STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN MATEO COMMUNITY COLLEGE FEDERATION OF TEACHERS. LOCAL 1493. AFT/AFL-CIO.	)	
Charging Party.	)	Case No. SF-CE-705
v.	)	PERB Decision No. 543
SAN MATEO COMMUNITY COLLEGE DISTRICT.	)	December 13, 1985
Respondent.	)	

Appearances: Brown and Conradi by Penn Foote for San Mateo Community College District.

Before Hesse, Chairperson; Jaeger and Burt, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Mateo Community College District (District) to the attached proposed decision of a PERB Administrative Law Judge (ALJ). The ALJ found that the District violated the Educational Employment Relations Act (EERA or Act)[1] when in June and July 1982 it refused to comply with the request of the San Mateo Community College Federation of Teachers (Union) to

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

deduct membership dues from the paychecks of Union members who had so authorized. For the reasons which follow, we affirm the findings of fact and conclusions of law reached by the ALJ. However, we modify the proposed remedy. We also deny the District's request to reopen the record for the taking of further evidence.

REQUEST TO REOPEN THE RECORD

The District requests that the Board order the reopening of the factual record in this case for the taking of further evidence. As grounds for this request, the District maintains that the ALJ made an erroneous finding of fact which is prejudicial to the District's position. The District cites the Board's authority to reopen a record pursuant to PERB Regulation 32320(a.[2]

Regulation 32320(a) does indeed empower the Board to reopen its proceedings for the taking of further evidence. However, it prescribes no standard by which the Board should determine whether it should, or should not. do so in any given case. Indeed, as to a request to reopen made at this procedural stage, i.e., in conjunction with exceptions to a proposed decision, neither Board decision nor regulation prescribes such a standard.

[2]PERB's rules and regulations are codified at California Administrative Code, title 8, section 31001 et seq.

PERB's regulations do. however, set forth a standard for judging such requests made in the form of a request for reconsideration. Regulation 32410 provides that reconsideration may be granted by the Board on the basis of. inter alia, "newly discovered evidence . . . which was not previously available and could not have been discovered with the exercise of reasonable diligence." In San Joaquin Delta Community College District (1983) PERB Decision No. 261b. the Board considered a request for reconsideration based on a claim of newly discovered evidence. We noted that the standard set out in Regulation 32410 parallels the standard prescribed in California civil law by Code of Civil Procedure section 651.4. The reasons for carefully limiting the right to reopen a record are well established.

We find no reason why the standard applied to requests for reconsideration based on new evidence should not also apply to requests to reopen a completed record at the earlier procedural stage here at issue. Judged on that basis, the instant request, unaccompanied as it is by any showing that the new evidence was previously unavailable, must be denied. Our review of the District's exceptions, therefore, must be conducted on the basis of the record as presently constituted.

FACTS

Upon a review of the ALJ's statement of facts, together with the evidentiary record as a whole, we find the ALJ's

statement of facts to be free from prejudicial error. We therefore adopt the factual findings of the ALJ as the findings of the Board itself.

DISCUSSION

In his proposed decision, the ALJ concluded that the District had denied Union rights guaranteed at section 3543.1(d), and thus violated section 3543.5(a) and (b). when it refused the Union's request, tendered on June 2, 1982. to deduct membership dues from paychecks.[3] The Union had won an election on May 18 to replace another employee organization as

[3]Section 3543.1(d) provides as follows:

> All employee organizations shall have the right to have membership dues deducted pursuant to Sections 13532 and 13604.2 of the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit, and then such deduction as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

Section 3543.5 provides in pertinent part as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

the exclusive representative of the District's certificated employees. On exceptions, the District raises several arguments in support of its position that the ALJ erred in finding any violation of law.

Initially, the District calls our attention to Education Code section 87833. which provides that the revocation of an existing payroll deduction authorization "shall be in writing and shall be effective commencing with the next pay period." Noting the fact that it received PERB's official notification of the Union's election victory on June 3, the District argues that it could not legally rescind the dues deductions for the former exclusive representative until the "next pay period," i.e., July. Moreover, argues the District, EERA section 3543.1(d) prohibits the District from making payroll dues deductions for two employee organizations where the employees are represented by an exclusive representative. Thus, it could not honor the Union's payroll deduction requests until it had terminated deductions for the former exclusive representative, which could not be done, under the Education Code, until July.

The District misreads the significance of both laws. Education Code section 87833 regulates the process by which an employee may revoke his or her authorization to deduct dues from payroll. Here, however, no employee ever submitted a request to cease dues deductions for the former exclusive

representative. Rather, on May 29, 1982, when PERB certified the Union as the new exclusive representative, authorizations on behalf of the former exclusive representative were revoked by operation of law. Upon receiving notification of the event on June 3, the District was thereafter prohibited from deducting dues on behalf of the former exclusive representative.

In its insistence that EERA section 3543.1(d) mandates that an employer, above all else, must not deduct dues for two employee organizations where the employees are represented by an exclusive representative, the District misinterprets the EERA provision. Section 3543.1(d) essentially sets out two independent rules: one is that an employer must honor dues deduction authorizations for an exclusive representative; the other is that an employer must not honor dues deduction authorizations for any other employee organization when the employees are represented by an exclusive representative. The District would have us find that the Education Code forced it to break the second rule, and that therefore the proper thing to do was to also break the first rule. We decline to adopt this reasoning.

The District next argues that, even if the law did not require that it refuse the Union's deduction requests in June, it was, as a practical matter, impossible to implement those deductions on such short notice. The District does not dispute the specific factual findings made by the ALJ; it challenges.

however, the conclusion the ALJ drew from those facts, to wit, that the District could have implemented the deductions without causing a delay in issuance of paychecks.

Again, the District's argument is largely premised on the idea that the overriding commandment of EERA section 3543.1(d) is that it must not deduct dues on behalf of two organizations simultaneously. Thus, here it relies on evidence that the implementation of the Union's deductions and the elimination of the former exclusive representative's deductions would have required two full days of staff time. Other evidence, asserts the District, makes clear that, given the late date on which the Union tendered its deduction requests, a two-day delay in finalizing the District's monthly payroll records would have caused a delay in the issuance of paychecks.

The gravamen of the Union's charge in this case, however, is limited to the District's refusal to honor the Union's deduction requests. The record shows that implementation of these requests alone, without also deleting the authorizations on behalf of the former exclusive representative, could have been accomplished in substantially less than a day. On these facts, the ALJ concluded that the District could have completed staff processing of the Union's requests sometime on June 3. and that this work would not have caused a delay in issuance of paychecks. We find no error in the ALJ's reasoning. Again, we decline to hold that, because the District could not have

eliminated June payroll deductions for the former exclusive representative, it was exempted from the provision of section 3543.1(d) requiring it to honor dues deduction authorizations on behalf of the exclusive representative.

The District raises two arguments in its exceptions to the ALJ's conclusion that the District violated the EERA by continuing to refuse the Union's dues deduction requests for the July 1982 pay period. It maintains first that the Union voluntarily agreed, during a conversation between the Union's president and a District representative, to be bound by the terms of the District's collective bargaining agreement with the former exclusive representative. Under that agreement the practice was that no dues deductions would be made in July. Second, the District argues that the collective bargaining agreement which it ultimately negotiated with the Union in March 1983 absolves it of any liability for failure to deduct Union dues in July 1982. It relies on provisions of that contract which require no dues deduction in July and which make the agreement retroactive to July 1, 1982.

We find that the ALJ adequately addressed and resolved these arguments. We therefore adopt his findings of fact and conclusions of law on these matters as those of the Board itself.

THE REMEDY

In his proposed decision, the ALJ concluded that, as the appropriate remedy, the District should be ordered to make the

Union whole for all June and July 1982 dues which the Union had not as of the date of his order collected from its members who had authorized payroll dues deductions for those months. The ALJ relied on Regents of the University of California (PNHA) (1983) PERB Decision No. 283-H. In that case, the employer refused to make payroll dues deductions for an employee organization. While that decision does not expressly so state, the record in that case showed that employees, who were doctors serving as hospital interns, generally had an employment tenure of only one or two years. The Board's decision, however, issued more than two years after the charge was filed. It was logical to conclude, therefore, that the individuals who were on the payroll of the employer at the time the charge was filed were no longer employed there when the Board's decision and order issued. Because those employees were no longer reasonably subject to the processes of the Board, we could not provide a remedy assuring that those individuals would produce the uncollected dues. It was appropriate in those circumstances, therefore, to turn to the employer, whose violation of the Act had caused the loss of revenue, and require it to make the employee organization whole for lost dues revenue.

The circumstances in the instant case differ. Here, there is no reason to conclude that the employees who authorized Union dues deductions in June and July 1982 are no longer in

the employ of the District. Thus, where possible, it is appropriate that those individuals should remain the source of the revenue sought by the Union. We therefore modify the proposed remedy to provide that, at the Union's request, the District must make available the payroll deduction procedure for the collection of June and July 1982 Union dues. Only where employees who authorized such deductions in 1982 are no longer in the employ of the District will the District be required to supply the unpaid dues from its own funds.

ORDER

Upon the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the San Mateo Community College District violated section 3543.5(a) and (b) of the Educational Employment Relations Act. Pursuant to section 3541.5(c) of that Act. it is hereby ORDERED that the San Mateo Community College District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM:

Failing or refusing to comply with dues deduction authorizations submitted by members of the employee organization which is the exclusive representative of its certificated employees, except to the extent that the District and the exclusive representative have mutually agreed to a different arrangement.

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

(a) At the request of San Mateo Community College Federation of Teachers. AFT/AFL-CIO, deduct from the paychecks of those current employees from whom Union dues should have been deducted in June and July 1982, and who have not yet paid those dues to the Union, an amount equal to the dues for those two months. These deductions are to be made in pay periods and in increments specified by the Union. If any of the 59 employees from whom dues should have been deducted in June and July 1982 is no longer in the employ of the District and has not to date paid the dues for those two months, the District shall make the Union whole by paying to the Union a sum equal to the unpaid June and July dues for each such employee. The District shall further pay to the Union interest at the rate of 10 percent per annum on all June and July 1982 dues amounts which should at that time have been deducted from payroll but which remain unpaid to date, both for employees who continue to be found in the employ of the District and for those who have left its employ.

(b) 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 customarily are 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 30 consecutive workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, altered or covered by any material.

(c) 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 his/her instructions.

IT IS FURTHER ORDERED that all other allegations in the charge and complaint are hereby DISMISSED.

Member Burt joined in this Decision.

Chairperson Hesse's concurrence and dissent begins on page 13.

Hesse, Chairperson, concurring and dissenting: I concur with the majority in its denial of the request to reopen the record, the rejection of the employer's defense and in the modification of the proposed remedy. However, I am not in agreement with the majority rationale and would further modify the remedy fashioned by the majority.

Request to Reopen the Record

I agree that requests to reopen a factual record on appeal to the Board should be granted in rare circumstances. The "newly discovered evidence standard" is appropriate here. But I am not prepared to join in the formulation of an absolute rule limiting the approval of such requests to the request for reconsideration standard only. It is conceivable that under certain circumstances, a request may be made because findings and credited testimony pertaining to issues not specifically alleged were not fully and fairly litigated at the evidentiary hearing. I do not regard a record on appeal with the same finality as the Board would view a record where a request for reconsideration had been made following a final decision of the Board. As the decisions on appeal to the Board are not final nor should the record be so settled or inviolate that it can never be reopened with proper justification.

Successor Unions

In the case before the Board, the majority misjudges the full effect of the nature and extent of the obligation to bargain had upon the change in the identity of an employee

representative. I adopt the National Labor Relations Board (NLRB) view that a successor union or successor employer is not bound by the terms of an existing contract and furthermore, a successor union may require an employer to bargain new terms. (See American Seating Company (1953) 106 NLRB 250 [32 LRRM 1439]; Ludlow Typography Company (1955) 113 NLRB 724 [36 LRRM 1364]; Consolidated Fiberglass Products Company, Inc. (1979) 242 NLRB 10 [101 LRRM 1089]; NLRB v. Burns International Security Services, Inc. (1972) 406 U.S. 272 [80 LRRM 2225].) Adopting this theory, the Union was not obligated to accept the terms of the existing contract, but it could assume the contract and enforce the terms of the contract. (See NLRB v. Hershey Chocolate Corp. (3d Cir. 1961) 297 F.2d 286 [49 LRRM 2173].)

In the instant case, one week after the decertification election, the employer during a telephone conversation with the Union president confirmed the Union's understanding that the existing contract would be honored. The Union did not object nor request negotiations for a new contract during this conversation regarding the transition.

With no indication by the Union that it objected, the employer was required to maintain the status quo and honor the terms of the contract including the dues deduction provision. The only required change by operation of law was to refrain from collecting and forwarding dues to the ousted employee representative. Rather, the employer was required to implement the dues deduction provision on behalf of the successor employee representative.

Employer Defenses

The employer raises several defenses for its refusal to honor the successor Union's request for implementation of the membership dues deduction. While I reject most of these arguments, I do not adopt the majority analysis.

I reject the employer's argument regarding the impact of EERA section 3543.1(d).[1] The successor Union became the exclusive representative in May 1982. Contemporaneously, the ousted employee representative's right to have dues deducted on its behalf ceased on that very same day. I do not adopt the majority conclusion that all changes could be accomplished in two days and, therefore, that the changes would not have delayed the issuance of payroll warrants. To the contrary, the record shows that once the regular payroll deadline lapsed, it would have taken a minimum of one week to process the membership dues deduction authorizations for 59 people. I would also hold that even if there were insufficient time to process the rescissions of the membership dues deductions on behalf of the ousted employee representative for 49 employees, the employer was not protected in its suppression of the implementation of dues deduction on behalf of the successor Union. The employer could have notified members of the ousted employee organization of the administrative problems and at a

[1]This section provides that only the exclusive representative may have membership dues deducted by the employer on behalf of the representative.

later date refunded the dues collected in June. In any case, the employer was prohibited from forwarding the dues collected in June 1982 to the ousted employee organization during the first week of July 1982..[2] Here, the employer collected the dues and forwarded the money to the ousted employee organization as if no change in representation had occurred. No explanation for this conduct could be divined from the record.

I am unpersuaded by the employer's argument that it was impossible to implement payroll dues deduction for the successor Union. Absent evidence or direct testimony concerning payroll processing timelines and operations, there was no demonstration of an employer's good faith effort to, at a minimum, notify the Union of the problems and to encourage successor Union members to make direct payment to the successor Union until the payroll transactions were completed.[3] 3

The June Deductions

In continuing the status quo, the employer could lawfully rely on the contract provision that allowed 30 days for implementation of new deduction requests. Thus, I would hold that the employer did not violate EERA when it failed to deduct

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[2]As noted in the proposed decision, the Union did not allege violation of EERA when the employer forwarded dues to the ousted employee organization.

[3]when the District refused to honor the successor Union's request, the successor Union notified the members that direct contributions would be required. Like the majority, I would not find the employer liable for the lost dues.

dues from the June paychecks.

The July Deductions

Section 3.1.1 of the existing contract contained a provision allowing for one-tenth of the annual employee organization dues to be deducted on behalf of the ousted employee representative each month for a period of ten months. Past practice had been to withhold the dues from September to June of each year, with no deductions from the July and August paychecks. In its communications with the employer, the successor Union did not object to the continuation of this provision, but confined its protest only to the continuation of dues deduction on behalf of the ousted employee representative any time after May 29, 1982. The successor Union appears to have accepted the ten-month deduction schedule which excused the employer from deducting any dues in July and August. Only when the successor Union submitted the authorization forms on June 2, 1982, did the successor Union representative then demand that deductions be taken out during the summer. At this point, the Union repudiated the ten-month portion of the existing contract. I would hold that the employer was obligated to implement the July dues deduction request.

The August Deductions

Although this repudiation of the ten-month clause affected deductions for both July and August, I concur with the majority in finding the employer did not violate EERA when it failed to deduct dues from the employees' August 1982 paychecks. The

August 4th ground rules agreement certainly shows that the successor Union waived its right to such a deduction for that month.

The Remedy

The majority overlooks the fact that not all 59 employees who submitted dues authorization forms were entitled to deductions in July and August. While full-time employees were paid on a twelve-month schedule, part-time employees did not receive paychecks in July and August. Part-time employees were paid on a ten-month schedule. The record shows 16 of the 59 employees who requested dues deductions were part-time employees. Since the 16 employees were not paid in July, the District was unable to deduct dues from their paychecks and should not be held liable for reimbursement of those dues.

Therefore, I would limit the employer's liability for reimbursement of lost dues to the July paychecks of the 43 full-time employees who submitted authorization forms. I dissent from the majority finding that the employer violated EERA by not forwarding dues for part-time employees in July or from any employee in June 1982.

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-705, San Mateo Community College Federation of Teachers. Local 1493. AFT/AFL-CIO v. San Mateo Community College District, in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5(a) and (b).

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

1. CEASE AND DESIST FROM:

Failing or refusing to comply with dues deduction authorizations submitted by members of San Mateo Community College Federation of Teachers. AFT. except as the District is excused from doing so by provision of an agreement reached by the District and San Mateo Community College Federation of Teachers. AFT.

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

At the request of San Mateo Community College Federation of Teachers. AFT, deduct from the paychecks of those current employees from whom Union dues should have been deducted in June and July 1982. and who have not yet paid those dues to the Union, an amount equal to the dues for those two months. These deductions are to be made in pay periods and in increments specified by the Union. If any of the 59 employees from whom dues should have been deducted in June and July 1982 is no longer in the employ of the District and has not to date paid the dues for those two months, the District shall make the Union whole by paying to the Union a sum equal to the unpaid June and July dues for each such employee. The District shall further pay to the Union interest at the rate of 10 percent per annum on all June and July 1982 dues amounts which should at that time have been deducted from payroll but which remain unpaid to date, both for employees who continue to be found in the employ of the District and for those who have left its employ.

Dated: _____ SAN MATEO COMMUNITY COLLEGE DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN MATEO COMMUNITY COLLEGE FEDERATION OF TEACHERS, LOCAL 1493, AFT/AFL-CIO, Charging Party, v. SAN MATEO COMMUNITY COLLEGE DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-705 PROPOSED DECISION (6/9/83)

Appearances; Stewart Weinberg (Van Bourg, Allen, Weinberg & Roger), attorney for the charging party San Mateo Community College Federation of Teachers, Local 1493, AFT/AFL-CIO; Penn Foote (Brown and Conradi), attorney for the respondent San Mateo Community College District.

Before; Martin Fassler, Administrative Law Judge.

PROCEDURAL HISTORY

The San Mateo Community College Federation of Teachers, Local 1493, AFT/AFL-CIO (hereafter Union) filed this charge on September 29, 1982, alleging that the San Mateo Community College District (hereafter District) had violated Government Code sections 3543, 3543.5(a), (b) and (c) by its actions with respect to employee organization dues deductions, after a decertification election won by the Union in May 1982.1 The

[1]Each of the sections alleged to have been violated is included within the Educational Employment Relations Act

Union charged that the District acted unlawfully, first, by refusing to honor, in June, July, and August 1982, dues

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(hereafter EERA). The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3543, and the pertinent sections of 3543.5 are set out below.

> 3543.
> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
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> 3543.5.
> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

deduction requests made by Union members in June; and, second, by honoring, in June, payroll deduction requests made previously by members of the employee organization which lost its certification as a result of the May 1982 election.[2]

A complaint based on this charge was issued on October 20, 1982. On November 12, 1982, the District filed its answer, admitting certain factual allegations of the charge, denying others, and specifically denying that it had violated any of the EERA sections specified in the charge.

In addition, the District presented three affirmative defenses: (1) pursuant to a pertinent section of the Education Code, the District was not required to discontinue the dues deductions for the decertified employee organization until July 1982; (2) the terms of the collective bargaining agreement

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[2]Dues deduction arrangements are authorized by section 3543.1(d) which provides:

> All employee organizations shall have the right to have membership dues deducted pursuant to Sections 13532 and 13604.2 of the Education Code, until such time as an employee organization is recognized as the exclusive representative for any of the employees in an appropriate unit, and then such deduction as to any employee in the negotiating unit shall not be permissible except to the exclusive representative.

Sections 13532 and 13604.2 of the Education Code were repealed by the Legislature in 1976 as part of the reorganization of the Education Code. They were re-enacted and renumbered.

in effect until June 30, 1982, were extended by agreement of the Union and the District, and required no dues deductions during July and August 1982; and, (3) because of time constraints placed on the District by the process of preparing the monthly payroll, much of which was done by the County Office of Education, the District was unable to prevent June dues deductions for the decertified organization or to begin dues deductions for the Union in June 1982.

An informal settlement conference was held on November 22, 1982, and again on December 3, 1982, but the dispute was not resolved. A hearing was held on March 21, 1983, before the undersigned administrative law judge. The parties filed post-hearing briefs on April 25, 1983, and the matter was submitted on that date.

STATEMENT OF FACTS

1. The Decertification Election.

For several years prior to May 1982, the certificated employees of the District were represented by the San Mateo District Colleges Teachers Association, an affiliate of the California Teachers Association (hereafter Association). The Association and the District entered into a collective bargaining agreement which, by its terms, was in effect from July 1, 1979 through June 30, 1982.

On March 17, 1982, the Union filed a decertification petition with PERB, seeking to replace the Association as the

collective bargaining agent of the District's certificated employees.[3] On April 21, 1982, the regional director issued an order for an election.

An election was held on May 17 and 18, 1982. The votes were tallied on May 18. Of the 678 valid votes cast, 350, a majority, were in favor of representation by the Union; 300 were in favor of continued representation by the Association. There were five challenged ballots, and 23 votes supporting no organizational representation.

Neither the District nor the Association filed any objections to the conduct of the election.

2. The Dues Deduction Provisions of the Collective Bargaining Agreement.

Article 3 of the collective bargaining agreement between the District and the Association included the following pertinent provisions:

> 3.1. A unit member who is a member of the Association or who has applied for membership, may sign and deliver to the District an assignment authorizing monthly payroll deductions of unified Chapter/CTA/NEA dues or Association assessments. Such authorization shall continue in effect from year to year unless revoked in writing between June 1 and September 1 of any year.
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> . . . . . .

[3]Such an election is authorized by section 3544.5. The Board's duty to conduct such an election, if appropriate, is set out in section 3544.7.

> 3.1.1. Pursuant to such authorization, the District shall deduct one-tenth of the annual dues from the employee's regular salary during each month for ten months. . .
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> 3.1.2. The Board shall not be obligated to put into effect any new, changed, or discontinued deduction until the pay period commencing thirty days or more after such submission. . . .

There was no written provision specifying the 10 months during which the dues deductions would be made. It was the District's practice to make such deductions during the months of September through June.

3. The Union's Post-Election Requests and the District's Response.

During the last week of May, a Union representative (either Union President Pat Manning or Executive Secretary John Kirk) spoke by telephone with District Assistant Superintendent Calvin Apter about the District's dues deduction obligations in view of the election result. The Union spokesperson told Apter the Union wanted the District to discontinue dues deductions on behalf of the Association, beginning with the June paychecks (which were to be distributed the last workday in June).[4]

[4]The Union spokesman may have also asked the District to begin payroll deductions, in June, for Union members. Apter's testimony on this point was ambiguous. Manning did not testify, and Kirk, who testified as the Union's only witness, was not asked about this conversation. The evidence is insufficient for a finding that the Union asked, during this conversation, to begin its dues deductions in June.

Apter was non-committal about whether the District would comply with the Union's request.

On May 27, District counsel William E. Brown wrote to PERB acting Regional Director Anita Martinez, asking that the effective date of PERB's certification of the Union as the exclusive representative of the District's certificated employees be delayed until July 1, 1982. Brown wrote that on May 26 or May 27 the Union had asked the District to discontinue dues deductions for the Association beginning with the June paychecks. However, Brown wrote, the District had a contract with the Association which, by its terms, was valid until June 30, 1982, and which called for monthly payroll deductions for Association dues at the request of members of the Association.

Brown told Martinez:

> If the San Mateo Community College Federation of Teachers (AFT) is certified as the exclusive representative prior to the termination of the current agreement (June 30, 1982), adherence to the Agreement apparently would cause a breach of section 3543.1 (d) and will create unnecessary confusion.

PERB acting regional director Martinez denied Brown's request in a letter dated June 1, 1982. Martinez' letter noted that, pursuant to PERB regulation (California Administrative Code, title 8, part III) section 32738(a), objections to the conduct of the election were due in the PERB office by May 28, 1982, 10 days after the service of the tally of ballots. She

noted that no timely objections had been filed, and that PERB's interpretation of regulation 32750,

> . . . has led to a long-standing PERB policy that certification be issued on the 11th calendar day after the election where no objections/challenges affect the results.

Also on June 1, PERB staff representative Jerilyn Gelt sent to Apter and to Union President Manning copies of the PERB certification of the Union as the representative of the District's certificated employees, effective May 29, 1982. A certified mail receipt in PERB files indicates the certification and the letter were delivered to the District on June 3.[5]

On June 2, Union Executive Secretary Kirk gave to Sharon Himebrook of the District's payroll office 59 dues deduction authorization forms signed by District employees. Forty-three of these had been signed by full-time District employees, and authorized the District to deduct $14.00 per month, "for each month of the year in which I receive a check," and to send that amount to the Union as membership dues. The remaining 16 dues deduction authorization forms called for

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[5]PERB may take administrative notice of documents in its own files. Antelope Valley Community College District (7/18/79) PERB Decision No. 99. In an affirmative defense included in its Answer to the Complaint, the District asserted this June 3 receipt, but no evidence in support of this assertion was introduced during the hearing.

deductions of either $7.00 per month, or $4.00 per month.[6]

Michele Hoover, accounting supervisor in the District's payroll department, was present when Kirk gave Himebrook the forms. Hoover told Kirk that the District had standard forms for dues deduction authorizations, and that since the forms submitted by the Union were not the standard District forms, she believed the District would not accept the forms submitted by the Union. She said she would have to check with her supervisor to get a definite answer.

On June 4, Irene Bluth, District assistant superintendent for administrative services, sent Kirk a memorandum and, at the same time, returned to him all of the dues deduction authorization forms which the Union had submitted two days earlier.[7] Bluth's memorandum said:

> These authorizations cannot be processed for the June payroll for the following reasons:

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[6]Kirk testified that the monthly dues from each employee was set by the constitution of the national union to which the Union belonged. An employee who taught nine units or more per semester was required to pay $14.00 per month, or $168 per year. An employee who taught between four and nine units per semester was required to pay $7.00 per month, or $70.00 annually. An employee who taught fewer than four units per semester was required to pay $4.00 monthly, or $40.00 annually.

[7]Bluth's memorandum refers to authorization forms which were mailed to the District. No other evidence was presented to indicate that any forms were submitted to the District by mail. It is found that the only authorization forms submitted to the District by the Union prior to June 4 were the 59 described in Kirk's testimony, referred to above.

1. A decision has not been made yet by the regional director of PERB, Anita Martinez, as to who is the exclusive representative of the certificated faculty.

2. Article 3 of the existing contract (items 3.1.1 and 3.1.2) is still in effect. (A copy is attached.)

These two factors cited by Bluth in her June 4 memorandum were the only reasons given by the District to the Union in explanation of the District's refusal to accept or process the authorization forms submitted on June 2.

On June 8, 1982, District counsel Brown appealed Martinez' June 1 decision—refusing to delay the effective date of the certification of the union—to the Board itself. Brown asked the Board to stay the certification of the Union until July 1. The Board refused to grant the District's request, in an Order and Decision issued on March 3, 1983. San Mateo Community College District, PERB Order No. Ad-133. Portions of the Board's Order are considered in the Conclusions of Law section, beginning on p. 29.

The District began deducting Union dues from the checks of Union members who authorized deductions, in September 1982.

4. The District's Payroll Procedures.

The payroll preparation for the District's employees—the listing and calculating of gross pay, deductions, and net pay—is done by District employees. However, the payroll checks themselves are prepared by the San Mateo County Office

of Education. Each month, the District receives from the county office two payroll ledgers. One shows each employee's name, social security number, gross salary and other information; the other shows voluntary deductions for each employee (e.g., for employee organization dues, insurance payments, credit union payments). When an employee arranges changes in any of these deductions, the District notes the changes on these ledger sheets, which are then returned to the county office. The county office, in turn, prepares the payroll checks, using the carry-over information and the new information.

Near the end of the month, the county office sends to the District the individual paychecks, along with the checks for the recipients of the voluntary deductions. The latter checks are audited by the District, and then transmitted to the appropriate organizations.

On September 1, 1981, an administrator in the county office of education sent to school districts in San Mateo County a memorandum which listed due dates for submission of payroll documents by the school districts to the county office of education, for the 12 months beginning October 1981.

In the memorandum, Paul A. Zink, the county administrator, wrote to school district administrators:

> Your efforts to submit the payroll either ON TIME or before if possible will be greatly appreciated. (Capitals in original.)

The due date for the "regular payroll" for June 1982 was June 3, at 9:00 a.m. The deadline for the "variable payroll" was June 17. 1982, at 9:00 a.m.

The "regular" payroll is used for employees paid once a month, which includes all the members of the certificated bargaining unit. The "variable" payroll is used for employees who are paid on an hourly basis, rather than on a monthly basis; for new employees; and for checks to employees who may have been inadvertently omitted from the regular payroll. According to Hoover, the District has tried to make changes in payroll deductions for employees on the "regular" payroll through the "variable" payroll procedure, and the effort was not considered successful. Hoover testified:

> The County's computer is not programmed in order to handle that. Anyone that is not a new employee must be handled on the regular payroll. The computer won't accept anything on the variable payroll. It's just the way it is . . . We've tried it, and it has created all kinds of problems. (TR:69)

Following receipt of the memorandum from the county education office, Bluth, District assistant superintendent for administrative services, distributed a memorandum within the District setting the dates by which the administrative service office (which included the payroll unit) was to receive from the various District departments information needed for processing of, and necessary adjustments in, each monthly payroll. The deadline for the June regular payroll was

May 28, 1982, at 8:00 a.m. The June deadline for the "variable" payroll was June 10.

Union Executive Secretary Kirk testified that someone speaking for the District—Kirk believed it was Michelle Hoover—told Union president Manning that if the Union submitted dues deduction forms to the District on or before June 2, the District would be able to arrange the dues deductions to begin with the June paychecks. Kirk testified that it was because of this information (which had been relayed by Manning to Kirk) that Kirk submitted on June 2 all the authorization forms which the Union had collected from employees in the several weeks prior to June 2.

Hoover specifically denied telling Manning that the dues deductions would be arranged for the June paychecks if the authorizations forms were delivered by June 2. However, in the same response, Hoover testified, "I don't recall that coming up," thus adding some ambiguity to her answer. (TR:63) However, it is not necessary to base a finding on Hoover's testimony, since, for the reason stated immediately below, Kirk's testimony (the only other evidence on the subject) cannot serve as the basis for a finding.

Kirk's testimony is hearsay, which would not be admissible in a court proceeding under any exception included in the California Evidence Code. (See Ev. Code secs. 1220 through 1341.) Pursuant to PERB regulation 32176, this testimony,

while admissible in an unfair practice proceeding, is insufficient in itself to support a finding that the District informed the Union that authorization forms submitted on or before June 2 would be processed in time for dues deductions on the June paychecks. There is no other evidence which might support such a finding; no such finding will be made.

Hoover testified that implementation of a changeover from Association dues deduction to Union dues deduction—for approximately 250 Association members and approximately 60 Union members—would require two full working days for District staff, using the "regular" payroll system. To accomplish the same changes using the "variable" payroll system would require one week, Hoover testified. This time would include the recalculation of each individual's tax and other deductions. (TR:59, 69-70)

Although Hoover was asked about the time required to arrange the elimination of dues deductions for approximately 250 Association members. Kirk testified that in June 1982 there were 296 District employees who were on Association dues deduction. The source of Kirk's testimony was information given to him by the District in a pre-hearing conference. The District did not dispute the 296 figure during the hearing; it is accepted as accurate.

Despite the Union requests to end the withholding of CTA dues, the District withheld CTA dues from the June paychecks of

296 District employees (TR:12, 67). At the end of June, the District office received from the County Office of Education a check made out to the California Teachers Association, which was sent to CTA by the District, probably during the first week of July (TR:67).

5. Negotiations between the Union and the District.

Apter testified that approximately one week after the election, Union President Manning asked Apter, in a telephone conversation, whether the District would continue to honor the terms of the collective bargaining agreement it had signed with the Association. Apter told Manning it was the District's intention to honor the contract. Apter acknowledged, during cross-examination by the Union's counsel, that he understood that there were certain legally necessary limitations on the District's continued adherence to the contract it had with the Association; if provisions of the contract were illegal, they would not be honored. (TR:53)

On June 9, 1982, the Union presented its initial contract proposal to the District board of trustees, pursuant to the "sunshining" provision of EERA, which requires public disclosure of initial contract proposals of the exclusive representative and of the public school employer.[8] The

[8]Section 3547 (a) provides:

All initial proposals of exclusive

District made public its first proposal on July 21. On August 4, during the first negotiating session between the Union and the District, the two parties agreed on a series of "ground rules" for negotiating, including the following:

> [A]ll provisions of existing contract to remain in force until new contract signed.

Apter testified that,

> [t]here was no controversy about that particular section and it was agreed to rather automatically. (TR:44)

In September, the Union printed and distributed a flier entitled "Negotiations Update." It included the following:

> On August 4, the AFT and the District agreed to the following item:
>
> > All provisions of existing contract are to remain in force until a new contract is signed.
>
> Since the old contract expired on June 30, 1982, this agreement insures the continuation of the Professional Development Program, the operation of the Grievance Procedure, fringe benefits paid by the District, and all of the other articles of the contract.

On March 9, 1983, the District and the Union agreed to a collective bargaining agreement, retroactive to July 1, 1982.

> representatives and of public school employers, which relate to matters within the scope of representation, shall be presented at a public meeting of the public school employer and thereafter shall be public records.

Section 3.1.1 of the agreement provided that for employees who authorized dues deductions,

> [T]he District shall deduct one-tenth of the annual dues from the employee's regular salary during each month for ten months (September-June).

However, Appendix Q to the contract provided for an alternative for employees who worked for the District on a 10-month contract. An employee in that category can choose to be paid in 12 equal monthly payments, with all voluntary deductions to be made over the 12-month period.

LEGAL ISSUES

1. Did the District violate the EERA by its failure to deduct Union dues from the June, July or August 1982 pay checks of the employees who had authorized such deductions?

2. Did the District violate the EERA by its deductions from employee paychecks of June 1982 monthly dues for CTA, and transmission of these amounts to CTA in early July 1982?[9]

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[9]The Union's charge alleges that the District's conduct violated section 3543, as well as various subsections of section 3543.5. The allegation regarding section 3543 will be dismissed. Unfair practices by an employer are described by section 3543.5. While section 3543 defines certain rights of employees, only the various provisions of section 3543.5 define violations of employee or employee organization rights by an employer. The PERB has dismissed similar allegations of violations of EERA sections other than 3543.5 and 3543.6. Fremont Unified School District Teachers Association (4/21/80) PERB Decision No. 125, and Capistrano Unified Education Association (3/16/83) PERB Decision No. 294.

CONCLUSIONS OF LAW

1. Contentions of the Parties.

The Union contends that the District had a statutory obligation to honor the dues-deduction authorizations submitted on June 2, by deducting from employees' paychecks, and sending to the Union, dues payments covering the months of June, July and August 1982. Regarding the remedy for these alleged violations the Union argues:

> Since some of these individuals paid dues to another organization during the period of time, and some individuals are no longer available, . . . the only appropriate remedy would be to have the District pay [$1,897] directly to it without any charge to the individuals.[10]

The Union's charge also alleges that, in view of the result of the decertification election, the District acted in violation of sections 3543.5 (a), (b) and (c) in June by deducting Association dues from the paychecks of those employees who had previously authorized such deductions. The Union did not explain or argue this point in either its post-hearing brief, or during counsel's opening statement at the hearing.

The District acknowledges that it did not deduct Union dues

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[10]The Union's brief asks for an Order that the District pay the Union $18,097. It is clear from the context that this figure is in error, and that the logic of the Union's analysis, if accepted, would lead to an Order for payment of $1,897, not $18,097.

from the paychecks of the employees who had authorized it, but asserts that it should not be found to have acted unlawfully because it had a number of valid reasons for not doing so. Specifically, the District argues that:

1. The contract in effect until June 30, 1982, the terms of which were extended by agreement of the Union and the District, did not require the District to alter any dues-deduction arrangement until the pay period commencing at least thirty days after the request is made, that is until the August 1982 pay period, at the earliest.

2. The contract which was in effect through June 30, 1982, required dues deductions for only 10 months each year; in practice these 10 months were September through June. Thus, the District was under no obligation to deduct employee organization dues for either July or August;

3. The collective bargaining agreement eventually agreed to by the Union and the District, and in effect retroactively to July 1, 1982, provided for dues deductions for only the 10 months from September to June; for that reason, the District had no dues-deduction obligation for the months of July and August 1982.

4. Education Code section 87833, which is a rewording and re-numbering of Education Code section 13532, provides that

> [a]ny revocation of a written authorization shall be in writing, and shall be effective commencing with the next pay period, . . .

thus excusing the District from any obligation to cease deduction of Association dues for June 1982. The same section also excuses the District from complying in June 1982 with the Union's dues deduction requests made that month.

5. Administrative deadlines previously imposed by the County Office of Education, and by the District's own administrative machinery, made it impossible to alter any dues deduction arrangement for the month of June 1982.[11]

The Union argues, in response, that the Union's agreement to continue in effect the terms of the CTA agreement was not made until August 1982, "after two months of deductions could have been made on behalf of the Union." In addition, the Union argues that the agreement to extend the terms of the contract "could not have" applied to the dues deduction sections of the contract, since to do so would have been in violation of the EERA. That is, the EERA prohibits dues deduction arrangements for any employee organization other than the exclusive representative.

2. The District's Failure to Deduct Union Dues in June 1982.

On June 2, the Union submitted to the District 59

[11]Respondent suggested during the hearing, but did not argue in its brief, that it had no obligation to honor the Union's dues-deduction authorization forms, because these did not include a specific notice to employees that they were subject to revocation. The contention was not raised by the respondent as an affirmative defense in its Answer to the Complaint. It will not be considered here.

dues deduction authorization forms signed by certificated employees of the District. A refusal by the employer to comply with such requests is a violation of the Union's rights (section 3543.5 (b)) and may also be a violation of employees' rights under section 3543.5 (a). Fresno Unified School District (4/30/82) PERB Decision No. 208; San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230.

PERB has not established a generally applicable test for determining whether employer conduct which is alleged to have violated the statutory rights of an employee organization does, in fact, violate section 3543.5(b). In some cases in which such conduct has been alleged, PERB has applied a test of the "reasonableness" of employer conduct, e.g., Muroc Unified School District (12/15/79) PERB Decision No. 80, and State of California (Professional Engineers in California Government) (3/19/80) PERB Decision No. 118-S.12 In other cases PERB has

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12In [12]In Muroc, the Board held that the respondent school district had acted reasonably, despite its refusal to allow released time for seven employees on the employee organization's negotiating team. The District had initially agreed to provide released time for three employees; after discussions with the employee organization, it provided released time for four employees; on a few occasions, it had given released time to seven employees.

In the State of California case, the Governor had signed the 1978-79 state budget bill on July 6 (three weeks after the constitutionally-mandated deadline for passage of the budget bill) without meeting with representatives of an employee organization to discuss salary levels. This occurred during

adopted a test which balances the conflicting interests of the employee organization (charging party) and the employer, e.g., State of California, Department of Transportation) (5/15/81) PERB Decision No. 159a-S; and Regents of the University of California, Lawrence Livermore National Laboratory (4/30/82) PERB Decision No. 212-H.[13]

The Board's reasoning in the University of California case cited above is instructive. The Board's analysis noted, first, the conflicting interests of the unions and the University intertwined in the issue of union access to an employee lunchroom adjacent to high security areas. The unions had a legitimate interest in communicating with members of the bargaining unit, in meeting which were long enough (30 minutes) to allow effective communication.[14] The University had a

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the first week that the provisions of SEERA were in effect. The Board concluded the employer had not violated section 3519(b), which is identical in language to section 3543.5(b).

[13]The Board has applied analysis developed in cases arising under EERA to cases arising under HEERA, and SEERA. California State University, Sacramento (4/30/82) PERB Decision No. 211-H; State California (Franchise Tax Board) (7/29/82) PERB Decision No. 229-S. Also, PERB has applied analysis developed in a case arising under SEERA to cases arising under HEERA. University of California Regents (Lawrence Livermore) (4/30/82), PERB Decision No. 212-H. Here, it is concluded that PERB analysis in a case arising under HEERA is applicable, in similar circumstances, to a case (like the one herein) which arises under the EERA.

[14]The Board rejected the University argument that union

legitimate interest in avoiding the inconvenience resulting from the steps that would have to be taken to protect the integrity of the security areas surrounding the lunchroom.

In balancing these interests, and concluding that the unions had a right to use the lunchroom at periodic intervals, the Board noted:

> We are not oblivious to the burden imposed upon the Regents by the necessity to downgrade the exclusion area in order to facilitate the meetings. (Id. at p. 17.)

However, the Board in that case reached the conclusion that the University would have to accept the inconvenience that was a consequence of protection of the statutory rights of the unions. The University's outright refusal to allow unions to use the lunchroom for meetings with employees was a violation of section 3571(b).

In this case, if the District's failure to deduct union dues for the month of June 1982 is judged by either of the two tests set out by PERB—reasonableness of the conduct, or the

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access to a different lunch area, a five-minute walk away from the preferred area, was adequate:

> [W]hen considered in light of the additional fact that these employees receive only 30 minutes for lunch, this means that employees would spend fully one-third of their lunch period travelling to and from a meeting in the open area. University of California Regents (Lawrence Livermore), supra, at pp. 17.

balancing of conflicting interests—it is concluded that the District violated section 3543.5 (b).[15]

District Assistant Superintendent Bluth stated two reasons for the District's refusal to comply with the Union request for dues deductions in June 1982: the Union was not yet the exclusive representative of the District's certificated employees; and the District was bound to honor the contract which it had with the Association, which provided for dues deductions for the Association.

The District thus asserted two interests which ostensibly justified its refusal to begin Union dues deductions in June 1982: its interest in complying with EERA provisions regarding dues deductions for employee organizations; and its interest in complying with the terms of a previously entered into collective bargaining agreement which, by its own terms, was still in effect.

Neither asserted interest withstands legal analysis. Bluth was incorrect, first, in her assertion that the Union was not yet certified as the exclusive representative of the District's certificated employees. The Union had been certified by the

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[15]The District's assertion that the provisions of Education Code section 87833 excuse it from any dues deduction obligation in June are rejected, as that section, by its language, refers only to revocation of dues deduction authorizations. There is no section of the Education Code which defines an analogous "waiting period" for the commencement of dues deductions of certificated employees.

PERB acting regional director on June 1. As noted above, this certification was delivered to the District on June 3.

The District's second asserted reason for refusing to begin Union dues deductions in June 1982 also fails. Bluth's memo refers to Article 3, sections 3.1.1 and 3.1.2 of the District's collective bargaining agreement with the Association. The implication is that inasmuch as the District had a continuing obligation to deduct from employee paychecks Association dues, it was not permitted to deduct Union dues from employee paychecks during the same month.[16]

This assertion is rejected for reasons stated in the Board's decision in San Mateo Community College District (3/3/83) PERB Order No. Ad-133, in which the Board upheld the Acting Regional Director's decision to certify the Union on June 1. As the Board order noted, there is well-established NLRA precedent that once an employee organization has lost its exclusive bargaining status through decertification process, it has no right to enforce provisions of a collective bargaining agreement previously entered into. Retail Clerks v. Montgomery Ward & Co. (7th Cir. 1963) 316 F.2d 754 [53 LRRM 2069]; Milk and Ice Cream Drivers, Local 98 v. McCullough (D.C. Cir. 1962)

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[16] Bluth's memorandum does not indicate which provisions of sections 3.1.1 or 3.1.2 were relevant or controlling, from the District's point of view. The two sections are cited on pp. 5-6, above.

306 F.2d 763 [50 LRRM 2322]; Modine Manufacturing Company v. International Association of Machinists (1954) 216 F.2d 326 [35 LRRM 2003]. This NLRA precedent is applicable here.[17] The decertification election provisions of the EERA (secs. 3544.5 and 3544.7) are similar in structure and purpose to the decertification provisions of the NLRA (NLRA sec. 9(c), and NLRB Rules and Regulations, secs. 101.17 and 101.18).[18]

Further, as the Board noted in its March 1983 Order upholding the decision of the regional director, the same conclusion follows from a straightforward analysis of the EERA:

> According to the express provisions of subsection 3543.1(d), once an employee organization has ceased to be an exclusive representative, it is no longer entitled to have dues deducted.

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[17]The construction of similar or identical provisions of the National Labor Relations Act, 29 U.S.C, section 150, et seq., may be used to aid interpretation of the EERA. San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, 12-15; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 618.

[18]NLRA section 9(c) provides for a representation election among employees by a business entity when employees file a petition seeking certification or decertification of a union. Section 101.17 of the Board's regulations describes Board procedures for the filing of such a petition; much of it is similar to provisions of EERA section 3544.7. Section 101.18 of the NLRB's regulations provides further direction to the Board agents pertaining to the handling of election petitions; it also includes a provision requiring submission of a showing of interest by 30 percent of the employees in the bargaining unit, similar to the 30 percent requirement of EERA section 3544.5(d).

By June 4, the date of the Bluth memorandum to Kirk, the Association had ceased to be an exclusive representative of the District's certificated employees. Thus, the District no longer had an obligation to deduct Association dues payments from the June paychecks of District employees. Contrary to Bluth's assertion, there was no prior contractual commitment preventing the District from deducting Union dues payments from June paychecks of those District employees who had asked for those deductions.

While the District has a cognizable interest in complying with EERA provisions regarding dues deductions for employee organizations; and also has a cognizable interest in complying with binding contracts, neither interest required it to reject the dues deduction requests made by the Union and the Union members who sought dues deductions in June 1982. Therefore, it is concluded that when assessed in light of the balance-of-interests test, the District has not established a satisfactory defense for its refusal to deduct Union dues in June 1982.

Did the District's conduct in June 1982 satisfy a "reasonable conduct" standard, and thus prevent a conclusion that it violated the Union's rights by refusing to deduct employee dues payments that month? The evidence does not support that conclusion.

The District knew since May 18 that the Union had won the

decertification election and that, if no objections to the conduct of the election were filed by the District or by the Association by May 28, PERB would very shortly certify the Union as the new exclusive representative of the District's certificated employees.

By June 4, the District knew that the Union's certification was inevitable. The District itself had filed no objections to the election. And, by June 4, the District must have realized that the Association had filed no election objections, since it had received none in the mail.[19]

If Bluth or any other District employee had any doubt, on June 4, about whether PERB had certified the election results (despite the June 3 delivery of the PERB certification), a telephone call to PERB would have answered the question. There is no evidence that any District employee took even this simple "reasonable" step.

Next, the "reasonable conduct" test must be applied in light of the County Office of Education schedule for submission of payroll data. Admittedly, the submission of 59 dues deduction authorization forms may have come at an inconvenient time for the District. However, the District

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[19]Board regulations 32738 and 32140 require any party which submits objections to an election to serve copies of its objections, by first class mail, on all other parties to the election.

presented neither evidence nor argument that the delivery of the dues deduction forms just one day prior to the county's payroll deadline made it impossible or even unreasonably difficult for the District to arrange dues deductions in the month of June. Rather, evidence suggests that the task could have been accomplished in time for preparation and distribution of the June paychecks on the usual schedule.

The memorandum from the county administrator which sets the June 3 date does not state or imply that the county cannot or will not process payroll information received after that date. Rather, the memorandum appears to be seeking voluntary cooperation from the local districts:

> Your efforts to submit the payroll either ON TIME or before if possible will be greatly appreciated.

That is not a statement of an inflexible deadline.

Other evidence strengthens the conclusion that the June 3 deadline was flexible. When Kirk submitted the dues authorization forms on June 2, Hoover did not tell him that it would be difficult or impossible for the District to make the payroll changes in time for the distribution of June paychecks. Most significantly, Bluth did not mention a timing problem in her June 4 memorandum to Kirk, which rejected the Union's dues deduction requests.

Finally, Hoover testified that it would have taken District

employees two days to enter on the computerized payroll ledger sheets (to be returned to the county office) notations to end the approximately 250 Association dues deductions and to begin the 59 Union dues deductions. Assuming that the time required to indicate addition of a new deduction is the same as the time required to indicate elimination of an existing dues deduction, the time required for the District clerical employees to arrange the beginning of union dues deductions in June would have been far less than one day. If both tasks together required two days, the smaller of the two tasks should require less than one day to complete.

There might have been some inconvenience to the District accounting office in turning its attention to the new dues deduction requests on the last day before the county's deadline. However, as we have seen in University of California (Lawrence Livermore National Laboratory), supra, the Board does not view objection to administrative inconvenience as a satisfactory basis for denial of an employee organization's statutory rights.

Aside from the difficulty created by the County Office of Education deadline, the District has pointed to its own internal deadline of May 28 for submission of payroll deduction changes. An argument based on this deadline is not persuasive, however, because of Hoover's testimony that the addition of the 59 dues deductions could have been made with a fairly minimal

effort to the District. That is, as noted, the clerical work could have been completed in far less than one workday.

It must be concluded, in view of all the evidence, that both Bluth and Hoover were aware, on June 2, that the District could have submitted the required paper work to the County Office of Education in time for the Union dues deductions to begin with the June paychecks of the 59 employees who had authorized such deductions. It must then be concluded that, to the extent that the District's defense of its refusal to honor the dues deduction requests in June is based on scheduling difficulties, the argument that the District acted "reasonably" is rejected.

The District also argues that it must be excused from failing to honor the dues deduction requests in June and July because the contract which was in effect until June 30, in Article 3.1.2, provides that:

> The District shall not be obligated to put into effect any new, changed, or discontinued deduction until the pay period commencing thirty days or more after such submission.

The District argues that this clause of the contract protects it from a finding of unlawful conduct in three ways. First, the District argues, the contract terms were in effect in June, when the Union submitted its dues deduction requests. Second, the Union agreed, in a late-May telephone conversation between Manning and Apter, to extend the terms of the contract.

Finally, the District notes that in August the Union agreed in writing to extend the terms of the contract during the interim period, prior to agreement on terms of a full contract.

The first argument (based on the pre-June 30 contractual obligation) fails because it requires upholding a contractual term which is contrary to a specific provision of the EERA. EERA section 3543.1(d), quoted above, makes the entire Article 3—all of which has to do with "Payroll Deduction for Association Dues"—unenforceable and void in June. Section 3543.1 (d) prohibits dues deductions for any employee organization other than the organization which is the exclusive bargaining agent of employees. As of May 29, 1982, the Association no longer held that position, and no dues deduction agreement between the District and the Association was permitted by law. PERB cannot uphold an argument that the dues deduction provisions of the contract represent a valid defense in this context.

The argument based on the alleged extension of the contract terms by agreement of the Union and the District in May fares no better. The required factual basis for the argument is absent. The testimony about the telephone calls leads to the conclusion that Manning was not agreeing to terms of an interim collective bargaining agreement, but was inquiring about the District's intentions for the interim period.

The third argument, based on the Union's agreement on

August 4 to an extension of the old contract terms, retroactive to July 1, is of no avail here. The issue is whether the District acted properly in June. It could not have relied, in June, on an agreement which was not reached until early August. In any event, there is no evidence that the Union and the District agreed to apply the contract terms retroactively to June, which is the relevant time for this analysis.

3. The District's Refusal to Honor the Union's Dues Deduction Requests for July.

The District offers three arguments regarding the July dues deductions: First: Section 3.1.2 of the agreement between the District and the Association provided that no new dues deductions arrangement need be made by the District until the pay period beginning at least 30 days after the employee's request. Since the July pay period began only 29 days after the June 2 dues deduction request, the argument goes, the District was required to process no dues deductions until August 1982.

The argument fails. Once the results of the May 17-18 election were certified by PERB, the contract provisions pertaining to dues deductions for the Association were not enforceable. Section 3.1.2 did not govern relationships between the District and the Union on June 2 and thereafter, and the District cannot rely on it as a defense.

Second: Section 3.1.1 of the contract with the Association

provided for 10 monthly payroll dues deductions. By practice, those 10 months were September through June. Therefore, the District argues, it acted in a way consistent with past practice in refusing to deduct dues payments from employee paychecks for the month of July.

While the practice may have been as described by the District, the argument fails, because once PERB had certified the Union as the exclusive representative of the District's employees, the dues deduction provisions of the contract entered into by the displaced exclusive representative are of no significance.

Third, the District argues that the current collective bargaining agreement (in particular, Section 3.1.1 of this agreement) provides for dues deductions only in the months September through June. Thus, argues the District, the current agreement, which applies retroactively to July 1, 1982,

> [r]elieves the District of any obligation to make payroll dues deduction for the months of July and August 1982.

The District's argument here is that the current contract provision is an implicit (partial) waiver of the Union rights arising under this charge which, in turn, are based on section 3543.1(d). During contract negotiations, the District sought Union agreement to dismissal of the charge herein. The Union did not agree to such a dismissal or waiver. In these circumstances, it would be improper to read into the contract

provision the implicit waiver which the District argues should be found there. Amador Valley Joint Union High School District (10/2/78) PERB Decision No. 74.

4. The District's Refusal to Honor the Union's Dues Deduction Requests for August 1982.

The District urges one argument which applies solely to its failure to deduct membership dues in August. The argument is based on the agreement by the District and the Union, on August 4, to "Ground Rules for Negotiation," including the following statement:

> All provisisons of existing contract to remain in force until new contract signed.

The District argues that by the Union's agreement to that provision, the Union agreed to continue in effect the provisions of the dues deduction article of the previous contract, Article III, including, specifically, Section 3.1.1, which provides for dues deductions during 10 months of each year. As noted above, the contract does not specify the 10 months in which dues are to be deducted, but the District's practice was to deduct dues payments in the 10 months from September through June, excluding July and August.

The District's argument is that by the Union's agreement to extension of the terms of the predecessor contract, the Union agreed to dues deductions during 10 months of the year, excluding July and August. To that extent, the District argues, the Union waived its statutory right to dues deductions from salary checks in August.

The argument is persuasive. There is no question, first, that an employee organization may, if it chooses to do so, waive certain of its statutory rights. There has been extensive litigation, under the NLRA and under the EERA, concerning the question of whether an employee organization has waived a different statutory right—the right to negotiate about adoption of new working conditions or changes of working conditions. Both the NLRB and the PERB have adopted standards under which it is difficult for an employer to carry the burden of proof that an employee organization has waived its statutory right to negotiate about a subject within the scope of bargaining. Nevertheless, in some cases the PERB has found that an employee organization has waived its right to negotiate about a specific subject. San Mateo Community College District (6/8/79) PERB Decision No. 94; and Newman-Crows Landing Unified School District (6/30/82) PERB Decision No. 223.[20]

There appears to be no PERB decision indicating the standard by which to determine if an employee organization has waived its statutory right to dues deductions by an employer. Reasoning by analogy, however, it is appropriate to adopt a

[20]Under the NLRA, there are certain statutory rights of employees which a union may not waive by contract, particularly rights related to an employee's ability to criticize the conduct of either the union or the employer. NLRB v. Magnavox Company (1974) 415 U.S. 322 [85 LRRM 2475]. However, rights of that kind are not at issue here.

test similar to that used by PERB to determine whether an employee organization has waived another of its statutory rights—the right to negotiate about matters within the scope of representation.

The PERB test has been set out in a number of cases. In San Mateo Community College District, supra, at p. 22, the Board held that evidence of clear and unmistakable [contract] language, or demonstrative behavior would be necessary to support a conclusion that an employee organization had waived its right to negotiate.

In this case, it is concluded that there is satisfactory evidence that it was the intention and understanding of the Union that all of the provisions of the predecessor contract, including the dues deduction provision, were in effect beginning with August 4, on an interim basis.[21] The strongest evidence in this regard is the leaflet prepared and circulated by the Union in September 1982. This leaflet reviewed the Union-District relationship, beginning with the May decertification election. It included the following:

> On August 4, the AFT and the District agreed to the following item:

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[21]Apparently, there was no discussion of specific contract provisions at the August 4 meeting where the Union and the District agreed to extension of the contract on an interim basis. Apter, the only witness to testify about the meeting, said the agreement on the extension was agreed to "rather automatically."

> All provisions of existing contract are to remain in force until a new contract is signed.
>
> Since the old contract expired on June 30, 1982, this agreement insures the continuation of the Professional Development Program, the operation of the Grievance Procedure, fringe benefits paid by the District, and all of the other articles in the contract.

This statement is definitive. In the face of this language, it is impossible to conclude that it was the Union's understanding that it had agreed with the District that all provisions of the contract except the dues deduction provision would be continued in effect. The flyer says "all of the other articles of the contract" remain in effect.

In its post-hearing brief, the Union argues that it could not have agreed to many provisions of the Association contract, since to do so would have been in violation of the EERA. Specifically, the Union refers to the recognition article of the contract and the dues deduction provision of the contract. By law, dues deductions may be given by an employer only to the exclusive representative. The Union argues, essentially, that it and the District agreed to continue in effect all the provisions of the prior contract, except those (not enumerated by the Union) which the District and the Union could not have agreed to, within the legal bounds set by the EERA. On cross-examination, Union counsel elicited from Apter the

acknowledgement that if any portion of the contract were illegal it could not be honored.

This argument is not fully persuasive. The Union stated specifically in its September flyer that the grievance procedure of the prior contract was continued in effect. PERB has held that:

> Government Code section 3543.1(a) prevents employee organizations other than exclusive representatives from filing or presenting grievances for employees in the unit. (Mt. Diablo Unified School District (12/30/77) PERB Decision No. 44, at p. 6.)

This decision was issued almost five years before the Union and the District reached their agreement in August 1982. In view of the Mt. Diablo decision, the Union's statements on its September flyer must be viewed as indicating the Union's understanding that it and the District had agreed to extend all terms of the precedessor contract, substituting the Union for the Association wherever necessary to make the agreement understandable and legal.

This understanding is the only one which makes sense of the Union's September statement that the grievance procedure was still in effect. And, this analysis leads to the conclusion that the Union and the District understood that they were agreeing to extend the dues deduction provision on an interim basis, substituting reference to the Union wherever the article referred to the Association. In effect, the Union agreed to

the previous contract's procedures in the new relationship between the Union and the District. The Union did not thereby restore any rights to the Association that were forbidden to it under the EERA.

Finally, it is concluded that in failing to deduct employee membership dues from the paychecks of those employees who received paychecks in August, the District did not violate section 3543.5(b), as the Union waived its right to collect dues, through salary deductions, in August 1982.

5. The District's Continuation of Association Dues Deductions in June 1982.

The Union's charge alleged that the District's conduct in this respect violated sections 3543.5(a), (b) and (c). A conclusion of a violation of section 3543.5 (a) would require evidence of threats, reprisals, discrimination, or some other form of interference with employee rights. No evidence has been introduced linking the District's deduction of dues payments of Association members to any such conduct.

All of those employees from whose paychecks Association dues were deducted were members of the Association, and each had specifically authorized deduction of dues payments from his or her paycheck. In these circumstances, it must be presumed that each employee was in favor of, not opposed to, the District's deduction and transmission to the Association of his/her June dues payments. It would be illogical to conclude that the

rights of any of these employees were violated by the District's actions, which were taken in compliance with the employees' specific requests. There was no evidence that any of the 296 employees who had previously authorized deductions of Association dues asked the District to discontinue Association dues deduction once the Association was displaced by the Union as the exclusive representative, in the mid-May election.[22] The allegation of a District violation of section 3543.5(a) by its deduction of Association dues in June 1982, shall be dismissed.

A conclusion of a violation of section 3543.5(c) requires a showing of an employer refusal to negotiate (presumably, with the Union) about some matter within the scope of representation. There has been no evidence of any such refusal. The allegation of a violation of section 3543.5(c) shall be dismissed.

With respect to the allegation of violation of section 3543.5(b), it is not clear from the charge, or from later statements by the Union, whether the Union intended to

[22]Kirk testified that 27 of the employees on Association dues check-off were among the 59 employees who signed Union authorization forms. However, none of these 27 were identified, and no evidence was presented about their wishes in this respect. It would be inappropriate to draw any inferences about the wishes of these 27 employees in the absence of relevant evidence.

allege that the District's conduct violated rights of the Union or of the Association. There appears to be no analysis which would lead to the conclusion that the District's continued deduction of dues of Association members among its employees violated any rights of the Association. It has been concluded that the District's refusal to honor the dues deduction requests of the Union members who signed the Union authorizations submitted on June 2 was a violation of the Union's statutory rights. However, there is no evidence that the District's deduction of dues of Association members in June, as a distinct act, violated the Union's rights in any way or did the Union any injury. In fact, the Union's brief fails to provide any argument in support of such a conclusion.

Based on the absence of evidence of harm to employee rights or to organizational rights, the allegations of District conduct in violation of section 3543.5 (a), (b) and (c), by virtue of its deduction of Association dues in June 1982, shall be dismissed.[23]

A colorable argument could be made that the District, by deducting Association dues from employee paychecks in June 1982, and by sending the money deducted to CTA in early

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[23]In view of the analysis in the text, there is no need to consider the District defense based on Education Code section 87883.

July 1982, assisted the Association, in violation of section 3543.5(d).[24] However, the Union's charge did not allege such a violation. Also, Union counsel never proposed or argued that theory during the hearing; the Union's post-hearing brief does not raise the argument. This lack of notice of the legal theory which might be the analytical framework for a finding of unlawful conduct is important, because there are specific affirmative defenses which the District might have put forward, if it had been on notice that it was accused of a violation of section 3543.5(d), e.g., the District might have asserted that any assistance to the Association was minimal and, therefore, that there should be no finding against it. See, Healdsburg Unified School District (6/19/80) PERB Decision No. 132, at p. 33. Because the District was not put on notice that its conduct might be viewed as a violation of section 3543.5(d), no such conclusion will be considered in this proposed decision. San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230.

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[24]Section 3543.5(d) makes it an unfair practice for an employer to:

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

VIOLATIONS

It is concluded that the District violated section 3543.5(b) by refusing to deduct Union dues from the paychecks of those employees who had authorized such deductions on forms submitted to the District on June 2, 1982, and who received paychecks from the District in June or July 1982. Further, because the District's conduct also had the effect of preventing employees from participating in a specific way (automatic payment of dues) in the Union's activities, and was not justified by business necessity, it interfered with the rights of employees, thus violating section 3543.5 (a). San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230; Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

All allegations that the District violated the EERA by its deduction of Association dues in June 1982 shall be dismissed.

All allegations that the District violated section 3543 by any of its conduct in June, July or August 1982, shall be dismissed. The allegation that the District violated the EERA by its refusal to deduct Union membership dues in August 1982 is dismissed.

REMEDY

In Regents of the University of California (Physicians National House Staff Association) (2/14/83) PERB Decision No. 283-H, PERB found that the University had violated

section 3571(b) by denying to the employee organization/charging party its statutory right to receive dues deductions from members. The Board concluded that the employee organization was entitled to recover dues lost when the University terminated the dues deductions, provided that the employee organization had not collected such dues from its members through other means. This remedy is consistent with NLRA precedent. Seneca Environmental Products (1979) 243 NLRB No. 77 [102 LRRM 1055]; and NLRB v. Shen-Mar Food Products, Inc. (4th Cir. 1979) 568 F.2d 665 [95 LRRM 2721].

The same remedy will be ordered here. The District will be ordered to remit to the Union an amount equal to the membership dues which would have been remitted to the Union after being deducted from the June and July paychecks of employees who had authorized such deductions, together with interest on that amount, calculated at an annual rate of 7 percent. See Santa Clara Unified School District (9/26/79) PERB Decision No. 104. This amount shall be offset by the amount of money the Union has otherwise collected in dues payments from the same employees for the months of June and July 1982.

It also is appropriate that the San Mateo Community College 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 and to make whole the Union for the dues income which it lost as a result of the District's unlawful acts. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69; Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587; 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 the case, and pursuant to section 3541.5(c), it is hereby ordered that the San Mateo Community College District and its representatives shall:

1. CEASE AND DESIST FROM:

Failing or refusing to comply with dues deduction authorizations submitted by members of Local 1493, American Federation of Teachers, except as the District is excused from doing so by provision of an agreement reached by the District and Local 1493, American Federation of Teachers.

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

(a) When the exact amount of dues owed is

ascertained, the San Mateo Community College District shall reimburse the San Mateo Community College Federation of Teachers, Local 1493, AFT/AFL-CIO for the dues together with interest thereon at 7 percent which it actually lost as a result of the District's refusal to deduct dues payments from the June and July 1982 paychecks of District employees who submitted dues deduction authorizations to the District on June 2, 1982 (taking into account the amount actually collected by the Union in June and July dues payments from the same employees).

(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 San Francisco 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.

IT IS FURTHER ORDERED all other allegations in the charge and complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on June 29, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on June 29, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing 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: June 9, 1983

MARTIN FASSLER
Administrative Law Judge