STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EL MONTE UNION HIGH SCHOOL DISTRICT EDUCATION ASSOCIATION/CTA/NEA, Charging Party,	)	Case No. LA-CE-1243
v.	)	PERB Decision No. 220
EL MONTE UNION HIGH SCHOOL DISTRICT, Respondent.	)	June 30, 1982

Appearances; Sandra H. Paisley, Attorney for El Monte Union High School District Education Association/CTA/NEA; and David G. Miller, Attorney for El Monte Union High School District.

Before Gluck, Chairperson; Morgenstern and Tovar, Members.

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the El Monte Union High School District (District) to the attached hearing officer's proposed decision. The Board affirms the hearing officer's findings and conclusions, to the extent they are consistent with the rationale expressed below.

FACTS

On October 20, 1980, the Board issued its decision in El Monte Union High School District, PERB Decision No. 142. In that decision, the Board ordered that the existing unit of certificated employees be modified to include the District's certificated summer school and hourly employees (the

Employees), and that the El Monte Union High School District Education Association/CTA/NEA (Association) be certified as the exclusive representative for the modified unit. At that time the parties were operating under a negotiated agreement covering the regular certificated unit which would expire in the summer of 1982.

On October 30, 1980, Sandra H. Paisley, representative for the Association, and David G. Miller, representative for the District, attended a negotiation session regarding adult education teachers, another unit.

At that session, Paisley asked Miller whether the employer would talk about the summer school and hourly employees who had been the subject of the PERB's decision which had just been rendered.

Walter Wise, Association president and a witness for the Association, testified that Miller's response to this question was that the Association's request was not a proper subject for bargaining because PERB did not have grounds to make the decision it had made.

It was stipulated that, if sworn, Miller would testify regarding this conversation as follows:

> On or about October 30, 1980, I was acting as the chief spokesperson and negotiator for the District at a meeting scheduled for meeting and negotiating with the adult education unit. It is my recollection that following the adjournment of that meeting Mrs. Paisley, Mr. Wise, and perhaps

> Mr. Ridgio remained in the room and Mrs. Paisley asked me whether or not we were going to negotiate concerning the summer school employees. I do not recall a reference to the hourly employees. However, my response was no, it is our intention to test PERB certification. By so stating I would think it a fair inference that my response covered both summer school and hourly employees. I do not recall a request to schedule a meeting or meetings for such purpose. I would further represent to the hearing officer that in the past, in discussions I have had with Mrs. Paisley, obviously relating to different units, that I have taken the position that for purposes of reopeners under a continuing agreement that it was not necessary to sunshine reopener proposals pursuant to the public notice provisions of the Rodda Act. (TR. Miller, p. 39)

Following this exchange, the Association did not make any other verbal or formal proposals on behalf of employees that were brought within the modified unit for which they were certified because they believed it was unnecessary for them to do so after the Board's decision in El Monte, supra, and because they characterized the negotiations over the employees as reopeners and therefore felt that a formal proposal was unnecessary. The Association filed the charges in question the next day, October 31, 1980.

DISCUSSION

The hearing officer relies on the Board's decision in Redondo Beach City School District (10/14/80) PERB Decision No. 140, to support his conclusion that the Board's decision in El Monte No. 142 is binding precedent and that relitigation is

therefore unwarranted. In Redondo Beach, supra, the employer made a tactical refusal to negotiate in order to test a PERB uniting decision. The Board held that:

> In the absence of the presentation of newly discovered or previously unavailable evidence or specific circumstances relitigation of PERB's unit determination is not warranted. PERB's unit determination is therefore binding precedent.

The District's evidence in the instant case consists of a memorandum of agreement between the parties entitled "Board Resolution and Recognition Agreement" dated March 14, 1977. On the second page it includes the following provisions:

> The El Monte UHS District Education Association/CTA/NEA agrees that the unit is appropriate and that it will not seek a clarification or amendment of the unit, either as to the specific exclusions or the enumerated inclusions.

Even though this document was available at the time of the hearing in the original case on December 1 and 7, 1977, as well as when the District presented its post-hearing brief on March 2, 1978, the District did not bring it to the Board's attention until the hearing on the unfair practice charge. Notwithstanding this recognition agreement we do not find that we erred in El Monte, No. 142. The Association has not violated the provisions of the Recognition Agreement between the parties because, when the Association filed its petition with the Board, it was a petition for recognition of the Employees, not an attempt to alter the existing unit. It

was the Board that construed the petition as one for unit modification because it believed the Educational Employment Relations Act (EERA)[1] would be better served by doing so. Thus, Redondo Beach is inapplicable here because, even though the document was available, the District could not be expected to divine that the Board would construe the petition as one for unit modification.

Further, the aforementioned waiver provision in the Recognition Agreement does not preclude the Board from exercising its discretion pursuant to the grant of statutory authority the Legislature has bestowed on it, particularly its authority to determine appropriate units. Arcadia Unified School District (5/17/79) PERB Decision No. 93.[2]

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[1]Government Code section 3540 et seq. Unless otherwise indicated, all citations are to the Government Code.

2section 3541.3 of the Act empowers the Board:

> (a) to determine in disputed cases, or otherwise approve, appropriate units.
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> . . . . . .
>
> (n) To take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

In addition, PERB Regulation 33430 (a) (2), in effect at the time the Association filed its petition, states:

> (a) The Board itself may:
>
> . . . . . .
>
> (2) Affirm, modify or reverse the

Under the NLRB, a waiver provision will not be upheld where the waiver is in derogation of the bargaining representative's rights under the Act, Bethlehem Steel Corp. (1950) 89 NLRB 341 [25 LRRM 1564], or where its enforcement might dilute employees' rights under the Act. NLRB v. Magnavox Co. (1974) 415 U.S. 323 [85 LRRM 2475]. Indeed, the NLRB has held that it is contrary to the basic philosophy of the national labor law policy to permit a union or an individual employee to contract away the jurisdiction of the board as established by Congress. Local 743, IAM v. United Aircraft Corp. (D.C. Conn. 1963) 220 F.2d 19 [53 LRRM 2904]; enfd. (2nd Cir. 1964) 337 F.2d 5 [57 LRRM 2245].

In El Monte No. 142, we concluded that it was PERB's changing policies, not errors by the Association, which precluded the Association from reaching its goal. The equities of the case required that the petitions for recognition be construed as a petition for unit modification as had been done in Redwood City Elementary School District (10/23/79) PERB Decision No. 107. The Board reasoned that the Association had sought to represent the petitioned-for employees since its first attempt at recognition in April 1976, and the original petition requested recognition on behalf of all certificated

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recommended decision, order the record reopened for the taking of further evidence, or take such other action as it considers proper.

employees. The District in fact began negotiations to that effect but refused to continue negotiating over summer school teachers as a result of Belmont Elementary School District (12/30/76) EERB Decision No. 7. The Association felt that it would have been futile to petition for unit modification in light of Belmont and the best they could do to regain the right to represent the affected employees was to file petitions for separate units. Before the hearing officer issued a proposed decision, we issued Redwood City, supra, and Peralta Community College District (11/17/78) PERB Decision No. 77 which developed the presumption of a single unit of all teachers in a district absent a finding that they lacked a community of interest.

If we had dismissed the Association's petitions the Association would have had to file for a unit modification pursuant to Rule 33260 et seq., which requires the petitioner to present a showing of majority support. This would have meant that the Association would have had to gather signatures of the unit members for the third time. The regulations in effect at the time the Association filed its petition did not require a showing of support to accompany a petition for change in unit determination (see, Article 6, section 33260, Representation Regulations, April 1977).

Even though the appropriateness of the unit of those presently covered and the petitioned-for teachers was not

specifically litigated by the parties, the record contained sufficient information to support a finding of a community of interest among members of the two groups.

We rejected the District's argument that the petitions for unit modification would have been untimely under PERB regulation 33261(a)(I)[3] because that regulation was not in effect in May or September 1977 when the Association filed its petition for representation.

We also ruled that an election was unnecessary in that case because the majority support of the petitioned-for employees was not questioned by the District. Nor is an election a requirement in a unit modification petition. In addition, the Association's showing of support was not stale at the time it filed its petition for recognition.

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[3]PERB Regulation 33261(a)(l) states:

> (a) A recognized or certified employee organization may file with the regional office a petition for unit modification pursuant to Government Code section 3541.3(e):
>
> > (1) To add to the unit unrepresented classifications or positions which existed prior to the recognition or certification of the current exclusive representative of the unit, provided such petition is filed at least 12 months after the date of said recognition or certification, except as provided in subsection (2) below;

We reaffirm our holding in El Monte, 142. The Board's authority to define the appropriate bargaining unit is sufficiently broad to enable it to include new employees in an existing unit without holding an election when the requisite community of interests is present, and the equities dictate such a conclusion. See Aracadia Unified School District, supra, and Redwood City, supra. The District contends an election is necessary to insure the majority of the employees favor the Association. An election is not necessary for the following reasons. First, PERB regulations regarding unit modification provisions do not require the holding of an election before a modification in the unit can be implemented.[4] In addition, the purpose of the unit modification provisions is to provide a mechanism whereby positions or classifications may be, among other things, added to the established unit when a community of interest exists. By the modification process, the employees in question are thus able to exercise their right to exclusive representation and good faith negotiation without the need for separate units which would derogate the legislative concern over potential fragmentation of employee groups and proliferation of

[4]Respondents cite to Section 33260 of the regulations to support their contention that the Board's action in El Monte, No. 142 was illegal. We reject this argument because this section was not in effect when the Association filed the petition with the Board.

bargaining units. To require an election every time a new position or classification is at issue would have the inevitable consequence of destabilizing existing employer-employee relationships contrary to the Act's fundamental purpose, as well as being financially prohibitive and administratively cumbersome for the Board. It is within the Board's discretion to decide under what circumstances it might consider an election appropriate. The Act itself sets forth no requirement that an election be conducted where established units are to be modified.

Finally, in this case, the Association timely filed a showing of support with its petition for recognition thereby demonstrating that it has the support of a majority of employees. See NLRB v. Pacific Southwest Airlines (9th Cir. 1977) 550 F.2d 1148 [94 LRRM 2772]. In that case, 5 years had elapsed since the matter had been initiated. The question arose as to whether this delay violated the utility of a bargaining order in light of the possible turnover of the personnel involved, changes in the desires of the employees to be unionized, and other conditions. The court conceded that, while a bargaining order based on authorization cards is less desirable than an election, the law is clear that the passage of time does not by itself compel a new election. See also, NLRB v. Coca-Cola Bottling Co. of San Mateo 472 F.2d 140, 82 LRRM 2088 (9th Cir. 1972); Franks Brass Co. v. Labor Board 321 U.S. 702, 704-05, 14 LRRM 591 (1944).

In addition to the above, respondent again contends that Rule 33261(f), requiring that a unit modification petition be accompanied by proof of majority support of persons employed in the classification(s) to be added applies. We also reject this contention because this rule was not in effect at the time the Association filed its petition.

The Refusal to Bargain Issue

We affirm the hearing officer's finding that the Association requested the District to negotiate over the Employees, and that the District refused to do so as a tactical manoeuvre to challenge the validity of PERB's decision in El Monte, No. 142.[5] Having reaffirmed our holding in El Monte, we find that the District refused to bargain in good faith in violation of subsection 3543.5(c). In addition, we find that this same conduct concurrently violates subsection 3543.5(b) by denying the Association its statutory right as an exclusive representative to represent unit members in their employment relations with the District.

We further find that the District's failure to meet and negotiate with the Association interfered with employees because of their exercise of representational rights in violation of subsection 3543.5 (a). San Francisco Community College District (10/12/79) PERB Decision No. 105.

[5]Pursuant to subsection 3542(a), the District's refusal to bargain is the only way it may obtain the right to judicial review.

The District also contends that it was necessary for the Association to sunshine its proposal in order to adhere to the public notice provisions under EERA.[6]

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[6]Section 3547 states:

> (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.
>
> (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.

The public notice provisions do impose certain procedural requirements which must be observed before actual negotiations may begin. However, it is disingenuous of the District to make this argument. The issue here is whether it would have been futile for the Association to observe those requirements.

We find that it would have been futile for the Association to go through the motions of observing the public notice requirements in light of the District's express refusal to bargain.[7] Also, the past practice between the parties of not sunshining reopeners,[8] while not in keeping with the public

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[7]The parties should not interpret our futility finding to absolve them of the responsibility of observing the sunshine provisions of the Act when negotiations regarding the employees commence.

[8]In Los Angeles Community College District (3/3/81) PERB Decision No. 158, the Board stated:

> It does not appear to be an unreasonable burden to require a public school employer and the exclusive representative to "sunshine" their initial proposals on possible amendments to their agreement.

Please note that in the instant case the Association requested the District to start negotiations on the Employees - neither party was at the stage where it had a proposal. It also would have been futile to require the Association to present a formal proposal given the District's clear refusal to bargain over the Employees. The Act does not require such futile acts. San Mateo Community College District (6/8/79) PERB Decision No. 94.

notice requirements, demonstrates that the District did not require nor did it expect those proposals to be sunshined.

REMEDY

We affirm the hearing officer's proposed remedy ordering the District to forthwith negotiate in good faith with the exclusive representative of the Employees, as well as requiring them to post a notice incorporating the terms of this order.

ORDER

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, IT IS HEREBY ORDERED that the El Monte Union High School District:

a. Cease and Desist from failing and refusing to meet and negotiate in good faith with the Association regarding summer school and hourly employees;

b. Upon request, meet and negotiate in good faith with the Association regarding summer school and hourly employees.

c. Within five workdays of the date of service of this decision, post copies of the notice attached as an appendix hereto at its headquarters office, all school sites, and in all other locations where notices to certificated employees are customarily posted. Said posting shall not be reduced in size and shall be maintained for a period of thirty (30) workdays. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

d. Within twenty (20) workdays from service of this decision, notify the Los Angeles regional director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this ORDER. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

This Order shall become effective immediately upon service of a true copy thereof on the El Monte Union High School District.

BY:

Irene Tovar, Member

Harry Gluck, Chairperson

Marty Morgenstern, Member

APPENDIX

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

An Agency of the State of California

After a hearing in unfair practice case No. LA-CE-1243, in which all parties participated, it has been found that the El Monte Union High School District violated the Educational Employment Relations Act by failing and refusing to negotiate in good faith with the El Monte Union High School District Education Association. As a result, we have been ordered to post this Notice, and we will abide by the following:

A. CEASE AND DESIST from failing and refusing to meet and negotiate in good faith with the Association regarding summer school and hourly employees;

B. Upon request, meet and negotiate in good faith with the Association regarding summer school and hourly employees.

Dated: EL MONTE UNION HIGH SCHOOL DISTRICT

BY_____

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

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

EL MONTE UNION HIGH SCHOOL DISTRICT EDUCATION ASSOCIATION,	)	
Charging Party,	)	Unfair Practice Case No. LA-CE-1243
v.	)	
EL MONTE UNION HIGH SCHOOL DISTRICT,	)	PROPOSED DECISION (5/29/81)
Respondent.	)	

Appearances; Sandie Paisley, Attorney for El Monte Union High School District Education Association, and David G. Miller, Attorney for El Monte Union High School District.

Before Stuart C. Wilson, Hearing Officer.

STATEMENT OF THE CASE

The El Monte Union High School District Education Association (hereafter Association) has charged the El Monte Union High School District (hereafter District) with having refused and failed to meet and negotiate in good faith, thereby violating section 3543.5(c) of the Educational Employment Relations Act (hereafter EERA), Government Code section 3540, et seq.,[1] and thus, derivatively, violating sections 3543.5(a) and (b) also.

[1]All statutory references are to the Government Code unless otherwise specified.

The charge was filed October 31, 1980, answered November 24, 1980, and the formal hearing was held February 17, 1981.

FINDINGS OF FACT

Within the meaning of the EERA, the parties stipulated and it is found that at all relevant times the District has been an employer, that the Association has been an employee organization, and that the Association has been the exclusive representative of the certificated negotiating unit at the District.

At all relevant times, Sandie Paisley has been the attorney and negotiations spokesperson for the Association while David G. Miller has been the attorney and negotiations spokesperson for the District. In a previous case involving these parties, El Monte Union High School District (10/20/80) Public Employment Relations Board (hereafter PERB) Decision No. 142, PERB ordered in part as follows:

> (1) The petitions of the El Monte Union High School District Education Association, CTA/NEA, for recognition as the exclusive representative of units of all summer school teachers and all certificated hourly employees including, but not limited to, evening continuation high school teachers, home teachers, driver training teachers, and enrichment teachers, are construed as petitions to modify the existing certificated unit to include the petitioned-for employees, and are granted; . . .

The Board ordered that the Association be certified as the

exclusive representative for a modified certificated unit that included the foregoing employees. At the time of this decision, the parties were operating under a negotiated agreement covering the regular certificated unit which would expire in the summer of 1982.

On October 30, 1980, approximately 10 days after the rendition of this decision, Paisley and Miller attended a negotiation session regarding adult education teachers, another unit. At that session, Paisley asked Miller whether the employer would talk about the summer school and hourly employees (hereafter The Employees) who had been the subject of PERB's order in the decision which had just been rendered.

Walter Wise, Association president, testified that Miller's response to this question was that Paisley's request " . . . was not a proper subject for bargaining because the PERB Board [sic] did not have grounds to make the decision it had made."

It was stipulated that, if sworn, Miller would testify regarding this conversation as follows:

> On or about October 30, 1980, I was acting as the chief spokesperson and negotiator for the District at a meeting scheduled for meeting and negotiating with the adult education unit. It is my recollection that following the adjournment of that meeting that Mrs. Paisley, Mr. Wise, and perhaps Mr. Ridgio remained in the room and Mrs. Paisley asked me whether or not we were

> going to negotiate concerning the summer school employees. I do not recall a reference to the hourly employees. However, my response was no, it is our intention to test the PERB certification. By so stating, I would think it is a fair inference that my response covered both the summer school and hourly employees. I do not recall a request to schedule a meeting or meetings for such purpose. I would further represent to the hearing officer that in the past, in discussions I have had with Mrs. Paisley, obviously relating to different units, that I had taken the position that for purposes of reopeners under a continuing agreement, that it was not necessary to sunshine reopener proposals pursuant to the public notice provisions of the Rodda Act.

Following this exchange, the Association did not make any verbal or formal proposals on behalf of employees brought within the modified unit for which they were certified. Because the Association did not make a formal proposal, the public notice process was not triggered.

To put this conversation into perspective, it is necessary to look at the history of the Association's attempts to represent The Employees.

On April 7, 1976, the Association sought recognition of a unit of all certificated employees. The District responded that it doubted the appropriateness of the unit but did not contest the sufficiency of majority support. The Association petitioned for a hearing to determine whether or not its requested unit was appropriate. However, following Belmont Elementary School District (12/30/76) EERB Decision No. 7,

which held that summer school teachers should not be included in the regular certificated unit, the Association withdrew its petition and the District voluntarily recognized a unit which excluded The Employees.

The Association then filed for a separate unit of summer school teachers and a separate unit of certificated hourly employees. The District did not doubt the sufficiency of support for either petition but denied the request on the ground that summer school and hourly teachers were not employees under the EERA.

The unit hearings on these petitions were consolidated and the cases were held in abeyance by agreement of the parties.

During the time these cases were in abeyance, even though the Association did not represent The Employees, it nevertheless attempted to help them by requesting the District to give to them the same benefits the Association had obtained for the regular certificated unit. The District complied with this request.

Also during the time these cases were in abeyance, PERB issued two decisions which addressed the subject of proper uniting of certificated employees. In Peralta Community College District (11/17/78) PERB Decision No. 77, it was held that absent a finding of lack of community of interest, all instructional personnel should be included in a single unit.

In Redwood City Elementary School District (10/23/79) PERB Decision No. 107, PERB held that summer school teachers were employees under the EERA.

Thereafter, a proposed decision was rendered in the cases which had been held in abeyance. That proposed decision was that The Employees be included in the regular certificated unit. The District appealed that proposed decision and it was affirmed in the previously-cited El Monte case.

At the hearing of the instant case, the entire file of the previous El Monte case was received in evidence, but nothing was offered regarding any newly discovered or previously unavailable evidence or special circumstances which bore on the issue of including The Employees within the certificated unit.

Because of the time proximity to PERB's El Monte decision and the fact that the Association had been trying to represent The Employees in one way or another for over five years, it is found that Paisley's October 30, 1980 question to Miller was intended and reasonably understood by Miller to indicate that the Association wished to discuss The Employees with the District. Because of the same factors, it is found that Miller's response was intended and reasonably understood by Paisley to be a refusal to discuss The Employees and a statement that further requests therefore also would be rejected.

Since Miller gave evidence that he believed that it was unnecessary to sunshine reopeners under a continuing agreement, it is found that his refusal was unrelated to whether or not public notice procedures had been complied with.

ISSUES

1. Did the Association request to negotiate regarding The Employees?

2. Did the District refuse the Association's request to negotiate regarding The Employees?

3. May the District defend its refusal to negotiate on the basis that The Employees are not appropriately included within the unit?

CONCLUSIONS OF LAW

Did the Association request to negotiate regarding The Employees?

In the Findings of Fact herein it was found that Paisley's question was intended and reasonably understood by Miller to indicate that the Association wished to discuss The Employees with the District. When this finding is viewed in the context that the Association had been seeking to represent The Employees for over five years; that it had attempted to help them even before it represented them; and that PERB, only 10 days before, had included them in the certificated unit represented by the Association; it is concluded that Paisley's

question constituted a request by the Association to negotiate with the District regarding The Employees.

The fact that the Association did not make a formal proposal which triggered public notice procedures does not detract from its request to negotiate. Although a request to negotiate could take the form of placing an initial proposal before the District for public notice, the EERA does not mandate any particular form of request. This conforms to the private sector rule that any form of request to bargain is sufficient, which makes clear that the employer is being requested to bargain. NLRB v. Columbian Enamelling and Stamping Company, Inc. (1939) 306 U.S. 292 [4 LRRM 524]; Joy Silk Mills v. NLRB (1950) 185 F.2d 732 [27 LRRM 2012]. Public notice requirements merely impose certain procedural requirements which must be met before actual negotiations may begin, but do not constitute the only way in which an employee organization may request negotiation.

It would have been futile for the Association to have made an initial proposal after Miller's statement that the District would not negotiate regarding The Employees. The EERA does not require such futile acts. San Mateo Community College District (6/8/79) PERB Decision No. 94.

Therefore, it is concluded that the Association did request the District to negotiate regarding The Employees.

Did the District refuse the Association's request to negotiate regarding The Employees?

In the Findings of Fact herein it was found that Miller reasonably understood Paisley's question to be a request to discuss The Employees with the District and that Miller's response was a refusal. When these findings are viewed in the same context mentioned above, it is concluded that Miller's response constituted a refusal by the District to negotiate with the Association regarding The Employees.

This conclusion is consistent with Miller's answer that the matter was not a proper subject of negotiations because the PERB did not have grounds to make the decision it made. It is also consistent with Miller's statement that the District intended to test PERB's uniting decision.

Since it was found that the District's refusal to negotiate was unrelated to whether or not public notice procedures had been complied with, it is also concluded that the District's refusal to negotiate was not merely a refusal to negotiate until public notice procedures had been complied with, but was a flat refusal to negotiate under any circumstances.

May the District defend its refusal to negotiate on the basis that The Employees are not appropriately included within the unit?

In Redondo Beach City School District (10/14/80) PERB Decision No. 140, another case in which the employer made a

tactical refusal to negotiate in order to test a PERB uniting decision, PERB affirmed the hearing officer's conclusion of law that:

> In the absence of the presentation of newly discovered or previously unavailable evidence or special circumstances relitigation of PERB's unit determination is not warranted. PERB's unit determination is therefore binding precedent.

Since, in the instant case, the District presented no newly discovered or previously unavailable evidence or special circumstances, Redondo Beach makes PERB's decision in El Monte binding precedent regarding the appropriateness of the unit established therein, and relitigation is unwarranted.

Thus it must necessarily be concluded that the District has failed in its attempt to defend its refusal to negotiate on the basis that The Employees are not appropriately included within the unit and that therefore the District violated section 3543.5(c) by its failure and refusal to meet and negotiate in good faith with the Association upon its request therefor regarding The Employees.

Pursuant to San Francisco Community College District (10/12/79) PERB Decision No. 105, it is concluded that the District's 3543.5 (c) violation also constitutes derivative violations of sections 3543.5 (a) and (b).

REMEDY

Section 3541(i) authorizes PERB to take such action regarding unfair practices as it deems necessary to effectuate the policies of the EERA. Here it is appropriate that the District be ordered to cease and desist from failing and refusing to negotiate in good faith with the Association regarding The Employees and further that it be ordered to forthwith negotiate in good faith with the Association regarding The Employees.

It is also appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice should not be reduced in size. Posting of such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U. S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

received by the Executive Assistant to the Board at the headquarters office in Sacramento before the close of business (5:00 p.m.) on June 22, 1981 in order to be timely filed. (See California Administrative Code, title 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 California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.)

Dated: May 29, 1981

STUART C. WILSON
Hearing Officer

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, the entire record in this case, IT IS HEREBY ORDERED that the El Monte Union High School District:

a. Cease and Desist from failing and refusing to meet and negotiate in good faith with the Association regarding summer school and hourly employees;

b. Upon request, meet and negotiate in good faith with the Association regarding summer school and hourly employees;

c. Within five workdays of the date of service of notice that this proposed decision has become final, post copies of the appendix attached hereto at its headquarters office, all school sites, and in all other locations where notices to certificated employees are customarily posted. Said posting shall not be reduced in size and shall be maintained for a period of thirty (30) workdays. Reasonable steps shall be taken to ensure that said notices are not altered, defaced or covered by other material.

d. Within twenty (20) workdays from service of the final decision herein, notify the Los Angeles Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this ORDER. Continue to report in writing to the regional director periodically therafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 22, 1981 unless a party files a timely statement of exceptions within twenty (20) calendar days following the date of service of the decision. The statement of exceptions and supporting brief must be actually

APPENDIX

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

After a hearing in unfair practice case No. LA-CE-1243, in which all parties participated, it has been found that the **El** Monte Union High School District violated the Educational Employment Relations Act by failing and refusing to negotiate in good faith with the El Monte Union High School District Education Association. As a result, we have been ordered to **post** this notice, and we will abide by the following:

A. Cease and Desist from failing and refusing to meet and negotiate in good faith with the Association regarding summer **school and hourly** employees;

B. Upon request meet and negotiate in good faith with the Association regarding summer school and hourly employees.

Dated: EL MONTE UNION HIGH SCHOOL DISTRICT

By_____

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