STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

Mt. SAN ANTONIO COLLEGE FACULTY ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-350
v.	)	PERB Decision No. 297
MT. SAN ANTONIO COMMUNITY COLLEGE DISTRICT,	)	March 24, 1983
Respondent.	)	

Appearances: A. Eugene Huguenin, Jr., Attorney for Mt. San Antonio College Faculty Association, CTA/NEA; John J. Wagner, Attorney (Wagner, Sisneros & Wagner) for Mt. San Antonio Community College District.

Before Tovar, Jaeger and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Mt. San Antonio Community College District (District) to the attached proposed decision. The administrative law judge (ALJ) found that the District violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (Act) when it made unilateral changes of matters within the scope of representation without negotiating with the Mt. San Antonio College Faculty Association, CTA/NEA (Association).

We have reviewed the ALJ's findings of fact and, determining that they are free from prejudicial error, adopt them as the findings of the Board itself. We affirm the ALJ's conclusions of law insofar as they are consistent with the discussion below.

The District has filed numerous exceptions to the proposed decision. However, in reviewing those exceptions, we find that most of them are identical to arguments raised before the ALJ, and fully considered in his proposed decision. Since we are in substantial agreement with the ALJ's analysis of those issues, we see no need to expand upon them. We therefore limit our discussion to those exceptions which raise issues not adequately considered in the proposed decision.

DISCUSSION

A. Change in the Summer School Program

In response to the alleged fiscal emergency arising from the passage of Proposition 13, the District determined, in June of 1978, that is was necessary to make substantial changes in its summer school course offerings. Accordingly, it cancelled selected summer school courses during the first summer session, modified the criteria for determining which courses would be cancelled due to low enrollment, and cancelled the entire second summer session.

In addition to these actions, the District unilaterally altered its existing practice of making summer school teaching assignments on a departmental "rotation" basis. The ALJ found that, prior to the start of the summer session on June 19, 1978, at least one division dean deviated from this established policy when he deprived certain instructors previously assigned to teach specified courses of their assignments and replaced them with instructors who had lost their courses due to the emergency cancellations.

Applying the test set forth in Anaheim Union High School District (10/28/81) PERB Decision No. 177, the ALJ found that the District's decision to cancel summer school courses, modify the low-enrollment course cancellation procedure, and cancel the entire second summer session was within its managerial prerogative.[1] However, he found that the procedure for making summer school teaching assignments was closely related to wages and hours of employment, and therefore, within the scope of representation.[2]

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[1]While we agree with the ALJ that these matters are outside the scope of representation, we note that this does not relieve the District of the duty to negotiate in good faith over the effects of these decisions on bargaining unit members. Anaheim Union High School District, supra; Newman-Crows Unified School District (6/30/82) PERB Decision No. 223; Newark Unified School District (6/30/82) PERB Decision No. 225.

[2]The ALJ's determination that the procedure for making teaching assignments is within the scope of representation is consistent with the analysis set forth

The District excepts to the ALJ's finding of a violation on a number of grounds. First, it argues that summer school employees are not in the bargaining unit. Second, it argues that Education Code section 72413 grants the District superintendent the unilateral right to make assignments. Third, it argues that, in any event, the District had a past practice of unilaterally assigning teachers to teach summer school.

The unit description contained in the original recognition agreement, of which we have taken administrative notice, includes all "full-time and part-time contract instructors" in the unit and does not otherwise exclude summer school instructors. Therefore, the District's contention that summer school employees are not in the unit is without merit.

Next, the District argues that Education Code section 72413 gives the District power to make unilateral assignments of instructors and therefore precludes negotiations.[3] That section provides, in relevant part:

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in Anaheim Union High School District, supra and the Board's previous decisions in Palos Verdes Peninsula Unified School District/Pleasant Valley School District (7/16/79) PERB Decision No. 96 and Jefferson School District (6/19/80) PERB Decision No. 133 (petition for review filed 7/29/80, 1 Civil 50223).

[3]The District's argument is based on the supersession language contained in section 3540. That

> The superintendent of each community college district shall, in addition to any other powers and duties granted to or imposed upon him:
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> . . . . . .
>
> (c). Subject to the approval of the governing board, assign all employees of the district employed in positions requiring certification qualifications, to the positions in which they are to serve. Such power to assign includes the power to transfer an instructor from one campus or college to another campus or college at which the instructor is certificated to serve within the district when the superintendent concludes that such a transfer is in the best interest of the district. (Emphasis added.)

Education Code section 72413(c) merely permits a governing board to delegate authority to a superintendent to make assignments. The Board has held, on numerous occasions, that an Education Code provision will not limit the scope of representation so long as it merely "authorizes a certain policy but falls short of [creating an] absolute

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section provides in relevant part:

> Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

obligat[ion]." Jefferson School District, supra.[4] As the Board stated in Holtville Unified School District (9/30/82) PERB Decision No. 250, at p. 11:

> . . . [N]egotiations would be precluded only where the statutory language clearly demonstrates a legislative intent to establish a specific and unalterable provision and where the contract proposals would tend to replace, modify, or annul such provisions of the [Education] Code.

By its express terms, Education Code section 72413 grants only conditional authority to the superintendent to make assignments or transfer employees, and thus only outlines powers which a District may confer upon a superintendent. Such powers must be consistent with the District's other legal obligations, including the requirement that it negotiate with the Association in good faith. There is nothing, therefore, in this provision which is inconsistent with a bargaining duty on the part of the District. Accordingly, we reject the District's argument that Education Code section 72413 relieves it of the duty to bargain over teaching assignments.

The District argues that even if the procedures for making summer school assignments are within scope, it had always

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[4]See also Healdsburg Union High School District (6/19/80) PERB Decision No. 132; Solano County Community College District, (6/30/82) PERB Decision No. 219; North Sacramento School District (12/31/81) PERB Decision No. 193; Calexico" Unified School District (12/20/82) PERB Decision No. 265.

unilaterally assigned employees to teach summer school. As noted earlier, the established policy in the District had been to make summer school assignments based on a departmental rotation system. In the summer of 1978, the District modified that system. While an employer is not deprived of the right to make an employment decision consistent with an established procedure, it may not unilaterally alter the procedure itself. The District's argument is, therefore, without merit.

For the above reasons, we affirm the ALJ's determination that the District violated subsection 3543.5(c) by unilaterally changing the procedure for making summer school teaching assignments. Such conduct concurrently violates subsections 3543.5(a) and (b). San Francisco Community College District (10/12/79) PERB Decision No. 105.

B. Assignment of Administrators to Teach Courses

In the fall of 1978, the District assigned "overload" teaching assignments to administrators who were not members of the bargaining unit. Although administrators had taught overload courses in the past, they had done so only after full-time faculty were given first opportunity to receive such assignments. The parties had incorporated this past practice in their collective agreement by including a provision requiring the District to give faculty members notice and equal opportunity to bid for overload

assignments.[5] The ALJ found that the assignment of administrators to teach overload courses had the effect of transferring unit work out of the bargaining unit and, as such, was a matter within the scope of representation. First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 2705]. Since the assignments were in violation of the District's established course overload policy, the ALJ found it to be a violation of the duty to negotiate in good faith.

The District does not deny that the assignment of overload teaching responsibilities to non-unit members transferred work out of the bargaining unit in violation of the collective agreement and was a modification of existing practice but, rather, it argues that there is no legal authority to support the proposition that the transfer of work out of the bargaining unit is a matter within the scope of representation.

In Rialto Unified School District (4/30/82) PERB Decision No. 209 and Solano County Community College District (6/30/82) PERB Decision No. 219, which were issued subsequent to the

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[5]Article X, section 12 of the collective agreement provides:

> Any offering of the District which is appropriate to an established department and which constitutes an overload shall be made known to all faculty within such department as soon as possible before commencement of the offering and all qualified faculty within the department shall have an equal opportunity for such overload assignment.

proposed decision in this case, the Board expressly held that a transfer of unit work out of the bargaining unit is a matter fully within the scope of representation. See also Healdsburg Union High School District, supra. Therefore, the District's contention that there was no legal authority to support the ALJ's determination is without merit.

Accordingly, we find that, by assigning administrators to teach "overload" courses, the District violated subsection 3543.5(c), and concurrently, subsections 2543.5(a) and (b). San Francisco Community College District, supra.

C. Assigning Librarians and Counselors to Teach Courses

In the fall of 1978, the District assigned counselors and librarians to teach a variety of courses throughout the college. The ALJ found that such assignments were a violation of the duty to negotiate in good faith, since they were a departure from established assignment policy and concerned course subject matters unrelated to traditional counselor and librarian job duties.

The District raises two exceptions with regard to the assignment of librarians to teach courses: first, that librarians and counselors were not included in the unit and, therefore the District was privileged to assign them to teach courses it wanted; and, second, that the assignment of

counselors and librarians to teach courses was consistent with past practice.[6]

With regard to the District's first exception, the unit description contained in the original recognition agreement, of which we have taken administrative notice, includes librarians and counselors in the unit. Therefore, the District's contention is without merit.

The thrust of the District's second exception is that, so long as librarians and counselors had taught some courses in the past, a change in the type of class assigned is irrelevant.

The ALJ found that previously counselors had taught special nine-week courses in career development, educational planning, career guidance, human potential and peer counselor training as part of their regular assignments. Librarians taught courses in library science and term paper preparation. These courses met on shorter schedules than regular academic courses. Occasionally, counselors and librarians volunteered to teach regular academic courses on an overload basis, but these had not been part of their regular assignments. In the fall of 1978, the District assigned counselors and librarians to teach a variety of regular courses in a number of academic subjects.

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[6]The District does not argue that the reassignment of employees from one set of duties to another is outside of the scope of representation. Section 3543.2, which sets forth the scope of representation, expressly provides that "reassignment" is a negotiable item. The assignment of librarians and counselors to teach courses is a "reassignment" within the meaning of section 3543.2, and is, therefore, negotiable.

In Rio Hondo Community College District (12/31/82) PERB Decision No. 279, at pp. 16-19, the Board considered a charge alleging that a unilateral assignment of counselors to teach career guidance courses constituted a violation of subsection 3543.5(c). The Board found that, while counselors had not regularly taught courses in the past, an assignment to teach career development courses was "reasonably comprehended" within the scope of their existing job duties. It thus did not constitute an unlawful deviation from existing policy.

The facts in this case are easily distinguishable from those in Rio Hondo, supra. Here counselors and librarians were required to teach courses unrelated to their primary job functions. They were required to teach courses in the art, foreign languages, health sciences, business and physical education departments. At least one counselor had to petition to obtain a teaching credential in preparation for his assignment. It is thus clear that these courses were not "closely enough related to their existing duties" so as to be reasonably comprehended within the District's established work assignment policy. Rio Hondo, supra at p. 19; Grant Joint Union High School District (2/26/82) PERB Decision No. 196.

Accordingly, we find that the District violated subsection 3543.5 (c), and concurrently, subsections 3543.5 (a) and (b), when it unilaterally assigned counselors and librarians to teach courses in violation of established policy.

REMEDY

PERB is granted broad authority under subsection 3541.5(c) to remedy unfair practices. We have found that the District violated subsections 3543.5(a), (b), and (c) of the Act when it adopted a resolution freezing salaries and the District's contribution to health benefits, as well as increasing class size. The District also violated subsections 3543.5(a), (b), and (c) of the Act by unilaterally modifying the procedure for making summer school teaching assignments and by assigning administrators, counselors and librarians to teach courses in derogation of established policy.

Accordingly, we find it appropriate to order the District to cease and desist from making unlawful unilateral changes, and to order it to negotiate upon demand with the Association concerning those matters affected by its unlawful conduct, including the effects of those decisions we have found to be within management's exclusive prerogative. Moreover, we order the District, upon request by the Association, to restore the status quo with regard to the level of employer contributions to employee health and welfare benefit plans and the procedure for making course overload and summer school teaching assignments.

Finally, the District excepts to the proposed remedy in light of the delay between the hearing and the issuance of the ALJ's proposed decision. It cites no harm that has occurred as

a result of the delay, other than the fact that the parties have entered into a successor agreement. It has generally been held that delay in the issuance of a Board decision is no basis upon which to deny employees a remedy for an employer's unlawful conduct. NLRB v. J.H. Rutter-Rex Mfg. Co. (1969) 396 U.S. 258 [72 LRRM 2881]; NLRB v. Electric Cleaner Co. (1942) 315 U.S. 685 [10 LRRM 501]. As the U.S Supreme Court stated in NLRB v. J.H. Rutter-Rex Mfg. Co., supra at 72 LRRM 2883, "[w]ronged employees are at least as much harmed by the Board's delay. . . as is the wrongdoing employer." Accordingly, we reject the District's exception to the proposed remedy.

ORDER

Upon the entire record in this case, the Public Employment Relations Board finds that the Mt. San Antonio Community College District violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act. As a result of this conduct, the Board ORDERS that it shall:

1. CEASE AND DESIST FROM:

(a) Refusing to negotiate in good faith with the exclusive representative, Mt. San Antonio Faculty Association, CTA/NEA by: (1) unilaterally adopting a resolution freezing salaries and District contributions to employees' health and welfare benefits and increasing teaching hours and class size; (2) unilaterally changing the preexisting procedures for assigning unit members to summer school classes;

(3) unilaterally assigning classroom courses and preparation time to counselors and librarians; and, (4) unilaterally depriving unit members of their right to overload assignments by assigning classroom courses and preparation time to non-unit employees.

(b) Interfering with employee rights under the Educational Employment Relations Act by: (1) unilaterally adopting a resolution freezing salaries and District contributions to employees' health and welfare benefits and increasing teaching hours and class size; (2) unilaterally changing the preexisting procedures for assigning unit members to summer school classes; (3) unilaterally assigning classroom courses and preparation time to counselors and librarians; and, (4) unilaterally depriving unit members of their right to overload assignments by assigning classroom courses and preparation time to non-unit employees.

(c) Interfering with employee organization rights under the Educational Employment Relations Act by: (1) unilaterally adopting a resolution freezing salaries and District contributions to employees' health and welfare benefits and increasing teaching hours and class size; (2) unilaterally changing the preexisting procedures for assigning unit members to summer school classes; (3) unilaterally assigning classroom courses and preparation time to counselors and librarians; and, (4) unilaterally depriving unit members of

their right to overload assignments by assigning classroom courses and preparation time to non-unit employees.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Rescind Resolution 78-4.

(b) Upon request of the Association, restore the status quo with regard to the level of employer contributions to employee health and welfare benefit plans and the procedure for making course overload and summer school teaching assignments.

(c) Upon request of the Association, negotiate concerning all matters which the District unilaterally changed, including the effects of those decisions found to be within management's exclusive prerogative.

(d) Within five (5) workdays after service of this Decision, prepare and post copies of the Notice To Employees attached as an appendix hereto, for at least thirty (30) consecutive workdays at its headquarters offices and in conspicuous places at the locations where notices to certificated employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(e) Within thirty (30) days from service of this Decision, give written notification to the Los Angeles regional director of the Public Employment Relations Board, of the actions taken to comply with this Order. Continue to report in writing to the regional director as directed. All reports to the regional director shall be concurrently served on the charging party.

Members Tovar and Burt joined in this Decision.

APPENDIX

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

After hearing in Unfair Practice Case No. LA-CE-350, in which all parties had the right to participate, it has been found that the District violated subsections 3543.5(a), (b), and (c) of the Educational Employment Relations Act.

As a result of this conduct, we will:

1. CEASE AND DESIST FROM:

(a) Refusing to negotiate in good faith with the exclusive representative, Mt. San Antonio Faculty Association, CTA/NEA by: (1) unilaterally adopting a resolution freezing salaries and District contributions to employees' health and welfare benefits and increasing teaching hours and class size, (2) unilaterally changing the preexisting procedures for assigning unit members to summer school classes, (3) unilaterally assigning classroom courses and preparation time to counselors and librarians; and, (4) unilaterally assigning classroom courses and preparation time to administrators.

(b) Interfering with employee rights under the Educational Employment Relations Act by: (1) unilaterally adopting a resolution freezing salaries and District contributions to employees' health and welfare benefits and increasing teaching hours and class size, (2) unilaterally changing the preexisting procedures for assigning unit members to summer school classes, (3) unilaterally assigning classroom courses and preparation time to counselors and librarians; and, (4) unilaterally assigning classroom courses and preparation time to administrators.

(c) Interfering with employee organization rights under the Educational Employment Relations Act by: (1) unilaterally adopting a resolution freezing salaries and District contributions to employees' health and welfare benefits and increasing teaching hours and class size, (2) unilaterally changing the preexisting procedures for assigning unit members to summer school classes, (3) unilaterally assigning classroom courses and preparation time to counselors and librarians; and, (4) unilaterally assigning classroom courses and preparation time to administrators.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

(a) Rescind Resolution 78-4.

(b) Upon request of the Association, restore the status quo with regard to the level of employer contributions to employee health and welfare benefit plans and the procedure for making course overload and summer school teaching assignments.

(c) Upon request of the Association, negotiate concerning all matters which the District unilaterally changed, including the effects of those decisions found to be within management's exclusive prerogative.

DATED: MT. SAN ANTONIO COLLEGE DISTRICT

BY_____
Authorized Agent

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

STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

MT. SAN ANTONIO COLLEGE FACULTY ASSOCIATION, CTA/NEA, Charging Party, v. MT. SAN ANTONIO COMMUNITY COLLEGE DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-350 PROPOSED DECISION (2/5/82)

Appearances; A. Eugene Huguenin, Esq., for Mt. San Antonio College Faculty Association, CTA/NEA; Wagner and Wagner by John J. Wagner, Esq., for Mt. San Antonio Community College District.

Before Stephen H. Naiman, Administrative Law Judge.

I. PROCEDURAL HISTORY

The Mt. San Antonio College Faculty Association CTA/NEA (hereafter Charging Party or Association) filed the instant unfair practice charge against Mt. San Antonio Community College District (hereafter Respondent or District) alleging that the District had failed to meet and negotiate with the Association before taking certain unilateral action relating to the terms and conditions of employment of employees represented by the Association. Pursuant to the Public Employment Relations Board (hereafter PERB) procedures, an informal conference was held, at which time Respondent moved to dismiss

the charge in that it merely sought to enforce certain contract rights of the Association. No ruling was made on this motion.

Commencing on September 22, 1978, formal hearings were begun in this matter. After eight days of hearing the matter was concluded on December 18, 1978, and after the filing of responsive briefs was submitted March 20, 1979.

The charge was amended at formal hearing, party to clarify allegations relating to certain alleged unilateral action occurring on or about June 7, 1978 and relating to the assignment of summer school employees to teaching assignments. Further, at the opening of the formal hearing in this matter, respondent again moved to dismiss the charge based upon the provisions of the Educational Employment Relations Act, (hereafter EERA or Act) section 3541.5(b),1 which prohibits PERB from issuing complaints on a charge based solely on a violation of an agreement between the parties unless the allegations would also constitute an unfair practice charge. The motion to dismiss the charge was taken under submission and is disposed of as part of this proposed decision.

II. FINDINGS OF FACT

A. 1977-1979 Agreement

The Mt. San Antonio Faculty Association is the exclusive representative of certificated employees of the District. On

[1]The Educational Employment Relations Act is found at Government Code section 3540 et seq.

or about March 15, 1978,[2] the District and Association entered into a collective bargaining agreement which covered terms and conditions of employment through June 30, 1979. The recognition clause of that agreement found in Article III expressly provides that full-time and part-time contract and regular instructors, day and continuing education hourly instructors, counselors and librarians are, inter alia, included in the unit. The recognition clause further provides that expressly excluded from the unit are substitute, hourly, intermittent, casual, summer school instructors not already members of the bargaining unit, and other certificated employees who are employed for less than a full semester, plus confidential and designated managerial employees. Further, the recognition clause acknowledges that, " . . . [the] parties agree that this represents the appropriate unit . . . "

Appendices A and B of the agreement set forth salary schedules for unit members on contract for 1977-78 and 1978-79 respectively. The salary scale for the 1978-79 academic year, which would become effective July 1, 1978, was approximately 5 percent higher than that for 1977-78. Appendix D set forth salary rates for hourly unit members for 1977-78 and 1978-79. Appendix E established rates of additional remuneration for special assignments. Appendix G of the agreement entitled

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2unless otherwise indicated all dates refer to 1978.

"Summer Session Hourly Rate for Unit Members" sets out the rates of pay for summer session work for the summers of 1978 and 1979, respectively. Appendix G provides for an hourly rate for summer session teaching which is based upon one percent of the "base salary as determined by placement on the relevant salary schedule for unit members," and further provides a $15.77 per hour minimum and $21.40 per hour maximum. This schedule is for the 10-month regular contract certificated personnel. Further, the salaries are set forth for hourly unit members and for adult educational instructors.

Article X of the contract entitled "Work Hours" provides that a unit member who is a full-time instructor shall be on campus for 30 hours per week. "These hours are exclusive of overload or extra-pay assignments."

Paragraph 7 of Article X provides that counselors shall be on campus for 32 assigned hours per week exclusive of overload or extra-pay assignments. Paragraph 8 provides that full-time librarians shall be on campus for 35 assigned hours per week. Paragraph 12 of Article X provides that,

> Any offering of the District which is appropriate to an established department which constitutes an overload should be made known to all faculty within such department as soon as possible before commencement of the offering and all qualified faculty within the department shall have an equal opportunity for such overload assignment.

During negotiations, the parties were aware that the voters of California would vote soon after ratification of the

contract on whether they wished to have property taxes reduced. Thus, four express provisions of the contract were subject to reopeners should the voters of California determine that property taxes should be reduced pursuant to ballot Proposition 13. The parties determined that the areas in which negotiations would be reopened were employee benefits, work hours, class size and salaries. The following language was utilized in each of the affected areas for which the parties had agreed to reopen negotiations were Proposition 13 to pass:

ARTICLE IX
EMPLOYEE BENEFITS

. . . . . .

2. For 1978-79, the District shall pay all costs for benefits as nearly identical to 1977-78 benefits as possible. This provision for 1978-79 is on the condition that Proposition 13 or other tax legislation does not pass that would result in a loss of local tax income for 1978-79. Should such constitutional amendment or legislation pass, the employee benefits for 1978-79 would be reopened and negotiated after the effects of the laws are known. A different carrier may be selected by mutual consent of both parties to this Agreement.

. . . . . .

ARTICLE
WORK HOURS

. . . . . .

13. For 1978-79, should Proposition 13 or other tax legislation pass that would result in a loss of local tax income

for 1978-79, the work hours would be renegotiated for 1978-79 after the effects of the laws are known.

ARTICLE XI
CLASS SIZE

. . . . . .

5. For 1978-79, should Proposition 13 or other tax legislation pass that would result in a loss of local tax income for 1978-79, the class size would be renegotiated for 1978-79 after the effects of the laws are known.

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ARTICLE XIII
SALARIES

. . . . . .

2. For 1978-79, should Proposition 13 or other tax legislation pass that would result in a loss of local tax income for 1978-79, the salaries would be renegotiated for 1978-79 after the affect [sic] of the laws are known.

. . . . . .

In addition to the specific language which provided reopeners in four articles of the contract should Proposition 13 pass, the parties went on to agree as follows:

ARTICLE XVIII
EFFECT OF AGREEMENT

During the term of this Agreement, the Association expressly waives and relinquishes the right to meet and negotiate and agrees that the District shall not be obligated to meet and negotiate with respect to any subject except as provided in reopener clauses in this Agreement and provided that the Board shall not reduce or

> eliminate any benefits or professional advantage within the definition of 3543.23 of the Government Code as enjoyed by teachers as of the effective date of this Agreement without first negotiating in good faith with the Association with respect to such reduction or elimination.
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> This shall not prevent the parties from beginning negotiations in a timely fashion for a successor agreement.

On or about May 22, 1978, John D. Randall, Superintendent/President of Mt. San Antonio College, issued to all staff a memorandum discussing the District's budgetary concerns. The focus of the memorandum was on the possible passage of Proposition 13. The memorandum discussed alternative budgets, one to be implemented if Proposition 13 passed and the other to be adopted if Proposition 13 were defeated by the voters. In addition, the memorandum informed the staff that were Proposition 13 to pass, certain substantial cuts in expenditures of the College District would have to be made. The memorandum alluded to areas where savings could be achieved by reducing certificated hourly budget costs and by using administrators, counselors, librarians, and regular instructors to assume additional teaching responsibilities. Further, the memorandum suggested indicated reductions in extra pay assignments.

3section 3543.2 sets forth the definition of the scope of representation. [This footnote is not contained in the original text of the contract.]

B. Proposition 13 Passes

On June 6, 1978, the voters of California approved Proposition 13.[4] On June 7, 1978, the Board of Trustees of Mt. San Antonio College met. The agenda of that board meeting contains substantial documentation from the administrative staff and a 1978-79 tentative budget for study. At the board meeting, the board considered recommendations of staff made in anticipation of the passage of Proposition 13, which would have reduced certificated hourly employment by the assignment of administrators, counselors and librarians to these teaching functions. The board proposed the elimination of community service programs except those which were self-supporting, and the careful review of summer school offerings for the purpose of reducing expenditures in that area. At the same meeting, the board approved the hiring of certain employees within the unit for work as summer school teachers, subject to the offering of classes. These persons were to be hired on an hourly basis pursuant to the contract agreement. At the meeting of June 7, 1978, the board further directed its administrative staff to take action to reduce expenses in the

[4]Proposition 13 placed significant limitations on the taxing power of local and state governments and sharply reduced the amount of revenue that local entities could raise by taxing property. The constitutionality of this measure was upheld in Amador Valley Joint Union High School District v. State Board of Equalization (1978) 22 Cal.3d 208. See also Sonoma County Organization of Public Employees v. County of Sonoma (1979) 23 Cal.3d 296.

face of the passage of Proposition 13 and to enter into negotiations concerning matters which were subject to negotiation under the contract in the face of the passage of Proposition 13.

C. Summer School Cancellations

On June 16, the Friday before summer school instruction was scheduled to commence, Joseph Zagorski, Vice President for Instructional Services at the College, made decisions to cancel a number of scheduled summer school classes. The cancellation decisions regarding individual courses were made in consultation with the College's Division Chairpersons, on the basis of the following criteria: courses which were not part of a major, which did not lead to immediate employment, which were not offered in large quantities during the regular Fall and Spring semesters, which were not transfer courses to a four-year institution, and which were multiple sections of the same class were given low priority. Low enrollment was also a criterion for class cancellation: generally, low priority classes which did not have 30 students enrolled at the time of the June 16 consideration were cancelled. Instructors whose classes were cancelled were notified by their Division or Department Chairs by telephone or telegram over the weekend, on June 17 or 18, so that they would not meet their first classes on Monday, June 19.

These criteria and procedures for summer school course cancellations represented a change from the District's past practice in a number of respects:

(1) In previous years the class low enrollment limit was 20 students: scheduled classes which had 20 students enrolled in advance of the commencement of instruction were allowed to meet and were offered. The 20 student enrollment limit was referred to in both the District's faculty Bulletin for Summer School Instructors and in its Evening Division Faculty Handbook which sets forth the regulations governing instruction in the District's Continuing Education Program. The regulations in the Evening Division Handbook apply to summer school employees as well, and were incorporated by reference in the teaching agreements issued individual instructors following the Board's approval on June 7 of the faculty summer school assignments.

(2) Previous District policy had been to allow some summer school classes to meet with less than 20 students. These included pilot courses, advanced courses with heavy prerequisites, courses meeting a special need such as a graduation certificate or licensing required, and "assured courses": those whose initial enrollment had been substantially above the course minimum for the previous two summer sessions.

(3) In previous years, summer school courses which had close to the enrollment limit prior to the first day of scheduled instruction were allowed to meet on the first day of

classes to see if additional students would enroll at that time. Instructors would then be paid for the first day of classes, even if the class cancelled. The 1978 summer school enrollment closed on Tuesday, June 20. On June 16, however, the District cancelled a number of classes in which the enrollment on was close to the new limit of 30 students, without allowing them to meet on the first day of classes to pick up additional students. Since they were not allowed to hold the first class meeting, the instructors in the courses close to the enrollment limit were not paid for the first class as they had been in the past.

(4) The entire second summer session was cancelled, without obtaining any enrollment figures for the classes scheduled.

Following the initial decision to cancel summer school classes, a number of division deans made changes in the previously scheduled assignments of faculty to those classes which had not been cancelled. Thus several faculty members whose assigned classes were not cancelled were deprived of their assigned classes and the classes were instead given to other faculty members whose scheduled courses had been cancelled. Those instructor changes, which occurred in the Division of Social Sciences, were made in an attempt to equalize the remaining summer school assignments among faculty originally scheduled to teach. However, they represented a

change in the District's prior procedures for assigning faculty to summer school courses.

In previous years, the individual department chairs, in consultation with their Division Deans, would determine what summer school courses should be offered. The Department Chairs would then consult the faculty members in their departments to determine which individuals wished to teach summer school. Assignments of individuals to summer school classes would then be made at a departmental meeting in accordance with previously established departmental policy, which varied with the individual departments. Most departmental policies involved some variation of a rotation system, according to which faculty wishing to teach summer school took turns being assigned to those courses most likely to attract enough students. Other departments combined seniority considerations with rotation amongst faculty.

The summer school assignments were then communicated to the Vice President for Instruction. The scheduled classes were printed in the summer session schedule, which was distributed to the community in April. In the summer school Bulletin the College explicitly reserved the right to cancel, reschedule, equalize or combine classes and to change instructors where such action is deemed necessary. Such changes were to be announced during registration. The District's regular class schedule, which listed courses to be offered during the Fall

and Spring Semesters of the regular academic year contained similar language.

The Administration would then issue individual teaching agreements for the specific classes scheduled to be taught. It would also distribute to the faculty copies of the Summer School Faculty Bulletin, outlining procedures and regulations. The Board of Trustees would then ratify the teaching agreements and authorize the employment of summer school instructors. The instructors would sign the teaching agreements and return them to the Continuing Education Office. Summer 1978 was the first occasion on which the condition "subject to the offering of classes" was appended to the Board's ratification of the summer school teaching agreements.

As a result of the District's reassignment of faculty to those summer school classes remaining after the June 16 cancellations, the departmental rotation policies for assignment of faculty to summer school classes were not adhered to in individual cases.

The Association President, Dr. Allen, first learned of the summer school cancellations in telephone calls from unit members on Saturday, June 17. Dr. Allen immediately contacted Dr. Randell and Dr. Zagorski, and requested to bargain concerning the cancellations. The District refused to bargain. The Association's request to negotiate the summer school cancellations was repeated in writing in a letter dated

June 18, 1978 from Dr. Allen to the President of the District's Board of Trustees, and was subsequently repeated at meetings of the parties on June 28, 1978 and August 16, 1978. The District never agreed to negotiate with the Association concerning the cancellations, and such negotiations never occurred.

The District's actions with respect to summer school courses were taken because Proposition 13's passage had led to a different budget situation than had existed previously. Whereas in previous years the District had received State funds for that summer school based on Average Daily Attendance in such a way income increased with the number of students enrolled, these funds had been replaced by a comprehensive block grant to the District for the entire fiscal year. Out of its block grant funds the District had established a summer school budget of $200,000. In reconsidering which summer school courses to offer, it therefore wished to use this budget allocation in the most efficient and beneficial manner possible.

D. The District's June 29 Emergency Resolution, 78-4

On June 16, 1978, the same day on which it acted to cancel summer session classes, the District's Board Management Team wrote Dr. Allen requesting a meeting June 20 for the purpose of renegotiating Articles IX - XIII and Appendices B, D, E, F and G of the parties' collective bargaining agreement. The letter declared that an economic emergency existed and that the District proposed contract changes as a matter of financial

necessity. The District stated its intention to take necessary action on the cited items prior to July 1, in order to meet its legal time constraints. The Association President replied on June 19, stating that he would have to consult the Executive Board about the District's request and the appointment of a bargaining team. He requested that the District meet and negotiate, as well, prior to taking any action in areas other than those under which it had obligations under the current collective bargaining agreement.

After an exchange of two more letters in which the District accused the Association of recalcitrance and stated that it would take action prior to July 1 even without negotiating, the District wrote to the Association on June 23, 1978, communicating a proposed resolution dealing with the financial effects of Proposition 13 to be presented at its Board of Trustees meeting on June 29. The resolution, Resolution 78-4, proposed to reduce all rates of pay for 1978-79 identified in Appendices B, D, E, F and G of the collective bargaining agreement by 10 percent, to increase class size to room capacity, to increase teaching hours by 20 percent, and to establish a dollar value per employee for fringe benefits equal to the amount paid by the District for such benefits during 1977-78. The resolution also provided that:

> Any salaries, health and welfare benefits, class size or work load subject to negotiation under the Educational Employment

> Relations Act (Government Code, Section 3543.2) will be subsequently adjusted to conform with any agreements reached pursuant to such negotiations.

The District's June 23 letter reiterated its request to meet and negotiate regarding the collective bargaining agreement reopeners, and suggested that the Association's responses had indicated that it was unable or unwilling to meet and negotiate on these matters. That same day the Association wrote the District naming the members of its bargaining committee and suggesting the date of June 28 for negotiations.

On June 28, the parties met for two and one-half hours. The District informed the Association of the resolution which it would present at its Board meeting the next day, June 29. The terms of the resolution presented to the Association were the same as those contained in the District's June 23 letter. The District did not request a counterproposal from the Association, but stated that Resolution 78-4 constituted its initial bargaining position. The discussion on June 28 did not center around the contents of the District's resolution but on the issue of whether it was appropriate to bargain concerning the effects of Proposition 13 at a time when these effects were not known. In addition, the Association requested bargaining concerning the summer school cancellations. The District refused and extensive time was spent arguing this point.

The next day, June 29, the District's Board of Trustees adopted a revised version of Resolution 78-4 in which the

provision for salary reductions was replaced by a provision that the salaries and supplemental rates of pay identified in the appendices to the collective bargaining agreement would remain at the same rates for 1978-79 as for 1977-78. The District claims that it changed its position between June 28 and June 29 as to the 1978-79 salary rates due to changes in the post-Proposition 13 financial picture, as well as in response to the Association's strenuous objections on June 28 to the resolution. The provisions for increased class size, increased teaching load and unchanged contributions for employee benefits remained the same as in the original resolution.

On July 7, the District wrote to the Association officially informing it that Resolution 78-4 had been adopted by its Board of Trustees on June 29 as its initial bargaining position, and requesting bargaining on the contract reopeners. The next bargaining session did not take place until August 16. At that time the same issues were discussed as on June 28: the Association requested bargaining about summer school and about the District's action in July transferring counselors and librarians to the classroom. The District refused these requests, expressing willingness to bargain only about Resolution 78-4. The Association denied that the meeting was a bargaining session since no formal contract proposals had been received. The latter argument also consumed the next

bargaining session on August 21, 1978. On August 23 the Association received written contract proposals from the District, which were discussed at a meeting of the parties on September 8, 1978.

On August 29, the District wrote to the Association requesting immediate separate bargaining on the issue of employee health and welfare benefits. It claimed that it was necessary to act by Sept. 6, and stated that it would maintain the current dollar amount of employer contributions and the same carriers if no agreement to the contrary were reached. Under those circumstances, employees would be required to pay the difference between the District's contribution and the current cost of the plan. As a result of the District's action, employees maintaining the Prudential package plan with dental and vision coverage during 1977-78 had twenty-three dollars per month deducted from their paychecks to cover the difference between the District's contribution and the cost of the plan. Past practice had been for the District to pay for the increased costs of the employees' existing health insurance coverage. In addition, employees choosing a less expensive type of health care coverage could no longer use the difference in total premiums to purchase coverage in other District approved insurance programs or District approved tax shelter annuities as in previous years.

The District claimed that its actions in passing Resolution 78-4 were necessitated by the changed funding provisions affecting its budget after the passage of Proposition 13. Following Proposition 13, the District experienced a sharp drop in revenues received from local taxes. State funds were received as a block grant, with no relation to Average Daily Attendance figures as in previous years. In addition it claims that Resolution 78-4 was written as a "status quo" resolution which did not change the rights and duties of the parties under the collective bargaining agreement.

At the time of the hearing, the District had a reserve fund of at least $2,700,000 for the 1978-79 academic year.

E. The Assignment of Administrators to Classroom Responsibilities

At its June 29, 1978 meeting, the District's Board also approved the assignments of a number of administrators to part-time classroom teaching. These teaching responsibilities, which ranged from one to four courses per employee during the Fall semester 1978, were in addition to the employees[1] administrative responsibilities. No additional compensation was received by the employees so assigned over and above their regular administrative salaries.

As a result of the District's action in assigning administrators to the classroom, at least one regular full-time faculty member, Andrew Markham, and one part-time instructor, Maureen Martin, each lost one course which they had requested

for Fall 1978. Mr. Markham's course assignments had been approved by his Department Chair. Both of these individuals taught in the History Department. The Association believes that there are other faculty members who also lost their customary overload assignments due to the District's actions, and requests that the District provide it with information sufficient to ascertain their identities.

The District's past practice had not been to assign administrators to the classroom as part of their regular college assignments, with the exception of two individuals whose regular assignments were part-time administration and part-time teaching. Administrators had taught classes on an overload basis in the past, but only outside of their regular working hours, for additional hourly remuneration. A District policy on extra assignments for management personnel which was adopted at the March 15 Board of Trustees meeting specifically provided that management employees could teach extra courses on an overload basis only if such an assignment would not replace a contract or regular employee who would normally have the course as part of his/her regular load or overload assignment.

As indicated in the collective bargaining agreement, the procedure for the assignment of departmental overload (those courses offered in addition to the full-time equivalents of all the instructors teaching in the department) was that full-time faculty in the department would be given the first opportunity

to teach such classes before individuals outside the department were allowed to teach. As in the case of summer school teaching, each department had its own policy for determining how overload courses were to be assigned to individual faculty members.

Although many administrators hold teaching credentials in various subjects of instruction they are not considered members of teaching departments at the college. Only faculty teaching full time in a department attend department meetings regularly, and are considered department members for purposes of overload assignments.

F. Assignment of Counselors and Librarians to Teaching Responsibilities

Early in July at the instigation of President Randall and Vice-president Zagorski, the District moved to implement its plan to reduce its certificated hourly budget by assigning counselors and librarians to classroom teaching.

On July 10, 1978, counselors in the college received a two-page memo from Bruce Paulson, Dean of Student Services, outlining their teaching responsibilities for Fall 1978. A third sheet set forth the class schedule for each individual employee. Employees were given six hours per week preparation time for their six-hour teaching assignments. Counselors had been asked in May 1978 to suggest areas in which they were competent to assume teaching responsibilities in the event that Proposition 13 passed. Division Deans were then asked if they

could use these individuals, and teaching assignments were worked out. The courses to be taught were part of the employees' regular assignments rather than overload assignments for additional pay on an hourly basis. All of the college's counselors and all but two of its librarians were assigned to a 60 percent teaching load.

Previously counselors had taught special nine-week courses in career development, educational planning, career guidance, human potential and peer counselor training as part of their regular assignments. These courses, however, meet on a different schedule than the regular academic course offerings within the academic departments: they meet only one hour per week for nine weeks rather than three hours per week for the entire semester. Students in the classes do not take examinations in which they are tested on their knowledge of the subject material, as in regular academic courses. Instead they are given diagnostic tests to aid them in their selection of careers. Librarians had in the past also taught special courses, in library science and how to write a term paper. However, the courses which counselors and librarians were assigned for Fall 1978 were not courses relating to their counseling or librarian functions. Instead they were regular academic courses in various academic departments ranging from art and foreign languages to health sciences, business and physical education. While some counselors and librarians had

occasionally taught such courses as overload for additional pay, such teaching had never been part of their regular assignment. In addition, unlike their academic teaching assignments, counselors and librarians had not been given preparation time for the special one-unit courses related to their counseling and librarian functions. Class time was simply part of their 32 hour weekly assignment.

On July 18 the Association wrote to the District requesting bargaining regarding the transfers of counselors and librarians. Its request was repeated at the scheduled bargaining session with the District on August 21, and in a further letter dated August 28. On August 29, the District wrote to the Association, rejecting its request to bargain concerning the reassignments.

Counselors who had protested the reassignments were informed by administration members on August 15 that the assignments would proceed as scheduled. The reassignments were also mentioned in a "welcome back" memo to faculty from the President dated August 25.

During the summer and the period immediately preceding the start of classes for the Fall Semester on September 11, 1981, a number of counselors who had been assigned courses which they had not taught previously or had not taught recently spent time in preparing their assigned fall classes. Preparation activities included searching for suitable textbooks and other

course materials, reading the subject material to be covered, outlining course assignments and individual lectures, and preparing assignments. Estimates of preparation time spent by several witnesses ranged from 15 to 20 hours to 80 to 100 hours. In addition, one counselor had to petition to obtain a teaching credential, and to enroll in an M.A. program at California State University, Fullerton, in order to obtain a "partial credential" in the event that his application for a regular credential was not approved.

Between August 30 and September 8, 1978, individual counselors were notified by Dr. Paulson or their Division Deans that they would not have to teach their assigned academic courses after all. The reason for the rescission of the assignments, according to Dr. Paulson, was that changing information concerning the budget indicated by the end of August that it would be possible to allow the counselors and librarians to remain full-time in their regular positions. One counselor, however, Don Greeley, who had been assigned to coach a cross-country class in the Physical Education Department, had already met his class for a period of one week by the time he was notified of the assignment's cancellation. During the week beginning September 1, Mr. Greeley met with the team for approximately 10 hours, in addition to his 32 hours' counseling assignment. While the contract provided for an additional stipend for assistant coaches, Mr. Greeley never asked for and

never received such a stipend as compensation for his coaching duties for the week of September 1.

The Association Requested Remedy

The Association requests a bargaining order with respect to the issues raised by the District's actions and a cease and desist order prohibiting the District from failing and refusing to bargain on matters within the scope of representation under Government Code section 3543.2. In addition, it requests that those individuals deprived of overload teaching by the District's assignment of administrators to the classroom during Fall 1978 be offered employment on a priority basis for the next academic year.

III. ISSUES

A. Whether the charge should be dismissed on the basis that this is solely an action to enforce a contract.

B. Whether the District took unlawful unilateral action when it adopted Resolution 78-4 which contemplated certain changes in contractual provisions.

(1) If the District took unilateral action in adopting Resolution 78-4, may it defend on the ground that some or part of the resolution was not implemented?

(2) If the District took unilateral action in adopting Resolution 78-4, was it merely maintaining the status quo?

(3) If the District took unilateral action in adopting

Resolution 78-4, was the action justified by emergency or necessity?

(4) If the District took unilateral action in adopting Resolution 78-4, did the Association waive any objection to the District's conduct?

C. Whether the District violated the EERA when it refused to bargain concerning decisions relating to the cancellation, offering, and teaching assignments for certain summer school classes or sessions.

D. Whether the District violated the EERA when it refused to bargain concerning the assignment of overload classes to administrators rather than to certificated faculty.

E. Whether the District violated the EERA when it refused to bargain concerning the assignment of certain certificated employees to teach classroom courses.

F. Whether any of the instances in which the District refused to bargain concerned matters upon which the Association waived its right to bargain.

G. Whether the District's conduct violates sections 3543.5(b) and (a) of the EERA.

H. What remedy, if any, is appropriate?

IV. CONCLUSIONS OF LAW

A. The Motion to Dismiss Pursuant to Government Code Section 3541.5(b)

At the inception of the hearing and throughout the proceedings in this matter, Respondent has argued that Charging

Party is merely seeking to enforce contractual rights in its claim of wrongdoing pursuant to California Government Code section 3543.5(3), (b) and (c). EERA denies PERB the " . . . authority to enforce agreements between the parties, . . . and prohibits the issuance of a complaint on any charge based on an alleged violation of such an agreement that would not also constitute an unfair practice . . ." (California Government Code Section 3541.5(b)).

In this case Charging Party contends the District committed unfair practices by inter alia, making unilateral changes in terms and conditions of employment, at least some of which are set forth in the contract between the parties. The District, in turn, relies on certain contractual defenses including the alleged waiver provisions of the contract "zipper" clause, Article XVII.

In almost every case of an alleged refusal to bargain, based on a unilateral change of contractual provisions, PERB or other administrative agencies must, of necessity, interpret the terms of the contract in order to determine whether there has been an unlawful failure to comply with them and consequently a contractual change prohibited by law (see NLRB v. Katz (1962) 369 U.S. 736).

Thus, in matters such as this, interpretation of the contract is essential to the issue of whether there has been a statutory violation. This is not enforcement of the agreement

in the abstract, albeit should a violation be found, enforcement of the contractual provisions might, of necessity, result as part of the administrative remedy. Rather, interpretation of the contract must precede any finding of unilateral change, which if unexcused in the agreement, may well be an unlawful refusal to bargain. (NLRB v. C & C Plywood Corp. 1967) 385 U.S. 421 [64 LRRM 2065]; Mastro Plastics Corp. v. NLRB (1956) 350 U.S. 270 [37 LRRM 2587]; Sea Bay Manor Home (1980) 253 NLRB No. 68; Anaconda Aluminum Co. (1966) 160 NLRB 35 [62 LRRM 1370]; contrast, [106 LRRM 1010] Baldwin Park Unified School District (4/4/79) PERB Decision No. 92.)

Thus, the allegations of unlawful unilateral action in this case, if proved, would constitute at least a violation of EERA section 3543.5(c), despite the fact they might also violate express terms of the agreement between the parties. (See Victor Valley Unified School District (12/31/81) PERB Decision No. 192; Davis Unified School District (2/22/80 PERB Decision No. 116). PERB has jurisdiction to resolve the issues in this case and accordingly the Motion to Dismiss is denied.

B. The Adoption of Resolution 78-4

In San Mateo Community College District (6/8/79) PERB No. 94, and San Francisco Community College District (10/12/79) PERB Decision No. 105, the Board held that a public school employer may not institute a change concerning matters within

the scope of representation under Government Code section 3543.25 without meeting and negotiating upon request with its employees' exclusive representative. The Board reasoned that the same considerations which disfavor unilateral changes in the private sector also obtain in the public sector. Unilateral changes destabilize employer-employee relations, damage negotiating prospects and interfere with employees' freedom of choice in selecting their representatives by derogating the representative's negotiating power and its ability to perform effectively in the eyes of employees. Subjective good faith is not a defense to a charge of unlawful unilateral action. Rather unilateral action on matters which require negotiation is per se unlawful and violates the duty to bargain as required by the EERA. (San Mateo, supra at 12; Davis Unified School District, supra at 7-8, 18-19; NLRB v. Katz, 369 U.S. supra, at 743.)

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[5]Section 3543.2 states:

> 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, . . . leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security, . . . procedures for processing grievances, . . . and the layoff of probationary certificated school district employees. . . .

Relevant here, PERB has expressed two important policy reasons to support the finding of illegality in the case of unilateral action by a party with an obligation to bargain. First, the statute's carefully structured equality of negotiating power between the parties is damaged by unilateral action. Second, unilateral action reduces the employer's accountability to the public and gives it an unfair advantage in the political competition for limited funds.

In the instant case, the agreement between the parties provides that should Proposition 13 pass, the parties would specifically reopen negotiations on four enumerated items. The District first requested that the Association bargain on the four contract reopeners on Friday, June 16, in a letter which announced the District's intention to take action on the items before July 1. The Association president responded on Monday, June 19, stating that he would need at least a week to consult his Executive Board and to assemble the bargaining team. The next day, June 20, the District again wrote the Association, accusing it of recalcitrance. The District's letter stated that

> . . . the failure of the Faculty Association to meet and negotiate in good faith . . . leaves the District with no choice but to take necessary action on the above Articles prior to July 1, 1978, and most likely at a meeting expected to be called for June 29, 1978.

That same day, the Association responded. The Association stated that its president had told the District's

representative team in the morning, that its position was in the mail.

This exchange of letters was followed by the District's letter to the Association on June 23, 1978, stating that since the Association's responses had indicated that it "is unable or unwilling to meet and negotiate on these matters," the District would present Resolution 78-4 to its Board on June 29, 1978. That same day, June 23, the Association wrote the District naming the members of its bargaining committee and suggesting that the parties meet on June 28.

Resolution 78-4 was adopted on June 29 following one meeting of two and a half hours' duration, during which the resolution's contents were not discussed. While the District modified the contents of the resolution after the June 28 meeting before presenting it to the Board, this change was not the result of substantive discussions between the parties about those contents.

There is no question that the matters in the four reopener provisions are within the scope of representation. Apart from the fact that the negotiation was expressly mandated by the agreement between the parties, the items covered by resolution 78-4 were rates of pay, class size, hours of employment, and health and welfare benefits. These mandatory subjects of bargaining required exhaustion of the negotiation process before taking unilateral action by adoption of

resolution 78-4 which inter alia, would have altered the status quo by freezing wages at their 1977-78 levels and freezing the dollar amount of the District's contribution to the employees' health and welfare benefits. Employees covered by the Prudential package plan were required for the first time to pay monthly contributions to complete the cost of their coverage, and those with less expensive coverage were unable for the first time to use the difference to purchase other District approved insurance programs for tax shelter annuities, under the District's "cafeteria plan" for fringe benefits. (See San Mateo Community College District, supra; San Francisco Community College District, supra; Davis Unified School District et al., supra; Oakland Unified School District (4/23/80) PERB Decision No. 126, affirmed Oakland Unified School District v. Public Employment Relations Board (1981) 120 Cal.App.3d. 1007.)

Thus, unless there is a viable defense to the District's act of adopting and partially implementing Resolution 78-4, the District will be found to have violated section 3543.5(c) of the EERA.

1. The Defense That Resolution 78-4 Was Not Implemented

The Board's reasoning in San Mateo Community College District, supra, and San Francisco Community College District, supra, implies that the District committed a per se violation when it acted unilaterally to adopt the resolution on matters

within the scope of negotiations as defined by section 3543.2. Even if the District had done nothing to implement its resolution, approval of the proposed actions by its governing board is the first step in effectuating them. As such, the District's official action on June 29 unfairly upset the statutorily designed equality of bargaining power between the parties by forcing the Association to bargain for the rescission of an already officially adopted action. Placing the Association in this position tended to undermine its bargaining power and to derogate its effectiveness in the eyes of its members. In addition, as discussed above, the record shows that the District did implement at least one provision of the Resolution which resulted in a freeze of its dollar amount contribution to health benefits. Thus, this defense is rejected.

2. The Defense That Resolution 78-4 Merely Maintained The Status Quo

The District argues that Resolution 78-4 merely maintained the status quo. This argument appears to have two prongs, (a) The version of the Resolution adopted on June 29 merely froze the dollar amounts of employees' salaries and of the District's contributions to health and welfare benefits at their 1977-78 levels, so there was no change in wages and fringe benefits. (b) The passage of Resolution 78-4 was merely the adoption of the District's initial bargaining position and

which the Association was invited to continue negotiations after July 1. These contentions will be dealt with in turn.

(a) The District argues it maintained the status quo. However, the collective bargaining agreement in effect between the parties had called for an increase in salaries effective July 1, 1978. For the District to freeze salaries, effective July 1, 1978, at their 1977-78 levels, therefore was not mere maintenance of the status quo. While the contract called for renegotiation of salaries should Proposition 13 pass, the District's action froze salaries at their 1977-78 level. PERB has declared that a unilateral freeze of the salary schedule in the face of Proposition 13 financial exigencies is an unlawful failure to negotiate in good faith. The District's argument has been repeatedly rejected. San Mateo County Community College District, supra, San Francisco Community College District, supra; Davis Unified School District et al., supra.

(b) The minutes of the June 29 Board meeting reporting the passage of Resolution 78-4 indicate a willingness to engage in subsequent negotiations. In San Francisco Community College District, supra, the District's Board of Trustees passed a resolution on June 20, 1978 declaring a state of emergency due to the passage of Proposition 13, freezing salaries and yearly and career increments at the 1977-78 rate, and withholding professional growth increments for 1978-79. PERB held that the District's action violated sections 3543.5 (a), (b) and (c) of

EERA. There, as here, the resolution affirmed the District's willingness to make later adjustments in the measures adopted, following negotiations with employee representatives. PERB held that the District could not unilaterally institute changes on matters within the scope of representation and then require the Federation to "recoup its losses at the negotiations table." Thus, the status quo defense is rejected.

3. The Defense That The Adoption of Resolution 78-4 Was Excused By Necessity or Emergency

The District argues the adoption of resolution 78-4 was justified by certain necessities and, therefore, falls within the exception of NLRB v. Katz, supra. The first argument which the District advances is that it had to take economic action on its budget before July 1, 1978, relying upon Rible v. Hughes (1944) 24 Cal.2d 437 [150 P. 2d 455]. In its decision in Davis Unified School District, et al, supra, PERB Decision No. 116, the PERB cited its decision in San Francisco Community College District, supra PERB Decision No. 105, with approval. In San Francisco, the Board held that, "The EERA itself authorizes the District and an exclusive representative to negotiate a wage schedule after July 1. Thus, the District was not constrained to adopt and implement the salary schedule by July 1." This first defense based on necessity, must fail.

The arguments that the adoption of the resolution was necessary to provide the District with sufficient funds to negotiate in good faith or with the flexibility to negotiate

higher as well as lower benefits have similarity been rejected. Ibid.

The District additionally argues that its actions were justified by financial necessity, due to the loss of local property tax revenues as a result of the passage of Proposition 13. In San Mateo Community College District, supra, and San Francisco Community College District, supra, the Board held that no fiscal emergency existed in June 1978 in the period immediately following the passage of Proposition 13 which would justify abrogation of the duty to bargain. There the Board referred to the California Supreme Court's holding in Sonoma County Organization of Public Employees v. County of Sonoma, 23 Cal.3d 296, that Proposition 13's passage did not create an emergency justifying the impairment of local public entities contractual obligations, because "bailout" legislation was passed by the State on June 24 and June 30 to alleviate the effects of Proposition 13. These bills made state surplus funds available to community colleges, and extended the deadlines by which local agencies were required to adopt their budgets. Since the actual effects of Proposition 13 were not known in the latter part of June, and since the bailout legislation was pending, this reasoning is dispositive of the District's claim of financial exigency in the instant case.

The District admits that its estimate of its financial situation was constantly changing in June and early July, as it

received daily reports on the action being taken in Sacramento. As in San Mateo Community College District, supra, at 17-18, and San Francisco Community College District, supra, at 10, there was no showing that a bona fide emergency existed. "The District acted prematurely, out of panic, and not in response to a bona fide emergency." San Francisco Community College District, supra, at p. 10. In San Mateo Community College District, as here, the collective bargaining agreement also provided for contract reopeners on wages and fringe benefits. There the Board concluded that the parties could have negotiated to resolve the potential financial problems expeditiously and lawfully, pointing to their negotiating duty under the contract reopener clause as well as under the statute. (*16.* at 19, 21) Here, the parties conditioned the four contract reopeners on the passage of Proposition 13. This indicates that they specifically contemplated negotiations to resolve any financial problems caused by that contingency. There was no showing of a supervening emergency which would absolve the District of its statutory and contractually assumed obligation to bargain over these matters.

Finally, as in San Mateo Community College District, the District's measures were not in fact financially necessary once the amount of funds available to it for the 1978-79 academic year was determined. In San Mateo, supra, at pp. 4 and 23,

PERB highlighted the fact that the District entered the new fiscal year with an uncommitted reserve carry over of about 2 million, stating that "in the end the facts did not justify the salary measures taken by the District." Here, the District had reserves of approximately $2,700,000 for the 1978-79 academic year. Thus, the defense of economic necessity or emergency is rejected.

4. The Defense That The Union Waived Its Right to Negotiate

In the instant case, the District requested negotiations on or about June 16. Both parties were aware of the contract reopener provisions which called for negotiations following passage of Proposition 13 on June 6. Neither party showed great desire to get to the table. Indeed, the union's responses to the District's request were hardly enthusiastic. The demand for a week to poll the executive board and the concomitant demand to discuss other issues, could have only slowed down negotiations.[6]

While the Association is to be faulted for not coming to the table more quickly following the District's request, it did

[6]"[E]mployee organizations may not shield themselves behind a restraint on unilateral employer actions as a way of avoiding a measure of responsibility for negotiating or resolving financial dilemmas confronting a public employer," San Mateo County Community College District, supra, at 22. Once the employer extends an invitation to negotiate to the organization concerning a matter wherein it is faced with financial difficulties, it is the organization's obligation to respond promptly so that the employer can take effective steps to meet its economic dilemma. (Id., at 22-24)

respond affirmatively within a few days of the District's first invitation. This "tardiness" of a few days even in the context of the facts of this case with certain dates crucial to the parties, does not justify the finding that the Association refused to bargain or waived any right to do so. (Compare, Electric Machinery Co. v. NLRB (5th Cir., 1981) ____F.2d____ [108 LRRM 2202, 2205; see footnote 5 and cases cited therein]; Amador Valley Joint Union High School District (1978) PERB Decision No. 74 *[2* PERC 2192]. See also, Sutter Union High School District (10/7/81) PERB Decision No. 175 at pp. 2-3 and cases cited therein.]

On the other hand, the District's rigid July deadline did not allow sufficient time for meaningful negotiations on the four subjects. Furthermore, the District's insistence in its letter of June 20, four days after it first wrote the Association, that it would take action before July 1 is indicative of a predetermined resolve not to move from its initial position. Its letter of June 23 notifying the Association of the contents of Resolution 78-4 confirms this attitude, since the Association had notified the District on June 20 that its position was in the mail. The District's conclusion that the Association was "unable or unwilling to meet and negotiate on these matters" was not justified by the Association's behavior, but betrays an eagerness on the District's part to find justification for its unilateral

action. Thus, the Association was not given, and therefore did not waive, "a reasonable opportunity to bargain over a decision not already firmly made by the employer." San Mateo Community College District, supra, at 22; accord, Sutter Union High School District, supra. Thus, the defense of waiver must be rejected.

The District's defenses having all proved to be without merit, it is found that by adopting and partially implementing Resolution 78-4, the District violated section 3543.5 (c) of the EERA.

C. The Changes In Summer School Teaching Assignments and Class Offerings

The Association claims that the District made unlawful unilateral changes in past practices relating to the offering of summer school classes and assignment of summer school teaching work. Thus, the Association shows that:

(1) The District raised the low enrollment limit from 20 to 30 students in contravention of the Summer School Faculty Bulletin and the Evening Division Faculty Handbook.

(2) Classes in which the enrollment was close to the limit were not allowed to meet the first day to pick up additional students.

(3) There was a change in the criteria for which low enrolled classes would nevertheless be offered. The practice of offering "assured courses" without regard to current enrollment figures was abandoned.

(4) The second summer session was cancelled without regard to enrollment figures in the scheduled courses.

(5) The criteria for assigning faculty to the remaining courses were changed so that some faculty members' assigned classes were given to other faculty members whose classes had been cancelled.

In response to the union's contention that the District acted unlawfully in making the changes enumerated above, the employer argues that summer school employees are not represented by the Association and that the changes made, are outside scope of representation.

With regard to its first position Respondent argues that summer school instructors are not represented by the Faculty Association, pointing to the exclusion of "certificated employees who are employed for less than a semester" from the unit originally certified by PERB. The Association counters by showing the absence of this exclusionary language from the recognition clause, Article III of the current collective bargaining agreement.

However, the issue of whether a bargaining unit may be redefined by agreement between the parties need not be decided in this context, because the record shows that many summer school instructors are members of the District's regular faculty. The collective bargaining agreement specifically sets forth summer session hourly rates for unit members; and the

testimony concerning summer school assignment policies unquestionably establishes that each academic department gives its faculty first choice of summer school assignments before hiring teachers who are not regular faculty members.

Thus, what is at issue here is whether summer school teaching is a term and condition of employment of certificated employees of the District within the meaning of Government Code section 3543.2. In a recent decision by a four-member panel, PERB set out the test for determining whether a subject is within the scope of representation when that subject is not expressly enumerated in Section 3543.2 of EERA. (Anaheim Union High School District (10/28/81) PERB Decision No. 177; see also, Palos Verdes Peninsula Unified School District/Pleasant Valley School District, (7/16/79) PERB Decision No. 96.)

The Board's three-pronged test first analyzes: (1) whether the subject logically and reasonably relates to an "enumerated" term and condition of employment in the Act; next (2) whether the subject is of such concern to both management and employees that a conflict is likely to occur which can best be resolved in the mediatory arena of collective bargaining; and (3) whether such collective bargaining would significantly abridge the employer's freedom to exercise those managerial prerogatives, relating to matters of fundamental policy and economic consideration "essential to the achievement of the

[employer's] mission". (Anaheim Union High School District, supra at pp. 4-5.)

Thus under the Board's test a subject first must be found to be logically and reasonably related to a specifically enumerated subject of bargaining. Next the subject would then be analyzed to determine whether it is amenable to the bargaining process or whether the placement of the subject in the bargaining arena would create untenable restraints on the managerial need for unencumbered decision-making relating to fundamental policy and economic considerations. A similar test has been endorsed by the United States Supreme Court to determine what is a mandatory subject of bargaining under the National Labor Relations Act. (See First National Maintenance Corp. v. NLRB (1981) 101 S.Ct. 2573 [107 LRRM 2705, 2710-2713]; see also Fiberboard Paper Products v. NLRB (1969) 379 U.S. 203 [57 LRRM 2609].)

Applying this test, it is evident that extra service pay assignments for unit members are closely related to their wages and hours of employment. Teachers have strong interests in the ability to earn extra compensation and in the ability to determine if they wish to work extra hours. In addition, the type of work done by summer school instructors is highly similar to that done by instructors during the regular academic year. The same courses are taught, with the same

pre-requisites, as during the regular academic year; students receive the same number of units of credit and the same credit towards a degree or vocational license as from courses offered during the regular year. Faculty must have the same qualifications in order to teach summer school as are required for courses in the regular program, and summer school courses are taught by the same faculty who teach during the regular academic term. Many of the same students who attend summer school also attend during the fall and spring semesters; courses taken in summer school are used by them as pre-requisites for more advanced courses in the various academic and vocational programs.

The integration of the District's summer school program into its regular curriculum is further evidenced by the fact that the same regulations set forth in the Evening Division Handbook also apply to summer school instruction. Summer school teaching is therefore the same type of work as is ordinarily done by unit members and is unit work. The record reflects that selection for summer teaching assignments is made by rules and policies within each department. Thus, in addition to rotation amongst the regular teaching faculty, summer school teaching assignments are made by seniority, and other considerations and crediting factors earned by certificated personnel during the regular academic year.

In addition to their close similarity and relationship to teaching during the academic year, summer school teaching assignments are arguably an employee benefit or professional advantage which the District could only "reduce" or "eliminate" following negotiations pursuant to Article XVIII of the agreement. (See pp. 7, supra, and 49-51 infra.)

While teaching of summer school courses appears to reasonably and logically relate to regular school-year teaching assignments, decisions regarding the offering of courses are analytically different. At issue here is whether management unilaterally can make the decisions to cancel summer school courses, to cancel an entire summer school session, to reduce the kind and number of courses offered, to increase the minimum number of students necessary before a course would be offered, and to cancel classes in advance of the first session.

It is concluded that these decisions relate to managerial prerogatives derived from the need to efficiently manage the work force and make policy determinations in the face of fiscal changes. The overall goal to provide a district's students and constituents with an educational program encompassing the total needs of the district's student body must be balances against the costs of providing these programs and their relative importance in the overall mission of the particular school district. These are considerations which inherently belong to the

management of the school district. (Compare Fibreboard Paper Products Corp. v. NLRB, supra.) Conversely, while teachers may have an interest in teaching the courses offered, the decision whether to offer courses is not easily resolved by the give and take of collective bargaining.

Thus, the cancellation of summer school classes is analogous to an employer's decision to close part of its business for financial reasons. The decision as to which classes to cancel, and on what basis is therefore a non-negotiable management prerogative. The timing of the decision to cancel a class is similarly non-negotiable. The District was therefore under no duty to bargain with the Association concerning items (1)-(4) at pp. 40-41, supra. (Compare, First National Maintenance Corp. v. NLRB, supra 107 LRRM at pp 2710-2713.)

The assignment of faculty to the classes which have not been cancelled, is clearly a negotiable issue for several reasons. First, the question of which faculty are assigned the remaining classes is one of the chief effects of the abolition of summer school work for unit members. Second, summer teaching assignments are reasonably related to wages and by past, practice, were a contractual benefit expected by the faculty. Finally, the allocation of work among similarly situated employees is not a decision which legitimately need be reserved to management control. Rather the decision to assign

work as between employees traditionally has been an issue before the parties at the negotiating table. Thus, work assignments are made on the basis of education, seniority, training, and prior experience. Such questions are equally of interest to employees as well as management.

Mt. San Antonio faculty members had traditionally been assigned to summer school classes on the basis of department policies, usually involving a rotation system. During the weekend before the start of summer school classes on June 19, at least one Division Dean deviated from these departmental policies by taking the scheduled summer classes of some unit members and giving these classes to other members whose own scheduled classes had been cancelled. While these changes were made for the most altruistic of motives, they were made without consulting the Association. They therefore constituted unilateral action in violation of the District's obligation to bargain with the Association concerning the effects of the class cancellation and deviations from past assignment practice. Since the Association was not notified of the summer school cancellations prior to their implementation, it was deprived of the opportunity to bargain. (See NLRB v. Royal Plating and Polishing Co. (3d Cir., 1965) 350 F.2d 191 [60 LRRM 2033].)

It is therefore found that the District violated Government Code section 3543.5(c) by unilaterally taking action to change

summer school teaching assignments following the cancellation of summer school classes without negotiating with the Association concerning the effects of the cancellations and the change in assignment policy and practice.

D. The Assignment of Overload Classes to Administrators

Extra duty work including overtime and other subjects which generate compensation to unit members are negotiable. Such extra duties which involve extra hours, extra pay, and extra benefits bear an obvious relationship to wages and hours. (Compare, Anaheim Union High School District, supra, and Palos Verdes Peninsula Unified School District/Pleasant Valley School District, supra.) It is well settled that the decision to subcontract for services is within scope, as it relates to unit work and therefore, the decision to subcontract is negotiable. Thus the replacement of employees in the existing bargaining unit with non-unit employees doing the same work is a statutory subject of collective bargaining. Fibreboard Paper Products Corporation v. NLRB, supra at 241. See also Palos Verdes Peninsula Unified School District/Pleasant Valley School District; supra.

In the instant case, the contract specifically states that

> [A]ny offering . . . which is appropriate to an established department which constitutes an overload should be made known to all faculty within such department . . . and all qualified faculty within the department shall have an equal opportunity for such overload assignments. (See p. 4, supra.)

The record here shows that the past practice of the District was to permit each department to determine its own standards for permitting faculty to bid on or qualify for overload teaching assignments.

At the June 29 meeting, the District Board approved the assignment of administrators to teaching positions, without additional compensation, for the Fall semester. The record reflects that two certificated employees lost at least one overload course which they had previously taught and requested to teach again. Although management employees had previously taught overload courses, these were only courses which were not taken by regular faculty as part of their overload assignments.

It is found that the District violated section 3543.4(c) when it denied overload teaching assignments to employees Martin and Markham[7] and instead gave the work to supervisory employees. The assignment of overload teaching to supervisors was tantamount to contracting out of unit work and subject to the negotiation process.

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[7]The Association requests, for a remedy, that the District give it additional information concerning other employees who were denied overload teaching assignments. It is concluded that this information is and was equally available to the Association through its members and accordingly this request is denied.

E. The Assignment of Certificated Personnel To Classroom Teaching

Changes in employment which require additional preparation time or reduce the amount of available preparation time reasonably relate to wages and hours. Increases in the amount of time required to prepare for certificated functions can lengthen the instructional day, can impinge on duty-free hours, and can effectively reduce salary by providing the same compensation for increased work hours to prepare for instructional obligations. Moreover, collective bargaining is best suited to accommodate conflicts between the teachers' interests in the length of the instructional day and the district's prerogative regarding the division, allocation and assignment of work to accommodate the needs of the students. (Compare, Anaheim Union High School District, supra; Palos Verdes Peninsula Unified School District/Pleasant Valley School District, supra.)

The record in the instant case indicates that certain counselors and librarians were given classroom teaching assignments for the Fall semester and allowed six hours of preparation time each week. While both counselors and librarians had taught courses, these were not regular academic courses. They did not involve regular examinations, were offered for only one hour per week for nine weeks and were directly related to the employee's field of specialty. The

courses assigned for the Fall semester were outside the field of specialty of the counselors and librarians and the record demonstrates that some employees spent as much as 100 hours in advance preparation for these courses.

The record shows that the District rescinded the assignments at the beginning of the Fall semester and all but one of the counselors was relieved of the obligation to teach any of the newly assigned courses. This one counselor, Don Greely, was assigned to coach a cross country class which met for one week. The record shows this class was covered by a stipend in the contract. However, Greely never applied for and never received any portion of the stipend.

It is found that the District violated 3543.5(c) by assigning new classroom teaching duties and preparation time to counselors and librarians without first negotiating with the Association. These assignments resulted in extra hours of off duty preparation and were made in derogation of the duty to bargain over the assignments and their impact. Further, the unilateral grant of six hours of weekly preparation time was in derogation of the duty of the District to bargain over this specific issue of preparation time for these courses. Ibid.

F. Waiver

The District argues that except for the four enumerated items subject to the reopener provisions of the 1977-79

contract, the parties agreed to conclude negotiations on matters within the scope of representation with the signing of the 1977-79 agreement. Relying on Article XVIII of the agreement, the District contends that the Association has "waive[d] and relinquished] the right to meet and negotiate and [has agreed] that the District shall not be obligated to meet and negotiate with respect to any subject except as provided in the reopener clauses in [the] agreement . . ." The District takes the position that this contractual provision is a "zipper" clause effectively waiving any right to negotiate concerning matters within scope for the term of the agreement.

On the other hand, the Association relies on the very same contractual provision to support, in part, its contention that the District acted unlawfully when it unilaterally changed the method of making summer school assignments, eliminated the availability of summer school courses, denied certain Faculty the benefit of teaching overload courses and required other certificated personnel to teach classroom courses instead of performing their customary non-classroom certificated functions. Thus, the Association argues that Article XVIII contains a proviso which conditions the closure of negotiations on the District's "not reducing or eliminating any benefit or professional advantage within the definition of section 3543.2 of the Government Code as enjoyed by teachers as of the

effective date of this agreement without first negotiating in good faith with the Association with respect to such reduction or elimination." [Emphasis supplied].

With regard to the issue of the assignment of counselors and librarians to the classroom, the District additionally argues that the above-emphasized language of Article 18 reveals that the parties intended to restrict the professional benefits and advantages to teachers "in that other provisions of the contract use the term 'unit member[1]."

PERB has held that waiver of the right to bargain must be established by clear and unmistakable language. Amador Valley Joint Union High School (1978) PERB Decision No. 74. PERB will not readily infer that a party has waived its rights under the EERA. Rather, waiver of the right to bargain must be intentional, clear and unmistakable. San Francisco Community College District, supra, PERB Decision No. 105 at pp. 16-17; Davis Unified School District, supra at p. 17.

The use of the term "teachers" in Article XVIII of the collective bargaining agreement does not show a clear and unmistakable intention of the parties to exclude counselors and librarians from the proviso to the "zipper" clause. Since all or almost all of the employees in the unit are certificated, it is equally likely that the term "teachers" was intended by at least one of the parties to be synonymous with the expression

"unit members." Thus, the District's ancillary argument, that the assignment of counselors and librarians to the classroom does not negate the Association's waiver of the right to bargain, must fail.

With respect to the District's chief claim: that the language of Article XVIII waives the Association's right to negotiate on matters within scope except for the four specifically enumerated contract reopeners, the language of Article XVIII clearly and unmistakably conditions the Association's waiver of the right to bargain on the District's forbearance from reducing or eliminating any benefits or professional advantages within the definition of Government Code section 3543.2. It has been found that the District unlawfully and unilaterally reduced, abridged or eliminated the following professional benefits or advantages within scope which were enjoyed by unit members as of the effective date of the agreement: the right to be assigned to summer school classes according to established departmental policy, the right to have first chance at overload teaching assignments during the academic year, and the right of counselors and librarians to work no more than their assigned 32 hours per week assisting students and teaching short courses in their fields of specialty. Since the District did reduce or eliminate these professional advantages without first negotiating in good faith

with trie Association, the "zipper" clause was rendered inoperative. There was, therefore, no waiver by the Association of its right to bargain on matters within scope.

G. The Violation of Sections 3543.5 (a) and (b)

The District argues in its brief that the Association did not request a finding of a violation of section 3543.5(b). This misstates the record. Charging Party merely withdrew allegations of independent wrongdoing pursuant to section 3543.5(b) of the Act. It is well settled that a violation of section 3543.5(c) also constitutes a derivative violation of the affected employees' representational rights under section 3543.5 (a) and the Association's rights under section 3543.5(b) of the Educational Employment Relations Act, San Francisco Community College District, supra. The violations of section 3543.5(c) found above, amply support a finding of these derivative violations.

REMEDY

Under Government Code section 3541.5(c) PERB is given:

> . . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It has been found that the District violated section 3543.5(c) by unilaterally adopting a resolution which

purported to take action to freeze unit member's salaries and the dollar amount of the District's contributions to their health and welfare benefits, and to increase their teaching hours and class size; by unilaterally assigning unit work to administrators, by unilaterally changing the procedures for assigning unit members to summer school classes and by unilaterally assigning classroom courses and preparation time to non-teaching faculty. The violation of section 3543.5(c) also violated the employee's right to participate in employee organizations pursuant to section 3543.5 (a) and the Association's right to represent unit members in their employment relations with the District pursuant to section 3543.5(b).

It is appropriate to order the District to cease and desist from unilaterally adopting a resolution which purports to freeze salaries and District contributions to health and welfare benefits and to increase teaching hours and class size, from unilaterally assigning unit work to administrators, from unilaterally changing the pre-existing procedures for assigning unit members to summer school classes, and from unilaterally assigning classroom courses and preparation time to non-teaching faculty.

It is also appropriate to order the District to bargain with the Association, upon request, concerning all those

matters with respect to which it made unilateral changes and to restore any benefits lost by virtue of its unilateral actions, if requested to do so by the Association. It is appropriate that the decision concerning the matters desired to be negotiated and the benefits, if any, to be restored, be that of the Association in the context of its current contractual and bargaining relationship with the District. This flexibility is in accordance with the opinion of the Board in Sutter Union High School District (10/7/81) PERB Decision No. 175 at pp. 7-8.

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 shall not be reduced in size. Posting 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 order 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].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to section 3541.5(c), it is hereby ordered that the Mt. San Antonio College District, its governing board and its representatives in Unfair Practice Charge No. LA-CE-350 have violated Government Code sections 3543.5(a), (b) and (c) and shall:

1. CEASE AND DESIST FROM:

(a) Refusing to negotiate in good faith with the exclusive representative, Mt. San Antonio Faculty Association/CTA/NEA, under the Educational Employment Relations Act by unilaterally adopting a resolution which purports to take action to freeze salaries and District contributions to employees' health and welfare benefits and to increase teaching hours and class size, by unilaterally changing the pre-existing procedures for assigning unit members to summer school classes, by unilaterally assigning unit work to administrators, and by unilaterally assigning classroom courses and preparation time to non-teaching faculty.

(b) Interfering with employee rights under the Educational Employment Relations Act by unilaterally adopting a resolution which purports to take action to freeze salaries and District contributions to employees' health and welfare benefits and to increase teaching hours and class size, by unilaterally changing the pre-existing procedures for assigning unit members to summer school classes, by unilaterally assigning unit work to administrators, and by unilaterally assigning classroom courses and preparation time to non-teaching faculty.

(c) Interfering with employee organization rights under the Educational Employment Relations Act by unilaterally adopting a resolution which purports to take action to freeze salaries and District contributions to employees' health and welfare benefits and to increase teaching hours and class size, by unilaterally changing the pre-existing procedures for assigning unit members to summer school classes, by unilaterally assigning unit work to administrators, and by unilaterally assigning classroom courses and preparation time to non-teaching faculty.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT.

(a) Upon request of the Association, bargain concerning all matters which the District unilaterally changed and restore any benefits lost by virtue of its unlawful unilateral actions.

(b) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty (30) workdays at its headquarters offices and in conspicuous places at the location where notices to certificated employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(c) Within twenty (20) workdays from service of the final decision herein, give written notification to the Los Angeles Regional Director of the Public Employment Relations Board, of the actions taken to comply with this order. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served 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 February 25, 1982, unless a party files a

timely statement of exceptions. See California Administrative Code, title 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 of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on February 25, 1982, 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: February 5, 1982

Stephen H. Naiman
Administrative Law Judge