, CSEA's response and the applicable law. The record as a whole supports the factual findings and the conclusions reached in the proposed decision. The proposed decision is well-reasoned and consistent with applicable law. As the Board concludes that the District's exceptions are without merit (and largely repetitive of the arguments contained in its post-hearing brief to the ALJ), the Board affirms the proposed decision and adopts the proposed decision as the decision of the Board itself as supplemented by the following limited discussion of the District's statement of exceptions.

[2] The District also filed a request for oral argument, which we deny. The Board historically denies requests for oral argument when an adequate record has been prepared, the parties had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Antelope Valley Health Care District* (2006) PERB Decision No. 1816-M; *Monterey County Office of Education* (1991) PERB Decision No. 913.)

## DISCUSSION

Article XI, section O, of the parties' expired CBA[3] governs the dispute in this matter. It conditions holiday pay entitlement on a single requirement. Under subsection 3, "[i]n order to be eligible for any paid holiday, a unit member must be on paid status on the working day immediately preceding or succeeding the holiday." In the summer of 2012, bus drivers and other classified employees in CSEA's bargaining unit who satisfied this requirement did not receive holiday pay for Independence Day, a designated holiday under the CBA. The District maintains that, despite the above CBA language, bargaining unit employees who do not work in an assignment classified as 12-month are not entitled to holiday pay.

At the outset of the formal hearing, counsel for the District objected to CSEA going forward with its presentation of evidence, asserting that "their whole case is about not being paid for the 4th, and we said, yes, we will pay them." After a brief exchange between counsel for the District and the ALJ, CSEA put on its case-in-chief. The District deferred its opening statement until CSEA rested. But when that time came on the second day of the formal hearing, the District did not make an opening statement or put on any witnesses, and it made no effort to proffer any evidence to support its claim that the holiday pay policy distinguishes between bargaining unit employees who work in an assignment classified as 12-month and those who do not.

The District now claims that the ALJ is the one who erred.[4] In the first of three exceptions, the District excepts to pages 17 through 21 of the proposed decision concerning the

[3] The CBA was in effect 2006-2007 through 2009-2010. It expired on June 30, 2010.

[4] The District filed no exceptions to the findings of fact, to the section of the proposed decision concerning deferral, to the remedy or to the order. Exceptions not urged are waived. (PERB Reg. 32300, subd. (c); PERB regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

unilateral change issue, arguing that the holiday pay provision in the parties' expired CBA does not apply to employees performing "extra-duty or summer session assignments." The District also excepts to page 21 of the proposed decision, which contains the ALJ's response to the District's past practice defense. Last, the District excepts to pages 22 through 24 of the proposed decision concerning the information request issue, arguing that the District responded to the requests and the ALJ abused her discretion when she "excluded evidence offered by the District demonstrating the District had complied with the information request."

Regarding the first exception, the holiday pay provision of the CBA is clear and unambiguous. Article 1 of the CBA defines "unit member" as those employees described in the "Inclusions" section. The Inclusions section of the CBA, section A of Article 1, provides that the unit shall include probationary and permanent classified employees in positions of the District. "Bus Driver" is one such position specifically enumerated in this section as "include[d]" in the bargaining unit. There are six exclusions, none of which apply here: (1) all management positions; (2) 10 confidential positions; (3) supervisory positions; (4) casual and limited term assignments, or those whose primary employment is elsewhere, such as Lay Reader, Limited Term classified persons, provisional classified persons and substitutes; (5) restricted classified persons who are classified under state and federal public employment programs; and (6) not classified such as certificated, noon duty assistant, student helper, student worker, teacher aides (three classifications), inspector and vocational rehabilitation worker.

The pay rate for holiday leave is governed by Article VIII, Hours and Overtime. Section B(2) of Article VIII, Overtime, provides: In determining the overtime rate, the number of hours worked by a unit member includes, amongst other things, "time during which the employee is excused (and is paid for) holidays." It is a ***given*** under the parties' CBA that an

employee excused from working a holiday is nonetheless paid for it. The overtime rate for an employee not excused from working a holiday is contained in the following provision. Section B(3) provides: "A unit member authorized to work on a holiday as defined in Article XI, Leaves of Absence, shall be compensated at the overtime rate of one and one-half times his/her regular rate of pay in addition to his/her regular rate of pay."

The District argues that the ALJ erred by shifting the burden of proof to the District to prove the holiday leave article applied to bus drivers and other CSEA-represented employees in other than 12-month assignments. The District fails to appreciate the difference between a charging party's failure to satisfy its burden of proof and a respondent's failure to prove up its defense. The ALJ's conclusion is grounded in the clear and unambiguous language of the CBA, relied on by CSEA to prove its case. Under the CBA, employees included within the bargaining unit are entitled to holiday pay whether they work the holiday or not so long as they are on paid status on the working day immediately preceding or succeeding the holiday. The District's attempt to remove bus drivers and other CSEA-represented bargaining unit employees from coverage under the CBA by referring to them as "as-needed" or to their assignments as "extra-duty or summer session" or "beyond their 'regular' assignments" fails. These distinctions are nowhere to be found in the parties' negotiated labor agreement.

The District's further argument that bus drivers and other CSEA-represented employees on other than a 12-month assignment fall within the CBA's fourth exclusion for "casual and limited term assignments" is indefensible. As a matter of contract interpretation, a position that is "included" in the bargaining unit such as bus driver cannot at the same time be a position that is "excluded" from the bargaining unit. Moreover, in a section specifically dealing with bus driver assignments, the CBA refers to assignments other than regular work

year assignments and in no manner suggests that such assignments are treated as a "casual" or "limited-term" assignments.[5] To the extent the District truly believes that permanent classified employees such as bus drivers become casual or limited term employees while working during the summer session, it was incumbent on the District to prove that up at the formal hearing. It was not CSEA's burden to disprove an unproven defense.

The District concedes in its exceptions that the ALJ is correct that there was no evidence showing that the employees in question "were not otherwise subject to the same salary, benefits, grievance, evaluation and other provisions of the CBA that apply to them during the regular school year." But the District then states the following:

> While this is true, there was also no consequential evidence that the employees in question were in fact subject to other provisions of the CBA.

First, as stated above, that was for the District to prove in its defense, but the District chose not to put one on. Second, this argument is belied by the District's own affirmative defense in which it asserts that the unfair practice complaint is "***barred*** by the failure to follow administrative remedies, including the grievance procedure prior to filing the unfair labor [sic] practice charge." (Answer, p. 2, affirmative defense no. 4, emphasis supplied.)

Third, at least one other section of the CBA makes clear that when the parties wanted to exclude certain bargaining unit employees, they did so explicitly. Under section G of Article XI, Leaves of Absences, governing Catastrophic Illness/Sick Leave Bank, two categories of employees are specifically excluded from coverage under subsection 4 titled "Exclusions."

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[5] In section H, Bus Driving Assignments and Reassignments, of Article VIII, Hours and Overtime, the CBA states: "11. Work that provides for an assignment beyond the regular work year assignments of drivers shall be offered to drivers (within the bargaining unit) by seniority." (CBA, Field Trips: Assignments and Reassignments, p. 24.)

Last, at the formal hearing, the District had the opportunity on cross-examination of Treenitta Harber (Harber), a bus driver in the bargaining unit, to demonstrate that the CBA did not apply to her while she was working during the summer session. But the District's questioning proved just the opposite. The cross-examination of Harber established that when she did not work the Independence Day holiday, she was paid 5.5 hours, "what they call our contracted time for that year." Harber's cross-examination also established that when she did work the Independence Day holiday, she "got paid in accordance with the contract."[6] The District made no attempt during Harber's cross-examination to discredit her assertion that she was paid according to the CBA for the bus driving work she performed during the summer session.[7]

The District's second exception concerns the ALJ's treatment of the District's past practice defense to the unilateral change claim and repeats, in large part and sometimes verbatim, the same arguments contained in pages 13 through 15 of the District's post-hearing brief to the ALJ. The District's third exception concerns the ALJ's treatment of the request for information claim and also repeats, in large part and sometimes verbatim, the same arguments contained on pages 22 through 23 of the District's post-hearing brief to the ALJ. The ALJ

[6] Harber testified that she was paid "double time and a half per the contract" for the Independence Day holidays she worked during summer school.

[7] The District argues in its exceptions that the testimony of Donald Lockwood (Lockwood), CSEA's labor relations representative, supports its claim that the exclusion for casual and limited term assignments applies to employees like Harber. On cross-examination, the District endeavored to get Lockwood to concede that employees like Harber were paid on an hourly basis and worked during the summer session according to the needs of the District. Lockwood agreed to those facts, but not to the District's underlying premise that those facts meant that the subject employees were not entitled to holiday pay under the CBA. He testified on cross-examination: "I consider them regular classified employees during the summer." Lockwood never wavered on that point.

thoroughly addressed the District's arguments in the proposed decision, with which we fully agree. We decline the opportunity to revisit those issues, with one exception.

The District argues that the ALJ committed reversible error by failing to enter into evidence a document proffered by the District on cross-examination of Lockwood. The District claims that the document is "precisely the type of evidence of which the ALJ may and should take judicial notice."[8]

The document at issue is referred to by both parties as a "Board Book" and appears to be a report of action taken by the District's governing board. The District asserted that its "Board Book" contains a list of all employees scheduled to work over the summer, and is typically provided to the president of CSEA. Because it contains information sought by CSEA, the District argued that it did not commit the alleged unfair practice relating to CSEA's information requests. The ALJ ruled as follows:

> ADMINISTRATIVE LAW JUDGE RACHO: Okay. I'm not going to notice this document. I don't think the foundation is laid. You could have brought a witness in and testify – and got the document received that way, but absent a stipulation, I don't – I don't think there's a proper foundation for it.

The District's exception to the ALJ's ruling is not well taken. The District asserts that "the District could have and elected not to call its own witnesses to testify has no bearing on the appropriateness or trustworthiness of the offered evidence." It is the District's burden, however, to establish the appropriateness *and* trustworthiness of the documents it seeks to move into evidence. Typically, this is done by calling a witness who is competent to qualify an exhibit for admission in evidence, i.e., a witness with the most knowledge about the

[8] See page 23, footnote 6, of the District's post-hearing brief to the ALJ, which contains the same argument, only in a footnote rather than in the main text.

document. Exhibits can be admitted in evidence only when a proper foundation has been laid. The District had the opportunity to put on a case, call its own witnesses and attempt to lay the foundation for this document. It chose not to, and cannot now complain that the ALJ abused her discretion.

The only legal authority provided by the District in support of this exception is *Bellflower Unified School District* (2014) PERB Decision No. 2385 (*Bellflower*). The District notes that the ALJ's ruling "was particularly surprising considering PERB's typically permissive and inclusive approach to receiving evidence," citing the Board's decision in *Bellflower*. In that case, the District objected to the admission of testimony by witnesses for CSEA regarding layoff notices over the District's hearsay objection. The ALJ had concluded that the testimony was admissible under the party admission and official record exceptions to the hearsay rule. The Board disagreed with the ALJ regarding the official record exception, holding that the official record exception to the hearsay rule does not apply "in the absence of a writing." (*Id.* at p. 11.) Although the Board agreed with the ALJ that the testimonial evidence regarding the layoff notices fell within the party admission exception to the hearsay rule, the Board's decision hardly represents a "permissive and inclusive approach to receiving evidence," as the District claims.[9]

[9] The District cited no authority in support of its point that the document it sought to move into evidence is subject to judicial notice. We therefore treat the District's point as forfeited. (See, e.g., *Garcia v. Seacon Logix, Inc.* (2015) 238 Cal.App.4th 1476, 1489.) It is, however, worth noting that the District's "Board Book" does not appear to fall within section 451 or section 452 of the California Evidence Code, which sets forth the categories of information subject to mandatory and permissive judicial notice, respectively.

Finally, in the proposed decision, the ALJ addressed the District's argument regarding the probative value of the document, in concluding that the District's unadmitted exhibit would not assist the District in its defense to the alleged unfair practice relating to CSEA's information requests. As the ALJ stated:

> This explanation does not address a significant part of Chapter 32's request for payroll information regarding who was and was not paid for July 4, which was almost certainly not information included in the "Board book." Nor does it explain why, since the District had this information readily available, it did not simply furnish it to Chapter 32 upon request. Instead, Superintendent Jacobs took the position that he was not required to provide information to Chapter 32. After that communication from the Superintendent, Chapter 32 eliminated its request for specific pay warrant information, but the District still made no effort to timely respond and simply ignored Chapter 32's request. The District did not present a case-in-chief and thus offered no facts to justify its delay. I find, therefore, that the delay was unreasonable and unexcused, and it caused prejudice to Chapter 32. (*City of Burbank* [(2008)] PERB Decision No. 1988-M, pp. 18-19.)

We agree.

## ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Bellflower Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c). The District violated EERA by unilaterally changing its policy regarding holiday leave pay and by failing to timely respond to California School Employees Association & its Chapter 32's (CSEA) requests for necessary and relevant information.

Pursuant to Government Code section 3541.5, subdivision (c), it is hereby ORDERED that the District, its governing board, and its representative shall:

A. CEASE AND DESIST FROM:

1. Failing to negotiate in good faith by enacting unilateral policy changes concerning issues within the scope of representation and by failing to timely respond to requests for necessary and relevant information by CSEA.

2. Interfering with the right of unit employees to be represented by CSEA.

3. Denying CSEA its right to represent unit employees.

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

1. Rescind the policy change regarding payment of holiday leave pay and abide by the terms under the July 1, 2007-June 30, 2010 collective bargaining agreement (CBA) at Article XI, Section O.

2. Make-whole unit employees (as defined under CBA Article I, Section A, "Inclusions") for financial losses suffered as a result of the District's unlawful action who were working and in paid status on either July 3, 2012 or July 5, 2012. Any financial losses should be augmented with interest at a rate of 7 percent per annum.

3. Either: (1) provide a complete response to CSEA's request for information dated September 19, 2012; or (2) verify, in writing, to CSEA that the responses provided thus far are complete.

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the District's bargaining unit customarily are posted, copies of the Notice attached hereto as Appendix A. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced

or covered with any other material. In addition to the physical posting requirement, the Notice shall be posted by electronic message, intranet, internet site and any other electronic means customarily used by the District to regularly communicate with employees in the bargaining unit. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or to the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CSEA.

Members Huguenin and Winslow have joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-5784-E, *California School Employees Association & its Chapter 32 v. Bellflower Unified School District*, in which all parties had the right to participate, it has been found that the Bellflower Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c). The District violated EERA by unilaterally changing its policy regarding holiday leave pay and by failing to timely respond to California School Employees Association & its Chapter 32's (CSEA) requests for necessary and relevant information.

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

A. CEASE AND DESIST FROM:

1. Failing to negotiate in good faith by enacting unilateral policy changes concerning issues within the scope of representation and by failing to timely respond to requests for necessary and relevant information by CSEA.

2. Interfering with the right of unit employees to be represented by CSEA.

3. Denying CSEA its right to represent unit employees.

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

1. Rescind the policy change regarding payment of holiday leave pay and abide by the terms under the July 1, 2007-June 30, 2010 collective bargaining agreement (CBA) at Article XI, Section O.

2. Make-whole unit employees (as defined under CBA Article I, Section A, "Inclusions") for financial losses suffered as a result of the District's unlawful action who were working and in paid status on either July 3, 2012 or July 5, 2012. Any financial losses should be augmented with interest at a rate of 7 percent per annum.

3. Either: (1) provide a complete response to CSEA's request for information dated September 19, 2012; or (2) verify, in writing, to CSEA that the responses provided thus far are complete.

Dated: _____ BELLFLOWER UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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

**STATE OF CALIFORNIA**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 32,<br><br>Charging Party,<br><br>v.<br><br>BELLFLOWER UNIFIED SCHOOL DISTRICT,<br><br>Respondent. | UNFAIR PRACTICE<br>CASE NO. LA-CE-5784-E<br><br>PROPOSED DECISION<br>(June 22, 2015) |

Appearances: Charmaine Huntting, Staff Attorney, and Donald Lockwood, Labor Representative, for California School Employees Association & its Chapter 32; Law Offices of Eric Bathen by Eric Bathen, Attorney, for Bellflower Unified School District.

Before Valerie Pike Racho, Administrative Law Judge.

## INTRODUCTION

This case involves allegations of a school district employer violating its duty to bargain in good faith with an exclusive representative of classified employees by unilaterally changing a policy regarding holiday pay during the summer, and by failing to timely respond to requests for information. The employer argues that the Public Employment Relations Board (PERB or Board) lacks jurisdiction over the claim because the exclusive representative failed to pursue a grievance over the holiday pay issue and otherwise denies that it violated the Educational Employment Relations Act (EERA).[1]

## PROCEDURAL HISTORY

On January 10, 2013, California School Employees Association (CSEA) & its Chapter 32 (Chapter 32) filed with PERB an unfair practice charge against the Bellflower Unified

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

School District (District).

On February 11, 2013, the District filed a position statement responding to the charge.

On June 3, 2013, the PERB Office of the General Counsel issued a complaint alleging that the District violated EERA section 3543.5, subdivisions (a), (b), and (c) by: (1) changing a policy regarding "holiday leave" as set forth in the parties' expired collective bargaining agreement (CBA) at Article XI, Section O, without notice and opportunity to bargain being afforded to Chapter 32; and (2) failing and refusing to provide responses to three requests for necessary and relevant information by Chapter 32.

On June 21, 2013, the District answered the complaint, denying any violation of EERA and alleging regarding the theory of unilateral change that "the long standing practice of the District is not to pay for the 4th of July holiday to employees who are working extra duty assignments during times they do not have probationary and permanent status because, in part, Article I of the CBA between the parties state that unit members include only 'probationary or permanent classified employees.'" (Answer, para. 3.) Thus, the District denied that it had made a change to its practices as alleged because "the District had never paid holiday pay for employees who are working in extra duty assignments outside their probationary or permanent status." (Answer, para. 4.) The District further alleged as affirmative defenses that the charge is untimely and the complaint is barred by Chapter 32's "failure to follow administrative remedies, including the grievance procedure[,] prior to filing the unfair labor practice charge."

Attempts by PERB's Office of the General Counsel and Division of Administrative Law to mediate a voluntary settlement between the parties were unsuccessful and the case proceeded to formal hearing.[2] The case was transferred, without objection, from Chief

[2] PERB representatives met with the parties on July 18, 2013, and April 8, 2014.

Administrative Law Judge Shawn Cloughesy to Administrative Law Judge Valerie Pike Racho to conduct the formal hearing and issue a proposed decision.

Formal hearing was conducted on May 30 and July 22, 2014. Upon receipt of the parties' post-hearing briefs on or about September 18, 2014, the case was submitted for decision.

## FINDINGS OF FACT

### Jurisdiction

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k). Chapter 32 is the exclusive representative of a unit of classified employees of the District within the meaning of EERA section 3540.1, subdivision (e).

### Unit Membership and Holiday Pay Under the Collective Bargaining Agreement

The relevant timeframe of events in this case was the summer of 2012. During that time, the parties' CBA had expired by its own terms as of June 30, 2010.[3] CBA Article I, "Recognition," states that "unit member," as referred to in the agreement refers to those employees who are described in the "Inclusions" section of the article. Section A, "Inclusions," lists alphabetically, by position, all of the job classifications in the unit. It states, "[t]he unit shall include probationary and permanent classified employees" who are included on that list. Section B, "Exclusions," notes that certain manager, confidential, and supervisory positions are excluded from the unit, as well as:

> all casual and limited-term assignments, or those whose primary employment is elsewhere, such as:

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[3] The record does not indicate that the parties were, at the time of the events in the charge, meeting and conferring over a successor agreement. By the time of the hearing in 2014, however, the parties had recently held some successor negotiations and were scheduled to attend additional bargaining sessions.

Lay Reader
Limited term classified persons
Provisional classified persons
Substitutes

This section also excludes from the unit certificated employees and "[n]on-classified positions, such as noon duty assistant; student helper; student worker; teacher aide, elementary; teacher aide, secondary; teacher aide, physical education; inspector, and Department Vocational Rehabilitation Worker."

The CBA at Article XI, Section O, "Holiday Leave," provides as follows:

1. Holidays shall be those days designated as holidays by statute, as well as those designated by the [governing] Board as local holidays. The dates of those holidays shall be determined based upon the District's instructional calendar. The holidays currently designated are:

    Independence Day[4]
    Labor Day
    Veteran's Day
    Thanksgiving Day
    Day after Thanksgiving
    Day before Christmas
    Christmas Day
    New Year's Eve (in lieu of 9/9)
    New Year's Day
    Martin Luther King's Birthday
    Lincoln's Birthday
    Washington's Birthday
    Memorial Day

2. In addition to the holidays designated above, each unit member shall be entitled to one (1) day designated as a paid floating holiday to be used on a day selected by the unit member with prior approval of his or her immediate supervisor. The floating holiday may not be carried over to the following year.

[4] I take administrative notice that Independence Day occurs each year on July 4, and that in 2012, July 4 was on a Wednesday.

3. In order to be eligible for any paid holiday, a unit member must be on paid status on the working day immediately preceding or succeeding the holiday.

Holiday Pay in Summer 2012

Two classified unit members testified who were working in the summer of 2012.[5] The first, Sandra Acosta, holds the position of "Clerical II Bilingual."[6] She has worked in this position for 16 years, and during that time has worked over summer school session 14 times. She worked during summer school in 2012, and was working on July 3 and July 5, 2012. She did not receive any holiday pay for the July 4 holiday in her next pay warrant. In all of the years that Acosta has worked during summer school, except in cases where there was an intervening weekend, she also worked on July 3 and/or July 5 of those years, but never received holiday pay for July 4.

Treenitta Harber held the position of Bus Driver for the District for 10 years before she was laid off in or around 2014. Bus Driver is a position listed within the Inclusions section of the CBA recognition article. Harber was also the Chief Shop Steward and on the negotiating team for Chapter 32 during the time at issue. Because of her leadership role within Chapter 32, she dealt with employee concerns over working conditions. Harber worked during the summer session at the District from 2004 until 2013.[7] In 2009, 2010, and 2011, she actually worked on July 4, driving children to the beach. During those three years, she was paid overtime for actually working on the holiday. Harber testified that between 2004 and 2011, she always

[5] All dates hereafter refer to calendar year 2012 unless stated otherwise.

[6] "Clerical Assistant II" is a position listed in the "Inclusions" section of the CBA recognition article discussed above. The District did not dispute at hearing or in its brief that Acosta's position is included in the bargaining unit represented by Chapter 32.

[7] In 2013, after the events at issue here, Harber was paid for the July 4 holiday.

received holiday pay for July 4, regardless of whether she worked on the holiday itself. Harber worked during summer school in 2012, and specifically on July 3 and July 5. When she received her pay warrant covering the first week of July, on or about July 15, she noticed that she had not been paid for July 4 and time records indicated "zero hours" for that day. This was the first time that had happened in her District employment.

Efforts by Chapter 32 to Investigate and Resolve the Holiday Pay Issue

Harber inquired about the holiday pay issue with her immediate supervisor, Shaunte Boatright, and other District employees, without resolution. Harber also was approached by and spoke to other bargaining unit employees who worked on the days surrounding July 4, but did not get paid. None of the people Harber had contact with over the issue gave testimony at hearing. Having received no answer explaining why she and other employees were not paid, Harber then contacted CSEA Labor Relations Representative Donald Lockwood to request assistance over the issue.[8] Lockwood testified, without contradiction, that Harber's contact with him over the issue was the first time he became aware that the District did not pay unit employees for the July 4 holiday. It is undisputed that he never received notice from the District that it would cease paying holiday pay for employees for July 4. During cross-examination, Lockwood testified as follows regarding CSEA's awareness of the District's practices regarding paying holiday pay for employees on July 4:

> Q When you became labor rep, did you know whether the District had a practice of paying the as-needed employees for the 4th of July?
>
> A I did not know.
>
> Q Do you know today?

[8] Lockwood has been the CSEA-provided representative to Chapter 32 since September 2011.

A No, I still don't know today. I haven't received the requested information. I know what you say when you're here, but that's –

Q No, I'm asking you, Mr. Lockwood.

A That's all I've heard.

Q So you have no knowledge one way or another of what the practice of the District is concerning paying for as-needed employees for the 4th of July holiday, correct?

A Other than what's been said here, I don't know for a fact, no.

(Hearing Transcript, Vol. II, pp. 90-91.)

On July 16, Lockwood wrote a letter to District Superintendent Brian Jacobs,[9] notifying him that the District had not paid unit Bus Drivers for the July 4 holiday as required by the CBA and Education Code section 45203.[10] Lockwood noted CSEA's concern that other unit employees, not just Bus Drivers, had also not received their holiday pay. Thus, Lockwood requested that the District provide a list of all unit members performing summer work for the District (who were not 12-month employees), a list of all unit employees who were and were not paid for July 4, and salary warrants for employees as demonstrative evidence of the requested list. Lockwood further noted CSEA's desire to resolve the issue at the "local level." The District did not respond to this letter.

[9] Superintendent Jacobs did not testify. However, because of his status as District superintendent, a party admissions exception to the hearsay rule applies to his out of court statements. (Evid. Code, § 1220; PERB Regulation 32176; *Chula Vista Elementary School District* (2011) PERB Decision No. 2221.)

[10] That code section requires that all permanent and probationary classified employees who are in "paid status" for any portion of the working day immediately preceding or succeeding the July 4 holiday are entitled to pay for the holiday.

On July 27, Lockwood had a telephone conversation with Transportation Department Supervisor Boatright. Lockwood informed Boatright that he wanted to set up a meeting with her to discuss the holiday pay issue. Lockwood testified that this was Chapter 32's attempt at setting an informal department-level meeting under the parties' grievance procedure.[11] Boatright informed Lockwood that there were ongoing departmental organizational changes, and the meeting would need to be scheduled with Mark Toti, another supervisor, who was then on vacation. Lockwood offered the dates of August 16 and 17 as possible meeting dates upon Toti's return. Lockwood testified, without contradiction, that he attempted to reach Boatright again on August 1 and 13, without success, to confirm the meeting date. The meeting never occurred.

On August 24, having received no response from the District over his earlier letter to Superintendent Jacobs, he wrote to him again demanding that the District cease and desist from failing to pay employees' holiday pay as required by the CBA. Lockwood reiterated Chapter 32's earlier information request and demanded a response thereto by September 7.

On September 11, Superintendent Jacobs responded to Lockwood by letter, stating verbatim, in part:

> If you truly believe that the District Leadership has violated an employees rights, then why have they themselves, or you not followed the agreed upon method of dealing with a contract dispute. You continually write me directly in lieu of following

[11] CBA grievance procedures are found at Article V of the parties' expired agreement. An informal meeting at the supervisor or department level is required to be pursued by "reasonable attempt" before the filing of a formal, written grievance at Level I. The informal level is to be completed within the time limits for Level 1, which is "no . . . later than twenty (20) days . . . after the grievant knew or reasonably should have known of the occurrence of the act or omission giving rise to the grievant." A "day" is any day in which the District central office is open for business. The Level I written grievance must be initiated not later than 20 days after the conclusion of the informal level.

> the practices as outlined in the current collective bargaining agreement.
>
> I also realize you are making demands of me as Superintendent, but please understand I am not required to provide any of the items you have listed within your letter. Should an employee feel so led to provide a salary warrant to you, that is their prerogative. The other items you demanded of me, would have appeared within the Governing Board Agenda under Personnel if any action were necessitated. I believe you receive a Board Agenda book prior to every Governing Board meeting.
>
> On another note, I am hopeful in the near future you will take a step back and look at how you are leading, and why it is that you are pursuing such an antagonistic relationship, rather than finding acquiescent ways to have an effective and sustaining relationship. Since your arrival, you have yet to truly want to establish a collaborative working relationship and seek amenable answers to the issues that arise.

On September 19, Lockwood wrote back to Superintendent Jacobs, stating that his attempts at initiating an informal grievance meeting with the department had been fruitless, and reminding him that since the CBA had expired, binding arbitration under the grievance procedure had also expired. Lockwood stated: "If the District is willing to agree to use binding arbitration as the final resolution to grievances, CSEA is more than willing to agree to [it] as well." Lockwood also denied receiving a "Board Agenda book" prior to every meeting of the District's governing board.[12] He again reiterated CSEA's information request, this time eliminating the request for employee pay warrants, and narrowing it to a list of those unit employees working over the summer, excluding 12-month employees, who were or were not paid on July 4.

[12] During cross-examination, Lockwood admitted to his belief that the Chapter 32 president receives a copy of the "Board book" before District governing board meetings.

On October 12, Lockwood and Chapter 32 President Diane St. Clair[13] attended a regularly-scheduled meeting with Superintendent Jacobs. The July 4 holiday pay issue came up during their discussion. Lockwood represented that Chapter 32 was trying to resolve the issue short of filing an unfair practice charge. Superintendent Jacobs said he would look into the issue and get back to Lockwood and St. Clair.

On December 19, having heard nothing from the District over the July 4 holiday pay issue in the interim, Lockwood wrote to Superintendent Jacobs recapping the discussion at the October 12 meeting and asking whether the District was willing to meet to discuss the issue before Chapter 32 must resort to filing with PERB to meet statutory time limits. The record does not demonstrate that Superintendent Jacobs ever responded and no meeting was scheduled.

On May 15, 2014, before hearing was set to commence in this case, Lockwood received an email message from the District's legal counsel with a list of unit Bus Drivers that were working between July 1 and July 15 during the timeframe at issue here. None of them were paid for July 4. Lockwood acknowledged that this list was partially responsive to CSEA's information request. Lockwood then requested, via email to District counsel on May 20, 2014, additional payroll records for Instructional Aides working in the summer of 2012, which District counsel had previously indicated were available. Lockwood requested an explanation for an assertion by counsel that the District did not have records for any other classifications that worked during the relevant time period.

[13] St. Clair did not testify.

On July 22, 2014, the final day of hearing, the District provided to CSEA a Board Agenda that purported to show all unit classifications who were working during the summer of 2012.

## ISSUES

1. Did the District unilaterally change its policy regarding holiday leave pay during the summer of 2012?

2. Did the District violate its duty to bargain in good faith by failing to respond in a timely manner to Chapter 32's requests for necessary and relevant information?

## CONCLUSIONS OF LAW

1. Unilateral Change to Holiday Leave Policy

A. Legal Standards Regarding Unilateral Employer Action and Deferral to Arbitration

Chapter 32 has alleged that the District has violated its duty to bargain in good faith under EERA section 3543.5, subdivision (c), by making an unlawful unilateral change to terms and conditions of employment. Unilateral changes to matters within the scope of representation are per se violations of the duty to bargain in good faith. (*Stockton Unified School District* (1980) PERB Decision No. 143; *San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813.)[14] This is because such conduct has an inherently destabilizing and detrimental effect upon the parties' bargaining relationship. (*San Mateo County Community College District* (1979) PERB Decision No. 94.)

[14] When interpreting EERA, it is appropriate for PERB to derive guidance from court and administrative decisions interpreting the National Labor Relations Act (NLRA) (29 U.S.C., § 151 et seq.) and parallel provisions of California labor relations statutes. (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12-13; see also *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 (*Fire Fighters*).)

To state a prima facie violation, it must be established that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun*); *County of Santa Clara* (2013) PERB Decision No. 2321-M.)

A policy may be dictated either by written agreement or by regular and consistent past practice. For a past practice to be binding and subject to a unilateral change analysis, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*County of Placer* (2004) PERB Decision No. 1630-M; *Riverside Sheriffs' Association v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186 (*Hacienda La Puente*).)

When a policy is established by the mutually bargained-for terms embodied within the parties' written agreement, the Board has explained the guiding principles behind its analysis for unilateral change:

> When interpreting collective bargaining agreements, including in unilateral change cases, the Board applies traditional rules of contract law, such as the provisions of Civil Code sections 1638[15] and 1641.[16] (*King City Joint Union High School District*

[15] That section states: "The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

[16] That section states: "The 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."

> (2005) PERB Decision No. 1777; see also, *City of Riverside* (2009) PERB Decision No. 2027-M.) Each contract clause must be read in conjunction with phrases surrounding it and harmonized as a whole. (*Long Beach Community College District* (2003) PERB Decision No. 1568.) The Board's interpretation should harmonize any potential conflict between provisions of the agreement and give a "reasonable, lawful and effective meaning to all the terms," as provided in Civil Code section 1641. (*King City Joint Union High School District, supra,* PERB Decision No. 1777.) The interpretation given must avoid leaving any provision without meaning. *(City of Riverside, supra*, PERB Decision No. 2027-M.)

(*Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, adopting partial dismissal, p. 2 (*LA Superior Court*).)

EERA Section 3541.5, subdivision (a), states, in pertinent part, that PERB shall not:

> Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining] agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a, p. 4, the Board explained that:

> While there is no statutory deferral requirement imposed on the National Labor Relations Board (hereafter NLRB), that agency has voluntarily adopted such a policy both with regard to post-arbitral and pre-arbitral award situations. [Fn. omitted.] EERA section 3541.5(a) essentially codifies the policy developed by the NLRB regarding deferral to arbitration proceedings and awards. It is appropriate, therefore, to look for guidance to the private sector.

(*Ibid.*; footnote omitted; see also *State of California (Department of Food and Agriculture)* (2002) PERB Decision No. 1473-S (*Department of Food and Agriculture*).) In *Collyer Insulated Wire* (1971) 192 NLRB 837, and subsequent cases, the NLRB articulated standards

under which deferral to the contractual grievance procedure is appropriate in pre-arbitral situations. These requirements are: (1) the dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent toward the charging party; (2) the respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and (3) the contract and its meaning must lie at the center of the dispute.

PERB will not order pre-arbitration deferral unless the arbitration is final and binding (*Pittsburg Unified School District* (1982) PERB Decision No. 199 (*Pittsburg*)), and the employer demonstrates its willingness to arbitrate on the merits by specifically waiving its contract-based procedural defenses. (*Department of Food and Agriculture*, *supra*, PERB Decision No. 1473-S.) If a charging party demonstrates that deferral to arbitration would be futile, exhaustion of that process is not required. (EERA, § 3541.5, subd. (a)(2).) Futility can be demonstrated, among other ways, by an employer's failure to waive procedural bars to arbitration on the merits of the claim. (See *Department of Food and Agriculture*, *supra*, PERB Decision No. 1473-S, pp. 10-13, overruling *Lake Elsinore School District* (1987) PERB Decision No. 646 (*Lake Elsinore*), to the extent that *Lake Elsinore* found that the failure to waive procedural defenses did not render deferral futile; see also *State of California (Department of Corrections)* (2003) PERB Decision No. 1540-S (*Department of Corrections*).) An arbitration clause in a grievance process does not continue in effect after the expiration of the contract, except for disputes that: (1) involve facts and occurrences that arose before expiration; (2) involve post-expiration conduct that infringes on rights accrued or vested under the agreement; or (3) under normal principles of contract interpretation, survive expiration of

the agreement. (*Trustees of the California State University* (1997) PERB Decision No. 1231-H (*CSU*).)

B. Analysis

i. Deferral to Arbitration

The District alleged as an affirmative defense in its Answer that the complaint is barred by Chapter 32's "failure to follow administrative remedies, including the grievance procedure[,] prior to filing the unfair labor practice charge." In its brief, the District cites to EERA section 3541.5, subdivision (a), quoted above, for the proposition that the parties' grievance procedure, culminating in binding arbitration, divests PERB of jurisdiction to decide the instant dispute. Thus, it is presumed that the District intended to raise deferral to arbitration as an affirmative defense and it is concluded that the issue has been adequately raised.

The District claims that Chapter 32 cannot pursue the charge because it chose not to file a grievance within the negotiated timeframes under the CBA, and instead wrote an "accusatory and inciting letter to the Superintendent[.]" The District quotes *Desert Sands Unified School District* (1995) PERB Decision No. 1102, thusly: "since *Lake Elsinore*[, *supra*, PERB Decision No. 646], PERB has held that waiver or nonwaiver of procedural defenses to arbitration is irrelevant to the issue of deferral under EERA." (District's closing brief, p. 20.) The District relies on this precedent to support the notion that Chapter 32's failure to timely initiate a grievance should not preclude deferral of the claim. The District cites *Long Beach Community College District* (2003) PERB Decision No. 1564 (*LBCCD*), for the premise that since PERB has found equitable tolling of the statutory period to pursue an unfair practice charge by utilization of grievance procedures that do not culminate in binding arbitration,

deferral is preferred because it promotes EERA's ultimate purpose in using negotiated procedures to resolve conflicts rather than unfair practice charges. These arguments are unavailing.

First and foremost, as discussed in the authorities cited above, PERB will not defer unless the arbitration process is final and binding. (*Pittsburg*, *supra*, PERB Decision No. 199.) Since the CBA was expired[17] at the time of this dispute, binding arbitration was therefore not available, as the conduct at issue did not arise prior to the expiration of the contract and there are no facts to suggest that the dispute involved any vested contractual rights. (*CSU*, *supra*, PERB Decision No. 1231-H.) Therefore, deferral to a non-binding procedure is not appropriate. The District's reliance on *LBCCD*, *supra*, PERB Decision No. 1564, is misplaced.

Second, Chapter 32 specifically expressed its willingness to proceed to arbitration in this matter through Lockwood's letter to Superintendent Jacobs on September 19, if the District would agree to a binding arbitration process. Chapter 32 representatives subsequently met with and communicated in writing with the Superintendent. There are no facts in the record showing the District ever agreed to submit to a binding process or otherwise waived its contract-based procedural defenses to proceeding to binding arbitration on the merits of the claim. Since Lockwood's attempts at initiating the informal level grievance meeting were unsuccessful due to management's inaction and he concluded that a formal Level I grievance

[17] When a CBA expires, the employer is generally obligated to maintain the status quo as established by the expired agreement pending the completion of negotiations. (*Temple City Unified School District* (1990) PERB Decision No. 841.) However, not all terms of an agreement are enforceable post-expiration, such as, binding arbitration provisions (*CSU*, *supra*, PERB Decision No. 1231-H) and waivers of statutory rights. (See, e.g., *Los Angeles Unified School District* (2013) PERB Decision No. 2326; *Antelope Valley Union High School District* (1998) PERB Decision No. 1287.)

was going to be a waste of time, it was not initiated within the 20-day contractual time limit. Thus, in order for deferral to be viable, it would have been necessary for the District to waive its procedural defenses. That the District failed to communicate its willingness to proceed to a binding process on the merits renders deferral futile under the circumstances, notwithstanding the District's reliance on outmoded case law to the contrary. (*Department of Corrections*, *supra*, PERB Decision No. 1540-S; *Department of Food and Agriculture*, *supra*, PERB Decision No. 1473-S, pp. 10-13.) In short, deferral is not appropriate under these facts, and PERB has jurisdiction over the alleged unfair practice.

ii. Unilateral Change

To recap, the test for unlawful unilateral change under *Fairfield-Suisun*, *supra*, PERB Decision No. 2262 requires demonstration of four essential elements:

> (1) a change in policy;
> (2) to a matter within the scope of representation;
> (3) without notice and opportunity to bargain;
> (4) that has a generalized and continuing effect on employment conditions.

There is no dispute that the issue here involves wages, which is squarely within the scope of representation under EERA section 3543.2, subdivision (a)(1). Thus, the second element of the test for unlawful unilateral change is met. Regarding notice, the third element of the test above, the uncontroverted evidence at hearing demonstrated that Chapter 32 did not receive prior notice from the District that unit employees were not going to receive holiday pay, and did not find out until Harber discovered that pay missing from her warrant. Thus, a lack of notice and opportunity to bargain is adequately demonstrated.[18] Regarding the fourth

[18] The District raised timeliness of the charge as an affirmative defense in its answer. However, it presented no evidence challenging Chapter 32's account of when it learned of the alleged unfair practice, and did not argue this theory in its brief. Thus, it failed its burden to

element above, in answering paragraph 4 of the complaint, the District stated that it: "had never paid holiday pay for employees who are working in extra duty assignments outside their probationary or permanent status." A respondent's admissions in an answer to a complaint are conclusive concessions of the truth of a matter that serve to remove an issue from controversy. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 15, citing *Pinewood Investors v. City of Oxnard* (1982) 133 Cal.App.3d 1030, 1035.) It is clear that the District has taken the position in its answer that it is entitled to take the action alleged here to violate EERA, i.e., the failure to pay holiday leave pay under the CBA. Where an employer maintains that it has the right to take the challenged action, a generalized and continuing effect on the unit is demonstrated. (*County of Riverside* (2003) PERB Decision No. 1577-M; *Hacienda La Puente, supra*, PERB Decision No. 1186.) Thus, the fourth element of the test above is also demonstrated. The main controversy here surrounds the first element of the test, whether there was a change in policy. As discussed below, I conclude that there was a change.

To dispute that there has been a change in policy, the District argues that Article XI, Section O, does not afford unit members who are not "regularly" employed in the summer, presumably 12-month employees, entitlement to holiday leave pay. The District states in its brief at page 12:

> The District contends that Section O applies to unit members employed and performing their regular assignment. CSEA's interpretation seeks to expand the applicability of Section O to any unit member, regardless of whether the unit member is performing his or her regular assignment, that is unit members performing extra-duty assignments at the pleasure of the District's Board. . . . On its face, Section O **does not** include its applicability to unit members serving in extra-duty assignments, like the bus driving summer school assignments in this case.

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demonstrate untimeliness of the charge under *Los Angeles Unified School District* (2014) PERB Decision No. 2359.

(Emphasis in original.) This argument is wholly unpersuasive for several reasons. First, Section O is silent regarding, and thus draws no distinction between, its applicability to assignments that are "regular," i.e., presumably filled by 12-month employees, versus so-called "extra-duty," i.e., filled by employees who are less than 12-month employees. Under the clear and unambiguous language of the provision, the only caveat for a unit member to receive holiday pay is to be in paid status on the working day immediately preceding or succeeding the holiday. In order for the District's argument to hold weight, it would need to be demonstrated that any unit employee who is usually employed on less than a 12-month basis is no longer considered to be within Chapter 32's bargaining unit, if working for the District during the summer.[19] The District offered no factual or legal support for this contention, however.

Second, the clear and unambiguous terms of Article I, "Recognition," do not support the District's theory. The language under the "Exclusions" section of the article does not support the contention that a unit member employed under one of the classification titles listed under the "Inclusions" section loses his or her bargaining unit status when working in "extra-duty" assignments. Under "Exclusions," the only persons specifically excluded from the unit are: certain management, supervisory, and confidential employees; certificated employees; non-classified positions, such as, "noon duty assistant; student helper; student worker; teacher aide, elementary; teacher aide, secondary; teacher aide, physical education; inspector, and Department Vocational Rehabilitation Worker"; and all casual and limited-term assignments, or those whose primary employment is elsewhere, such as: "Lay Reader, Limited term

[19] As noted herein, the District answered paragraph 4 of the complaint by stating that it "had never paid holiday pay for employees who are working in extra duty assignments outside their probationary or permanent status." The District's brief does not expand on, explain, or provide legal support for the idea that employees working extra-duty assignments over the summer lose their status as probationary or permanent classified employees.

classified persons, Provisional classified persons, [and] Substitutes." Notably, the "Exclusions" section does not mandate that bargaining unit employees working in less than 12-month assignments are excluded from the unit when working in "extra-duty" assignments over the summer.

Furthermore, there was no evidence, nor did the District argue in its brief, that bargaining unit employees working in the summer were considered to be on "casual" or "limited-term" assignments, such that they would be considered excluded under the proviso above, or that they were employed in the summer under different classification titles than those listed under "Inclusions." There was also no evidence presented showing that unit employees working in the summer were not otherwise subject to the same salary, benefits, grievance, evaluation, and other provisions of the CBA that apply to them during the regular school year. Reading Article I and Section O together, there is no basis to conclude that "unit member" in this situation does not apply to unit employees employed on less than a 12-month basis who are working in the summer.[20] (Civ. Code, § 1641; *LA Superior Court, supra*, PERB Decision No. 2112.) Thus, the District's departure from the unambiguous language of Section O, affording a unit member the right to holiday pay if working on the days surrounding the holiday was a clear change in policy no matter how long it believed it was privileged to implement its own interpretation of the contract. (*Marysville Joint Unified School District*

[20] The District also argues that the parties never intended Section O to apply to employees performing extra-duty assignments in the summer because the provision regarding unit employees' one floating holiday not being able to be carried over to the following year (Section O.2) would be rendered meaningless, as employees could earn a second floating holiday and it is uncertain when they would be able to exercise it. The argument is unclear. Independence Day is not a floating holiday, and is uncertain whether employees working extra-duty over the summer would even earn a second floating holiday as the District speculates. In any event, nothing in the language of the CBA supports the District's contention that unit members are stripped of their bargaining unit status when working in extra-duty assignments.

(1983) PERB Decision No. 314 [clear and unambiguous contract terms dictate policy and trump past deviation from the policy].)

The District next argues that, even if Section O was considered ambiguous and therefore open to extrinsic evidence over the policy, Chapter 32 failed to demonstrate a regular and accepted past practice of paying holiday pay for extra-duty employees working in the summer. The District points to Lockwood's admission that he was not sure what the District's practice was in this regard. Notwithstanding that I have concluded that the policy is set forth in the parties' agreement, the argument is unconvincing because Lockwood had no cause, before Harber informed him that holiday pay was missing in 2012, to question that the District was following the terms of the contract. Moreover, the District's argument here is contradictory. It claims that Bus Drivers, like Harber, were working extra-duty assignments in the summer and that it never paid July 4 holiday pay in that situation. (See District's Closing Brief, p. 12.) Yet, the uncontradicted evidence is that Harber always received holiday pay, except for 2012, the year in question. The fact that the District seemingly always failed to pay Acosta for July 4 does not obviate its routine practice of paying holiday leave to employees working extra-duty assignments in past years.

Chapter 32 has demonstrated all of the required elements to show an unlawful unilateral change. The District has neither asserted nor proven that its duty to bargain over this change was excused. Thus, the District has violated EERA section 3543.5, subdivision (c) by failing and refusing to bargain in good faith with Chapter 32. These actions derivatively violated EERA section 3543.5, subdivisions (a) and (b). (*Fairfield-Suisun, supra*, PERB Decision No. 2262.)

2. Information Request Allegation

Stemming from the duty to bargain in good faith is the obligation on the part of the employer to supply an employee organization, upon request, with sufficient information to enable it to understand and intelligently discuss the issues raised in bargaining. (*Trustees of the California State University* (1987) PERB Decision No. 613-H (*California State University*).) This obligation is based on the premise that, without such information, employee organizations would be unable to properly perform their duties, and therefore no bargaining could take place. (*Ibid.*) "An employer's refusal to supply information is as much a violation of the duty to bargain as if it had failed to meet and confer with the exclusive representative in good faith." (*Id.*, adopting administrative law judge's proposed decision at p. 12, citation omitted.)

An exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (*Stockton Unified School District, supra*, PERB Decision No. 143.) PERB uses a liberal, discovery-type standard to determine the relevance of the requested information. (*California State University, supra*, PERB Decision No. 613-H.) Information requested that pertains immediately to mandatory subjects of bargaining—such as, wages, hours, and other terms and conditions of employment—is presumed relevant. (*State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Decision No. 1227-S (*DPA/Transportation*).) Furthermore, information that is necessary for an exclusive representative to decide "whether to proceed with a grievance or arbitration" on behalf of unit members is presumed relevant. (*City of Burbank* (2008) PERB Decision No. 1988-M at p. 15, citing *Ralphs Grocery Co.* (2008) 352 NLRB 128.) Once a valid request is made, "[t]he burden then shifts to the employer to either provide the information within a reasonable time of the request or overcome the presumption

of relevance." (*DPA/Transportation, supra*, PERB Decision No. 1227-S at p. 6.) An employer may not simply ignore a request, or refuse to provide information. (*Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*).) The lack of any response is deemed a flat refusal to provide the information requested, and thus a violation of the duty to bargain in good faith. (*Ibid.*)

An employer's response to a valid information request must be timely. (*Regents of the University of California* (1999) PERB Decision No. 1314-H; *Chula Vista, supra*, PERB Decision No. 834.) When a good faith demand is made for relevant information, it must be made available promptly and in a useful form. "Unreasonable delay in providing requested information is tantamount to a failure to provide the information at all." (*Chula Vista*, at p. 51.) Even a two-month delay may be untimely under certain circumstances. (*Regents of the University of California*, citing *Colonial Press, Inc.* (1973) 204 NLRB 852.) In *City of Burbank, supra*, PERB Decision No. 1988-M, the Board found an employer's late response was a violation even though it eventually produced some information, because the employer failed to act diligently and because the delay interfered with the union's preparation for arbitration. The Board found the delay in that case would have been excused had it been reasonable—i.e., justified under the circumstances and without causing prejudice to the union. (*Id.* at pp. 18-19.)

Here, it is undisputed that the District did not provide any response to Chapter 32's several requests for information for nearly two years. Since the information requested pertained to the wages of its unit and was tantamount for Chapter 32's ability to determine whether the contract had been violated by the District, it was presumptively relevant. (*City of*

*Burbank, supra*, PERB Decision No. 1988-M; *DPA/Transportation, supra*, PERB Decision No. 1227-S.)

The District argues that its "Board book" for the July 19 governing board meeting would have contained a list of employees scheduled to work over the summer, and that the CSEA president typically receives this information. This explanation does not address a significant part of Chapter 32's request for payroll information regarding who was and was not paid for July 4, which was almost certainly not information included in the "Board book." Nor does it explain why, since the District had this information readily available, it did not simply furnish it to Chapter 32 upon request. Instead, Superintendent Jacobs took the position that he was not required to provide information to Chapter 32. After that communication from the Superintendent, Chapter 32 eliminated its request for specific pay warrant information, but the District still made no effort to timely respond and simply ignored Chapter 32's request. The District did not present a case-in-chief and thus offered no facts to justify its delay. I find, therefore, that the delay was unreasonable and unexcused, and it caused prejudice to Chapter 32. (*City of Burbank, supra*, PERB Decision No. 1988-M, pp. 18-19.) Thus, the District's conduct violated its duty to bargain in good faith with Chapter 32 under EERA section 3543.5, subdivision (c), and derivatively violated EERA section 3543.5, subdivisions (a) and (b). (*Santa Monica Community College District* (2012) PERB Decision No. 2303.)

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5, subdivision (c) states:

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not

> limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The District violated EERA section 3543.5, subdivisions (a), (b), and (c) by unilaterally changing its policy regarding holiday leave pay and by failing to timely respond to Chapter 32's requests for necessary and relevant information. The appropriate remedy in a case of unilateral action is to order the employer to rescind the policy change and to return to the status quo ante. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Rio Hondo Community College District* (1983) PERB Decision No. 292.) That is appropriate here. In addition, the traditional make-whole remedy in a unilateral change case is ordered. Thus, the District is ordered to pay holiday leave for "Independence Day" 2012, for any unit employee (as defined under CBA Article I, Section A, "Inclusions") who was working and in paid status on either July 3, 2012 or July 5, 2012. Any financial losses should be augmented with interest at a rate of 7 percent per annum. (*Journey Charter School* (2009) PERB Decision No. 1945a.)

In *City of Burbank, supra*, PERB Decision No. 1988-M, the Board considered the proper remedy where an employer provided an inexcusably late, but otherwise adequate, response to an information request and determined that an order to cease and desist from the offending conduct with a notice posting was an adequate remedy in that circumstance. Here, it is probable, but not entirely clear from the record, that the District provided a complete response to the final information request on the last day of hearing in this matter. Thus, in addition to posting notice, the District is ordered to either: (1) provide a complete response to Chapter 32's request for information dated September 19, 2012, or (2) verify, in writing, to Chapter 32 that the responses provided thus far are complete.

It is also appropriate to order the District to post a notice incorporating the terms of this order at all locations where notices to unit employees are usually posted. Posting of such a notice, signed by an authorized representative of the District, provides employees with notice that the District acted in an unlawful manner, must cease and desist from its illegal action, and will comply with the order. In addition to physical posting of paper notices, the notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the bargaining unit represented by Chapter 32. (*City of Sacramento* (2013) PERB Decision No. 2351-M.) It effectuates the purposes of EERA to inform employees of the resolution of this controversy. (See *Omnitrans* (2010) PERB Decision No. 2143-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Bellflower Unified School District (District) violated the Educational Employment Relations Act (EERA or Act), Government Code section 3543.5, subdivisions (a), (b), and (c). The District violated EERA by unilaterally changing its policy regarding holiday leave pay and by failing to timely respond to California School Employees Association & its Chapter 32's (Chapter 32) requests for necessary and relevant information.

Pursuant to Government Code section 3541.5, subdivision (c), it is hereby ORDERED that the District, its governing board, and its representative shall:

A. CEASE AND DESIST FROM:

1. Failing to negotiate in good faith by enacting unilateral policy changes concerning issues within the scope of representation and by failing to timely respond to requests for necessary and relevant information by Chapter 32.

2. Interfering with the right of unit employees to be represented by Chapter 32.

3. Denying Chapter 32 its right to represent unit employees.

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

1. Rescind the policy change regarding payment of holiday leave pay and abide by the terms under the July 1, 2007-June 30, 2010 collective bargaining agreement (CBA) at Article XI, Section O.

2. Make-whole unit employees (as defined under CBA Article I, Section A, "Inclusions") for financial losses suffered as a result of the District's unlawful action who were working and in paid status on either July 3, 2012 or July 5, 2012. Any financial losses should be augmented with interest at a rate of 7 percent per annum.

3. Either: (1) provide a complete response to Chapter 32's request for information dated September 19, 2012; or (2) verify, in writing, to Chapter 32 that the responses provided thus far are complete.

4. Within 10 workdays of a final decision in this matter, post at all work location where notices to classified employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that this Notice is not reduced in size, altered, defaced or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its classified employees.

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or to the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Chapter 32.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. 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
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

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 or received by electronic mail before the close of business, 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, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-5784-E, *California School Employees Association & its Chapter 32 v. Bellflower Unified School District* in which all parties had the right to participate, it has been found that the Bellflower Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by unilaterally changing its policy regarding holiday leave pay and by failing to timely respond to California School Employees Association & its Chapter 32's (Chapter 32) requests for necessary and relevant information.

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

A. CEASE AND DESIST FROM:

1. Failing to negotiate in good faith by enacting unilateral policy changes concerning issues within the scope of representation and by failing to timely respond to requests for necessary and relevant information by Chapter 32.

2. Interfering with the right of unit employees to be represented by Chapter 32.

3. Denying Chapter 32 its right to represent unit employees.

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

1. Rescind the policy change regarding payment of holiday leave pay and Abide by the terms under the July 1, 2007-June 30, 2010 collective bargaining agreement (CBA) at Article XI, Section O.

2. Make-whole unit employees (as defined under CBA Article I, Section A, "Inclusions") for financial losses suffered as a result of the District's unlawful action who were working and in paid status on either July 3, 2012 or July 5, 2012. Any financial losses should be augmented with interest at a rate of 7 percent per annum.

3. Either: (1) provide a complete response to Chapter 32's request for information dated September 19, 2012; or (2) verify, in writing, to Chapter 32 that the responses provided thus far are complete.

Dated: _____ BELLFLOWER UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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