STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MICHAEL ROBERTSON, Charging Party, v. SAN DIEGUITO UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6111-E PERB Decision No. 2511 January 24, 2017

Appearances: Michael Robertson, on his own behalf; Fagen, Friedman & Fulfrost by Jordan I. Bilbeisi, Attorney, for San Dieguito Union High School District.

Before Winslow, Banks and Gregersen, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Michael Robertson (Robertson) from the dismissal (attached) by PERB's Office of the General Counsel of Robertson's unfair practice charge. The charge, as amended, alleged that the San Dieguito Union High School District (District) violated section 3547 of the Educational Employment Relations Act (EERA)[2] by: (1) by failing to comply with public notice requirements concerning its negotiations with the San Dieguito Faculty Association (Association); (2) failing to provide the public with reasonable notice of a

[1] PERB Regulation 32320, subdivision (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 Regs., tit. 8, § 31001 et seq.)

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

special meeting at which the District's governing board would vote on a tentative agreement (TA); and (3) entering into new subjects of bargaining without providing the public 24 hours' notice. The Office of the General Counsel dismissed the charge for untimeliness and for failure to state a prima facie case of any violation of EERA.

The Board has reviewed the case file and has fully considered the relevant issues and contentions raised by Robertson's appeal, the District's opposition to the appeal, and applicable law. The warning and dismissal letters accurately describe the factual allegations included in the unfair practice charge, as amended, and the Office of the General Counsel's legal conclusions are well-reasoned and in accordance with applicable law. Based on this review, the Board adopts the warning and dismissal letters as a decision of the Board itself, subject to the following discussion of issues raised in Robertson's appeal.

DISCUSSION

EERA's "sunshine" provisions require presentation at a public meeting of all the initial collective bargaining proposals between a public school employer and the exclusive representative of its employees, and a reasonable period of notice and opportunity for public comment before the public school employer adopts its initial proposal and bargaining commence. (EERA, § 3547, subds. (a), (b), (c).) The statute also requires that "[n]ew subjects of meeting and negotiating arising after the presentation of initial proposals shall be made public within 24 hours," and that any vote taken by the public school employer's governing board shall be made public within 24 hours. (*Id.* at subd. (d).) The purposes of the sunshine provisions are to ensure that the public is informed of the issues being negotiated and has full opportunity to comment on these issues, and to ensure the public knows the positions of

elected representatives on the public school's governing board. (EERA, § 3547, subd. (e); *Standard School District* (2012) PERB Decision No. 2273 (*Standard*), p. 9.)

Robertson appeals from the Office of the General Counsel's dismissal of his allegation that the District's initial proposal was too vague to satisfy EERA's sunshine requirement. The Office of the General Counsel dismissed this allegation as untimely, reasoning that, although Robertson knew or should have known the material facts underlying this allegation on or about May 7, 2015, when the District's initial proposal was made public, he did not file an unfair practice charge until February 10, 2016, well after the six-month limitations period had run. Robertson argues on appeal that the Office of the General Counsel mischaracterized the allegations and that his charge was timely filed because the District's initial proposal was too vague to inform the public of the issues to be negotiated. According to the appeal, until the allegedly new subjects of bargaining were revealed in a TA published and approved by the District in December 2015, Robertson could not have known that new subjects had been discussed in violation of EERA's sunshine requirements. As discussed in the warning letter, Robertson attempts to conflate two theories of liability, based on different provisions of the statute.

The statute of limitations for a charge alleging a violation of the public notice provisions of EERA section 3547, subdivisions (a) through (c), begins to run either upon publication of a public notice of a meeting at which bargaining proposals will be sunshined or at the public meeting itself. (*Standard, supra,* PERB Decision No. 2273, p. 9.) If the charge alleges that the notice itself was defective, the statute of limitations begins to run upon publication of the notice. (*Ibid.*) If the charge alleges that the notice itself was proper but the proposals sunshined at the meeting failed to comply with the provisions of EERA

section 3547, the limitations period begins to run on the date of the meeting where the proposals were presented to the public. (*Ibid*.)

By contrast, the statute of limitations for an allegation that new topics were discussed without public notice, in violation of EERA section 3547, subdivision (d), begins to run when the charging party knew or should have known that new subjects were discussed, typically through publication of a tentative or final agreement including previously undisclosed subjects. (*California State University* (1989) PERB Decision No. 719-H, p. 8.) To interpret the statute otherwise would require disclosure of *all* bargaining notes and intermediate proposals or opening otherwise closed bargaining sessions to public scrutiny, and potentially undermining their effectiveness as a forum for frank and open discussion. (*Ibid*.; *State of California (Department of Personnel Administration)* (1992) PERB Decision No. 921-S, p. 5; see also EERA § 3549.1; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, pp. 28-34.) The public notice requirements found in section 3547 were never intended to be read in isolation or to be interpreted in a manner that would frustrate EERA's purpose of improving employer-employee relations through collective bargaining, culminating in final agreements between public school employers and the exclusive representatives of their employees. (*Standard*, *supra*, PERB Decision No. 2273, p. 7, citing *Los Angeles Community College District* (1978) PERB Order No. Ad-41.)

Robertson is free to argue one or both of the above theories of liability, but he is not free to create a third, hybrid unfair practice that combines the two, when the Legislature has not done so. When reviewing an unfair practice charge, the Board and its agents have the power to determine which provisions of law are implicated by the factual allegations in the charge (*Barstow Unified School District* (1996) PERB Decision No. 1138a, p. 10; *State Employees*

Trades Council United (Ventura, et al.) (2009) PERB Decision No. 2069-H, pp. 6-7) and, regardless of how Robertson seeks to characterize his allegations, the Office of the General Counsel appropriately interpreted Robertson's charge as alleging, among other things, that the District's initial proposals were too "vague" and "amorphous" to satisfy the sunshine requirements of EERA section 3547, subdivisions (a) through (c). For the reasons explained in the warning letter, this allegation is untimely, because the charge was not filed with PERB until more than six months after publication of the District's initial proposals. (EERA, § 3541.5, subd. (a)(1); *Coachella Valley Mosquito & Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090.)

Robertson also appeals the dismissal of his separate allegation that the TA published on the District's website on December 16, 2015 contained previously undisclosed subjects of bargaining. Here, the material allegations pertain to events within six months of February 10, 2016, the date Robertson filed his original charge, and thus, the allegation is timely. However, for the reasons explained in the warning letter, Robertson's charge does not allege a prima facie violation that new subjects were discussed without public notice because the subjects included in the TA were inextricably related to the subjects previously disclosed in the District's initial proposal.

Initial proposals presented to the public must be sufficiently developed to permit the public to comprehend them. (*Palo Alto Unified School District* (1981) PERB Decision No. 184, p. 3.) An initial proposal which simply states the subject matter of a proposal, such as wages, does not adequately inform the public of the issues to be negotiated. (*Ibid.*) Moreover, although an interest-based bargaining approach, as was used in this case, tends to produce initial proposals that do not include specific details, the perceived or actual advantages of this approach do not

relieve the parties of their obligations to provide the public with notice of sufficiently developed initial proposals to satisfy the intent of the statutory public notice requirements. (*Ocean View Teachers Association (Busch)* (1992) PERB Decision No. 943, p. 5; *Los Angeles Unified School District* (1992) PERB Decision No. 964 (*LAUSD*), pp. 9-12.) Consequently, the Board has held that initial proposals presented in the context of interest-based bargaining must be reviewed closely on a case-by-case basis so as not to frustrate the public notice requirements of EERA.

However, as explained in the warning letter, the provisions of a TA that are inextricably[3] interconnected to the subjects disclosed in an initial proposal are not "new" subjects within the meaning of EERA section 3547, subdivision (d). (*Antioch Unified School District* (1986) PERB Decision No. 581, p. 6) Additionally, the obligation to present initial proposals applies to "[a]ll initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation." (EERA, § 3547, subd. (a).) It follows from the mutual obligation to meet and negotiate over mandatory subjects found in EERA section 3543.3 that when one party to negotiations identifies a subject in its initial proposal, the public is on notice that both parties will negotiate over that subject. (*Standard, supra*, PERB Decision No. 2273, p. 5.)

The Association submitted an initial proposal that it would seek to "[m]aintain the security and stability of the financial compensation and health care for certificated unit members." Although the District did not specify that it would seek to negotiate financial compensation and health care, to the extent economic issues were negotiated, it submitted initial proposals "[t]o be proactive and fiscally prudent" and "[t]o ensure long-term budget stability for

[3] The warning letter incorrectly uses the phrase "inexplicably" interconnected. Although we correct the editing error, we do not see how this oversight substantially affected Robertson's rights or the outcome of this case and therefore disregard it as harmless. (*Fremont Unified School District* (2003) PERB Decision No. 1528.)

the District." It also submitted an initial proposal expressing its interest in "retain[ing] highly qualified certificated staff." Taken together, these initial proposals notified the public that the District and the Association would be negotiating economic issues such as financial compensation and benefits, within the context of their respective interests in maintaining budget and employee stability. Thus, the Office of the General Counsel correctly concluded that provisions in the TA pertaining to salary increases, the Flexible Benefit Account revision, the English Learner stipend elimination, and employee leave rights were not "new subjects" because they were inextricably connected to the District's and the Association's initial proposals. (Warning letter, p. 6.)

The Association also submitted an initial proposal to "[i]mprove the quality of education provided to SDUHSD students by decreasing class sizes at all District schools." Given the financial impact of class size reductions, the public was also reasonably on notice that, although the District was not seeking to reduce class sizes, it would negotiate over class-size from the standpoint of the District's interests in being "proactive and fiscally prudent," "ensur[ing] long-term budget stability for the District," and "retain[ing] highly qualified certificated staff." The public was further notified that the District had an interest in "support[ing] opportunities for academic innovation and reform." Thus, the Office of the General Counsel correctly concluded that provisions in the TA that impacted learning — including class sizes, the student instructional day and classroom bell schedules — were inextricably connected to the District's and the Association's initial proposals. (Warning letter, p. 6.)

The Association also submitted an initial proposal to "[i]mprove the quality of District-provided instruction by decreasing or eliminating unnecessary or non-instructional workload demands placed upon certificated unit members." This language notified the public that the

Association would seek to negotiate reductions in teacher responsibilities, including non-instructional responsibilities outside the workday. The public was also reasonably on notice that the District, although not seeking to decrease or eliminate teacher workload demands, would negotiate with the Association over any such proposal from the standpoint of the District's interests in "retain[ing] highly qualified certificated staff" and "support[ing] opportunities for academic innovation and reform." Thus, provisions in the TA that impacted the teacher workday and workload — including class sizes, staff allocations, master schedule development, the instructional day and bell schedule modifications, and allowing the Workload Reduction program to sunset — were inextricably connected to the District's and the Association's initial proposals.

In reviewing the subjects identified in Robertson's charge, the Board has held that proposals of similar specificity were adequate to allow the public to understand the issues to be negotiated and thus, the charge does not include sufficient facts to state a prima facie case that the District negotiated over "new" subjects unrelated to those included the District's and the Association's initial collective bargaining proposals. (*Ocean View Teachers Association, supra*, PERB Decision No. 943, p. 5; *LAUSD, supra*, PERB Decision No. 964, pp. 9-12; see also *Los Angeles Unified School District* (1993) PERB Decision No. 1000, pp. 6-7.)

ORDER

The unfair practice charge in Case No. LA-CE-6111-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Gregersen joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2808
Fax: (818) 551-2820

June 24, 2016

Michael Robertson

Re: *Michael Robertson v. San Dieguito Union High School District*
Unfair Practice Charge No. LA-CE-6111-E
DISMISSAL LETTER

Dear Mr. Robertson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 10, 2016. On March 31, 2016, a First Amended Charge was filed. Michael Robertson (Robertson or Charging Party) alleges that the San Dieguito Union High School District (District or Respondent) violated section 3547 of the Educational Employment Relations Act (EERA or Act)[1] by: (1) providing the public with vague sunshine proposals; (2) holding a special meeting before the School Board to vote on a tentative agreement, but failing to provide the public with reasonable notice of the meeting and time to review the tentative agreement; and (3) entering into "new subjects" of bargaining without providing the public 24 hours' notice.

Charging Party was informed in the attached Warning Letter dated June 3, 2016, 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. Charging Party was further advised that, unless he amended the charge to state a prima facie case or withdrew it on or before June 10, 2016, the charge would be dismissed.

On June 24, 2016, the undersigned Board agent spoke with Charging Party by telephone. Charging Party confirmed that he received the Warning Letter, but indicated that he believed responding to the Warning Letter would futile.

PERB has not received either an amended charge or a request for withdrawal. Therefore, the charge is hereby dismissed based on the facts and reasons set forth in the June 3, 2016 Warning Letter.

[1] EERA is codified at Government Code section 3540 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

Right to Appeal

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

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

The Board's address is:

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

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,

J. FELIX DE LA TORRE
General Counsel

By _____
Mirna Solís
Regional Attorney

Attachment

cc: Jordan I. Bilbeisi, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2808
Fax: (818) 551-2820

June 3, 2016

Michael Robertson

Re: *Michael Robertson v. San Dieguito Union High School District*
Unfair Practice Charge No. LA-CE-6111-E
WARNING LETTER

Dear Mr. Robertson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on February 10, 2016. On March 31, 2016, a First Amended Charge was filed. Michael Robertson (Robertson or Charging Party) alleges that the San Dieguito Union High School District (District or Respondent) violated section 3547 of the Educational Employment Relations Act (EERA or Act)[1] by: (1) providing the public with vague sunshine proposals; (2) holding a special meeting before the School Board to vote on a tentative agreement, but failing to provide the public with reasonable notice of the meeting and time to review the tentative agreement; and (3) entering into "new subjects" of bargaining without providing the public with 24 hours' advance notice.

Facts As Alleged

Charging Party is a member of the public.

According to the District's Position Statement, the San Dieguito Faculty Association and the District engage in *interest-based* bargaining.[2]

On May 7, 2016, before a School Board meeting, the District presented a document titled "Sunshine Statements for 2015-16 Negotiations." The document reads:

> The following statements have been identified by the San Dieguito Union High School District administration as

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[2] A Board agent is permitted to consider undisputed facts supplied by a respondent during charge investigation. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

> interests to pursue in contract discussions with the San Dieguito Faculty Association:
>
> 1. To retain highly qualified certificated staff.
> 2. To be proactive and fiscally prudent.
> 3. To ensure long-term budget stability for the District.
> 4. To support opportunities for academic innovation and reform.
> 5. To continue to strengthen the cooperative relationship between the District and SDFA, through collaborative problem solving.
>
> It is the District's goal to explore with the San Dieguito Faculty Association alternatives for achieving the mutual interests identified by both parties.

The San Dieguito Faculty Association (Association) also presented a documented titled "Sunshine Statements for the 2015-16 Negotiation." This document reads as follows:

> The following statements have been identified as a focus of new contractual discussions with the San Dieguito Union High School District.
>
> 1. Improve the quality of education provided to SDUHSD students by decreasing class sizes at all District schools.
> 2. Improve the quality of District-provided instruction by decreasing or eliminating unnecessary or non-instructional workload demands placed upon certificated unit members.
> 3. Support opportunities for academic innovation and reform.
> 4. Maintain the security and stability of the financial compensation and health care for certificated unit members.
> 5. Continue to use the interest-based, collaborative process as SDFA and the District mutually address common problems, concerns, and issues.

On May 21, 2015, during a School Board meeting, the School Board afforded the public an opportunity to comment on the above sunshined statements. Charging Party asserts no public comments were made.

Charging Party alleges that on December 16, 2015, at 9:30 p.m., the District announced on its website that a tentative agreement was reached between the Association and the District. The tentative agreement was posted on the website. The District also announced that on December

17, 2015, at 4:30 p.m., less than 20 hours after posting the tentative agreement, the School Board would hold a special meeting to vote on whether to adopt the tentative agreement.

Discussion

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

A. Timeliness

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

Since the instant charge was filed on February 10, 2016, the statute of limitations period only includes conduct that occurred on or after August 10, 2015. Charging Party argues in his First Amended Charge that the District's May 7, 2015 sunshined proposal was deficient and vague in violation of EERA section 3547. This allegation must be dismissed because Charging Party knew or should have known on May 7, 2015, that the sunshined proposal was allegedly deficient and vague.

The allegation that the Association and the District began negotiating on allegedly "new subjects" without providing the requisite notice, also appears to be untimely filed. Charging Party characterizes the initial proposal, i.e., the sunshined statement, as "fuzzy ideals." Since Charging Party knew or should have known on May 7, 2015, that the District's initial proposal contained allegedly "fuzzy ideals," Charging Party should have also known on May 7, 2015, that any subsequent proposal would be allegedly "new proposals." Instead of filing the charge within the statute of limitations period, Charging Party waited until after a tentative agreement was reached and now argues that "virtually" all the terms in the agreement are "new subjects."

Moreover, Charging Party fails to meet its burden of providing sufficient facts. He alleges general facts and does not state when he knew that the alleged "new subjects" were being negotiated without 24 hours' notice to the public nor does Charging Party state when he knew

that the District provided only 20 hours' notice before holding the December 17, 2015 special meeting to adopt the tentative agreement.

B. EERA section 3547(b)

Charging Party argues that the District violated section 3547(b). This section provides:

> Meeting and negotiating shall not take place on any proposal until a reasonable time has elapsed after the submission of the proposal to enable the public to become informed and the public has the opportunity to express itself regarding the proposal at a meeting of the public school employer.

As demonstrated by the clear and unambiguous language of this section, it applies only to proposals and not tentative agreements.

Charging Party argues that the District did not provide the public with a reasonable amount of time to review and form an opinion of the alleged "new proposals" published on December 16, 2015. However, the document posted on the District's website on December 16, 2015, does not appear to contain "new proposals," rather, the District posted its tentative agreement. It appears that Charging Party conflates the concepts of proposals and tentative agreements and argues that the notice obligation under section 3547(b) applies to tentative agreements. This is a misinterpretation of section 3547(b). The plain language of 3547(b) repeatedly references the term "proposal." While the District and the Association may have exchanged proposals at some point to reach a tentative agreement, it is clear that a tentative agreement is not a proposal. Rather, it is a contractual agreement that is contingent on ratification either by a governing board and the membership of an exclusive representative. Charging Party cites to no legal authority to support its apparent contention that section 3547(b) applies to a tentative agreement.

Moreover, section 3547.5(a) requires that after negotiations are completed, but before an employer enters into a written agreement with the exclusive representative, the employer must disclose at a public meeting the major provisions of the agreement. This section does not identify any specific amount of advance notice to the public. It appears that the District fulfilled its obligation under section 3547.5(a) when it published the tentative agreement on December 16, 2015, and 20 hours later held a special meeting on December 17, 2015.

As a separate basis for a section 3547(b) violation, Charging Party argues that after the May 7, 2015 proposals, i.e., sunshine statements, "no subsequent proposals were submitted yet a 72 page contract was arrived at." Charging Party appears to repeat this argument under the section of his statement of facts titled "VIOLATIONS OF GOVERNMENT CODE 3547 (d)." This argument will be discussed below under "EERA section 3547(d)." To the extent that

Charging Party is arguing that the public is in entitled to intermediate proposals,[3] such as counterproposals, PERB has already determined that the public does not have a right to notification of counterproposals. (See *State of California (Department of Personnel Administration)* (1992) PERB Dec. 921-S.)

C. EERA section 3547(d)

Charging Party also asserts that the District violated section 3547(d) by failing to provide 24 hours' notice of proposals concerning allegedly "new subjects."[4] Assuming arguendo that Charging Party establishes this allegation was timely filed, Charging Party fails to assert a prima facie case demonstrating that the District violated section 3547(d). This section reads as follows:

> New subjects of meeting and negotiating arising after the presentation of initial proposals shall be made public within 24 hours. If a vote is taken on such subject by the public school employer, the vote thereon by each member voting shall also be made public within 24 hours.

Subjects which are inextricably connected to previously sunshined proposals do not require notice. (*Antioch Unified School District* (1986) PERB Decision No. 581, *Los Angeles Community College District* (1991) PERB Decision No. 908.)

While PERB has held that interest-based or collaborative bargaining approach will not relieve the parties from its public notice requirements (*Ocean View Teachers Association (Busch)*

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[3] Specifically, Charging Party argues "[n]o intermediate proposal was ever submitted to the public despite a 7 month time span between the initial proposal and the final proposal."

[4] Charging Party argues in its original charge, "I do not allege as the District states that the initial proposals violated section 3547. My complaint revolves around new subjects arising after the initial proposals which were not disclosed." In Charging Party's initial charge, he lists two pages of subjects which were not listed in the District's May 7, 2015 initial proposal. He argues "[v]irtually the entire contract [citation] approved at the December 17th meeting involved new subjects not contained in the initial proposal."

Specifically, among the listed "new subjects" for which the District allegedly failed to meet public notice requirements were: retroactive wages, stipends, salary increases, extra/co-curricular compensation, dental, life insurance, income protection plans, and site formula and department budgets.

Also, among the listed "new subjects" for which the District allegedly failed to meet public notice requirements were: flex accounts, sick leave hours, bereavement leave, child rearing leave, reduced workload program, personal business and necessity days, and transfer policies.

(1992) PERB Decision No. 943), PERB has recognized that the nature of interest based bargaining tends to produce initial proposals that fail to include "a great deal of specific details." (*Los Angeles Unified School District* (1992) PERB Decision No. 964, pp. 8-9 [*LAUSD*].) With respect to such types of negotiations, PERB has held:

> initial proposals presented in the interested-based bargaining format and the public notice processes in which they are presented, must be reviewed closely on an individual case-by-case basis to determine if they meet the underlying ERRA public notice requirements.

(*LAUSD*, *supra*, PERB Decision No. 964, p. 9.)

Subsequent proposals from the District, which were more specific than the May 7, 2015 initial proposal, does not necessarily mean that the subsequent subjects were "new proposals" requiring 24 hours' notice under section 3547(d). As discussed below, the provisions of the tentative agreement between the District and the Association do not appear to be "new subjects" because these provisions are inexplicably interconnected with the District's initial proposal.

The District's initial proposal of "support[ing] opportunities for academic innovation and reform" suggested that during negotiations the District planned to support reform practices that impacting learning. Subjects which impact learning, such as class size, curriculum and instructional programs, extra/co-curricular policies, do not appear to be "new subjects," but rather connected to the District's initial proposal for academic reform. Additionally, the Association expressly proposed "[i]mprove the quality of education provided to SDUHSD students by decreasing class sizes at all District schools." This proposal, even though it was presented by the Association, directly informed the public that the subject of class size would be negotiated.

The District's initial proposal "[t]o ensure long-term budget stability," as well as its initial proposal "[t]to be proactive and fiscally prudent" indicates that economic subjects would be discussed at the bargaining table. This was also confirmed with the Association's proposal to "maintain the security and stability of the financial compensation and health care for certificated unit members." Any subsequent proposals on the subject of compensation, i.e. stipends, salary increases, health benefits, cannot be characterized as "new subjects" requiring 24 hours' notice because they are fiscal in nature and inextricably connected to budget stability and financial prudence, which indeed was sunshined.

The District also initially proposed to "retain highly qualified certificated staff," which indicates that negotiations would consist of discussions concerning incentives that would appeal to "highly qualified certificated staff." Any discussion of benefits such as hours, flex time, conferring various types of leaves, reducing workloads, transfers and evaluations, would appear to constitute incentives and assist in retaining highly qualified teachers.

Accordingly, it does not appear that the subjects listed in Charging Party's statement of facts are "new subjects." Although they were not specified or listed in the initial proposal, they are not "new subjects," because they were inextricably connected with the initial proposals. (See *Antioch Unified School District*, *supra*, PERB Decision No. 581). Also, as previously noted, interest-based bargaining anticipates *general* proposals/statements of interest. (*LAUSD*, *supra*, PERB Decision No. 964, pp. 8-9.)

For these reasons the charge, as presently written, does not state a prima facie case.[5] 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 Second Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **JUNE 10, 2016**,[6] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Mirna Solís
Regional Attorney

MZS

[5] 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.*)

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