



required that it be performed by members of the classified unit, contending that such conduct violates the District's duty to negotiate in good faith during the term of the collective agreement. As a further ground for finding a District violation of its duty to negotiate in good faith, the Association argues that the District refused to disclose information essential to the Association's performance of its negotiating function. Additionally, the Association excepts to the denial of its motion, made subsequent to the issuance of the proposed decision, that the proceeding be reopened for purpose of introducing additional evidence.

The Board finds, contrary to the hearing officer, that the District's unilateral transfer of work out of the certificated unit was in violation of its duty to negotiate in good faith as

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Government Code unless otherwise stated. Section 3543.5 states in pertinent part:

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

. . . . .

required by subsection 3543.5(c) and that such conduct gives rise to a concurrent violation of subsections 3543.5(a) and (b). Consequently, the hearing officer's holding to the contrary is reversed. However, the Board finds that a separate unfair practice was not proven by reason of the District's alleged refusal to disclose information to the Association; nor does the Board find merit in the Association's claim that reopening the hearing record is warranted. The hearing officer's holding is affirmed in both respects.

#### FACTS

The hearing officer's procedural history and findings of fact contained in the attached proposed decision are substantially correct and are adopted by the Board itself.

#### DISCUSSION

EERA section 3543.3<sup>2</sup> requires an employer to meet and negotiate with the exclusive representative in good faith concerning matters within the scope of representation. Section

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<sup>2</sup>Section 3543.3 states:

A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

3543.2 defines scope of representation.<sup>3</sup> An employer commits an unfair practice when it unilaterally initiates a change in terms and conditions of employment within the scope of representation without notifying and affording the employee organization an opportunity to negotiate. Pajaro Valley Unified School District (5/22/78) PERB Decision No. 51; San Mateo County Community College District (6/8/79) PERB Decision No. 94; San Francisco Community College District (10/12/79) PERB Decision No. 105.

Duty to Negotiate.

The District initiated a plan to remove work from the attendance counselors in the certificated unit and have it performed by persons in the classified unit. A large proportion of the duties assigned to the new positions was formerly performed by counselors within the certificated unit. While the number of employees in the certificated unit at

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<sup>3</sup>Section 3543.2 states in relevant part:

(a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. . . .

Eisenhower High School and Frisbee Junior High School, respectively, was not reduced, the attendance counselor position was eliminated and the certificated incumbent became a regular counselor at Eisenhower.

There is no question that the District took the above-referenced action unilaterally. Repeated efforts by the Association to negotiate over the transfer of unit work were met by the District's steadfast assertion that it had no obligation to discuss its course of conduct. The issue here is whether the act of transferring duties out of the negotiating unit falls within the EERA's scope of representation.

In interpreting section 3543.2, supra, we note at the outset that it does not state with specificity which matters are within the scope of representation and which matters are beyond scope. Thus, while section 3543.2 specifically enumerates terms and conditions of employment, "matters relating to" wages, hours and the enumerated terms and conditions of employment are also within scope.

The responsibility for determining whether a matter is within scope has been entrusted to this Board by the Legislature.<sup>4</sup>

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<sup>4</sup>Section 3541.3(b) provides:

The Board shall have all of the following powers and duties:

(b) To determine in disputed cases whether a

In determining whether a subject is negotiable as a matter "related to" an expressly listed subject, the Board applies the following test: a subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission. Anaheim Union High School District (10/28/81) PERB Decision No. 177.

The decision to transfer work from one unit to another affects the wages, hours and working conditions of employees in the former unit. Actual or potential work is withdrawn from negotiating unit employees when such work is transferred out of that negotiating unit to employees in another unit in the employer's workforce. Wages and hours associated with the transferred-out work are similarly withdrawn.

In addition to these effects, diminution of unit work by transferring functions weakens the collective strength of

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particular item is within or without the scope of representation.

employees in the unit and their ability to deal effectively with the employer and can affect the viability of the unit itself. Such impact affects the work hours and conditions, and thus is logically and reasonably related to specifically enumerated subjects within the scope of representation. (UAW v. NLRB (General Motors) (D.C Cir., 1967) 381 F.2d 265 [64 LRRM 2489]).

International Harvester (1976) 227 NLRB 85 and American Needle and Novelty Co. (1973) 206 NLRB 534 citing Fibreboard, supra, held that the transfer of jobs from the bargaining unit to non-unit employees, with an adverse impact on the unit employees, imposed on the employer the obligation to negotiate the decision to relocate the jobs. In UAW v. NLRB, supra, the United States Circuit Court found this obligation to exist even though the affected employees were assigned other unit work and there was no demonstrable change in their wages or hours. The Court reasoned that the reduction of the whole number of jobs within the unit itself triggered the bargaining obligation. This holding is appropriate to the facts here. The loss of the counseling jobs precludes negotiations over wages, hours, and negotiable terms and conditions of employment for work assigned to the representation unit pursuant to CTA's unit petition and subsequent recognition by the District.

The first part of the test having been answered in the affirmative, the Board proceeds to the considerations involved in the balancing test.

The Board observes that the unilateral transfer of work can create a conflict between the employer and its employees. The record evidenced disruption of the work pattern in that attendance counseling work continued to be performed by classified employees in the presence of the certificated staff who had formerly performed that function. The elimination of unit positions denied to the remaining certificated employees the opportunity to move into the attendance counselor position. Additionally, the viability and effectiveness of the employee organization is adversely affected by diminution of the unit. See UAW v. NLRB (General Motors), supra.

Negotiations that allowed for the possibility of tradeoffs and concessions, as well as suggestions of alternate means of accomplishing the District's cost-reduction objectives in this case, may have provided opportunity for the interests of both the employer and the employees to be accommodated. The unilateral withdrawal of work from the unit followed by its placement in another unit may, as well, be expected to have a destabilizing influence on labor relations in the District because of a loss of the organization's credibility and viability.

The District would not have surrendered central managerial prerogatives had it negotiated with the Association before transferring work out of the unit. The decision itself was not one which is central or essential to the District's obligation

to run its operation or deliver educational services. Therefore, negotiations over this matter would not have abridged the District's freedom to exercise managerial prerogatives essential to its mission. San Mateo County Community College District and San Francisco Community College District, supra.

The NLRB, in OPEIU, supra, described some of the effects of the employer's unilateral decision to transfer unit work:

There is no assurance that these jobs will continue to be filled in the future through assignment of unit employees. Once the employee is assigned to the [new positions] he [sic] is in fact no longer included in the unit; the work of the unit is clearly diminished to this extent; and the opportunity to share in the benefits provided by participation in work carrying higher pay and wider opportunity is lost to the employee in the unit. . . . A failure to enforce the [bargaining] order could lead to the eventual whittling away of the union by the Company through numerous, small function assignments until no work is left for the Union-represented employees. Office and Professional Employees Union (1967) 68 NLRB 677 [67 LRRM 1029].

Although this case differs factually from OPEIU in that employees as well as work were transferred in that case, the ultimate impact of the employer's decision in OPEIU and the case before us is loss of work to the unit.<sup>5</sup>

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<sup>5</sup>Generally under NLRA, if an employer's decision to transfer work out of the bargaining unit has an demonstrable adverse impact on employment conditions of unit employees, that decision is subject to the mandatory negotiation requirement. Westinghouse Electric Corporation (1965) 150 NLRB 1574 [58 LRRM

In conclusion, the employer's unilateral removal of work from the negotiating unit without meeting and negotiating with the exclusive representative constituted a violation of subsections 3543.5(b) and 3543.5(c) of the Act. See San Francisco Community College District, supra. The same conduct that denied to the employee organization rights provided in the EERA, also constituted a concurrent deprivation of the right of employees to representation on matters relating to terms and conditions of employment, thereby violating section 3543.5(a). San Francisco Community College District, supra; Oakland Unified School District (4/23/80) PERB Decision No. 126. The hearing officer accordingly is hereby overruled with respect to his dismissal of the subsections 3543.5(a), (b) and (c) charges.

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1257]; Office and Professional Employees v. NLRB (D.C. Cir. 1969) 419 F.2d 314 [70 LRRM 3047] enf'd. 168 NLRB 677 [67 LRRM 1029]; American Needle and Novelty Co. (1975) 217 NLRB 730 [89 LRRM 1224], enf'd (6th Cir. 1977) 547 F.2d 138 [94 LRRM 3152]. In these and other cases decided under the NLRA, a showing of significant adverse impact was a prerequisite to finding a violation. In General Motors, supra, the D.C. Circuit Court found that the diminution of the unit by the loss of whole jobs constitutes a significant impact on the unit and thus rendered the decision negotiable. We find the General Motors rationale applicable here. We also note that "demonstrable" and "significant" are used interchangeably by the NLRB. We do as well.

### Duty to Disclose Information

We note that the Association alleges by its exceptions that the District failed to comply with its duty to disclose information.<sup>6</sup> This allegation, raised for the first time by the Association's exceptions, is not in fact a charge that the District failed to disclose information but is rather a restatement in different form of the Association's allegation that the Association was provided with misleading information by the District.

We dismiss the Association's exception. The Association does not allege in its charge nor does the record reflect that the alleged miscommunication lulled it into believing that the District had withdrawn its unilateral action or that the Association was thereby prevented from fulfilling its representational function.<sup>7</sup>

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<sup>6</sup>The obligation to produce information is described as that of providing "information that is needed by the bargaining representative for the proper performance of its duties." See NLRB v. Acme Industrial Company (1967) 385 U.S. 435, 436 (64 LRRM 2069).

<sup>7</sup>According to the testimony of Association witness Wiefels, the District representative stated: first, that the changes complained of were not to take place because they had been "squashed"; second, that the course of conduct would not involve the assignment of new responsibilities; and third, that the certificated staff was not to be decreased as a result of the reassignment of duties. As noted by the hearing officer, there was conflict in the testimony concerning the implications to be drawn from these statements. The District representative's letter to the Association president on January 19, 1978, as well as the school board agenda published

### Motion to Reopen Hearing

The Association filed a motion to reopen the record on December 26, 1978 in response to the proposed decision of the hearing officer issued on December 6, 1978. The evidence relied upon by the hearing officer in his decision was obtained at the hearing on May 9, 1978, which took place prior to, and therefore did not include, the subsequent reassignment and transfer of counselors to a classroom position for one period per day as alleged in the Association's motion to reopen.

The reasons why the Charging Party neglected to move for an opening of the case while it was under submission to the hearing officer are not disclosed. It could be argued that the Association should have made its motion earlier, since the new evidence was available in August while the case was under submission at the hearing officer level. However, we have found the District's conduct to constitute a violation of subsection 3543.5(c) even without the proffered evidence of an alleged subsequent reassignment and transfer. Thus, the evidence is not crucial to the finding of an unfair practice and it is therefore unnecessary to reopen the record.

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January 20, 1978, indicated that individuals would be hired to fill the two newly-created positions and that the District remained steadfast in its belief that it had no obligation to negotiate over the matter. Both communications were made subsequent to the date of the alleged misrepresentations.

### REMEDY

Subsection 3541.5(c) of the EERA grants PERB broad powers to remedy unfair practices. Pursuant to this authority, we may fashion appropriate remedies to effectuate the purposes and policies of the EERA. In the present case, we have found that the District transferred attendance counseling work out of the certificated unit without first satisfying its duty to negotiate with the Association. This is a serious infringement of employee rights, as it denies the exclusive representative the opportunity to present and negotiate alternatives to the District's action, and to negotiate over the effects of the transfer of work. It is generally appropriate under these circumstances to order a return to the status quo and order the District to meet and negotiate, upon request, over the decision and effect of the transfer of work, to cease and desist from taking any further unilateral actions regarding matters within scope, and to make employees whole for any compensation lost as a result of the District's unlawful conduct. However, we are reluctant to order a restoration of the status quo ante in this case. We note that new employees were hired and have been working in the newly created positions since 1978. If the District were required to transfer the attendance supervising work back to the certificated unit, it might be required to lay off these employees. Furthermore, the District would have to either hire additional counselors to perform attendance work,

divert existing counselors from counseling to attendance duties, or eliminate attendance supervision. If the District then proceeded, after exhausting its duty to negotiate, to create classified attendance supervisor positions, it could entail layoff of any newly hired counselors and new hiring of attendance supervisors. The above-described personnel and service arrangements and rearrangements would amount to considerable inconvenience for the District and would also work to the detriment of newly hired classified employees who were not responsible for the unfair practice. These consequences outweigh the harm caused to the exclusive representative and the employees in this case. In particular, significant dislocation and disruption of employee service could result.

Based on the above, we conclude it would be inappropriate to require restoration of the status quo ante, especially where, as here, there is no finding that the District's transfer of the attendance function was for discriminatory reasons.

However, we do find it appropriate to require the District to reimburse any employees who suffered loss of compensation as a result of the District's unilateral action and failure to negotiate. Although there was no evidence presented at the hearing proving that any certificated employees suffered loss of wages, we note that the Association requested PERB to reopen the record to take new evidence regarding adverse impact of the

unilateral action on unit employees. Such evidence may be appropriately presented at a compliance proceeding, if the Association wishes to prove that the District's unilateral action resulted in loss of compensation to unit employees. The District shall also be required to sign and post the Notice to Employees which is attached to this Decision and Order.

ORDER

Pursuant to subsection 3541.5(c) and based upon the foregoing findings of fact, conclusions of law, and the entire record in the case, the Public Employment Relations Board hereby ORDERS that the Rialto Unified School District shall:

A. CEASE AND DESIST FROM VIOLATING SUBSECTIONS 3543.5(a), (b) AND (c) BY:

1) Making unilateral changes in the terms and conditions of employment in the unit described herein above, without prior notice to the Association and without providing an opportunity to negotiate, with particular reference to transferring unit work.

2) Denying the Association its rights to represent unit members by failing and refusing to meet and negotiate about transfer of unit work.

3) 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 unilaterally

transferring unit work, when such action affects matters within the scope of representation, without offering to the exclusive representative the opportunity for meeting and negotiating.

B. THE BOARD FURTHER ORDERS THE DISTRICT TO TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT.

1) Upon request of the Association, meet and negotiate with the Association over the effects of transferring of attendance counseling work out from the certificated unit.

2) Make whole any certificated employees for any loss of compensation, plus interest at the rate of 7 percent per annum, which they suffered as a result of the District's transferring work from the certificated unit to the classified service. Such reimbursement is to run from the date the unit work was transferred until the occurrence of the earliest of the following events: (1) the date the District negotiates to agreement with the Association on matters pertaining to the effects of transferring of certificated unit work, (2) a bona fide impasse in negotiating, (3) the failure of the Association to request to negotiate within five days of service of this Decision, or to commence negotiations within five days of the District's notice of its desire to negotiate with the Association or, (4) the subsequent failure of the Association to negotiate in good faith.

3) Post at all school sites, and all other work locations where notices to employees customarily are placed, within five workdays of service thereof, copies of the Notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to insure that said notices are not reduced in size, altered, defaced or covered by any other material.

4) Notify the Los Angeles regional director of the Public Employment Relations Board, in writing, within 20 calendar days of service of this decision, of what steps the District has taken to comply herewith.

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

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Irene Tovar, Member

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John Jaeger, Member

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Barbara D. Moore, Member

Chairperson Gluck's concurrence and dissent begins on page 18.

Harry Gluck, Chairperson, concurring and dissenting:

I am in substantial agreement with the majority's decision. However, I disagree with the remedy ordered.

PERB's remedial powers are granted in order that the purposes of the Act be effectuated. Thus, remedies should address the harm that results from unlawful conduct. Here, the harm is the adverse impact on the employees' wages, hours, and conditions of work resulting from a loss of specific jobs to the bargaining unit, jobs which they had performed. Yet the remedy does nothing to restore those jobs. Moreover, it precludes their restoration even through the ordered negotiations. The diminution of the unit, for which the majority expresses concern, will remain and it is difficult to envision any solution negotiated under the majority's limitations which would amount to more than a short-term compensation for a permanently continuing effect of an unlawful unilateral act. The weakness of the remedy is emphasized by the majority's reference to the possible continuous erosion of the representation unit by a series of small job transfers.

(p. 8.) Although I agree that the mid-term restoration of status quo ante would work an exceptional hardship on the District and the classified employees to whom the work was transferred, the Board's Order should have required such relief at the start of a later semester barring some alternatively

negotiated solution.<sup>1</sup> Otherwise, I concur with the majority's reasoning and conclusions.

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~~Harry Glück, Chairperson~~

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<sup>1</sup>See Transmarine Navigation (1968) 170 NLRB 389, where even though the decision to lay off was not negotiable, the NLRB ordered limited backpay to "recreate in some practicable manner a situation in which the parties' bargaining position is not entirely devoid of economic consequences for the [employer]." Id. p. 390.

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

After a hearing in Unfair Practice Case No. LA-CE-218, in which all parties had the right to participate, it has been found that the Rialto Unified School District violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act.

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

We will cease and desist from denying the rights of the Rialto Education Association and interfering with the rights of employees by refusing to meet and negotiate with the Rialto Education Association concerning a matter within the scope of representation, to wit, the transferring out of unit work.

We will meet and negotiate upon request of the Association over the impact and effects of the transfer of work formerly performed by employees in the certificated unit.

We will make whole any certificated employees for any loss of compensation they suffered as a result of the District's transferring work from the certificated unit to the classified service.

RIALTO UNIFIED SCHOOL DISTRICT

Dated: \_\_\_\_\_ By: \_\_\_\_\_  
Authorized Representative

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

PUBLIC EMPLOYMENT RELATIONS BOARD  
OF THE STATE OF CALIFORNIA



RIALTO EDUCATION ASSOCIATION, )  
 )  
 Charging Party, ) Unfair Practice  
 ) Case No. LA-CE-218-77/78  
 )  
 v. )  
 )  
 RIALTO UNIFIED SCHOOL DISTRICT, ) PROPOSED DECISION  
 ) 12/6/78  
 Respondent. )  
 )  
 \_\_\_\_\_ )

Appearances: Edward Hogenson, Attorney for Rialto Education Association; Lee T. Paterson and Ronald C. Ruud, Attorneys (Paterson & Taggart) for Rialto Unified School District.

Before Kenneth A. Perea, Hearing Officer.

STATEMENT OF THE CASE

The events preceding the administrative hearing before the above-named hearing officer of the Public Employment Relations Board (hereafter PERB) are summarized as follows:

(1) On February 6, 1978 the Rialto Education Association (hereafter Association) filed the above-captioned unfair practice charge against the Rialto Unified School District (hereafter District) alleging violation of sections 3543, 3543.1, 3543.5(a), (b) and (c).<sup>1</sup>

(2) On February 24, 1978, the District timely filed a Motion to Dismiss and Answer to the unfair practice charge.

(3) An informal conference held on March 1, 1978 failed to resolve the matter which was thereupon heard on May 9, 1978 in San Bernardino, California.

<sup>1</sup> All statutory references are to the California Government Code unless otherwise specified herein.

(4) At the hearing on May 9, 1978, the District renewed its motion to dismiss those portions of the charge alleging violation of sections 3543, 3543.1 and 3543.5(b). The District's motion was granted regarding sections 3543, 3543.1 and denied regarding section 3543.5(b).

The gravamen of the Association's unfair practice charge is that the District violated section 3543.5(a), (b) and (c) by unilaterally implementing the creation and filling of two new classified positions, attendance supervisor and staff assistant/student relations, to perform work which in the past had been performed by unit members represented by the Association.

The District responds that it is without authority to bargain over the Rialto Unified School District Personnel Commission's (hereafter Personnel Commission) decision to classify the two positions as part of the classified service, the District's action to fill the positions is not a mandatory subject of negotiating, certificated unit members were not substantially affected in their terms and conditions of employment so as to require negotiations regarding the assignment and reassignment of duties and nothing in the record supports alleged violations of section 3543.5(a) and (b).

#### FINDINGS OF FACT

The Association is the exclusive representative of certificated employees in the District. A different employee organization is the exclusive representative of all classified employees in the District.

On September 9, 1977 the District and the Association executed a collective negotiating agreement, effective September 9, 1977 through June 30, 1979.

Sometime in the fall of 1977 Mr. Jan Button, principal at Eisenhower High School, had several conversations with Ms. Mary Hodson, then the attendance counselor at Eisenhower and a member of the certificated unit represented by the Association. According to Mr. Button (Ms. Hodson did not testify at the hearing), the purpose of the conversations was "to work together to solve Eisenhower's attendance problems." Ms. Hodson complained to Mr. Button about her inability to perform her counseling function because the inordinate amount of clerical tasks that came with the role of attendance counselor caused her to be bogged down in paperwork. Ms. Hodson indicated the need for more hands to perform these various clerical functions.

During September and October 1977, Mr. Button, in frequent talks with Mr. Robert H. Williams, superintendent of the District, recommended that the position of attendance counselor at Eisenhower be changed to that of a classified position. Although Mr. Button felt that there was a possibility of getting more than one classified position with the money that had been budgeted for the attendance counselor position, Mr. Button was unsure about whether he communicated this thought to anyone.

During this same period of time, members of the District administration also considered the possibility of creating a second new classified position, that of staff assistant/student relations at Frisbee Junior High School.

Superintendent Williams directed Mr. Sam Simpson, assistant superintendent of personnel, to contact and work with Mr. Charley Perry, classified personnel director and executive secretary to the Personnel Commission, regarding the creation of these two classified positions.

The idea that the two positions be created in the classified service was first communicated to Mr. Perry by Mr. Simpson. Following that initial contact, Mr. Perry contacted Mr. Button, principal at Eisenhower, and Mr. Britton, principal at Frisbee. These site administrators told Mr. Perry, in general terms, of their individual needs and the particular problems creating those needs. Mr. Perry then synthesized this information, looked at the skills, knowledge, and abilities needed to perform the particular duties involved, and contacted other school districts to see if they had similar classified positions. Based on this information, Mr. Perry came up with two class specifications: staff assistant/student relations at Frisbee and attendance supervisor at Eisenhower.

These class specifications were submitted by Mr. Perry to the Personnel Commission at a non-public meeting on December 4 or 5, 1977. The purpose of this meeting was to decide whether or not the two positions belonged in the classified service. The Personnel Commission reviewed Mr. Perry's information, looked at additional responsibilities which the Commission felt should be added, and discussed salary recommendations which they would make to the District's administration. Based on these considerations, the Personnel Commission gave approval to Mr. Perry to initiate job

announcements relative to the two positions. On December 9, 1977, the Personnel Commission published the proposed classified job descriptions for the two positions and on December 12, 1977, the Personnel Commission published job announcements requesting applications for the two positions.

On December 10, 1977, the Association expressed its concern to Mr. Larry G. Ruttan, assistant superintendent employee relations, that the job descriptions as proposed would involve transferring out of the bargaining unit work done by members of the certificated bargaining unit and would otherwise affect matters within the scope of representation pursuant to section 3543.2.

The Association outlined these concerns with respect to the position of attendance supervisor at Eisenhower on December 12, 1977, in a letter from Mr. Bert Wiefels, president of the Association, to Mr. Ruttan. The Association stated: (1) that the position as described in the proposed job description involved many responsibilities and duties appropriate for a certificated person which therefore ought to be staffed by a certificated person; (2) that although the position as posted included some administrative and clerical duties, such duties did not significantly depart from those duties handled by the certificated person who was occupying the position; (3) that the position of attendance counselor was clearly a part of the bargaining unit recognized by the District to be represented by the Association; and (4) that although the recognized unit was incorporated in the collective negotiation agreement between the District and the Association,

there had been no consultation between the parties prior to the posting of the position. The Association further expressed its concern about the erosion of the bargaining unit insofar as it involved recognized certificated duties being performed by non-certificated personnel. The Association also expressed its concern that the proposed shifting of recognized bargaining unit work out of the unit had taken the form of unilateral action having been preceded by no negotiations, discussion, or notice to the Association.

In a letter dated December 15, 1977, Mr. Wiefels expressed to Mr. Williams the Association's concern that both positions, as advertised by the District, involved duties and responsibilities that were part of the bargaining unit work represented by the Association and that many of these duties should appropriately continue to be performed by certificated personnel.

The Personnel Commission held its regular monthly public meeting on January 5, 1978. On its published agenda as an action item was the approval of the two new classified positions. At that meeting, the Personnel Commission took formal action to approve the two positions as part of the

classified service. No representative of the Association was present and no one challenged the Personnel Commission's classification of the two positions at the Commission's meeting on January 5, 1978.

On January 1, 1978, President Wiefels telephoned Superintendent Williams concerning the proposed job descriptions and again indicated the desire of the Association to meet and negotiate in this regard. There is conflicting testimony as to what was said during this conversation.<sup>2</sup>

Wiefels' interpretation of that conversation is contained in a letter written by Wiefels to Williams dated

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<sup>2</sup>Wiefels testified that Williams indicated that the two positions had been "squashed" by the Association. Wiefels interpreted this to mean that the positions had been "killed", that "they're no longer viable."

Williams' account of the conversation differs from that of Wiefels. Williams testified that he told Wiefels that he didn't believe the Association had the right to negotiate on the issue at all and that the District was moving ahead with the matter. Williams testified that he informed Wiefels that he (Williams) had doubts in his own mind whether the position would be filled because the dispute with the Association would probably "quash" the request on the part of the two principals. By "quash" Williams meant "quash" with the Board of Education. Williams added that the Association would then get the credit for depriving the two schools of the requests that they had made. In any event, resolution of the conflicting testimony appears to be unnecessary to arrive at a determination of whether the District violated section 3543.5(b) and (c).

January 16, 1978 in which Wiefels states that pursuant to the telephone conversation of January 6, 1978, he considers the entire negotiation issue closed because the two new classified positions had been "squashed."

Williams replied to Wiefels' letters of December 15, 1977 and January 16, 1978 by writing to Wiefels on January 19, 1978. Williams' letter stated that negotiations were closed pursuant to the collective negotiating agreement and that it did not seem appropriate to open them because the Association felt the District was hiring two classified persons. Williams further stated that management had the right to the assignment of new responsibilities. Williams went on to say that the two positions had been referred to the Personnel Commission and had been accepted as classified appointments, that a testing system had been set up and the employees would soon be selected, and that the next step would be to take the recommendation to the Board of Education. Williams also indicated that there would be no decrease in the certificated staff due to reassignment of duties.

On January 20, 1978, the District published an agenda for the District's School Board meeting to be held on January 25, 1978. Included in that agenda was the proposed approval of the hiring of two individuals to fill the positions of staff assistant/student relations and attendance supervisor. On January 25, 1978, Mr. Wiefels again wrote Mr. Williams, outlining further the Association's position regarding the District's refusal to honor the Association's request to meet and negotiate on the issues surrounding the

filling of the two new positions, and reiterating the Association's request to meet and negotiate in that regard. In addition, Mr. Wiefels delivered a speech to the Rialto School Board at its January 25, 1978 meeting concerning the proposed filling of the two positions. Following Mr. Wiefels' speech, the District's Board unanimously approved the hiring of two individuals to fill the positions of staff assistant/student relations and attendance supervisor.

Sometime before the position of attendance supervisor was approved by the District's Board, Mr. Williams, Mr. Button and Ms. Hodson engaged in a conversation in which Mr. Williams indicated to Ms. Hodson that there were doubts about making changes in the position of attendance counselor because of the controversy with the Association over the position. Mr. Williams indicated to Ms. Hodson that she might not get her transfer because of the controversy. According to Mr. Williams' testimony, Ms. Hodson stated that she was quite satisfied to do what the District would have her do even though she wished to have a transfer, that she did not like to be in the middle of a controversy, and that she didn't want to cause trouble. Mr. Williams stated that he did not talk to Ms. Hodson about a transfer at any other time and that he did not know if Ms. Hodson had ever requested a transfer. Ms. Hodson did not testify at the hearing and there is nothing in the record to indicate whether she ever requested a transfer or how she interpreted or reacted to this conversation with Mr. Williams.

In the latter part of January 1978, Mr. Amos L. Saulsbury, chairman of the faculty senate at Eisenhower and a member of the negotiating unit represented by the Association, was asked by Mr. Button if he would like to sit in on the interview committee for the position of attendance supervisor.

Mr. Saulsbury testified that Mr. Button indicated to him, in general terms, that the position of attendance counselor was to be changed, that there would no longer be a counselor in that position, and that they would be interviewing for a classified person to assume some of the functions of the attendance counselor. Mr. Saulsbury stated that at the time he participated in the interviews he was not aware that the position of attendance supervisor was the subject of a dispute between the Association and the District.

Mr. Button was also a member of the interview committee for the attendance supervisor position. He testified that during the interviews he asked the candidates if their hours were flexible because some home visitations in the evening hours would be required. He also indicated to at least one candidate that counselors felt they had the right to leave work at 2:30 and that this had been a problem in the past. Mr. Button also indicated to the candidates that they would be required to handle the "15-day absence notices." In the past, a student with five or ten days of absences from certain classes was referred to a regular counselor. When the student accumulated 15 days of absences, the student was referred to the attendance counselor. With the removal of the attendance counselor

position, the attendance supervisor was to handle those 15-day referrals. This was a new attendance policy at Eisenhower. Ms. Hodson had performed this function in the past.

In regard to the 15-day notices, candidates were told they would also be required to make determinations as to whether further counseling by the student's counselor was required. The candidates were also informed that they would be required to work with the School Attendance Review Board (hereafter SARB), an agency composed of school and community representatives whose purpose is to solve attendance problems.

Of the three candidates who interviewed for the attendance supervisor position, Ms. Mary Cardozie was eventually hired. Ms. Hodson was subsequently reassigned to duties as a regular counselor at Eisenhower and the position of attendance counselor, which had been in existence at Eisenhower since at least 1961, was abolished. Ms. Hodson is still at Eisenhower and is still a member of the negotiating unit represented by the Association. The creation of the position of attendance supervisor at Eisenhower has not resulted in the reduction of the certificated staff at Eisenhower.

Ms. Joanne Kuiper is a member of the Association's negotiating team and has been a counselor at Eisenhower since 1964. In 1972, Ms. Kuiper participated in the drafting of a "Tentative Job Description - Counselor - Grades 7-12." Although the District represented that this was not an official job description for counselors and that there has never existed such an official job description for counselors, Ms. Kuiper testified that the "Tentative Job Description" was an umbrella

description of the duties performed by counselors at Eisenhower, that the document correctly described the work performed by counselors at Eisenhower, and that nothing contained therein was inaccurate.

Ms. Kuiper testified about the general duties and responsibilities of counselors and about the particular duties and responsibilities of the attendance counselor at Eisenhower. According to Ms. Kuiper, the following duties and responsibilities of the attendance supervisor, as described in the final job announcement published by the Personnel Commission, are duties and responsibilities currently performed by counselors in general and previously performed by the attendance counselor in particular:

Assist staff, parents, and students in looking at attendance realities, strategies, and alternatives. Discuss problems and keep in touch with parents by telephone and home visitations. Keep thorough written records of contacts with parents; enlist assistance from other students, adults, and agencies; make frequent home visits to verify student's residence and attendance habits. Provide liaison between parents, teachers, counselors, and administrators in working with students with attendance problems; also work with the School Attendance Review Board.

Ms. Kuiper testified that the counselors at Eisenhower still perform these same functions as part of their job responsibilities. Ms. Kuiper also testified that to the best of her knowledge, classified personnel at Eisenhower have never, on a regular basis, filled any of these functions in the past.

Principal Button testified, however, that in previous years at least three classified persons had performed many of the

duties assigned to the attendance supervisor. Mr. Button testified that Ms. Pauline Garcia, a CETA employee, had worked at Eisenhower for one-half of the 1975-76 school year as an attendance aide, a classified position. Mr. Button testified that her duties included:

assist staff in looking at attendance alternatives . . . discuss problems and keep in touch with parents by telephone . . . make home visitations to parents . . . keep written records of contacts with parents . . . enlist assistance from other students, adults, and agencies . . . make frequent home visits to verify attendance habits . . .

According to Mr. Button, these same functions were performed by Mr. Woodrow Feather, a CETA employee who worked at Eisenhower for one-half of the 1975-76 school year in the classified position of attendance aide, and by Ms. Sadie Pittman, a tutor assigned to work with attendance problems on a part-time basis at Eisenhower for two to three months during the 1976-77 school year. While there have been no similar CETA positions at Eisenhower in the past two years, Mr. Button testified that all attendance clerks perform duties similar to those of the attendance supervisor and that the attendance supervisor is now doing much the same thing that the attendance counselor did.

Ms. Kuiper also testified that other duties previously performed by the attendance counselor are now performed by the attendance supervisor. In the past, according to Ms. Kuiper, a regular counselor dealt with a student who had accumulated five or ten days of absences. At 15 absences, the regular counselor would notify the attendance counselor, who would at that point

deal with the student. The attendance supervisor now performs this functions. Additionally, in the past, the attendance counselor was assigned to work with the SARB, a function now performed by the attendance supervisor. Lastly, the attendance supervisor is now responsible for filling out various attendance forms previously filled out by the attendance counselor.

Ms. Kuiper also testified that the implementation of the attendance supervisor position has had an impact on her own work load and role as a regular counselor. Ms. Kuiper stated that, prior to the appointment of the attendance supervisor, a licensed certificated person held the position of attendance counselor. Thus, Ms. Kuiper had no problem referring the 15-day absences to a qualified person. But since the employment of a classified attendance supervisor, a position that requires the equivalent of a high school diploma, Ms. Kuiper stated she no longer has the confidence in that person that she had in a licensed certificated person. Consequently, as a general rule, she no longer passes the 15-day absence notices along to the attendance supervisor, but rather deals with them herself. Thus, Ms. Kuiper testified, she has assumed a greater role in the handling of attendance problems.

The position of staff assistant/student relations at Frisbee Junior High School was filled with the hiring of Mr. Anderson shortly before the start of the second semester of the 1977-78 school year.

Ms. Nancy Patteson, a counselor at Frisbee for the last ten years, testified that at a February 2, 1978 meeting of the Frisbee counselors, she was asked by Mr. Britton, principal at Frisbee, if she would develop a form for Mr. Anderson to use on home visitations. Ms. Patteson initially agreed to do this; however, she subsequently wrote to Mr. Britton and declined to develop the form, citing as her reason the dispute that existed over the position between the Association and the District.

Ms. Patteson testified that the following duties and responsibilities of the staff assistant/student relations, as described in the job announcement published by the Personnel Commission, are functions that have traditionally been performed and are currently being performed by counselors at Frisbee:

to promote academic and social success of students by fostering educational goals . . . to develop and maintain communication with students concerning their problems in relating to the School District . . . to provide paraprofessional counseling assistance to students and their parents . . . to motivate a greater feeling of unity and respect among all students . . . to handle student disciplinary actions as necessary . . .

Ms. Patteson testified that to the best of her knowledge classified employees at Frisbee in the past have never performed these functions. She indicated, however, that Mr. Anderson is currently performing these functions along with the counselors at Frisbee.

Ms. Patteson also testified that the implementation of the staff assistant/student relations position has had an impact on the duties and work load of the counselors at Frisbee.

Ms. Patteson stated that in the past years she had worked a great deal more with students with tardy problems than she does in the current year. Specifically, Ms. Patteson testified that in the past, counselors dealt with students who had accumulated four and five tardies to an individual class. This year, however, counselors deal only with the fourth tardy and the fifth tardy is referred to Mr. Anderson.

Ms. Patteson testified that there is a lack of communication regarding tardy problems and that counselors generally have less contact with what is going on on campus since the implementation of the staff assistant/student relations position. Ms. Patteson stated that the counselors are now "separated" from what they had been doing in the past, which Ms. Patteson described as "kind of like being in the front lines." According to Ms. Patteson, "things just aren't as visible" to the counselors as they used to be.

Ms. Patteson also stated that Mr. Anderson is difficult to find because he spends much of his time out of the office and that he has made no effort to establish contact with the counselors.

According to Ms. Patteson, however, the most significant change at Frisbee this year, compared to the past seven years, is the presence of a new principal, new assistant principal, and one new counselor. Ms. Patteson testified that it was thus difficult to assess the impact of the new staff assistant/student relations position on the functioning of the counselors because some of the changes at Frisbee in the current year are the result of new managerial personnel.

Finally, Ms. Patteson testified that prior to the implementation of the staff assistant/student relations position at Frisbee there were three counselors at that site. Following the implementation of that position, there continues to be three counselor positions at Frisbee. Thus, the implementation of that position has not resulted in the reduction of the number of counselors at Frisbee or the number of positions represented by the Association.

Ms. Ruth DeSadier has been employed as a counselor at Frisbee since September 1977. She testified that one day she found her office occupied by Mr. Anderson, a student, and a teacher. She was later told by the teacher that the student had been fighting and that Mr. Anderson had counseled the student. Ms. DeSadier testified that she felt slighted by the incident because she felt Mr. Anderson had been doing her counseling job. On another occasion, Ms. DeSadier was counseling a student and was considering a home visitation when Mr. Anderson informed her that he had visited the student's home the previous evening. Mr. Anderson then gave Ms. DeSadier a list of suggestions and recommendations which he felt would help her in counseling the student and his family. Ms. DeSadier also testified that the office Mr. Anderson occupies was formerly occupied by a certificated person, that the office in the past had been used by certificated personnel to make phone calls and conduct parent conferences, and that the office is now unavailable for these functions.

## ISSUES

1. Did the District fail to meet and negotiate in good faith by unilaterally implementing the creation and filling of two new classified positions, attendance supervisor and staff assistant/student relations, to perform work which in the past had been performed by unit members represented by the Association in violation of section 3543.5(c)?

2. Did the District interfere, restrain or coerce employees in violation of section 3543.5(a)?

3. Did the District deny the Association its rights as an employee organization in violation of section 3543.5(b)?

## CONCLUSIONS OF LAW

A. The Allegation That The District Failed To Meet And Negotiate In Good Faith In Violation Of Section 3543.5(c)

Section 3543.5(c) provides that 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.

"Meeting and negotiating" is defined in pertinent part by section 3540.1(h) 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 reach . . . . [Emphasis added.]

Matters within the "scope of representation" are limited, pursuant to section 3543.2, to:

. . . matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Sec. 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Sec. 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7 and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code . . .<sup>3</sup>

Thus, before an employer may be found to have violated section 3543.5(c), it must be determined that it has failed to meet and negotiate regarding any subjects of mandatory negotiation enumerated in section 3543.2.

The District defends its action of failing to meet and negotiate regarding the creation of the two new classified positions in question with the defense that the District is a merit system school district and the Personnel Commission has the sole authority to classify said positions.

It is clear that the District is a merit system school district and as such, pursuant to Education Code section 45240 et. seq., the Personnel Commission is granted broad authority in developing and monitoring procedures relating to the hiring, retention and termination of district employees. The PERB

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<sup>3</sup>Sec. 3543.2 was amended pursuant to Stats. 1977, ch. 606 (effective September 7, 1977) to make reassignment policies negotiable.

itself recognized the role of the merit system in Sonoma County Organization of Public Employees (11/23/77) EERB Decision No. 40, in ruling that a school board can negotiate the increase or decrease of salaries of particular job classifications, so long as such negotiated changes do not lift a classification which formerly was lower paid above one which formerly was higher paid within the same "occupational group."

The District's argument, however, must fail for the reason that the District alone made the decision to request the Personnel Commission to create the classified positions in question. Certainly the District was not restrained by the merit system in making its initial decision to seek the creation of the positions by the Personnel Commission. Furthermore, after the Personnel Commission created the classified positions, it was still within the District's exclusive control to approve the hiring of two individuals to fill the positions. The District's action to approve the filling of the classified positions took place at the District's school board meeting on January 25, 1978. Clearly the District was not restrained in taking this action by virtue of the merit system. Thus, while the merit system leaves the Personnel Commission with the exclusive authority to classify positions within the classified service, the District has the authority to initiate requests to the Personnel Commission for the classification of new positions and to eventually approve the hiring of individuals to fill newly created positions. Certainly it was not beyond the District's control pursuant to the merit system to have met and negotiated with the Association

upon the Association's request after the Personnel Commission approved the positions in question but before the District's Board approved the hiring of two individuals to fill the positions.

(1) The Classified Positions And The Duty To Meet And Negotiate Regarding "Wages" And "Hours Of Employment"

The facts are clear that the creation of the two new classified positions and the filling of those positions did not affect the wages of any certificated unit members represented by the Association. Nor is it contended by the Association that the District had an obligation to meet and negotiate over wages.

The subject of "hours of employment", however, requires careful examination. In Fullerton Union High School District Personnel and Guidance Association (5/30/78) PERB Decision No. 53, the Board itself held that the Fullerton Union High School District unlawfully failed to meet and negotiate with the Fullerton Union High School District Personnel and Guidance Association on the subjects of counselor and psychologist caseloads on the ground that caseload is a matter relating to "hours of employment" as used in section 3543.2.

There is testimony in the record of the instant case regarding the impact on the working load of regular counselors in the District after the creation and filling of the two new classified positions. Ms. Kuiper, a counselor at Eisenhower since 1964, testified that since the appointment of the attendance supervisor, she no longer has the same confidence in that person that she had in the licensed certificated person who formerly filled the position of attendance counselor and consequently, as a general rule, she no longer sends 15-day

absence notices to the attendance supervisor but rather deals with them herself.

Ms. Patteson, a counselor at Frisbee, testified that, while in the past she and other counselors at her school dealt with students who had accumulated four and five tardies to an individual class, after the implementation of the staff assistant/student relations position, counselors deal with only the fourth tardy and that the fifth tardy is referred to the staff assistant/student relations. Ms. Patteson further testified that subsequent to the implementation of the staff assistant/student relations position there is less contact between counselors and the campus and that things are not as "visible" to the counselors as they used to be. Ms. Patteson however added that it is difficult to assess the impact of the new staff assistant/student relations position on the functioning of counselors because some of the changes at Frisbee are the result of new managerial personnel at the school. Ms. Patteson testified, however, that there has been no change subsequent to the implementation of the staff assistant/student relations position in the number of counselors at Frisbee or the number of positions represented by the Association.

Ms. DeSadier, a counselor at Frisbee, testified that in one instance she felt slighted by the fact that the staff assistant/student relations person had conducted a conference between a student, a teacher and himself in Ms. DeSadier's office because she felt that the staff assistant/student relations person was doing her counseling job. In another instance, the staff assistant/student relations person made some

suggestions to Ms. DeSadier which he felt would help her in counseling a particular student and his family. Ms. DeSadier further stated that the office which the staff assistant/student relations occupies was formerly occupied by a certificated person and that while the office was then available for certificated personnel to make phone calls or conduct parent conferences, it is no longer available for these purposes.

While sensitive to the practical difficulties experienced by counselors at Eisenhower and Frisbee in adjusting to the changes here at issue, it must be concluded that the implementation of the new classified positions did not have a substantial impact upon counselors' workloads. Unlike Fullerton, it cannot be concluded from the testimony that the implementation of the positions in question has increased the number of hours worked by counselors at Eisenhower or Frisbee nor affected the quality of the work performed by counselors. Accordingly, it is concluded that the implementation of the two new classified positions was not a matter relating to "hours of employment" as used in section 3543.2

(2) The Classified Positions And The Duty To Meet And Negotiate Regarding "Other Terms And Conditions Of Employment"

An analogy may be drawn between the District's actions in this case regarding the creation and filling of two new classified positions to perform some of the duties in the past performed by certificated employees represented by the

Association and cases involving the subcontracting out of work performed by unit members which have arisen under the Labor Management Relations Act (hereafter LMRA)<sup>4</sup>

In its precedential decision, Fibreboard Paper Prods. Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609], the U.S. Supreme Court declared that the employer had violated section 8(a)(5) of the LMRA in refusing to meet and negotiate on the subject of contracting out to an independent contractor the performance of plant maintenance work. The Supreme Court held:

The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." See Order of Railroad Telegraphers v. Chicago & N.W.R. Co., 362 U.S. 330 [45 LRRM 3104]. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit. [57 LRRM at 2612.]

As shown by the above-quoted passage, the Supreme Court's determination in Fibreboard, supra, relied on the general provision "terms and conditions of employment" in the LMRA. The more narrow legislative definition given to the phrase "terms and conditions of employment" in the EERA, however, requires a careful examination of the District's action in

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<sup>4</sup>29 U.S.C. sec. 151 et. seq. The Labor Management Relations Act amended the National Labor Relations Act.

light of the enumerated subjects which constitute "terms and conditions of employment" pursuant to the EERA.<sup>5</sup>

The sole item enumerated in the EERA as a term and condition of employment which arguably applies to the facts of this case is that of "reassignment policies." The facts of this case clearly show that there has been no failure to meet and negotiate transfer policies since that term as used in the

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<sup>5</sup>Subsequent to the Supreme Court's decision in Fibreboard, the National Labor Relations Board (NLRB) developed the "significant adverse impact" rule in Westinghouse Elec. Corp. (Mansfield Plant) (1965) 150 NLRB 1574 [58 LRRM 1257], wherein it was held that the employer's subcontracting decisions, challenged by the union as unlawfully unilateral, resulted in no "significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit" where the employer had a long history of subcontracting maintenance and production work. Similarly, in Fafnir Bearing Co. (1965) 382 U.S. 205, the Court held that even if the subcontract in question relates to unit work, there is no duty to negotiate if no unit employee is laid off or has his working hours reduced as a result. Thus, under the facts of the case at bar wherein no employee was laid off or had his hours reduced, it is doubtful that even the Supreme Court's expansive reading of "terms and conditions of employment" in Fibreboard, supra, would bring the creation and filling of the positions in question within the scope of mandatory subjects of negotiation pursuant to sec. 3543.2.

While not controlling in the case at bar due to the limited scope of "terms and conditions of employment" in the EERA, an expansive reading of the phrase in the private sector has led at least one court to the conclusion that the employer is obligated to meet and negotiate regarding contracting out where there is an adverse impact on the unit representative. In UAW v. NLRB (General Motors Corp.) (1967) 381 F.2d 265 [64 LRRM 2489], a subcontracting decision by General Motors (which the union conceded "achieved substantial efficiencies") resulted in the elimination of six unit jobs in a bargaining unit of more than 1,000 employees, with the displaced workers being reassigned to other positions in the plant. The NLRB found no significant adverse impact and thus no obligation to bargain. The court of appeals reversed, however, since even though the six individuals suffered no job loss there was an adverse impact on the bargaining unit since it diminished by six the whole number of jobs performed by its members.

EERA involves movement from one school to another and none of the members of the Association's certificated unit were moved as the result of the creation and filling of the positions in question.<sup>6</sup>

Section 3543.2 was effectively amended on September 7, 1977 to include "reassignment policies" within the scope of representation. Several court decisions considering questions of reassignment pursuant to the California Education Code shed some light on the term "reassignment policies" as used in section 3543.2.

In Council of Directors and Supervisors v. Los Angeles Unified School District (1973) 35 Cal.App.3d 147 [110 Cal.Rptr. 624], the Court of Appeal considered the question of whether or not the Los Angeles Unified School District had properly reassigned certain supervisors and administrators at the beginning of the 1970-71 school year as a result of decentralization of the administration of the district into four zones. In Thompson v. Modesto City High School District (1977) 19 Cal.3d 620 [139 Cal.Rptr. 603], the California Supreme Court considered the question of whether certificated administrators can be reassigned from positions as administrators to classroom teachers and whether certain counselors can be reassigned from

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<sup>6</sup>Of course both a reassignment and transfer can be simultaneously involved as, for example, when a teacher is moved from a counseling position at one school to a position teaching history at another. See, e.g., Adelt v. Richmond School District (1967) 250 Cal.App.2d 149 [58 Cal.Rptr. 151].

positions as counselors to classroom teachers. In Leslie Wellbaum v. Oakdale Joint Union High School District of Stanislaus County (1977) 70 Cal.App.3d 93 [138 Cal.Rptr. 553], the Court of Appeal confronted the question of the reassignment of a probationary school teacher, due to a decline in enrollment, from teaching foreign language classes to teaching English.

In light of the above decisions of the California Supreme Court and California Courts of Appeal, it is evident that the term "reassignment policies" contemplates an alteration in working conditions of a more significant impact than the record indicates occurred in this case.

It is doubtful that the Legislature intended the term "reassignment policies" to apply to a change in job duties which had such a relatively insignificant impact upon unit members as the record indicates the change of job duties in this case had. Certainly, had any of the counselors been reassigned to teaching positions, the issue of the negotiability of their reassignments would be brought sharply into focus. Likewise, if any of the counselors in the District had been reassigned to administrative positions or assigned to counseling positions in another location, the issue of "transfer and reassignment policies" would likewise be clearly drawn.<sup>7</sup> However, to hold in this case that a reassignment

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<sup>7</sup>This opinion does not address the issue of whether such action would constitute a change in policies of transfer and reassignment. "Policy" is defined in Webster's Third New International Dictionary (1976) as "a definite course or method of action selected (as by a government, institution, group, or individual) from among alternatives and in the light of given conditions to guide and usually determine present and future decisions. . . ."

has occurred either in the case of Ms. Hodson, a counselor both before and after the change at issue, whose duties were altered only in that she is no longer performing clerical functions or in the case of counselors at Frisbee and Eisenhower who no longer handle fifth tardies and voluntarily deal with 15-day absence notices would be to hold that even the most minor change in counselors' job duties is subject to negotiation as a change in "reassignment policies." In view of the above-cited cases, however, it is apparent that the term "reassignment policies" means a substantial change in job duties such as from a counselor to teacher, administrator to teacher or foreign language teacher to English teacher.

B. The Allegation That The District Interfered, Restrained Or Coerced Employees in Violation Of Section 3543.5(a)

The facts in this case show that prior to the District's action of filling the attendance supervisor position, the superintendent spoke with Ms. Hodson, the attendance counselor for Eisenhower. The superintendent stated that Ms. Hodson might not get her transfer request because of the controversy surrounding the Association's request to meet and negotiate regarding the subject. The Association argues that the natural and probable consequences of the superintendent personally informing Ms. Hodson of the issue between the Association and District was to restrain and coerce her from acting on any contractual rights including the grievance procedure.

It must first be noted that to prove a violation of section 3543.5(a) it must be shown that the District acted with the motive of interfering, restraining and coercing employees in

the exercise of employee rights guaranteed by the EERA or that the natural and probable consequence of the District's action was to interfere, restrain or coerce employees in the exercise of employee rights as guaranteed by the EERA. San Dieguito Union High School District (9/2/77) EERB Decision No. 22.

It has not been shown that the District intended to or did in fact interfere with, restrain or coerce Ms. Hodson or any other employee because of the exercise of rights guaranteed by the EERA. It moreover cannot be concluded that the natural and probable consequences of a conversation between the superintendent and Ms. Hodson, wherein Ms. Hodson was informed of the controversy between the Association and the District was to interfere, restrain or coerce Ms. Hodson because of the exercise of rights guaranteed by the EERA.

The Association additionally argues that a derivative violation of section 3543.5(a) must be found because the natural and probable consequences of the District's failure to meet and negotiate over matters within the scope of representation was to interfere, restrain or coerce employees from the exercise of rights guaranteed by the EERA. However, having found no violation of section 3543.5(c) inasmuch as the District's action in creating and filling the classified position in question was not a matter within the scope of representation as defined in section 3543.2, it cannot be concluded that a derivative violation of section 3543.5(a) has occurred.

C. The Allegation That The District Denied The Association Its Rights As An Employee Organization In Violation Of Section 3543.5(b)

The Association argues that the District, in utilizing certificated unit members in the process of creating and filling the classified positions in question, has denied to the Association its right to represent unit members. The right of the Association as exclusive representative to have the District deal only with the Association and not individual unit members stems from the duty to meet and negotiate in good faith with, and only with, the exclusive representative pursuant to sections 3543 and 3543.5(c). The District, however, was clearly not seeking to meet and negotiate with individual unit members when it spoke with Ms. Hodson and expressed an opinion on the subject of the change of duties for Ms. Hodson or when the District attempted to use members of the counseling staff in the selection process for attendance supervisor. Similarly, the District was not attempting to meet and negotiate with individual unit members when Mr. Britton requested suggestions from counselors at Frisbee as to what specifically the duties of the staff assistant/student relations should be, in asking counselors at Frisbee to develop recording forms for home visits or asking counselors if they would object to the staff assistant/student relations attending counseling meetings. In summary, none of the above actions may be construed as an attempt by the District to circumvent its duty to meet and

negotiate with the Association as exclusive representative of unit members. Consequently, no violation of Association's rights pursuant to section 3543.5(b) is found.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in the matter, the District has not violated section 3543.5(a), (b) or (c). It is the Proposed Order that the unfair practice charge filed by the Rialto Education Association against the Rialto Unified School District is hereby DISMISSED.

Pursuant to Calif. Admin. Code, tit. 8, part III, section 32305, this proposed decision and order shall become final on Friday, December 29, 1978 unless a party files a timely statement of exceptions. See Calif. Admin. Code, tit. 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the Headquarters Office in Sacramento before the close of business (5:00 p.m.) on December 26, 1978, in order to be timely filed. See Cal. Admin. Code, tit. 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See Calif. Admin. Code, tit. 8, sections 32300 and 32305 as amended.

Dated December 6, 1978.

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Kenneth A. Perea  
Hearing Officer