*** VACATED IN PART By *Fremont Unified School District* (1982) PERB Decision No. 136a and OVERRULED IN PART by *Oakland Unified School District* (2024) PERB Decision No. 2906 ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

FREMONT UNIFIED SCHOOL DISTRICT,

Charging Party,

v.

FREMONT UNIFIED DISTRICT TEACHERS' ASSOCIATION, CTA/NEA,

Respondent.

Case Nos. SF-CO-19
SF-CO-20

PERB Decision No. 136

June 19, 1980

FREMONT UNIFIED DISTRICT TEACHERS' ASSOCIATION, CTA/NEA,

Charging Party,

v.

FREMONT UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-92

Appearances; Arthur J. Krannawitter, Attorney for Fremont Unified School District; Donald P. McCullum, Robert W. Johnson, Benjamin D. James, Jr. and Charles 0. Triebel, Attorneys for the Fremont Unified District Teachers' Association, CTA/NEA.

Before Gluck, Chairman; Gonzales and Moore, Members.

DECISION

These cases stem from the same factual situation and have been consolidated for deliberation and decision. They concern mirror charges filed by and against the Fremont Unified District Teachers' Association (hereafter FUDTA) and the Fremont Unified School District (hereafter District). In SF-CO-19 and SF-CO-20 the District alleged that in violation of section 3543.6(d) of the Educational Employment Relations Act

(hereafter EERA or Act)[1] FUDTA had refused to participate in the statutory impasse procedures in good faith. In SF-CE-92 FUDTA alleged that in violation of sections 3543.5(c) and (e)2 of the Act the District had refused to meet and negotiate in good faith and had refused to participate in the impasse procedures in good faith. The same hearing officer decided both cases. His proposed decisions dismissed the charges against FUDTA and sustained the charges against the District in large part.[3] The District excepts from these decisions.

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[1]EERA is codified at Government Code section 3540 et seq. All section references herein are to the Government Code unless otherwise noted.

Section 3543.6(d) provides:

> It shall be unlawful for an employee organization to:
> . . . . . .
> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

2Sections 3543.5(c) and (e) provide:

> It shall be unlawful for a public school employer to:
> . . . . . .
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
> . . . . . .
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548) .

[3]The hearing officer found that the District had breached its duties to negotiate in good faith and to participate in the

For the reasons discussed below, the Board affirms the hearing officer's decisions in both of these cases, and additionally finds that in SF-CE-92 the District's conduct violated sections 3543.5(a) and (b).[4]

FACTS

The hearing officer's findings of fact are free from prejudicial error and are adopted as the findings of the Board

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statutory impasse procedures in good faith. But, because FUDTA suggested no legal basis on which to sustain a charge that the District had dominated, supported, or interfered with the administration of FUDTA, the hearing officer dismissed FUDTA's charge that the District had violated section 3543.5(d), which makes it unlawful for an employer to:

> Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

On the authority of CSEA, Ch. 658 v. Placerville Union School District (9/18/78) PERB Decision No. 69 (overruled by San Francisco Community College District (10/12/79) PERB Decision No. 105), the hearing officer also dismissed charges that in violation of section 3543.5(b) the District had denied FUDTA its EERA rights.

[4]Sections 3543.5(a) and (b) make it unlawful for an employer to:

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

itself except as noted in footnote 6, infra. Briefly, at the beginning of the 1976-77 school year, before the District's certificated employees selected FUDTA as their exclusive representative, the District implemented a 4.1 percent salary increase and paid normal step and class increments.

FUDTA became the exclusive representative after a consent election held on December 9, 1976. Its initial proposal, submitted on December 21, 1976, sought an additional 12 percent retroactive salary increase (16.1 percent total increase for 1976-77) and other economic benefits. The proposal was submitted in compliance with the public notice ("sunshine") provisions of EERA. (Sec. 3547 et. seq.)[5]

5Section 3547 provides:

> (a) All initial proposals of exclusive representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.
>
> (b) 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.
>
> (c) After the public has had the opportunity to express itself, the public school employer shall, at a meeting which is open to the public, adopt its initial proposal.

The parties met on 14 days between January 13 and April 21, 1977. During that time the District steadfastly maintained that it had no money to meet FUDTA's demands. On January 13, the District submitted a written proposal to maintain the status quo. This proposal was evidently "sunshined" between January 13 and January 28.[6]

> (d) 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.
>
> (e) The board may adopt regulations for the purpose of implementing this section, which are consistent with the intent of the section; namely that the public be informed of the issues that are being negotiated upon and have full opportunity to express their views on the issues to the public school employer, and to know of the positions of their elected representatives.

[6]The hearing officer found that the District did not submit a proposal which complied with the public notice procedures until March 25 (proposed decision at pp. 61, 23, 5 and 30.

Contrary to the hearing officer's determination, we find that the following unrebutted testimony supports a finding that the District's January 13 proposal was "sunshined" sometime subsequent to January 13 but before January 28.

Mr. Bradley, a witness on behalf of the District, testified on cross-examination:

> Q. Now at the time you — your team, the District's team, presented this proposal to the Association's negotiating team, were you personally aware that it had not gone

Between January 13 and March 25 the District and FUDTA exchanged proposals but little progress was made because the District generally insisted upon settling the duration of the contract as a precondition to actual negotiations on other

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> through the so-called Sunshine Proceedings before the District?
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> A. Yes.
>
> Q. Well, isn't it true that you really had no authority to negotiate upon a proposal which had not gone through that procedure?
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> A. If — if I remember — If I remember correctly, it was stated to the Association that we were there to discuss the terms of their request at that time.
>
> Q. You never intended to discuss this proposal here did you? Exhibit No. 87?
>
> A. I don't think — at that — at that particular meeting, I don't believe — if I remember correctly, it had to go through the Sunshine Clause at the following board meeting. I believe that was the proposal. It had to go through the Sunshine Clause at the following board meeting, and it was stated" to the Association that we were there at that time to discuss theirs; subsequently" it went through the Sunshine Clause and we were ready to discuss"it. (Emphasis added)

(Reporter Transcript) April 20, 1978, pp. 196-197.)

Ms. Cusack, the Chairperson of FUDTA's bargaining team, testified on direct examination with regard to the meeting held between the parties on January 13 as follows:

> HEARING OFFICER: All right. So the question now is, what was the Association's response to the District's statement that

issues. The District also took the position at the January 13 negotiating session that until its proposal was properly "sunshined," it could not make any "affirmative proposals" but could only negotiate over the Association's proposals.

> the District could not negotiate with respect to the District's proposal, because it had not yet been submitted to the public?
>
> MR. KRANNAWITTER: Right.
>
> HEARING OFFICER: What was the Association's response to the District's comment in that regard, if any?
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> WITNESS: As I remember, the only thing that we had — recourse that we had was in terms of his intent, that he could at least start the process on our document that we were going —- we were going to proceed and move through the period of the sunshine, which was January 28.
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> . . . . . .
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> HEARING OFFICER: In other words, the Association's response was, and this was communicated by some member of the Association's team, that you would like to then begin discussions with respect to the Association's proposal, that was then on the table. In view of the fact that in terms of meeting the requirements to the law the District's proposal would have to be given the seven day public notice, well, it would have to be put before the public for that period of time. Is that it?
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> WITNESS: Yes, we calendared a date prior to, and then the one followed, which was the January 28, when it would have been through the sunshine week. ("Emphasis added)

(Reporters Transcript; Sept. 30, 1977, pp. 68-69),

On February 17 the District offered to raise salaries by 7.5 percent effective July 1, 1977 — but made its entire proposal, including noneconomic provisions, expressly contingent upon "passage of the tax election May 31, 1977." A written package proposal by the District on April 19 which contained proposals on both economic and noneconomic items was also made entirely contingent on the passage of the tax measure. That tax measure was subsequently defeated by a margin of roughly 6 to 1.

FUDTA submitted a new proposal on March 9. The comprehensive (79 page) March 9 proposal would have tied salary increases to the consumer price index for the San Francisco area, thereby granting an initial increase of 13.9 percent. In a brief (3 page) response, on March 22 the District in writing renewed its offer of January 13 to maintain the status quo on salaries, fringe benefits,[7] and District policies on matters within the scope of representation.

On March 25, the District submitted a comprehensive written proposal. The hearing officer determined that the March 25 proposal was regressive because it retreated from the previous

[7]This proposal did add an offer to permit retirees and employees leaving the District to continue fringe plans upon payment by the employee of the total premium. The proposal also contained a provision offering accidental death and dismemberment coverage to all employees at no cost to either the District or the employees.

"status quo" offers made by the District. He found, among other things, that while the District offered to keep the existing salary and fringe benefits, it proposed to increase the work week from 35 to 40 hours; that the proposed grievance procedure significantly restricted the rights grievants already had under existing policy;[8] that the proposal eliminated existing restrictions on management's discretion in making transfers; and that the proposed leave policy would eliminate certain prior benefits.

On April 21 FUDTA proposed a 10 percent retroactive salary increase effective July 1, 1976, and a 13.5 percent increase on July 1, 1977. Also on April 21 the District's negotiator declared impasse. The next day the parties jointly requested EERB to appoint a mediator.[9] Between April 26 and May 7, 1977, eight mediation sessions were held.

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[8]One item contained in the proposed grievance procedure would have required grievants to pay for their representative's released time used to process the grievance. This provision was not only absent from the prior grievance policy but it also contravenes section 3543.1(c) which provides that:

> (c) A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

[9]The Educational Employment Relations Board (EERB) was renamed PERB effective January 1, 1978. (Gov. Code sec. 3540.)

On April 28, the District offered to continue the status quo on salaries and work rules and to submit the District's financial condition in relation to the 1976-77 and 1977-78 salaries to factfinding at District expense. The District proposed to "[r]esume negotiations upon receipt of Factfinder's recommendations." FUDTA responded on the same date with an offer to reduce its salary increase proposal to 9 percent for 1976-77 and 13.5 percent for 1977-78.

On April 29, the District removed the tax measure contingency from all items of its April 19 proposal "except the 7 1/2% salary offer for 1977-78" and again proposed to submit the District's financial condition in relation to the 1976-77 and 1977-78 salaries to factfinding. FUDTA continued to press for negotiations on both economic and noneconomic issues as evidenced by its mediation probe made through the mediator to the District on April 29. Through this written probe FUDTA sought to determine whether the District was interested in negotiating on several listed items. Questions were also asked in an attempt to seek clarification of the District's prior proposal on expedited factfinding and the District's position on an item contained in FUDTA's proposal of April 28 relating to salary contingencies. The District did not give either an oral or written response to this probe other than to indicate that it had received the probe.

On April 30, it offered to meet with FUDTA "and a neutral third party selected through the offices of the EERB . . . to identify unencumbered monies not restricted by law, board policy or practice" and agreed "to apply such identified funds to the salaries and costs incidental to salaries of the members of the unit...."

On May 2, FUDTA brought its 1976-77 salary increase proposal down to 7.5 percent and further indicated that it wanted to continue the mediation process in an attempt to resolve all cost-related proposals and all other conditions of employment until either an agreement was reached or until differences of opinion on the outstanding issues had been reduced to the point where the mediator would be warranted in recommending factfinding on all outstanding issues.

In the next few days, both parties exchanged written communications seeking clarification of each other's positions.

On May 5, FUDTA modified its counterproposal of May 2 by, among other things, moving closer to the District's position on various leave policies. The District responded on May 6 by again proposing that the parties request PERB to initiate factfinding proceedings.

On May 7, FUDTA requested that the District either offer a counterproposal responsive to FUDTA's proposals or agree to mutually submit all outstanding issues to factfinding. The

District immediately accepted the latter portion of FUDTA's offer.

On two days when mediation sessions were not scheduled FUDTA conducted work stoppages. On April 27 approximately 976 unit members participated in "Can-Do Day," a sick out to protest the District's refusal to negotiate.[10] On May 4 approximately 850 teachers participated in "Budge-It Day," an activity intended "to once again inform the Board of Education of our resolve to settle now!" FUDTA also urged teachers to work "Hours Only" during the week of May 2-8 and to refuse to perform unpaid duties outside of the school day.

On May 7 the parties agreed to request factfinding on all outstanding issues.[11] The factfinders recommended an

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[10]The Association prepared and distributed a flyer explaining that Fremont teachers were sick on April 27 "because the Board of Education has been stalling on negotiations." The flyer concluded:

> A willingness by the Board to come to the negotiations table and negotiate a fair and equitable contract will cure the sickness. (Emphasis in the original.")

[11]Sections 3548.1-3548.3 govern factfinding. Section 3548.1 authorizes the mediator to declare that factfinding is appropriate. Either party may then request that the dispute be submitted to a factfinding panel. Section 3548.2 gives the factfinding panel broad powers to investigate the issues in dispute. It sets forth the criteria the panel is to consider in arriving at its findings and recommendations. Section 3548.3 authorizes the panel to make advisory recommendations on terms of settlement if the dispute is not resolved within 30 days after the appointment of the panel or a longer period agreed upon by the parties. That section also provides that

immediate 4 percent salary increase for 1977-78, an additional 2.5 percent based on certain contingencies, and various changes on noneconomic issues. They made no recommendation on an increase for 1976-77.

DISCUSSION

The District's Failure to Meet and Negotiate (SF-CE-92)

The EERA is a collective negotiations statute designed

> to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, . . . [Sec. 3540.]

The duty to meet and negotiate is basic to the purpose of the Act.[12] Therefore EERA instructs employers and exclusive

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the employer shall make the factfinding report public within 10 days after its receipt. (Also see Board rules 36070-36090 (8 Cal. Admin. Code secs. 36070-36090).)

[12]Section 3540.1 (h) defines meeting and negotiating as

> meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive

representatives to participate in bilateral negotiations to determine wages, hours, and other terms and conditions of employment. (See sections 3543.3, 3543.5(c), 3543.6(c).)

Federal labor law precedent is relevant guidance in interpreting provisions of the EERA that are similar or identical to provisions of the National Labor Relations Act (29 U.S.C, sec. 151 et seq., as amended, hereafter NLRA) .13 In Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51 at p.4, the Board observed the similarity between section 3543.5 (c) of EERA and section 8(a) (5) of the NLRA.[14]

> representative and the public school employer, become binding upon both parties. . . .

[13]Sweetwater Union High School District (11/23/76) EERB Decision No. 4. And see FireFighters Union v. City of Vallejo (1974) 12 Cal.3d 608.

[14]Section 3543.5(c) provides:

> It shall be unlawful for a public school employer to:
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> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

NLRA section 8(a)(5) (29 U.S.C, sec. 158(a)(5)) provides:

> It shall be an unfair labor practice for an employer—
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> . . . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

To determine whether a party has negotiated in good faith, the NLRB generally applies a "totality of the conduct" test.[15] By studying the parties' actions in context, it ascertains whether they have met their duty to bargain with the subjective intent of reaching an agreement if possible. (E.g., NLRB v. Stevenson Brick and Block Co. (4th Cir. 1968) 393 F.2d 234 [68 LRRM 2086], modifying (1966) 160 NLRB 198 [62 LRRM 1605].)

Bad faith may be inferred from a party's approach to negotiations. When a party takes an inflexible position,[16] conditions agreement on economic matters upon agreement on noneconomic matters,[17] or delays the bargaining process,[18] the NLRB may conclude that it is not negotiating in good faith.

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[15]The totality of conduct test does not apply in all cases. For example, unilateral changes of matters within the scope of negotiations prior to impasse can be found to be per se refusals to bargain. (E.g., NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].)

16E.g., NLRB v. Reed & Prince Mfg. Co. (1st Cir. 1953) 205 F.2d 131 [32 LRRM 2225]; Hartford Fire Ins. Co. v. NLRB (8th Cir. 1972) 456 F.2d 201 [79 LRRM 3007].

[17]See e.g. NLRB v. Patent Trader, Inc. (2nd cir. 1969) 415 F.2d 190 [71 LRRM 3086]. Federal Mogul Corp. (1974) 212 NLRB 950 [87 LRRM 1105] enfd (6th Cir. 1975) 524 F.2d 37 [91 LRRM 2207]; Adrian Daily Telegram (1974) 214 NLRB 1103 [88 LRRM 1310]; Neon Sign Co. (1977) 229 NLRB 861 [95 LRRM 1161]; Cal-Pacific Furniture Mfg. Co. (1977) 228 NLRB 1337 [95 LRRM 1160]; Collins & Aikman Corp. (1967) 165 NLRB 678 [65 LRRM 1484] enfd in part (4th Cir. 1968) 395 F.2d 277 [68 LRRM 2320].

18see e.g. Lloyd A. Fry Roofing Co. v. NLRB (9th Cir. 1954) 216 F.2d 273 [35 LRRM 2009], amended (9th Cir. 1955) 220 F.2d 432 [35 LRRM 2662].

This District engaged in all the foregoing conduct. The District initially frustrated negotiations by taking the position at the January 13 meeting that it could only negotiate over FUDTA's proposals and could not make any "affirmative proposals" because the District's offer on that date to maintain the "status quo" had not been "sunshined." It took an inflexible position on salaries and benefits. It insisted on settling the duration of the contract before negotiating other substantive matters, an especially frustrating condition in that it is virtually impossible for an employee organization to agree on the duration of a contract before it knows what terms that contract will embody.

Throughout negotiations the District pressed FUDTA to reach a "mutual perception" of the District's financial condition. To force FUDTA to view the District's financial situation the District's way, the District held noneconomic issues hostage. This attitude reached its nadir on February 17 and again on April 19 when the District's proposals made both economic and noneconomic items contingent upon the passage of a tax measure in an upcoming election. By conditioning those entire proposals upon a future event (the tax election), the District frustrated the negotiations process as surely as if it had refused to negotiate outright.

As the Board stated in Muroc Unified School District, (12/15/78) PERB Decision No. 80 at p. 13:

> It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. (fn. omitted) Specific conduct of the charged party, which when viewed in isolation may be wholly proper, may, when placed in the narrative history of the negotiations, support a conclusion that the charged party was not negotiating with the requisite subjective intent to reach agreement. (fn. omitted) Such behavior is the antithesis of negotiating in good faith.

In the instant case the District's original offer to FUDTA on January 13 was to maintain the "status quo". Eight negotiating sessions were held between the parties from January 13 to March 25. On the latter date the District made a counterproposal which the hearing officer found was regressive from the District's previous offer, made 10 weeks earlier, to maintain the "status quo." Instead of attempting to reduce the differences between the parties, the District hardened its position and offered less to FUDTA 10 weeks after negotiations commenced than it had originally. The District's conduct was incompatible with its stated desire to reach an agreement with FUDTA. (See Irvington Motors (1964) 147 NLRB 565 [56 LRRM 1257] enfd (CA 3 1965) 343 F2d 759 [58 LRRM 2816]; West Coast Casket Co. (1971) 192 NLRB 624 [78 LRRM 1026, 1030] (concurring opinion of chairman Miller), enfd in part, (9th Cir. 1972) 469 F.2d 871 [81 LRRM 2857]).

The District's approach to mediation was also inconsistent with a sincere desire to reconcile its differences with FUDTA

in the manner the Act requires. The statutory impasse procedures enable "parties to a dispute over matters within the scope of representation" who "have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile" to request PERB to appoint a mediator. The mediator has considerable latitude "to persuade the parties to resolve their differences and effect a mutually acceptable agreement." (Secs. 3540.1(f) and 3548.)[19] For example, while factfinding

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[19]Section 3540.1(f) provides:

> (f) "Impasse" means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile.

Section 3548 provides in relevant part:

> Either a public school employer or the exclusive representative may declare that an impasse has been reached between the parties in negotiations over matters within the scope of representation and may request the board to appoint a mediator for the purpose of assisting them in reconciling their differences and resolving the controversy on terms which are mutually acceptable. If the board determines that an impasse exists, it shall, in no event later than five working days after the receipt of a request, appoint a mediator in accordance with such rules as it shall prescribe. The mediator shall meet forthwith with the parties or their representatives, either jointly or separately, and shall take such other steps

is not a statutory right, the mediator may decide that it is appropriate to resolve the impasse. (Sec. 3548.1). In this case, however, the District treated mediation as if it were merely a springboard to factfinding. Throughout mediation the District made no appreciable effort to resolve its differences with FUDTA. The District's proposals made on April 29 and April 30 to remove the tax contingency from the noneconomic items are not evidence of any significant movement on its part, and this aspect of the proposals must be viewed in the broader context in which they were presented. Since we have found that the conditioning of both economic and noneconomic items on the distant tax election is an indication of bad faith negotiating, the District's belated removal of the contingency as to noneconomic items is not persuasive evidence of the District's lack of bad faith.

In addition, both of the above proposals which were made by the District early in the mediation process contained provisions that would have led to submission of the District's financial condition to factfinding. Rather than participate in

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> as he may deem appropriate in order to persuade the parties to resolve their differences and effect a mutually acceptable agreement. The services of the mediator, including any per diem fees, and actual and necessary travel and subsistence expenses, shall be provided by the board without cost to the parties.

mediation in good faith, the District remained fixated upon its financial condition and persisted in its demand to go directly to factfinding, thereby effectively bypassing the mediation process.

The District's conduct was incompatible with an earnest desire to reach an agreement with FUDTA through the negotiations process or with the aid of the impasse procedures established by law. Therefore, the Board finds that the District violated sections 3543.5(c) and 3543.5(e)20 of the Act.

An employer that fails to meet and negotiate with the exclusive representative necessarily denies that organization its right to represent its members in violation of section 3543.5(b). (San Francisco Community College District (10/12/79) PERB Decision No. 105.) In San Francisco, supra, a case including a flat refusal to negotiate, we also determined that an employer's failure or refusal to negotiate interferes with its employees' right to be represented in their employment relationship by the representative of their choice in violation of section 3543.5 (a). Those principles equally apply when the

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[20]Section 3543.5(e) makes it unlawful for an employer to:

> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with section 3548) .

employer has engaged in surface negotiating as the District did here.

The Work Stoppage

The District asserts that strikes by public employees are unlawful.[21] Accordingly, it maintains that FUDTA's work

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21 The District maintains that section 3549's denial to public school employees of the protections of Labor Code section 923 is the equivalent of outlawing public employee strikes.

Section 3549 provides in pertinent part:

> The enactment of this chapter shall not be construed as making the provisions of Section 923 of the Labor Code applicable to the public school employees. . . .

Labor Code section 923 provides in pertinent part:

> In the interpretation and application of this chapter, the public policy of this State is declared as follows:
>
> Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from interference, restraint,

stoppage was an unfair practice per se and that FUDTA is liable for money damages proximately caused thereby.

In San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1 [154 Cal.Rptr. 893; 593 P.2d 838], the Supreme Court reviewed the state of the law regarding public school employee strikes in California and declined to rule on the legality of such strikes. The Court said:

> It is unnecessary here to resolve the question of the legality of public employee strikes if the injunctive remedies [obtained by the District here] were improper because of the district's failure to exhaust its administrative remedies under the EERA. [Id. at 7.]

The Court further held that PERB has exclusive initial jurisdiction over public school employee strikes that arguably can be unfair practices under EERA.[22] But it neither held

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> or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

[22]The unfair practice provisions of EERA are codified at sections 3543.5 and 3543.6. Specifically, the Court indicated that a work stoppage may be evidence of at least two unfair practices: a failure or refusal to meet and negotiate in good faith (sec. 3543.6(c)) or a refusal to participate in the impasse procedures in good faith (sec. 3543.6(d)). Section 3543.6 (c) is quoted supra at note 1. Section 3543.6(d) makes it unlawful for an employee organization to:

> Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548) .

nor implied that every strike is per se an unfair practice. To the contrary, the Court stated "an unfair practice consisting of 'refusal to participate in good faith in the impasse procedure' . . . could be evidenced by a strike that otherwise was legal." (Id. at 8.) In other words, a strike may indicate that the exclusive representative did not meet its obligation to participate in the impasse procedures. Implicit in this statement is its contrary—that a strike does not necessarily indicate such a failure.

That strikes are not unlawful per se under EERA comports with the entire fabric of a collective negotiations statute that includes impasse-breaking procedures. (Sec. 3548.) The Court indicated that "the impasse procedures almost certainly were included in the EERA for the purpose of heading off strikes,"[23] and went on to say:

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[23]PERB's policy with respect to the treatment of requests for injunctive relief in cases of work stoppages or lockouts is set forth in Board rule 38100:

> Policy. In recognition of the fact that in some instances work stoppages by public school employees and lockouts by public school employers can be inimical to the public interest and inconsistent with those provisions of the Educational Employment Relations Act (EERA) requiring the parties to participate in good faith in the impasse procedure, it is the purpose of this rule to provide a process by which the Board can respond quickly to injunctive relief

> Since [the impasse procedures] assume deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in the impasse procedures in good faith and thus an unfair practice under section 3543.6 subdivision (d). [San Diego, supra, at 8-9.]

Since strikes occur whether or not they are lawful,[24] an absolute prohibition on strikes would negate the role the Court said PERB is to play in the "long range minimization of work stoppages." [Id. at 13.] If an economic strike were per se unlawful regardless of whether it occurred before or after the completion of the statutory impasse breaking procedures, an employee organization would have no incentive to follow those

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> requests involving work stoppages or lockouts.
>
> The EERA imposes a duty on employers and exclusive representatives to participate in good faith in the impasse procedure and treats that duty so seriously that it specifically makes it unlawful for either an employer or an exclusive representative to refuse to do so. The Board considers those provisions as strong evidence of legislative intent to head off work stoppages and lockouts until completion of the impasse procedure and will, therefore, in each case before it, determine whether injunctive relief will further the purposes of the EERA by fostering constructive employment relations, by facilitating the collective negotiations process and by protecting the public interest in maintaining the continuity and quality of educational services. (Added as of 5/21/79)

[24]See, e.g., Cubulski, An Analysis of 22 Illegal Strikes and California Law (1973) 18 CPER 2.

procedures scrupulously before striking, but if the legal status of a work stoppage under the EERA depends among other things upon its timing, employee organizations are encouraged to resolve their negotiating differences with the employer via the impasse procedures. Strikes in fact become their last resort.

The Court acknowledged PERB's power to seek injunctive relief from a strike that is an unfair practice, but noted that PERB's power to remedy unfair practices includes the "discretion to withhold as well as pursue, the various remedies at its disposal." The Court said:

> PERB may conclude in a particular case that a restraining order or injunction would not hasten the end of a strike (as perhaps neither did here) and, on the contrary, would impair the success of the statutorily mandated negotiations between union and employer. [Id. at 13.]

The Court therefore annulled the contempt orders instituted by the Court below

> . . . on the ground that PERB had exclusive initial jurisdiction to determine whether the strike was an unfair practice and what, if any, remedies PERB should pursue.[25] [*Id.* at 14.]

It is unlawful for an employee organization to fail or refuse to participate in the impasse procedures in good faith.

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[25]The Court expressly limited its holding "to injunctions against strikes by public school employee organizations recognized or certified as exclusive representatives." (Id. at 14.)

(Sec. 3543.6(d).) This Board has not previously determined what standard shall be used to measure an employee organization's good faith when, at the same time that it is participating in the impasse procedures, it stops work to protest the employer's unlawful failure to meet and negotiate in good faith or to participate in the impasse procedures in good faith.

As in determining whether a party is negotiating in good faith, no one isolated action during the impasse procedures controls. It is the totality of the employee organization's conduct that counts. The work stoppage is a significant factor, but only one factor, to consider. The Board must determine if in the context of the case as a whole the work stoppage belies an earnest desire on the employee organization's part to resolve its differences with the District in the manner prescribed by the Act.

The single fact that FUDTA conducted work stoppages during the same general time frame that mediation occurred is insufficient grounds on which to find the work stoppages an unfair practice. As discussed above, neither the unfair practice provisions of the Act nor, according to San Diego, supra, section 3549 outlaw strikes per se. PERB is not the proper body to determine the ultimate question of whether strikes are legal at common law. Our charge is to enforce EERA. While declining to specifically rule on the issue of the

legality of strikes by public school employees, the California Supreme Court said "...section 3549 does not prohibit strikes but simply excludes the applicability of Labor Code section 923's protection of concerted activities." (Id. at 19.) Thus PERB must determine in each case without reference to Labor Code section 923 whether a work stoppage is protected under the EERA, or whether it is evidence of conduct prohibited by EERA.

In this case, the District did not argue and the evidence does not show that FUDTA did not approach mediation and factfinding in earnest. FUDTA did not attempt to avoid or delay its obligation. Nor was it argued or shown that FUDTA did not intend to reach an agreement if possible. FUDTA participated in mediation faithfully, and it continued throughout the impasse procedures to advance new proposals in an attempt to reach an agreement. The work stoppages, which were intended to prompt the District to meet and negotiate in good faith as required by law,[26] were deliberately scheduled on days when there was no mediation.

The District's own bad faith at the negotiations table and during impasse provoked the Association's work stoppages.

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[26]We do not need to and do not here decide whether a work stoppage that has purely economic goals would be inconsistent with an employee organization's duty to participate in the impasse procedures in good faith.

The first work stoppage by the employees on April 27 came on the heels of months of frustration over the District's retrogressive proposals while FUDTA made numerous reductions in its demands on both economic and noneconomic items. The fact that the first work stoppage occurred on the second day of mediation does not necessarily belie an intent to participate in the impasse procedures in good faith. The employees did not strike in support of an economic position, but in response to the District's retrogressive and dilatory approach to negotiations.

Between the first work stoppage on April 27 and the second work stoppage on May 4 FUDTA made further concessions on economic and noneconomic items. During this time FUDTA reduced its salary increase proposals from a pre-impasse 10 percent increase for 1976-77 to 7.5 percent and continued to press for negotiations as evidenced by its mediation probe on April 29 and its May 2 proposal to continue mediation on all items in a good faith effort to reach an agreement. The District did not respond to the mediation probe but did propose to remove the tax contingency from the noneconomic items while retaining such condition on its salary offer for 1977-78. We have previously found that the original attachment of this condition on both economic and noneconomic items was evidence of the District's bad faith during negotiations and thus, the partial removal of the condition cannot be characterized as representing

significant movement by the District toward good faith mediation.

The work stoppages thus resemble what the NLRB calls an "unfair labor practice strike"—a job action in response to unfair practices committed by the employer.[27]

In this case, the work stoppage alone does not support the District's allegation that FUDTA lacked good faith in its participation in the impasse procedures, since FUDTA's overall conduct during mediation and factfinding in fact negate an inference of bad faith, and because the work stoppage was provoked by the District's own unlawful conduct and was undertaken as a last resort. The hearing officer therefore correctly dismissed the District's charge against the Association.

Because of our disposition of this issue, it is unnecessary to discuss the District's demand for money damages.

By: Barbara D. Moore, Member

Chairperson Gluck's concurrence begins on page 30.

The Order in this decision begins on page 40.

27see, e.g., NLRB v. MacKay Radio & Telegraph Co. (1938). 304 U.S. 333 [2 LRRM 610]. NLRB v. Pecheur Lozenge Co., Inc. (2d Dist. 1953) 209 F.2d 393 [33 LRRM 2324], Cert, den. (1954) 347 U.S. 953 [34 LRRM 2027].

In contrast to an unfair labor practice strike, an "economic strike" is one in support of bargaining demands that is neither caused nor prolonged by the employer's unlawful conduct. (E.g,, NLRB v. Pecheur, supra; NLRB v. Thayer Co. (1st Dist. 1954) 213 F.2d 748 [34 LRRM 2250] cert, den. (1954) 348 U.S. 883 [35 LRRM 2100].

Harry Gluck, Chairperson, concurring:

I am in substantial agreement with the opinion authored by Member Moore, but I resist the implication that a "belated" offer made in mediation does not suffice to terminate a prior and continuous unfair course of conduct (p. 19). How else is a party in delicto to remedy its objectionable actions?

However, I find the District's removal of the tax vote contingency on non-economic items not persuasive evidence of a move towards good faith bargaining. The District requested mediation and then quickly urged a move to factfinding on the economic items, but only indicated a willingness to negotiate on non-economic items at some future and unspecified date. Had the District intended to remove the interdependence of the non-economic and economic items, it should have responded to the Association's proposals either directly or by counterproposal during the mediation sessions it insisted upon. The vagueness of the District's position permits the inference that negotiations on non-economics were still, in reality, subject to the results of the economic factfinding it demanded. It is for this reason also that I can concur in Member Moore's conclusion that the District's conduct "was incompatible with an earnest desire to reach agreement . . . with the aid of the impasse procedures" (p. 20). While a fixed position on salaries alone may justify a desire to quickly

terminate mediation on that subject in favor of a process more specifically designed to develop the factual basis for the ultimate resolution of the dispute, the District's recalcitrance on the full range of proposals belies so single-minded a motive.

I further believe that evidence of the essentially unlawful nature of the District's conduct can be found in its proposal to permit a neutral to identify and assign unencumbered funds to salary settlement. At first blush, this offer seems almost a willingness to resort to binding arbitration on an interest dispute involving wages. But, the strings attached to the offer included the exemption of funds already encumbered by school board policy. Thus, the District would foreclose consideration by the neutral of funds which were allocated under conditions and at times when collective negotiations did not exist and according to policy considerations which might readily and lawfully be modified at the employer's discretion. This limitation bears no visible relationship to the District's actual ability to pay, though the terms in which the offer was couched might create such an impression upon a casual or perfunctory reading. Thus, the District has failed to justify its inflexible stand on economic issues. Furthermore, this proposal was limited to wage adjustments for the 1976-77 school year. The record fails to reveal any wage offer for

1977-78. Particularly in view of the District's total conduct, this proposal lacks sufficient yeast to raise the quality of the District's bargaining to the level of good faith.

The Work Stoppage

I find in the facts before us the kind of situation the Supreme Court may have had in mind when it stated that "harsh, automatic sanctions" may be counterproductive to the administration of the EERA.[28] While the court referred to the enjoinder of illegal strike activity, the rationale is certainly no less applicable to a work stoppage which is responsive to an employer's pervasive and continuous unfair negotiating practices, as I find the employer's conduct to be here. By its continued refusal to present meaningful proposals coupled with its outright rejection of FUDTA's proposals, the District forced the Association to negotiate against itself. That the Association permitted itself to be so led is at least a tribute to its sincere effort to resolve its concerns amicably. By this unwaivering inflexibility persisting through negotiations and impasse proceedings, and its ultimate superficial movement, the District invited the type of response which was designed to further the bargaining process and

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28 ~~San Diego Teachers Association~~ v. ~~Superior Court~~, ~~supra~~, p. 17.

minimize any disruption of the educational services to the public. While it is true that the Association could have proceeded solely in pursuit of its unfair practice charges, I do not consider the sacrifice of employee and organizational rights during such a prolonged process, with the obvious attendant advantages to a recalcitrant employer, to be a legitimate requirement for this Board to impose. To the contrary, if the rights of employees which have been granted by the EERA are to be protected, PERB must recognize that the employer, as the responding party to negotiations, enjoys a form of power which, when exercised in bad faith, should not be augmented by unreasonable restraints imposed upon employees who seek some form of balance and equality at the table.

Harry *Gluck,* Chairperson

Dr. Raymond Gonsales' concurrence and dissent begins on page 34.

The Order in this decision begins on page 40.

Raymond J. Gonzales, Member, concurring and dissenting:

I concur with the majority's finding that the District violated subsections (c) and (e) of section 3543.5 in its persistent drive toward factfinding on economic issues and its refusal to discuss other issues until the matter of its financial condition was settled. In addition, consistent with my concurring opinion in San Francisco Community College District, supra, I would find an independent violation of subsection(a) because the record demonstrates that the District had the requisite intent to harm employee rights. I would not reach the (b) violation for the reasons expressed by a unanimous board in Placerville Union School District (9/18/78) PERB Decision No. 69.

However, no amount of intellectual gymnastics engaged in by the majority will persuade me that FUDTA's work stoppages were justified by the District's unlawful action. I have expressed innumerable times my opposition to the majority's obvious attempts to protect and legalize strikes under the EERA. These attempts have completely disregarded the importance of having an issue of such magnitude decided by that body, that is, the state Legislature, which is designed to respond to the interests of the general public and not simply to a limited special interest constituency. But, in this decision, the majority have not been content to hint at sanctioning strikes, or to freely characterize facts in such a way as to find a

strike "protected activity." Here, they have gone beyond the arrogation of legislative power which I have warned against in the past and are promoting strikes as activity which "further[s] the bargaining process and minimize[s] any disruption of the educational services to the public." (Conc, opn. at pp. 36-37.) One can only imagine, not without justification, that soon the majority would have striking employees awarded good citizenship medals for their martyrdom in the cause of public service.

From this day forward, employee associations have been licensed by the majority to include in their negotiations strategy not merely the threat but the invocation of a strike as a tactical weapon. Denominating the strike a "last resort" is, in my view, a blatant usurpation of the legislative prerogative to amend the statutory design of EERA by expanding the impasse process. It is not the function nor the right of this board to do other than interpret the law we have been entrusted to administer; to invent rights , which could not conceivably have been excluded inadvertently, is to assume a role for which this board is unsuited.

The majority believes that employees need a "last resort" weapon to balance the power between employee organizations and employers. I recognize that employers appear to have the prerogative of implementing their last best offer after the

exhaustion of impasse procedures,[1] while employees have no comparable tool either explicitly granted or implied in the EERA. However, if there is an imbalance or defect in the statutory scheme then it is the responsibility of PERB to defer remedying the defect to the Legislature. It is possible that the mediation and factfinding provisions included in EERA (in contrast to the Winton Act), were intended to place greater public pressure on districts in order to balance any inequity between the parties. In any event, I am dismayed by my colleagues' sanctification of employees' right to shut down the public schools; this position, if anything, tips the balance of power in favor of employee organizations, since districts are mandated by statute to provide at least 175 days of instruction per year and have no corresponding "right" to close down through a lockout. To follow the logic of the majority would require the conclusion that a district may lockout recalcitrant employees to motivate them to negotiate and the public be hanged. I am convinced that, were the board to pursue the "right" of districts to lockout employees with the same fervor with which it has pursued the employees' "right" to strike, there would be a tremendous outcry from the public, which is the only truly powerless party in this proceeding.

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[1]See Modesto City Schools (3/12/80) PERB Order No. IR-12.

As I have stated before today, my greatest fear is that decisions of the type rendered here by the majority, serve primarily to undermine the purpose for which this board was established and to threaten the continued administration of public employee collective bargaining. In essence, by administratively authorizing activity whose legality has not been determined under common law, the majority circumvents judicial and legislative arenas in favor of sanctioning a self-help remedy clothed in the righteousness of redressing a supposed or actual injury to employee rights. Thus, the process by which unfair practices are charged, adjudicated and remedied is bypassed, the injunctive relief process is apparently superfluous and employees may proceed with impunity to determine when the employer is in need of some motivating action to reach an agreement more favorable to employees.

Whether a strike (or "work stoppage" as it is euphemistically called) is purely for economic goals or is in response to an employer's alleged unfair practices, under the majority's approach strike activity will almost never be found to be an unfair practice. All an employee organization need do is maintain a modicum of cooperation in negotiations, schedule its "days off" when no negotiating sessions are scheduled (regardless, apparently, of the effect on the tenor of negotiations or the operation of the schools), or be impatient or easily frustrated in negotiations. Most importantly, if an

employee organization does not actually file an unfair practice charge before going out on strike, in order for PERB to determine whether a strike is in response to an employer unfair practice, it would be necessary for the board to decide in an evidentiary vacuum, without a hearing or adequate record, whether the employer committed an unfair practice which would justify the strike. This is not simply a procedural problem but raises a critical substantive question concerning the ability of a district to defend itself as well as the ability of the board to make a fair and impartial decision whether to allow a strike to continue.

I deplore this circumvention of board procedures even as I acknowledge that the system is not flawless and is undoubtedly cumbersome at times. Nevertheless, the inability of this agency to expeditiously process unfair practice charges cannot justify condoning, nay, encouraging employees' failure to utilize the process. Clearly, the preferred alternative to sanctioning strikes would be to assure that the system of adjudicating unfair practices responds promptly.

I am not persuaded that permitting public employees to strike, for any reason, will equalize power between the parties, but will simply up the ante in negotiations and press employers to make unwarranted concessions in order to foreclose chaos in the classroom. The strike may be an appropriate "balancing" tool in the private sector, but it is totally

unacceptable in public education as the real parties in interest, parents and children, are unrepresented.

I have always ardently supported the collective negotiations process and deeply regret that the majority have followed their tortuous path to effectively legitimizing strikes, notwithstanding their pretense of avoiding a decision which conflicts with common law. As any legal scholar will attest, it is substance rather than form which generally prevails, and I urge the school district in this instance to vigorously pursue a challenge to the majority's quasi-legislative decision. I am certain that all parties with an interest in the integrity of the educational system in this state, as well as the peaceful and rational resolution of labor disputes, will want to see the strike issue resolved by the highest court of this state. Anything less than a definitive answer from the judiciary or the legislature will hasten the demise of an effective and fair collective bargaining system for public employees. When that occurs, I assure the reader I will have no satisfaction in having sounded repeated warnings, but will suffer only profound regret.

By: Raymond J. Gonzales, Member

The Order in this decision begins on page 40.

ORDER

Based on the foregoing Decision and the entire record in this case, the Public Employment Relations Board ORDERS that the Fremont Unified School District shall:

1. Cease and desist from refusing and failing to meet and negotiate in good faith with the Fremont Unified District Teachers' Association, CTA/NEA.

2. Cease and desist from refusing to participate in good faith in the statutory impasse procedures.

3. Cease and desist from denying the Fremont Unified District Teachers' Association, CTA/NEA its right to represent unit members by refusing and failing to meet and negotiate in good faith and by refusing to participate in good faith in the statutory impasse procedures.

4. Cease and desist from interfering with employees because of their exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf, by refusing and failing to meet and negotiate in good faith and by refusing to participate in the statutory impasse procedures in good faith.

5. Take the following affirmative action which is necessary to effectuate the policies of the Educational Employment Relations Act:

(a) Post at all school sites, and all other work locations where notices to employees customarily are

placed, immediately upon receipt thereof, copies of the notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 consecutive workdays from receipt thereof. Reasonable steps shall be taken to insure that said notices are not altered, defaced or covered by any other material.

(b) Notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, within 20 calendar days from the date of service of this Decision, of what steps the District has taken to comply herewith.

The Board further ORDERS that the unfair practice charges in Case Nos. SF-CO-19 and SF-CO-20 are dismissed.

This Order shall become effective immediately upon service of a true copy thereof on the Fremont Unified School District.

PER CURIAM

Appendix; Notice

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD,

An Agency of the State of California

After a hearing in which all parties had the right to participate, it has been found that the Fremont Unified School District violated the Educational Employment Relations Act by failing and refusing to meet and negotiate in good faith with its employees' exclusive representative, the Fremont Unified District Teachers' Association, CTA/NEA, and by refusing to participate in good faith in the statutory impasse procedure. It has further been found that this same course of action denied the exclusive representative its right to represent unit members in their employment relationship with the District and interfered with employees because of their exercise of rights protected by the Educational Employment Relations Act. As a result of this conduct, we have been ordered to post this notice, and we will abide by the following:

Cease and desist from failing and refusing to meet and negotiate in good faith with the Fremont Unified District Teachers' Association, CTA/NEA.

Cease and desist from refusing to participate in good faith in the statutory impasse procedure.

Cease and desist from denying the Fremont Unified District Teachers' Association, CTA/NEA its right to represent unit members.

Cease and desist from interfering with employees' right to negotiate collectively through their exclusive representative.

FREMONT UNIFIED SCHOOL DISTRICT

By:
S
uperintendent

Dated:

This is an official notice. It must remain posted for 30 consecutive work days from the date of posting and must not be defaced, altered or covered by any material.