STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

GONZALES UNION HIGH SCHOOL DISTRICT TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-633
v.	)	PERB Decision No. 410
GONZALES UNION HIGH SCHOOL DISTRICT,	)	September 28, 1984
Respondent.	)	

Appearances; Ramon E. Romero, Attorney for Gonzales Union High School District Teachers Association, CTA/NEA; Barbara S. de Oddone, Attorney (Littler, Mendelson, Fastiff & Tichy) for Gonzales Union High School District.

Before Tovar, Jaeger and Burt, Members.

DECISION

BURT, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Gonzales Union High School District (District) to the proposed decision of the administrative law judge (ALJ) finding that the District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally changing the school calendar without providing notice and an opportunity to negotiate to the Gonzales Union High School

[1]The Educational Employment Relations Act is codified at Government Code section 3540 et seq. All references are to the Government Code unless otherwise noted.

Teachers Association, CTA/NEA, (GUHSDTA or Association) and by unlawfully removing a Pepsi machine in the teachers' lounge in retaliation for the Association's exercise of its rights under EERA. No exceptions were filed to the ALJ's finding that the District had fulfilled its obligation to consult about the class schedule. Based on the discussion below, we affirm in part, and reject in part, the findings and conclusions of the ALJ.

FACTS

After a review of the record, we find that the ALJ's findings of fact are free from prejudicial error, and we adopt them as our own. A summary of those facts follows.

The Association is the exclusive representative of the District's certificated employees, and has been party to collective bargaining agreements with the District since 1977. Negotiations for the 1981-82 agreement began in May 1980, and concluded when agreement on the contract for 1981-82 was reached on September 8, 1981.

A. Change in Class Schedule

The Association alleges that the District's change in the beginning and ending times of the teacher workday implemented on December 14, 1981, was a unilateral change in violation of EERA.

The parties' agreement contains Article V, entitled "Hours of Employment", which defines the length of the workday as

seven and three-fourths hours per day including lunch. The contract does not include a class schedule.

Paragraph G of Article V of the contract states:

> The class schedule will be established after consultation with the Exclusive Representative. The regular schedule shall include six (6) periods of instruction of fifty (50) minutes per period, and a total amount of instructional time of no more than 315 minutes.

The contract also includes a standard zipper clause. From September 1981 until December 14, 1981, classes were held from 8:25 a.m. to 3:00 p.m. Teachers were required to report to work 30 minutes before classes began, at 7:55, and were required to remain for seven and three-fourths hours, until 3:40.

On November 5, 1981, District Superintendent and High School Principal Randall Olson distributed to department heads at the high school a "suggested class schedule, beginning at 8:20 and ending at 2:45, with a 15-minute reading period to be eliminated." Two other schedules were distributed at the meeting, marked "Homeroom" and "Activity Schedule", which provided the same beginning and ending times as the "suggested" class schedule.

A few days later, Association President Jack Havens heard about the proposed changes and asked Olson about them. Olson gave Haven the three schedules with slight alterations. These were noted: "For your information and comment." After

consulting with the Association's executive board, Havens notified Olson that the Association believed the new schedules to be negotiable. Olson replied that they were a "consult item." Olson and Havens met and exchanged memos, disputing the meaning of the contract and the District's negotiating obligations. On December 8, the District announced a new "regular schedule", the same one given to Havens in mid-November.

B. The Unilateral Change in the 1982-83 calendar

Both Havens and District Negotiator Currier testified that the 1981-82 calendar was determined during the negotiations which culminated in the collective bargaining agreement covering those years. Language in the contract defined the school year as 179 days. Attached to the contract was the calendar for 1981-82, showing a total of 179 teacher workdays, including 175 teaching days and four teacher workdays. (In practice, the teachers only worked 178 days during 1981-82, since Martin Luther King Day was added by the Legislature as a holiday, and the District revised its calendar accordingly.) It also included "mandatory holidays", including the Monday after Easter.

The 1981-82 bargaining agreement expired on June 29, 1982. However, it contained a clause providing that if neither party gave the other notice of a desire to terminate the agreement

and negotiate a new one on or before February 1, 1982, "the Agreement shall be extended for at least another year."

Several notes from Havens to Olson in November and December 1981 referred to the possibility of new negotiations for a successor contract. From December 1981 through March of 1982, there were a series of increasingly acrimonious memos between District representatives and those of the Association concerning the bell schedule, possible raises for some teachers, what to do about Martin Luther King Day, use of the District equipment, the Pepsi machine, and the new calendar. In the middle of this exchange, on February 9, Currier wrote to Havens stating that notice had not been given by either party of an intent to terminate the old contract and renegotiate a new one for the next year, and concluding that the 1981-82 contract was therefore extended for another year. The letter did however express the District's wish that Currier meet with representatives of GUHSDTA "to discuss employer/employee relations for 1982-83." The Association took the position that the entire contract should be renegotiated.

As was the practice in past years, the District adopted a tentative calendar on March 22, 1982. This calendar differed from the 1981-82 calendar in two ways. First, the Monday after Easter was shown as a regular class and workday rather than a holiday. Second, the last week of January was changed from two full teaching days and three "minimum days" to one regular

teaching day, three minimum days, and one teacher workday. The two calendars began and ended the school year at the same time.

On March 23, Jack Steadman, chief negotiator for the Association, sent a note to Olson saying,

> It has come to my attention that the proposed school calendar you presented to the Board of Trustees last night eliminated the day after Easter as a holiday. This represents a major change in the present contract. The school calendar is within scope of bargaining as defined by the Rodda Act. If you wish to make changes in the calendar, you must present your proposal during contract negotiations. We plan to present our contract proposals for the 1982-83 school year at the April Board of Trustees meeting.

On March 26, Currier (unaware of Steadman's letter to Olson) wrote to Steadman, reiterating the District's position that, since neither party had chosen to terminate the contact, it was extended for another year. The letter continued:

> A second purpose of this letter is to again extend an invitation to the Association that we meet to discuss employer-employee relations for 1982-83. These discussions shall not be negotiations, but they may prove mutually rewarding. I sincerely hope that you will be able to attend the suggested meeting.

On April 14, 1982, there was a meeting attended by Olson, Currier, and three members of the Association's negotiating team, lead by Steadman. Steadman and Currier agree that the calendar was discussed, but their versions of the meeting differ otherwise. Steadman testified:

> . . . From Mr. Currier's point of view, he wanted to discuss employer-employee relations. From our point of view, we wanted to clarify the status of negotiations, would there be negotiations for the contract, this contract here, basically 1982-83. At this point, we discussed what we would either negotiate or discuss informally. Mr. Currier mentioned that a District concern was increasing salaries for teachers to keep morale high. He was also interested in the article concerned with health and welfare benefits. From our side, we didn't particular itemize (sic), our, the issues that we wanted to bargain, but we indicated that they were not going to be significant. I made reference to the fact that the board had adopted a new school calendar and suggested that that would certainly be an item that we would want to negotiate. And Mr. Currier indicated that the District didn't have to negotiate that.

Currier testified that he raised a few matters of concern that the parties could resolve informally, including the calendar, but the Association expressed no interest in the arrangement. He denied saying that the District was not required to negotiate the calendar, and Olson supported Currier's version of the meeting.

There was another meeting of the same five individuals on September 10, characterized by the District as a meeting to discuss settlement of the unfair practice charges. Steadman testified:

> Mr. Currier indicated that since there would be no negotiations for the year that . . . the District adopted a calendar which was as close to the status quo as possible.

He did not assert that the Association had made a demand to negotiate the calendar at that time.

Olson and Currier testified neither indicated at that time that the calendar was final, nor did either refuse to negotiate the calendar for 1982-83.

Olson also testified that Currier had advised him in March to be sure that the calendar adopted was tentative, since it was subject to negotiation. Olson said that as of the time of the hearing the tentative calendar had not been changed, nor did he know if it would be, but that the Board was willing to negotiate about it.

C. Removal of the Pepsi Machine from the Teachers' Lounge

For several years, the Association operated a Pepsi-Cola vending machine in the teachers' lounge at the high school. The profits from the machine ($500-$600 in 1981-82) were used for Association activities, including the awarding of Association scholarships.

The teachers' lounge was used for a variety of purposes, not including Association meetings. Theoretically, students were not allowed in the lounge, although they were sometimes found there.

On March 9, 1982, Olson told Havens that the District would replace the Pepsi machine with a "machine from food service." Sometime in April, the Pepsi machine was replaced by a

Coca-Cola machine, leased along with other machines by the District and serviced by the food service department.

During the second week of April, Olson called in John Mahoney, new president of the Association, to discuss general District problems. Mahoney testified that it was an opportunity for both to air differences, and to discuss the District's and Association's views. Mahoney continued:

> . . . I think the big problem would be Mr. Olson expressed frustration that the number of unfair labor practice charges that the teachers had filed and he also expressed frustration at the manner in which negotiations had been conducted during the previous year and I said that I was equally frustrated, that we were very unhappy with the way negotiations had gone . . .

Mahoney characterized the meeting as an informal exchange of ideas. He testified that he believed Olson was trying to establish a better relationship and that the atmosphere was not at all hostile or threatening.

During that meeting, Olson and Mahoney also discussed the Pepsi machine. Mahoney asked for reasons why the machine had been removed, and Olson said it was the combination of several. Olson noted that the teachers were supposed to empty the coin box but frequently did not, so that other District employees had to do it. He also commented that the machine frequently jammed and District secretaries had to see to the malfunction. Olson also noted that Currier had suggested that the operation of the machine by the Association might be

illegal under PERB's Healdsburg[2] decision. Finally, Olson said the change was partially due to the availability of a new Coke machine that would serve nutritional drinks as required by State law.

Mahoney, joined by Sharon Heller, the Association treasurer, had a further conversation with Olson later in April. Olson repeated the three-part rationale for removing the machine — nuisance, possible illegality, and convenience of the new machine. However, Mahoney testified that he also added another reason:

> . . . The additional reason he had then was, he said something about well, also, he says, of course the general dissatisfaction of the board, the general displeasure that the board had toward the Teachers' Association. . . .

Mahoney testified that he expressed his surprise at this new reason, and Olson indicated that he thought he had mentioned it earlier. Mahoney agreed that general dissatisfaction had been discussed at the earlier meeting, but that that dissatisfaction was never related to the removal of the Pepsi machine. Elsewhere, Mahoney testified that Olson said he thought he had made that clear. According to Mahoney, Olson said that the decision to remove the machine had been made by the board of trustees, that it had been talked about in

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[2]Healdsburg Union High School District (6/19/80) PERB Decision No. 132; subsequently annulled by Healdsburg Union High School District, et al. (1/5/84) PERB Decision No. 375.

executive session, "and that the board had gone along with the idea or authorized it in some way."

The Association representatives went on to request that the machine be reconnected and outlined a plan for reducing the nuisance factor. Olson declined to do so. It was his testimony that he mentioned the board's dissatisfaction with the relationship with the Association during this conversation rather than in the initial discussion of the reasons why the machine was disconnected, he felt that it would be awkward to recommend that a potentially illegal machine be reconnected, especially in light of the Board's general dissatisfaction with the relationship between it and GUHSDTA. However, on questioning by the ALJ, Olson testified that the machine would have been discontinued regardless of the labor relations atmosphere because of the practical reasons for doing so.

During the last week of May, Mahoney again met with Olson to request formally that the District reconnect the Pepsi machine. Mahoney described steps to be taken to eliminate the nuisance, and also emphasized the Association's interest in having the machine reconnected. Olson did not testify about this meeting, but the machine was not reconnected.

Betty Bettencourt, Director of Food Services for the District, testified that in early 1982, knowing the Pepsi machine was a nuisance, she had approached Olson regarding a substitute machine. She had discovered that Coca-Cola made a

machine Which could dispense juices until all lunches were served and then, after a key was turned, dispense carbonated beverages. She also testified about her experience with the vending machine in the teachers' lounge, including the fact that at one time a student working for food services was responsible for emptying the coin box and depositing the money to the Association's account in Salinas.

In early March, Olson decided to obtain the Coca-Cola machines, and authorized Bettencourt to sign a lease for several, which she did in late March. The District obtained several machines, including one for the cafeteria, one for the snack bar, and one for the teachers' lounge. Bettencourt arranged for the Pepsi-Cola Company to remove two machines from the school: one from the lounge, and one from the "bus barn", which was used almost exclusively by employees who drove and maintained the District's vehicles. The "bus barn" machine was not, however, removed. Bettencourt testified that she was not at school on the day the company came to pick up the machines, and the District employee who heads the transportation department dissuaded or prevented the Pepsi employee from removing the machine in the bus barn.

Currier testified that he had first become aware that the Association was operating the machine in the teachers' lounge in August or September 1981. He had heard rumors to that effect "but I thought it was a joke." At that time Currier and

Olson were talking while they purchased drinks from the machine and Olson confirmed that the Association did indeed operate the machine for its own benefit. Currier told Olson that there might be a legal problem with the District allowing vending machine profits to go to the Association, and that he would check it out.

Later in the fall, Currier responded to Olson about the machine, and sent Olson a copy of PERB's Healdsburg decision. Currier testified that he was particularly concerned because he feared that the District's grant of "almost carte blanche release time for negotiations", in conjunction with the operation of the machine for the Association's benefit, might give rise to a charge of unlawful assistance if there was a decertification move, which Olson had told him was possible. Currier testified further that he left the choice of what to do about the machine up to Olson. Olson said that he did not replace the machine at the time, because he wanted to let things calm down after protracted negotiations, and he had no alternative at hand.

The Association had been active in the District in the past, filing several unfair practice charges and negotiating the 1981-82 contract through impasse and mediation. As noted above, there were several issues unresolved between the parties during the period the change in machines was contemplated,

including the class schedule, the matter of the 1982-83 calendar and reopening negotiations for that year.

DISCUSSION

Substitution of ALJ

The District excepts to the assignment of the case to ALJ Fassler for decision after a hearing before ALJ Becker. Because Becker knew that he would be leaving PERB at the time of the reopened hearing, he discussed with the parties how credibility questions would be resolved and determined that he would make written credibility findings.

Becker did not make any credibility resolutions before he left, and the statement of facts in the proposed decision was written by ALJ Fassler. The District claims that it was prejudiced by its reliance on Becker's representations, and it would have sought rehearing had it known that the original hearing officer would not make credibility resolutions. It further argues that the Board should not defer to ALJ Fassler's credibility resolutions.

The case was reassigned to Fassler pursuant to PERB regulation 32168(b),[3] permitting substitution of Board

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3PERB rules and regulations are codified at California Administrative Code, title 8, section 31001 et seq. Rule 32168 provides in part:

. . . . . .

(b) A Board agent may be substituted for another Board agent at any time during the

agents. The Board has repeatedly upheld the substitution procedure in cases of unavailability of a hearing officer. Fremont Unified School District (4/5/78) PERB Order No. Ad-28. Azusa Unified School District (12/30/83) PERB Decision No. 374.

The District is correct that in making its decision the Board may not rely on the ALJ's credibility resolutions which are based on demeanor of the witnesses; however, there is no reason that the substitution is, in and of itself, improper, or that the case requires rehearing.

The Board has conducted an independent review of the record in order to make its own findings of fact and conclusions of law. As discussed below, we do not find it necessary to make credibility resolutions in order to resolve this case. We conclude, therefore, that the substitution was entirely proper, and that there has been no prejudice to the District.

Amendments to Charge

The District excepts to the ALJ's finding that the complaint was properly amended to include both the allegation of unlawful change in the 1982-83 calendar and the allegation of unlawful conduct with respect to the Pepsi-Cola machine, in violation of subsections 3543.5(a), (b), and (c).

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proceeding at the discretion of the Chief Administrative Law Judge in unfair practice cases or the General Counsel in representation matters. Substitutions of Board agents shall be appealable only in accordance with Sections 32200 or 32300.

The District claims that the October 6 amendment was barred by the six-month statute of limitations. The original charge alleging refusal to bargain about the hours of the teacher workday was filed on January 20, 1982, and was amended on January 26. A complaint issued on February 2, 1982. The District adopted the "tentative calendar" on March 22, 1982. On April 28, the Association filed with PERB a "memo" titled "Amendment to Unfair Practice Charge", including allegations that the District had unilaterally altered the calendar and disconnected the Association's vending machine without negotiating with the Association. The District also received a copy of this "memo." At the hearing in October, the ALJ stated that he would treat the April 28 memorandum as a "motion to file an amendment", and he subsequently granted that "motion."[4]

The District would have us find that the amendment is time-barred since the October 6 date of the amendment is more than six months after the calendar alteration. The District

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[4]PERB rule 32655(b), in effect at the time of the memo, stated:

> (b) After the issuance of a complaint, the Board may allow an amendment to the charge or an amendment to the answer upon written or oral motion on the record, unless a party objects to the amendment and the Board determines that such party shall be prejudiced by the amendment. Any such amendment allowed by the Board shall be

bases its claim on the fact that there was never a "written or oral motion on the record" until after the six-month time period.

On the contrary, we find that the Association's April 28 memo constituted a sufficient notice to amend. It is clear from the record that the District had notice of the Association's intent to amend the complaint when the memo was

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automatically incorporated as part of the complaint.

In effect at the time of the hearing were PERB rules 32647 and 32648;

32647. Amendment of Complaint Before Hearing

(a) The charging party may move to amend the complaint. Before hearing, the charging party may move to amend the complaint by filing an amended charge and request to amend complaint with the Board agent in compliance with Section 32615. If the Board agent determines that amendment of the complaint is appropriate, the Board agent shall issue an amended complaint in accordance with Section 32640.

32648. Amendment of Complaint During Hearing

During hearing, the charging party may move to amend the complaint by amending the charge in writing, or by oral motion on the record. The hearing officer may allow the amendment unless a party objects to the amendment and the hearing officer determines that the party would be prejudiced by the amendment. If the hearing officer determines that amendment of the charge and complaint is appropriate, the hearing officer shall issue an amendment to the complaint in accordance with section 32640.

filed. Even by exception, the District does not argue that it was prejudiced by the ALJ's granting of the amendment; it merely argues that the Association did not proceed with procedural regularity. The District made no inquiry or protest before the commencement of the hearing, and it was given the opportunity to fully litigate the issue of adoption of the calendar at hearing. We therefore find the complaint properly amended to include this issue.

The District further claims that the November 9 amendment alleging that removal of the Pepsi machine was retaliatory was similarly time-barred. The ALJ writes that the Association made a motion at the hearing to amend the unilateral change charge to allege that the District's action was retaliatory. The District claims that the motion was not made during the hearing, since the Association only stated its intention to amend, and the ALJ expressed his willingness to allow the amendment if it was filed in writing as required by the current applicable PERB regulations. The actual written motion to amend was not filed until November 8, and it was then granted by the ALJ on November 9. The District therefore asserts that the charge was time-barred since it was filed more than six months after the machine was replaced.

The ALJ relies on National Labor Relations Board (NLRB) precedent to conclude that a complaint may be amended more than six months after the conduct in question if the substance of

the new allegations is closely related to the subject matter timely charged. NLRB v. Hotel Tropicana 398 F.3d 430 [LRRM 2726 68].

In NLRB v. Central Power & Light (5th Cir. 1970) 425 F.2d 1318 [74 LRRM 2268], the Fifth Circuit enforced a board order in a case involving an amendment to a complaint made more than six months after the allegedly illegal conduct. The original charge alleged discriminatory discharge and that the company had violated section 7 rights by "other acts and conduct." A later charge concerned an invalid no-solicitation rule.

The court approved the incorporation of the later charge, even though the rule was promulgated more than six months earlier because the "the events complained of were all part of the same alleged anti-union campaign, were close together in time, and were clearly covered by the general language of the formal charge."

The District claims that 1) the subject matter is not closely related since a charge concerning the reasons for the replacement of the machine is different from a charge that the decision was made unilaterally, and 2) the original charge of a unilateral change concerning the Pepsi machine was not timely because the April 28 memo was not a proper amendment, as discussed above.

The cases cited by the ALJ support his conclusion that amendments are appropriately filed even after the six-month

period if the amended charges are closely related to the actions in the original charge. Here the Association has simply added another theory of the case, since the events at issue concern the same circumstances which occurred within six months of the April 28 amendment surrounding the replacement of the Pepsi machine. There is every reason to follow the NLRB practice permitting amendment here, since the events are the same and, again, there is no evidence of prejudice to the District. The amendment was granted by the ALJ on November 9, 1982, and the hearing convened on December 2 to permit the taking of evidence on the charge of retaliation. Since we have found that the April 28 amendment was properly granted, the November amendment was properly made. We therefore uphold the ALJ's denial of the District's motion to dismiss.

Adoption of the Tentative Calendar

The District challenges the ALJ's finding that there was an unlawful unilateral change, arguing that its action in adopting a tentative calendar in March was in line with long-standing practice; the District was, at all times, willing to negotiate the calendar and it never received a demand to bargain about the calendar. It does not contend that the changes made were outside the scope of representation.

There is no dispute that it was customary for the District to adopt a tentative calendar in the spring of each year. Steadman testified that that had been the practice as long as

he had been with the District (nine years) but that, in the past, the calendar had been adopted tentatively, subject to negotiation with the Association. While the District asserts that that was the case this year as well, the fact remains that negotiations did not occur despite the Association's request.

It is also quite clear that at the time the calendar was adopted the parties were involved in a number of disputes, including the conflict over whether the 1981-82 contract had been extended or whether the parties would renegotiate the entire contract, as the Association wished to do. In the midst of a flurry of memos and meetings, the issue of the calendar for 1982-83 was only one item in question. The Association obviously wished to renegotiate the entire contract, and it sometimes tied the calendar question to overall negotiations. On balance, however, the record supports the ALJ's conclusion that "the District was walking too fine a line" in its unwillingness to negotiate.

Immediately after the school board's action in adopting the tentative calendar, Steadman wrote to Olson indicating the Association's wish to negotiate about the change in the calendar. Three days later, Currier wrote to Steadman, asking for a meeting to discuss employer-employee relations for 1982-83, but making it clear that "these discussions shall not be negotiations." Currier's letter is consistent with the District's position that it would not renegotiate the entire

contract, and Currier testified that he did not know of Steadman's note to Olson. However, the fact remains that a clear request was made by the Association and was not answered by the District.

Steadman acknowledged that at the April 14 meeting he was interested in negotiations for the entire contract. However, he also expressed his interest in negotiating about the calendar. While there is conflicting testimony about whether Steadman or Currier raised the calendar issue and whether Currier actually said the District did not have to negotiate about the calendar, even Currier himself testified that he raised a few matters of concern "that we could start to look at and maybe resolve informally, one of them was the matter of the tentative calendar", and that the calendar was discussed. The Association expressed no interest in such an arrangement, and did not pursue the calendar issue. The record, therefore, reflects a clear request to negotiate about a matter within scope, to which the District responded only with the suggestion that the parties resolve the matter informally.

The District claims that Steadman's testimony is so inconsistent that it is inherently unreliable, but the transcript does not support that claim. The ALJ did not resolve the conflict between Steadman and Currier's versions of what was said on April 14, finding that even without such a resolution the evidence was sufficient to find that the

District had not afforded the Association a reasonable opportunity to negotiate. We agree.

The District also objects, pursuant to PERB rule 32176,[5] to any reliance on statements made during the September 10 settlement meeting. Steadman testified briefly about that meeting, recalling that Currier had indicated that the District had adopted a calendar "as close to the status quo as possible", since there were to be no negotiations for the next year. Olson and Currier testified that they had not said the calendar year was final, nor had they refused to negotiate.

First, it is not clear from the testimony that the meeting was for settlement purposes. Further, while the ALJ makes findings regarding statements at this meeting, he apparently does not rely upon them in articulating the rationale for his

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[5]Regulation 32176 provides in part:

> . . . Evidence of any discussion of the case that occurs in an informal settlement conference shall be inadmissible in accordance with Evidence Code section 1152.

Evidence Code section 1152 provides in part:

> (a) Evidence that a person has, in compromise or from humanitarian motives, furnished or offered or promised to furnish money or any other thing, act, or service, to another who has sustained or will sustain or claims that he has sustained or will sustain loss or damage, as well as any conduct or statements made in negotiation thereof, is inadmissible to prove his liability for the loss or damage or any part of it.

finding of a violation, nor would we consider such reliance necessary. Even if the District never said the calendar was final, its unwillingness to negotiate had that result.

The District objects to the ALJ's suggestion that it had an affirmative duty to signal to the Association that it was willing to negotiate about the calendar. However, the ALJ's conclusion was that the District did have such a duty, given the Association's requests to negotiate about any change in the calendar.[6]

The District further objects to the ALJ's conclusion that the Association did not waive its right to negotiate the calendar. The District takes the interesting position that the issue is not waiver at all, but rather whether the Association ever demanded to bargain about the calendar.

As noted by the ALJ, PERB concluded in Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223, that a request to negotiate need not be specific or made in a particular form to be effective. Further, the District need not actually refuse to negotiate about an issue in order for PERB to find that it did not afford an opportunity for

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[6]The ALJ also noted that the April 28 memo of amendment to the Association's charge listed the District's refusal to negotiate about calendar change, thereby giving the District further notice of the Association's interest in this issue, if there was any doubt. However, PERB has previously determined that "a charge cannot trigger a duty to negotiate if the employer had no pre-existing obligation to bargain." Delano Joint Union High School District (5/5/83) PERB Decision No. 307,

negotiation. Contrary to the District's assertion, the relevant inquiry is whether the Association waived its right to negotiate about a matter within scope by failing to request negotiations. In order to demonstrate that the Association has waived its right to negotiate, the District must show either clear and unmistakable language or demonstrable behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74. San Mateo County Community College District (6/8/79) PERB Decision No. 94. Here the Association made at least one written request to negotiate, and its wish to negotiate was discussed further on April 14. The District never agreed to do more than informally discuss the issue. The District argues that the Association never came forward with a proposal related to the calendar. However, we find that the Association's failure to do so was reasonable given the District's refusal to acknowledge a duty to negotiate. See Kern Community College District (8/19/83) PERB Decision No. 337. We therefore uphold the ALJ's finding that the District did not afford the Association a reasonable opportunity to negotiate and thereby violated section 3543.5(c) of EERA.

The District indicated at hearing its willingness to negotiate about this issue, contending that the calendar was still tentative rather than final and that there had as yet

been no unilateral change. The parties were, however, unable to settle this aspect of the case. We nevertheless uphold the ALJ's conclusion that the finding of a violation was warranted, since the Association had made a timely request to negotiate at the time the school board first took action and the District had not in the intervening months so much as indicated that it was willing to negotiate, thereby denying the Association a reasonable opportunity to negotiate the calendar.

The District argues that the ALJ improperly distinguishes San Jose Community College District (9/30/82) PERB Decision No. 240 in which PERB found that the District had not made an unlawful change in adopting a tentative student calendar. In that case, the Board found that the District had met its duty to negotiate since it was actively involved in negotiation with the Association both before and after adoption of the calendar. However, the ALJ does not cite that case, as the District suggests, for the proposition that the District has an affirmative duty to invite negotiations, but rather for the principle that a district does not necessarily violate its duty to negotiate by adopting a tentative student calendar while in the process of negotiating with the exclusive representative.

Further, the Board has more recently found a violation on the unilateral adoption of a tentative calendar in Oakland Unified School District (12/16/83) PERB Decision No. 367 where, as here, the adoption of the calendar altered the holidays

scheduled in the parties' collective bargaining agreement and the calendar was intended to cover both students and employees.

Having found that the District violated subsection 3543.5(c) by taking unilateral action on a matter within scope without giving the Association a reasonable opportunity to negotiate about that change, we note that such unilateral action also constitutes a concurrent deprivation of the right of employees to representation on matters relating to terms and conditions of employment in violation of subsection 3543.5(a) and the right of the Association to represent its members in violation of subsection 3543.5(b).

The Pepsi Machine

The Association originally argued that the change in vending machines was an unlawful unilateral change, because it unilaterally deprived the Association of revenue. The ALJ found that the decision to replace the Pepsi machine was not a violation of subsection 3543.5(c), since it did not effect a change in a matter within scope. He therefore dismissed the (c) charge.

The ALJ did find, however, that the removal of the machine was carried out in retaliation for the Association's exercise of statutorily protected rights, and was therefore a violation of subsection 3543.5(b), and concurrently subsection 3543.5(a). The District excepts to this conclusion.

In so finding, the ALJ relied on the analytical framework used by the Board in Novato Unified School District (4/30/82) PERB Decision No. 210 to resolve cases involving reprisals against employees. He concluded that it was appropriate to use the same framework in analyzing cases involving retaliation against employee organizations, noting that the National Labor Relations Act (NLRA) does not contain similar language to EERA's subsection 3543.5(b) and, therefore, offers no applicable precedent.

Following this analysis, he chronicled the Association's protected activities, and found that the evidence supports a finding that the board's dissatisfaction with this protected activity was a factor in the decision to substitute machines. He rejected the District's claim that the machine was disconnected because 1) it was a nuisance, 2) the District feared it was illegal for the Association to operate it, and 3) the District found a convenient and profitable alternative. He found also that the District's action in retaliation against the Association interfered with the right of employees to be represented, thereby violating subsection 3543.5(a).

The District claims that the ALJ's use of a Novato analysis is inappropriate here. It further claims that, even if such an analysis were used, the evidence does not support the conclusions reached by the ALJ.

Subsection 3543.5(b) states that it shall be unlawful for a public school employer to "[d]eny to employee organizations rights guaranteed to them by this chapter." Those rights are enumerated in section 3543.1:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, . . .
>
> (b) Employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes, and other means of communication, subject to reasonable regulation, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this chapter.
>
> (c) A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.
>
> (d) All employee organizations shall have the right to have membership dues deducted . . .

In order to establish a violation of subsection 3543.5(b), the charging party must initially prove that the employer has denied to an employee organization "rights guaranteed by this chapter." The employer here argues that the charging party has failed to establish that element of a prima facie case, and we agree. It is not apparent what right an employee organization has to maintain a Pepsi machine for its own profit on the employer's premises, and neither the ALJ or the Association

points to any. We find no precedent for finding a (b) violation for discrimination against an employee organization (as opposed to an individual) because of its protected activity when no right guaranteed by EERA has been infringed. State of California (California Department of Corrections) (5/5/80) PERB Decision No. 127-S.

The employer goes on to argue that, even if a violation could be found because the District had retaliated against the Association for its protected activity by removing the Association's Pepsi machine and the ALJ's Novato analysis was proper, the District here has offered sufficient evidence to establish that the removal was not retaliatory and it would have occurred anyway because of nuisance, the possibility of a more utilitarian model and possible illegality.

This latter argument refers to dicta in the original Healdsburg PERB No. 132, supra, language at p. 33 dealing with the parameters of unlawful employer assistance to an employee organization. In finding a proposal which would have required the District to finance conference expenses for CSEA conference delegates outside of scope, Member Moore noted that:

> Direct cash payments are illegal (citation omitted), as are payments of union legal fees (citation omitted) and financial assistance derived from vending machines and flower funds Connor Foundry Company (1952) 100 NLRB 146 [30 LRRM 1250J. Other forms of financial assistance, however, are viewed as permissable friendly cooperation (citation

> omitted) or excused because the amount of assistance is seemed minimal (citations omitted).
>
> While the distinction involving employer communication and internal business is maintained because of the express language of the proviso contained in the NLRA, I am persuaded that financial support is impermissible when its primary purpose is to subsidize internal union business. The comment in Dairylea Cooperative, Inc. (1975) 219 NLRB 656 [89 LRRM 1737] with regard to the employer's payment to union stewards is similarly appropriate:
>
> > . . . it is nevertheless remains the union's task to build and maintain its own organization.

Chairperson Gluck concurred. On remand, the Board, without Moore, affirmed its conclusion with regard to the specific proposal in question.

Here there is evidence that the funds from the machine were in fact used for internal union business. In the past, the District had at a minimum allowed its premises and the machine to be used for the union's profit and, at one point, even assisted in operating the machine and depositing the money to the union's account. It appears that the operation of the machine probably could be unlawful assistance; at any rate the District had good reason to reconsider its past policy in light of Healdsburg, PERB No. 132 supra. See also State of California (Department of Corrections), supra. Clovis Unified School District (7/2/84) PERB Decision No. 389.

In any case, it is unnecessary to consider whether the District has demonstrated sufficient justification for removing the machine since we have found no interference with protected rights in its doing so. We, therefore, overturn the ALJ's finding that the District violated EERA by removing the machine in retaliation for protected activity, and we dismiss all charges related to that issue.

ORDER

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

A. CEASE AND DESIST FROM:

1. Unilaterally making changes in the employee calendar without providing notice and a reasonable opportunity to negotiate to the Gonzales Union High School District Teachers Association, CTA/NEA.

2. Denying to the Gonzales Union High School District Teachers Association, CTA/NEA rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

3. Interfering with employees in the exercise of rights guaranteed by the Educational Employment Relations Act, including the right to be represented by their chosen representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Upon request, meet with and negotiate with the exclusive representative regarding the calendar.

2. Restore the day after Easter as a District holiday until such time as the parties reach agreement or negotiate through completion of the statutory impasse procedure concerning the subject matter of the unlawful unilateral change. However, the status quo ante shall not be restored if, subsequent to the District's actions, the parties have, on their own initiative, reached agreement or negotiated through the impasse procedure concerning the subject matter of the unilateral change.

3. Within thirty-five (35) days following the date the decision is no longer subject to reconsideration, post at all work locations where notices to employees are customarily placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered, or covered by any material.

4. Written notification of the actions taken to comply with this Order shall be made to the Regional Director

of the Public Employment Relations Board in accordance with her instructions.

C. All other charges are dismissed.

Members Tovar and Jaeger 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 a hearing in Unfair Practice Case No. SF-CE-633, Gonzales Union High School District Teachers Association, CTA/NEA v. Gonzales Union High School District, in which all parties had the right to participate, it has been found that the District violated Government Code subsections 3543.5(a), (b) and (c) by unilaterally changing the school calendar and eliminating a holiday for certificated employees without affording the exclusive representative notice and the opportunity to negotiate.

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

A. CEASE AND DESIST FROM:

(1) Failing and refusing to meet and negotiate in good faith with the Gonzales Union High School District Teachers Association, CTA/NEA with respect to changes in the employee calendar.

(2) Interfering with the rights of employees to be represented by failing and refusing to meet and negotiate in good faith.

(3) Denying to the Gonzales Union High School District Teachers Association, CTA/NEA the rights to represent employees by failing and refusing to meet and negotiate in good faith.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

(1) Upon request, meet with and negotiate with the exclusive representative concerning the calendar.

(2) Reinstate the day after Easter as a holiday for certificated employees until such time as the parties reach agreement or negotiate through completion of the impasse procedure concerning the subject matter of the unlawful unilateral change. However, the status quo ante shall not be

restored if, subsequent to the District actions, the parties have, on their own initiative, reached agreement or negotiated through completion of the impasse procedure concerning the subject matter of the unilateral change.

DATED: _____ GONZALES UNION HIGH SCHOOL DISTRICT

By: _____
Authorized Representative

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