

REVERSED IN PART by San Diego Adult Educators v. PERB  
(1990) 223 Cal. App. 3d 1124



STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN DIEGO ADULT EDUCATORS, LOCAL )  
4289, AMERICAN FEDERATION OF )  
TEACHERS/CALIFORNIA FEDERATION OF )  
TEACHERS, AFL-CIO, )  
 )  
Charging Party, ) Case No. LA-CE-1905  
 )  
v. ) PERB Decision No. 662  
 )  
SAN DIEGO COMMUNITY COLLEGE ) April 5, 1988  
DISTRICT, )  
 )  
Respondent. )  
\_\_\_\_\_ )

Appearances; Liebert, Cassidy & Frierson by Larry J. Frierson for San Diego Community College District; James M. Gattey, Attorney, for San Diego Adult Educators, Local 4289, American Federation of Teachers/California Federation of Teachers, AFL-CIO.

Before Hesse, Chairperson; Porter, Craib, and Shank, Members.

DECISION

HESSE, Chairperson: The San Diego Community College District (District) excepts to the attached proposed decision by an administrative law judge (ALJ) of the Public Employment Relations Board (PERB or Board). In that decision, the ALJ ruled that the District violated sections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA or Act)<sup>1</sup> ~~ACU~~.

<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

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

when it failed to bargain with the San Diego Adult Educators, American Federation of Teachers/California Federation of Teachers, AFL-CIO, (SDAE or Union) about the decision, and the effects of the decision, to contract out work performed by certain bargaining unit members. After a full review of the record below, the Board affirms the ALJ's decision, consistent with the following determinations and order.

FACTS

On March 9, 1983, the District, through the Board of Trustees, decided to discontinue offering language classes in German, French and Spanish through the fee-based program. The classes were not given for credit, but were taught by certificated unit employees represented by SDAE. The teachers for the German, French and Spanish classes were long-time District employees, and were paid according to the regular salary schedule applicable to all full-time District instructors at the community college. Although fees were charged students who took the classes, the fees did not cover the expenses the District incurred by offering the classes, due almost exclusively to the salaries received by the teachers.

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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.

Thus, the decision to discontinue fee-based French, German and Spanish language classes was made solely because of an economic condition caused by the salaries received by the instructors in those classes.

Almost immediately, and continuing for several months thereafter, the District began to receive pressure from the public to restore classes in the three languages. This pressure took the form of appearances at Board of Trustee meetings, as well as letters to the District. All those who were heard from expressed a desire that the District reinstate the fee-based German, French and Spanish classes.

On May 4, 1983, the public again made several presentations at the Board of Trustees meeting, urging that the District restore the classes. The board, in response to this pressure, directed Chancellor Garland Peed to investigate the cost of and alternatives to the restoration of the foreign language classes. In the meantime, the three affected teachers who had been laid off initiated hearings under the Education Code, protesting their layoffs. On May 10, a proposed decision was issued by a hearing officer, ruling that the discontinuance of the language classes was proper and that therefore the termination of the teachers was permissible under the statute. The proposed decision was adopted by the Board of Trustees at its May 23 meeting.

In addition to adopting the proposed decision concerning the teacher terminations, the Board of Trustees at the May 23 meeting discussed again alternatives to discontinuing the

language classes. There were essentially four alternatives presented: (1) students could be urged to take regular, college-credit language classes in lieu of the fee-based, non-credit classes; (2) the Parks and Recreation Department could be asked to take over administration and financing of the language classes; (3) the YMCA could be approached to see if it would offer the language classes; and (4) the San Diego Community College District Foundation, Inc. (Foundation) could be asked to offer the same classes that had been eliminated by the District.

The Foundation was established sometime in the mid-1970s as a general non-profit corporation. The stated purpose and objective of the Foundation is to assist and promote the educational activities of the District. The Foundation has no members and is governed by a five-member board of directors. According to June 1983 amendments to the original bylaws, each individual member of the Foundation board is designated by a member of the District Board of Trustees. At the time of the instances relevant to this matter, Garland Peed was not only Chancellor for the District, but he also served as Foundation President.<sup>2</sup>

After the alternatives were discussed, the Board of Trustees instructed the Chancellor to contact the Foundation to

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<sup>2</sup>The Foundation had only one office, and it was located in the Chancellor's office in the District building. Rent was paid by the Foundation to the District for use of this space.

see if it could offer the French, German and Spanish language classes formerly offered by the District's fee-based program. If so, then the Chancellor was to prepare the necessary papers to enable the Foundation to take over the classes.

The District would continue to offer other language classes in its fee-based program, including languages such as Farsi, Swedish and Tagalog. The District could afford to continue to offer those language classes because the instructors of those classes were paid on an hourly basis, rather than on the certificated salary schedule as were the teachers of the French, Spanish and German classes. Thus, the District did not lose any money by offering those classes, as the instructors' salaries were met through the fees received from the students who enrolled in the classes. The Foundation, in offering the French, German and Spanish language classes, would pay the instructors on an hourly basis based on class size rather than on teaching experience and, thus, would pay to the affected language teachers an amount much smaller than the teachers employed by the District. On June 2, the deans of the various campuses in the District were told to begin hiring teachers for the Foundation language classes. Evidently some of the former employees of the District classes were hired by the Foundation. The actual contract between the District and the Foundation regarding French, Spanish, and German class instruction was entered into on June 22.

From June through August, public criticism of the District's decision not to offer fee-based language classes in

French, German and Spanish continued. In testimony taken by the Board of Trustees on August 3, several students and former language faculty members commented that singling out the French, German and Spanish teachers was discriminatory because the District was still offering other fee-based language classes.

On August 22, the Trustees agreed to ask the Foundation to teach all fee-based language classes formerly taught by the District, including the classes in Tagalog, Farsi, Swedish, etc.,

On December 21, 1983, the SDAE filed an unfair practice charge alleging a violation of section 3543.5(b) and (c). The charge alleged that the District violated the Act by: (1) interfering with the Union's right to represent members and denying the Union the right to represent its members in negotiations over the contract with the Foundation; and (2) failing to meet and negotiate in good faith with the Union over the transfer of work from the District to the Foundation. In other words, by discontinuing the fee-based language classes, terminating permanent faculty members, and contracting with the Foundation to teach language classes, the District failed to bargain with the Union over those decisions, and thereby interfered with the Union's right to represent its members on this particular issue.

The charge was filed with PERB in a timely manner, but there is no proof of service on the District attached to the original charge. The regional attorney evidently noted this

when he communicated with the Union. A letter from the District to the regional attorney references the charges being received by the District sometime in January 1984.

On April 30, 1984, the Union filed an amended charge alleging that the District (1) interfered with, restrained, and coerced employees because of the employees' exercise of rights to join and participate in the Union; (2) interfered with the Union's right to represent its members; and (3) failed to meet and negotiate in good faith with the Union over the transfer of work, referred to in the charge as "sub-contracting." With the amended charge there was a proof of service; however, it showed proof of service on PERB, not on the respondent. A cover letter to PERB indicated that a copy of the charge was being sent to the District concurrently with the PERB filing.

The complaint that issued on the charge simply states that the conduct of the respondent "alleged in the charge designated as Case No. LA-CE-1905, served during January 1984 [and] as amended and served on April 30, 1984 . . . states a prima facie case. . . ." The answer was filed on June 25, 1984, and inter alia, the District denied the allegations in the charge. Several affirmative defenses were also raised, such as: (1) the Foundation is a separate entity and is not under the control of the District; (2) the charge is barred by the statute of limitations as it was not served on the respondent until after the six-month time limit; (3) the District cannot control the Foundation, which is not a public school employer under EERA; and (4) PERB lacks jurisdiction over the Foundation.

THE ALJ'S DECISION

The District initially moved to dismiss the complaint on the grounds, inter alia, that it had not been served within the six-month statute of limitations set out in section 3541.5(a)(I),<sup>3</sup> PERB Regulation 32615(b),<sup>4</sup> and PERB Regulation 32140.<sup>5</sup> The District argued that, because service was not effected until January 1984, the charge could not be

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section 3541.5(a)(1) reads, in pertinent part:

. . . . .

(a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:  
(1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. . . .

<sup>4</sup>PERB Regulations are codified at California Administrative Code, title 8, Part III, section 31001 et seq. Regulation 32615(b) reads, as follows:

(b) Service and proof of service [of the charge] on the respondent pursuant to section 32140 are required.

<sup>5</sup>Regulation 32140 reads, in pertinent part:

(a) All documents referred to in these regulations requiring "service" or required to be accompanied by "proof of service," except subpoenas, shall be considered "served" by the Board or a party when personally delivered or deposited in the first-class mail properly addressed. All documents required to be served shall include a "proof of service" affidavit or declaration signed under penalty of perjury which meets the requirements of section 1013(a) of the Code of Civil Procedure. . . .



considered filed until then, more than six months after the date of the contract between the District and the Foundation. The ALJ rejected the motion to dismiss because the respondent could show no prejudice due to the late service, and the deficiency was cured in a reasonable amount of time.

At the hearing on the merits, the District's various arguments can be grouped into three major areas: (1) the Foundation is not a public school employer under EERA section 3540.1(k),<sup>6</sup> and thus PERB has no jurisdiction over its activities; (2) the District did not contract out work, it merely ceased to offer classes that were then offered by a private corporation; (3) the SDAE waived any right to negotiate by failing to request negotiations after it had notice of the District's intentions; and (4) the established past practice of the District was to have the Foundation take over courses that the District no longer wished to offer.

The ALJ rejected all of the District's arguments and ruled that the decision to contract out language classes, made in June and formalized with the Foundation on June 22 was a unilateral change. The ALJ noted that the original decision to contract out, involving the French, Spanish, and German

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<sup>6</sup>Section 3540.1(k) reads:

(k) "Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

classes, was a permissible decision because, at the time the decision was made, the District had decided not to offer these classes, a decision that fell within management's prerogative. As to PERB's jurisdiction over the Foundation, the ALJ concurred that PERB had none. Thus, any remedy could only be directed to the District and not to the Foundation. Accordingly, an order was proposed that would restore the status quo ante of June 22 and would make whole the amount of salaries lost by language teachers laid off due to the contracting out.

#### DISCUSSION

As a threshold question, we confront first the argument that the charge was untimely because service was not effectuated within the statutory six-month period, although the charge was filed with PERB within six months.<sup>7</sup>

Other jurisdictions are not helpful in giving PERB guidance, because most states' labor laws are modeled after the National Labor Relations Act (NLRA) which requires

that no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge

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<sup>7</sup>The charging party failed to file its "proof of service" showing service on the District for either the original or the amended charge. The District, however, does not dispute that it did receive the first charge, albeit later than the date of filing with PERB. Further, the District has never denied that it received the amended charge, even though the proof of service does not indicate service on the District. As noted above, the cover letter sent with the amended charge to PERB references that the District was served concurrently with the PERB filing.

with the board and the service of a copy thereof upon the persons against whom such charge is made. (29 USC sec. 160(b).)<sup>8</sup>

That is, in most states service upon the parties is required by statute rather than by regulation. Likewise, states that do not require proof of service by statute rarely have regulations that address the issue of service. Those that do require such proof do not use language analogous to the specific language of the California regulation.<sup>10</sup>**10**

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<sup>8</sup>The nature of the NLRA, administered by the National Labor Relations Board (NLRB), was reiterated in the Ninth Circuit in the case Hospital and Service Employees Union, Local 399 v. NLRB, 798 F.2d 1245 [123 LRRM 2234]. In that case, the charge was timely filed within the six months. The respondent, however, never received the charges from the charging party. When the NLRB twice mailed the charges to the respondent, there was no delivery due to the wrong address being used. Eventually, a complaint was issued and the respondent answered the complaint, even though it had been sent to the same wrong address to which the charges had been sent on two separate occasions. The NLRB dismissed the complaint on the grounds that no service was effectuated. The Court of Appeal reversed. The Court of Appeal noted that the charge was filed within the six months and that the respondent had "actual notice" within that same six-month period. Only if the employer had been able to show prejudice would the court have considered dismissing the charge. Furthermore, the complaint issued by the NLRB and the answer filed by the respondent were both completed within the six-month statute of limitations.

<sup>9</sup>See, e.g., Michigan Compiled Laws, section 423.216 "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission and the service of a copy thereof upon the person against whom the charge is made . . ." Statutes in Illinois, Iowa, and Vermont impose similar service requirements.

<sup>10</sup>See<sup>10</sup>See, e.g., title 39, chapter 31 Revised Code of Montana, section 39-31-404: "No notice of hearing shall be issued based upon any unfair labor practice more than six months before filing of the charge with the board." Nevada Revised Statutes section 288.110(4) provides: "The board may

While this Board has ruled that a failure to serve a party will result in a dismissal of an appeal (Los Angeles Community College District (1984) PERB Decision No. 395), it has also recognized that where the respondent has notice, late service, coming after a petition for decertification has been timely filed, will not bar a petition. (Santa Monica-Malibu Unified School District (1987) PERB Order No. Ad-163.)

Here, we note that the charging party has complied with the statute's six-month requirement. PERB regulations, however, were not complied with in a timely manner. When considering the charging party's non-compliance with the Board's service requirements, we should read and apply PERB regulations in light of their intended purpose, that is, to protect a respondent from stale claims or to prevent prejudice because a respondent was unable to defend itself due to the late service.

Here, the respondent alleges no prejudice. Moreover, we note that the District was served with, and answered, the complaint in this matter.<sup>11</sup> Thus, we concur with the ALJ in

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not consider any complaint or appeal filed more than six months after the occurrence which is the subject of the complaint or appeal." See also, New Jersey Statutes Annotated section 34:13A-5.4(c) chapter 34:13A: "Provided that no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge."

**11**We note the ruling of the Eighth Circuit Court of Appeal in *Thomsen v. United Parcel Service* (1986) 742 F.2d 115 [122 LRRM 2865], cert. den. (1987) 107 S.Ct. 1886. That court declined to adopt the NLRB rule of service within six months in a lawsuit brought under a hybrid section 301/Duty of Fair Representation case, and instead balanced the equities in favor

holding that the late service was not fatal to the charging party's cause of action.

As to the ALJ's conclusion that the Foundation is not an employer under EERA, we also concur. Although there was much overlapping of management, purpose, supervision, and operation, key elements prevent the Foundation from being considered a public employer. There is no common ownership that would permit a finding that the Foundation is an alter ego of the District. (Crawford Door Sales Co. (1976) 226 NLRB 1144.)<sup>12</sup> Nor, because of the lack of common ownership, can the Foundation and the District be considered a single employer. (Television Broadcast Technicians Union, Local 1264 v. Broadcast Service (1965) 380 US 255.) Finally, the Foundation cannot be an ostensible agent of the District. Even though the District may inadvertently have caused third parties to believe that the Foundation was its agent, California law requires that it also be shown that third parties changed position in reliance upon that representation. No evidence was presented here to show any change in position.

Thus, under no theory can the Board exercise jurisdiction over the Foundation and, for purposes of this case, the Foundation will be considered a separate employer whose own

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of a plaintiff who filed the lawsuit in a timely manner but did not effectuate service at the same time.

<sup>12</sup>If the Foundation were the alter ego of the District, its employees would be subject to the collective bargaining agreement.

employees are not protected by EERA.. This finding, however, does not absolve the District of liability. Rather, it proves a point the District wishes to ignore, that is, work performed by bargaining unit members is now being performed by nonunit employees, at the specific behest of the District. Surely this is contracting out in its most basic form.

The District initially raised the argument that it had the right to discontinue services, that is, it had the right to decide not to offer fee-based language classes. This is correct, as the decision of what shall be offered in any curriculum is strictly one for management. (Stanislaus County Department of Education (1985) PERB Decision No. 556.)

When, however, the District received public rebuke because of its decision, it then sought alternatives to discontinuing the language classes. By contracting with the Foundation, the District continued to offer this service, albeit by using instructors supplied by the Foundation.<sup>13</sup> If the District had truly ceased to offer the language instruction service, it would not have contracted with the Foundation at all, and the Foundation would have been free to decide for itself to offer the language classes if it so desired. But because the District contracted with the Foundation, it tacitly admitted

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<sup>13</sup>Relationships between community college districts and organizations like the Foundation are hardly those of strangers. Instead, those relationships are regulated by Education Code section 72670 and 78020-23. Given the stated purpose of this Foundation (supra, p. 4), and the benefits to the District arising out of these two contracts, we find the dissent's focus on the Foundation's payments to the District not to be significant.

that it wished to continue to offer certain classes, despite its earlier position that it was discontinuing those services. Therefore, contracting with the Foundation was a unilateral removal of work from the bargaining unit.<sup>14</sup> The unilateral change was based solely on the high cost of instructors' salaries. Unilateralism motivated solely by labor costs is unlawful. (State of California (DPA) (1987) PERB Decision No. 648-S.)

The sole defense left to the District is that the Union waived its right to negotiate over the decision and the effects of the decision.

The March 9 decision to discontinue French, German, and Spanish fee-based language classes was within its prerogative. No duty to bargain that decision fell on the District. But, as a result of public outcry, the District set in motion a course of events that led to the contracting out of all of the other fee-based language classes. Did the Union sleep on its rights, or could it have foreseen the consequences of that first decision?

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<sup>14</sup>We find the dissent's reliance on Fremont Union High School District (1987) PERB Decision No. 651 to be inapposite. In that case, there was a substantial gap of some four years before LaVerne College began offering its summer school. Second, at no time was the public led to believe that the summer school was offered by Fremont instead of LaVerne. Finally, if LaVerne had not offered the summer school classes, the evidence clearly showed that there would have been no summer school. Here, the District quite obviously wanted the benefits of offering the language courses without any of the burden.

Charging party Exhibit No. 20 is the board action docket item for May 23 and references alternatives concerning the funding of certain discontinued classes. Five alternatives were listed, including keeping the classes within the District itself, requesting that Parks and Recreation provide courses, or contracting with another agency such as the Foundation. Considering that the contracting out option was one among five alternatives, we do not view this docket item as specific enough to give notice that the District had indeed determined to contract with the Foundation.

The minutes of the May 23 meeting were only slightly more specific: "Mr. Grady moved that the Chancellor be directed to inform the Foundation that the District suggests that it offer certain classes that the District is unable to offer: and that the chancellor prepare the necessary contracts between the District and the Foundation to facilitate the offering of those classes by the Foundation." At that point, the District was unsure if the Foundation was able to offer classes or if it desired to. Thus, no action by the District could yet be said to give notice that a decision would be made that would trigger a request to bargain.

The next time the contract with the Foundation is mentioned in the agenda was on June 22, when the Trustees were asked to ratify the contract. A request to bargain on that day would have been futile as the contract had actually been negotiated and merely needed adoption by the Trustees. Thus, the Union was never notified, formally or informally, that unit work



would be done by nonunit employees, until the decision was final.

Concerning the August 22 action, the docket item summary says, "Consideration of answers to questions raised at the August 3, 1983 board meeting by concerned citizens/students re the cancellation of certain foreign language classes in the continuing education program." The recommendation that the Chancellor made on the docket item was, "It is recommended that the board discuss this item and issue appropriate instructions to the chancellor." Certainly, there is no reason to believe at that point that the District intended again to contract with the Foundation to offer certain language classes. Thus, the board agenda alone does not provide adequate notice to the Union that the District was intending to make a unilateral change.

The remaining question is whether the presence of the Union president at the Chancellor's council meetings prior to the board meeting, at which various items were discussed, constitutes adequate notice. Could it be fairly said that the Union knew about the pending action and that it did not request negotiations?

No minutes were introduced concerning those meetings. Thus, we have only the testimony of the Chancellor and the testimony of the Union as to whether there was adequate discussion. The ALJ ruled that the discussion was not substantial enough to give rise to notice. Furthermore, the purpose of the Chancellor's meeting was merely to review each

agenda item, not to predict what the Board of Trustees would actually do. Therefore, even if the items were discussed at the Chancellor's meeting, such a discussion would not necessarily include the knowledge of action the board would actually take based on their own discussion at the Board of Trustees' meeting.

Based on the foregoing, we conclude that the Union did not waive its right to negotiate. The District violated EERA section 3543.5(c) when it contracted out bargaining unit work without providing the Union with notice and an opportunity to negotiate.

#### REMEDY

In addition to the standard order to bargain the decision to contract out and the effects of that decision, the ALJ ordered that the contract with the Foundation be rescinded and the instructors laid off on August 22 be reinstated.

While the Board has the authority to order reinstatement when appropriate, we decline to exercise that power here. Reinstatement presumes that the District would not have laid off these teachers but for this opportunity to contract out. Based on the District's initial decision in March to cease offering certain language classes unconditionally, we find it highly probable that the District intended to get out of the business of fee-based language classes, whether the Foundation was available to step in or not. The evidence does not give us any reasonable belief that the District intends to offer these classes anymore. So long as it exercises its right not to

offer these classes, reinstatement is not appropriate.<sup>15</sup>

Back pay is appropriate, however, for those teachers who were laid off as a result of the August 22 action. The pay, with interest at the rate of 10 percent per annum, and minus any interim earnings, shall be owed from the date of the unlawful layoffs until expiration of the contract with the Foundation. Should the District have extended or renewed the contract under the same conditions as the original contract, the back pay would extend to that period as well.

The back pay award is not available to the instructors laid off on March 9, however. That layoff occurred as a result of a decision, later rescinded, to eliminate certain classes. The District shall be required, however, to rescind any current contractual arrangement with the Foundation to provide foreign language courses that were contracted for on June 22 and August 23, 1983. Such agreements with the Foundation are the result of unlawful decisions to contract out bargaining unit work. The District must bargain any future decision to contract out, and the effects of that decision. Said bargaining shall continue until agreement is reached or until the parties have exhausted impasse procedures.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to EERA

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<sup>15</sup>Should the District again offer these classes, reinstatement would be appropriate.

section 3541.5(c), it is hereby ORDERED that the San Diego Community College District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation, specifically with reference to the decision, and the effects of the decision, to contract with the San Diego Community College District Foundation, Inc. for the provision of teaching services formerly provided by members of the adult education faculty bargaining unit.

2. Denying to the San Diego Adult Educators, Local 4289, American Federation of Teachers/California Federation of Teachers, AFL-CIO, its right to represent unit members by failing and refusing to negotiate about matters within the scope of representation.

3. Interfering with employees represented by the San Diego Adult Educators, Local 4289 because of the exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without first providing the exclusive representative with notice and the opportunity to meet and negotiate about such matters.

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

1. Meet and negotiate with the San Diego Adult Educators

Association, Local 4289 about the decisions of June 22 and August 22, 1983 (and the effects of these decisions), to enter into an agreement with the Foundation for the provision of foreign language classes that were formerly taught by unit employees until the parties reach agreement or exhaust the statutory impasse procedure.

2. Make the employees laid off August 22, 1983, whole for any loss of wages or benefits as a result of the unlawful unilateral change, from the effective date of the unilateral change until the expiration of the contract with the Foundation. Should the original contract have been extended or renewed, the back pay will continue through the succeeding contract terms.

3. Rescind any current contractual arrangement with the Foundation to provide foreign language courses that were contracted for on June 22, 1983 and August 22, 1983; until bargaining has been completed, either by agreement or until impasse procedures have been exhausted.

4. If, within one year of the date this Decision becomes final, the District again offers fee-based language classes, offer reinstatement to those employees who were placed on layoff status by action of the District board of trustees on August 22, 1983.

5. Within thirty-five (35) days after this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to unit employees are customarily placed, copies of the Notice to employees attached as an Appendix hereto. The Notice must be signed by an authorized agent of the District indicating that the District

will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced, or covered by any other material.

6. Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Members Craib and Shank joined in this Decision.

Member Porter's concurrence and dissent begin on page 23.

Porter, Member, concurring and dissenting:

Timeliness of the Charge

As to the threshold issue concerning the timeliness of the charge, I concur that the charge was timely filed within the six months charge filing period set forth in Government Code section 3541.5, and that service is not a required component of an effective filing under that statute.

In the instant case, the Charging Party filed the charge within the applicable six-month period but did not serve a copy thereof on the Respondent. While Government Code section 3541.5 proscribes the issuance of a complaint based upon such a charge when the alleged unfair practice occurred more than six months "prior to the filing of the charge," there is no reference in the statute as to any service of a copy of the charge on the Respondent within the six-month period. Nor is there in the general provisions of the Government Code (Gov. Code, secs. 5-24), of which EERA is a part, or in EERA's own general definition section (Gov. Code, sec. 3540.1), any definition of the term "filing" as meaning or including service.

In a procedure analogous to EERA section 3541.5, with respect to the timeliness of the commencement of civil actions, Code of Civil Procedure section 350 provides that, "An action is commenced, within the meaning of this Title [Of the Time of Commencing Civil Actions], when the complaint is filed." In such cases, the courts have held that the filing of the complaint

itself suffices to meet the timeline, and that service of a copy of the complaint and/or summons on the defendant/respondent is not necessary for the filing to be timely. (Code of Civ. Proc, sec. 350; Pimental v. City of San Francisco (1863) 21 Cal. 351; Waters v. Superior Court (1962) 58 Cal.2d 885, 891; Ray v. Industrial Accident Commission (1956) 146 Cal.App.2d 393, 397; and see Ingram v. Superior Court (1979) 98 Cal.App.3d 483, 495 (dis. opn.); 3 Witkin, Cal. Proc. (3d ed. 1985) Actions, sec. 506, pp. 531-532.)

In contrast, the applicable provision in the Agricultural Labor Relations Act (ALRA) which was enacted by the Legislature in the same year (1975) it enacted EERA,<sup>1</sup> prescribes that the alleged unfair labor practice must not have occurred more than six months "prior to the filing of the charge with the board and the service of a copy thereof upon the person against whom such charge is made. . . ." (Labor Code, sec. 1160.2, emphasis added.)<sup>2</sup>

Thus, we may not by interpretation or implication insert a service requirement into the six-month charge filing period delineated by Government Code section 3541.5. (Cadiz v.

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<sup>1</sup>**EERA:** Stats. 1975, ch. 961; ALRA: Stats. 3d Ex. Sess. 1975, ch. 1.

<sup>2</sup>AS noted by the majority, this additional requirement of service is also found in the National Labor Relations Act: 29 U.S.C, sec. 160, subdiv. (b).



Agricultural Labor Relations Board (1979) 92 Cal.App.3d 365, 371-372, hg. den.; Regents of the University of California v. Public Employment Relations Board & Laborers Local 1276, LIUNA, AFL-CIO (1985) 168 Cal.App.3d 937, 944-945; Bailey v. Superior Court (1977) 19 Cal.3d 970, 977-978; Estate of McDill (1975) 14 Cal.3d 831, 838.) Likewise, while this Board may implement EERA through the adoption of procedural regulations to effectuate it (Gov. Code, sec. 3541.3, subdiv. (g)), the Board may not promulgate or apply such a regulation so as to create a substantive change in EERA's provisions. (J.R. Norton Co. v. Agricultural Labor Relations Board (1979) 26 Cal.3d 1, 29; Harris v. ABC Appeals Board (1964) 228 Cal.App.2d 1, 6, hg. den.; Morris v. Williams (1967) 67 Cal.2d 733, 748; Whitcomb Hotel, Inc. v. Calif. Employment Commission (1944) 24 Cal.2d 753, 759; Calif. Welfare Rights Organ, v. Brian (1974) 11 Cal.3d 237, 242-243, cert. den. 419 U.S. 1022; Cadiz v. Agricultural Labor Relations Board (1979) 92 Cal.App.3d 365, 372-373, hg. den.) In this regard, PERB's regulations dealing with the filing of an unfair practice charge prescribe service of a copy of the charge, on the respondent. (Cal. Admin. Code, tit. 8, sec. 33615, subd. (b).) While it is appropriate to require service of the charge on the respondent in order to facilitate the processing of the charge and to apprise the respondent of the filing of the charge, the regulation may not be applied so as to necessitate service as an essential requirement for a timely

filing pursuant to Government Code section 3541.5.<sup>3</sup>

The Transfer or Contracting Out of Bargaining Unit Work

The District is alleged to have committed an unfair practice by either having transferred bargaining unit work to non-unit employees or by having contracted out/subcontracted such bargaining unit work. The ALJ found that the District and the Foundation did not constitute a "single employer," that the Foundation was not an "alter ego" of the District, and that the Foundation was a separate employer. The ALJ accordingly concluded that "there is no basis for deciding that the District's action in contracting with the Foundation amounted to a transfer of unit work to non-unit employees." Instead, the ALJ found it appropriate to characterize the District's action as "a subcontracting or contracting out of services."

My colleagues agree with the ALJ—and I concur—that there is no "single employer" or "alter ego" relationship between the District and the Foundation, and that the Foundation is a separate employer. The majority then asserts that since work previously performed by bargaining unit members (employed

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<sup>3</sup>Independent of section 3541.5, certain consequences may occur where service is not effected pursuant to PERB Regulation 32615. For example, the charge may not be processed until service is accomplished, or an adverse ruling in a subsequent evidentiary motion may result when the respondent can demonstrate prejudice due to the lack of service. However, since service is not a required component of a timely filing under section 3541.5, any question as to whether the respondent was prejudiced by the lack of such service is not germane to the timeliness issue under section 3541.5.

by the District) is now being performed by "non-unit employees" (employed by the Foundation) at the specific behest of the District, that "[s]urely this is contracting out in its most basic form."

PERB case law, in accord with private sector case law, establishes what constitutes an unlawful unilateral transfer of bargaining unit work to non-unit employees. An unlawful transfer occurs where an employer unilaterally transfers work done by its employees in one bargaining unit to "non-unit employees." Non-unit employees are defined as other employees of the employer who are either in another bargaining unit or who are not in any bargaining unit.<sup>4</sup> Since the Foundation is a

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<sup>4</sup>Rialto Unified School District (1982) PERB No. 209, pages 4-5 (transfer of counseling work from district employees in a certificated bargaining unit to district employees in a classified bargaining unit); Solano County Community College District (1982) PERB No. 219, pages 8-9 (transfer of off-campus and tutoring services from district employees in a classified bargaining unit to district employees in a certificated bargaining unit); Mount San Antonio Community College District (1983) PERB No. 334, pages 8-11 (transfer of chairperson work from district employees in a certificated bargaining unit to district employees who were not in any bargaining unit); Goleta Union School District (1984) PERB Decision No. 391, pages 19-20 (transfer of counseling work from district employees in a certificated bargaining unit to new district employees who were not in any bargaining unit); Eureka City School District (1985) PERB Decision No. 481, pages 14-15 (transfer of special education work from district employees in a certificated bargaining unit to district employees in a classified bargaining unit); State of California (Department of Developmental Service) (1985) PERB Decision No. 484-S, pages 4-5 (transfer of work from department employees in a psychiatric technicians' bargaining unit to department employees in a hospital workers<sup>1</sup> bargaining unit); Bldg. Material & Constr. Teamsters' Unit v. Farrell (1986) 41 Cal.3d 651, 660-661 (transfer of truck

separate employer, and there is no "single employer" or "alter ego" relationship whereby the Foundation's employees could be considered "non-unit employees" of the District, no unlawful transfer of bargaining unit work is established by the record in this case.

There being no unlawful transfer of bargaining unit work, the remaining issue is whether the District unlawfully "contracted out or subcontracted" bargaining unit work.<sup>5</sup>

Similar to an unlawful transfer of bargaining unit work, what constitutes improper "contracting out" or "subcontracting" is established by PERB case law, which is also in accord with

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driving work from city employees in a teamsters' bargaining unit to new city employees who were not in the teamsters' bargaining unit); Soule Glass & Glazing Co. v. NLRB (1st Cir. 1981) 652 F.2d 1055 [107 LRRM 2781, 2797-2799] ("single employer" case involving transfer of glass replacement work from bargaining unit employees in the "union" company to non-bargaining unit employees in the "non-union" company); Boeing Company v. NLRB (9th Cir. 1977) 581 F.2d 793 [99 LRRM 2847] (transfer of welding work from company employees in one bargaining unit to company employees in another bargaining unit); University of Chicago v. NLRB (7th Cir. 1974) 514 F.2d 942 [89 LRRM 2113] (transfer of custodial work from university's employees in one bargaining unit to university's employees in another bargaining unit); and Office & Professional Employees v. NLRB (D.C. Cir. 1969) 419 F.2d 314 [70 LRRM 3047] (transfer of auditing work, along with two company employees, from a bargaining unit to two new company "exempt employee" positions outside of bargaining unit).

<sup>5</sup>If there was an unlawful transfer, then there could be no "contracting out or subcontracting" as transfers are separate from and mutually exclusive of the concept of contracting out or subcontracting. (Bldg. Material & Constr. Teamsters' Union v. Farrell (1986) 41 Cal.3d 651, 661; Roseville Joint-Union H.S. District (1986) PERB No. 580, dis. opn., p. 13) fn 1.)

private sector case law. An unlawful "contracting out" or "subcontracting" occurs where an employer unilaterally takes bargaining unit work and contracts with and pays an independent contractor (e.g. another employer) for the independent contractor's employees to perform or supply such work.<sup>66</sup>

I cannot agree with my colleagues that the record before us demonstrates that the District unlawfully "contracted out" or "subcontracted" bargaining unit work.

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<sup>66</sup>Archoe Union School District (1983) PERB No. 360, pages 4, 6-7 (district contracted with and paid private firm to have the private firm's employees do custodial work which had been bargaining unit work of district employees); Oakland Unified School District (1983) PERB Decision No. 367, pages 3-4 (district contracted with and paid private "temporary help" agency to have the agency's employees perform secretarial and clerical work which was bargaining unit work of district employees); El Dorado Union High School District (1986) PERB Decision No. 564, pages 1, 18-20 (attached ALJ's proposed decision) (district contracted with and paid Greyhound Corporation for Greyhound's employees to do bus driving work which was bargaining unit work done by district's bus driver employees); Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 ~~L13 L.Ed.2d 233~~ (company contracted with and paid an independent contractor to do maintenance work at company plant, which had been bargaining unit work done by company's employees); AFC Industries, Inc. v. NLRB (8th Cir. 1979) 592 F.2d 422 [100 LRRM 2710] (company contracted with and paid another company to do part of trailer hitch work which was bargaining unit work of the first company's employees); United Auto Workers v. NLRB (D.C. Cir. 1967) 381 F.2d 265, 266 ~~[64 LRRM 2489] cert, den., 389 U.S. 857~~ (company contracted with and paid another firm to have firm's employees do "parking" work which had been bargaining unit work of company's employees); Westinghouse Electric Corp. (Mansfield Plant) (1965) 150 NLRB 1574 [58 LRRM 1257, 1258-1259] (company contracted with and paid various other entities for maintenance work and manufacturing work which the company's maintenance bargaining unit employees and manufacturing bargaining unit employees had performed).

First, the District could lawfully discontinue its offering and operation of the adult, noncredit, fee-based language courses. This it could do because such courses were not mandated by the State. Nor was it unlawful for the District to arrange for another entity to offer and operate such courses provided the District itself was not funding or paying the other entity. (Stanislaus County Department of Education (1985) PERB Decision No. 556, pp. 3-5 and 6-7, dis. opn.) Receiving community pressure for the continued offering of the fee-based courses at issue, the District trustees directed their superintendent to explore alternatives to the District's continued offering of such courses. Entities considered as potential providers of the courses included the city department of parks and recreation; the YMCA; the YWCA; and the Foundation. The District trustees ultimately requested that the Foundation offer the courses.<sup>7</sup>

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<sup>7</sup>Noteworthy in the record is the exchange between the District trustees when Trustee Grady moved to request the Foundation to offer the classes, and Trustee French seconded the motion:

Trustee French; I second with a question. I'd like to see the motion say that the District reinstate these foreign classes and that—the means by which—that it would be under the Foundation and/or various college courses.

Trustee Grady: Well, Mr. French, at the risk of losing my second, I would not accept the language because in view of the action

Second, the District did not pay or fund the Foundation to offer the courses. In fact, the contract between the District and the Foundation required payment by the Foundation to the District for the lease of facilities,<sup>8</sup> publication of the Foundation's courses in the District's schedule of classes and certain administrative support. The record indicates that the District, in fact, received \$10,570 from the Foundation for the services that it provided pursuant to the contract in connection with the Foundation's provision of classes from September to November 1983.

A somewhat similar situation arose in Fremont Union High School District (1987) PERB Decision No. 651 when, after certain nonmandated courses had been discontinued for a period of years,

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taken earlier, in view of the actions that have been taken throughout this Spring, the District is not taking any action whatsoever under Alternative 4 [requesting the Foundation to offer the classes] to reinstate these classes but is just informing the Foundation that it—we will provide any assistance that the District has as its--has available in order for the Foundation to offer classes to the students that were previously served by the District; but the District has made a--adopted a stance of cancelling the classes and the District cannot reinstate the classes without reversing all of its previous position.

<sup>8</sup>The District was actually subleasing facilities it had leased from the San Diego Unified School District. And since the Foundation, not the District, would be offering the courses on San Diego USD property, the Foundation was not under the same minimum student-age restrictions which San Diego USD had placed on the San Diego Community College District.

pressure arose in the community for the district to restore and offer the courses again. The Fremont district then went out and secured the private University of La Verne to offer and operate the courses, and in connection therewith contracted with the University of La Verne to lease district classrooms for the courses. As in the instant case, while the Fremont district sought out the University of La Verne to offer the courses, it did not pay or fund the University of La Verne to offer and operate the courses. In Fremont, this Board found no "contracting out" or "subcontracting." Although there may have been more indicia of limited "control" by the District in this case with respect to the choice and operation of the classes, such control did not amount to "ultimate control." (Fremont Union High School District (1987) PERB Decision No. 651, p. 19; and see Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 at 224, Stewart, J., cone.)

I would dismiss the charges.





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

After a hearing in Unfair Practice Case No. LA-CE-1905, San Diego Adult Educators, Local 4289, American Federation of Teachers/California Federation of Teachers, AFL-CIO v. San Diego Community College District, in which all parties had the right to participate, it has been found that the District violated Government Code sections 3543.5(a), (b), and (c) by failing to negotiate the decisions (and the effects of such decisions) to contract with the San Diego Community College District Foundation to provide foreign language courses that were formerly provided by the District's adult education faculty unit employees.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation; specifically with reference to the decision, and the effects of the decision, to contract with the San Diego Community College District Foundation, Inc. for the provision of teaching services formerly provided by members of the adult education faculty bargaining unit.

2. Denying to the San Diego Adult Educators, Local 4289, American Federation of Teachers/California Federation of Teachers, AFL-CIO, its right to represent unit members by failing and refusing to negotiate about matters within the scope of representation.

3. Interfering with employees represented by the San Diego Adult Educators, Local 4289, because of the exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without first providing the exclusive representative with notice and the opportunity to meet and negotiate about such matters.

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

1. Meet and negotiate with the San Diego Adult Educators Association, Local 4289, about the decisions of June 22 and August 22, 1983 (and the effects of these decisions), to enter into an agreement with the Foundation for the provision of foreign language classes that were formerly taught by unit employees until the parties reach agreement or exhaust the statutory impasse procedure.

2. Make the employees laid off August 22, 1983, whole for any loss of wages or benefits as a result of the unlawful unilateral change, from the effective date of the unilateral change until the expiration of the contract with the Foundation. Should the original contract have been extended or renewed, the back pay will continue through the succeeding contract terms.

3. Rescind any current contractual arrangement with the Foundation to provide foreign language courses that were contracted for on June 22, 1983 and August 22, 1983, until bargaining has been completed, either by agreement or until impasse procedures have been exhausted.

4. If, within one year of the date this Decision becomes final, the District again offers fee-based language classes, offer reinstatement to those employees who were placed on layoff status by action of the District board of trustees on August 22, 1983.

Dated: \_\_\_\_\_ SAN DIEGO COMMUNITY COLLEGE DISTRICT

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

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

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



SAN DIEGO ADULT EDUCATORS. LOCAL 4289.	)	
AMERICAN FEDERATION OF TEACHERS/	)	
CALIFORNIA FEDERATION OF TEACHERS.	)	
AFL-CIO.	)	
	)	Unfair Practice
Charging Party.	)	Case No. LA-CE-1905
	)	
V.	)	PROPOSED DECISION
	)	(4/28/86)
SAN DIEGO COMMUNITY COLLEGE DISTRICT	)	
	)	
Respondent.	)	
	)	

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Appearances: James M. Gattey. Attorney for San Diego Adult Educators Local 4289. American Federation of Teachers/California Federation of Teachers, AFL-CIO; Liebert. Cassidy & Frierson by Larry J. Frierson for the San Diego Community College District.

Before: W. Jean Thomas. Administrative Law Judge.

PROCEDURAL HISTORY

On December 21. 1983. the San Diego Adult Educators. Local 4289, American Federation of Teachers/California Federation of Teachers. AFL-CIO (hereafter Charging Party or SDAE) filed an unfair practice charge against the San Diego Community College District (hereafter Respondent or District).

The charge, as amended April 30. 1984, alleges that the District violated sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (hereafter EERA or Act)<sup>1</sup>

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<sup>1</sup>The Educational Employment Relations Act is codified at Government Code section 3540 et seq. Unless otherwise

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This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

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by discontinuing certain fee-based, non-credit foreign language courses taught by certificated unit employees represented by the SDAE and, thereafter, contracting with the San Diego Community College District Foundation, Inc., (hereafter Foundation) for the provision of some of the same courses formerly offered by the District's continuing education and adult program. It is further alleged that, prior to taking this action, the District failed to meet and negotiate with the SDAE as exclusive representative of the employees affected by this action and that the unilateral transfer of courses amounts to unlawful contracting out of services previously performed by bargaining unit employees.

On May 30, 1984, the Office of the General Counsel of the Public Employment Relations Board (hereafter PERB or Board)

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indicated, all statutory references herein are to the Government Code.

Section 3543.5 states, 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.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

issued a Complaint based on the amended charge. Respondent filed an Answer to the Complaint on June 25, 1984, raising several affirmative defenses, including allegations that the Charge was time-barred by the statute of limitations provision contained in section 3541.5(a)(I)<sup>2</sup>

An informal settlement conference conducted on June 29, 1984, failed to resolve the dispute.

Subsequent to the informal conference, Respondent filed a Motion to Dismiss Complaint (Summary Judgment) on the grounds that the charge was time-barred and that it failed to set forth facts constituting a violation of sections 3543.5(a), (b) or (c).

The Motion to Dismiss was orally argued by the parties at a pre-hearing conference held on August 31, 1984. On this same date the formal hearing scheduled for September 13 and 14, 1984, was continued, pending a ruling on the timeliness issue as a threshold jurisdictional question. A ruling on the Motion to Dismiss was issued October 11, 1984, rejecting the argument that the charge was time-barred by the statute of

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2section 3541.5(a)(1) states as follows:

(a) Any employee, employee organization or employer shall have the right to file an unfair practice charge, except that the board shall not . . . : (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . . .

limitations. In the ruling it was concluded that, although the charge was technically deficient at the time that it was filed with the PERB on December 21, 1983, that deficiency was subsequently cured by the Charging Party with no demonstrable prejudice or harm to the rights of the Respondent as a result thereof.

A hearing was conducted in this matter on January 28 and 29, 1985. Post-hearing briefs were filed and the case was submitted on May 1, 1985.

#### FINDINGS OF FACT

##### A. Background

The parties stipulated and it is found that the Charging Party is an employee organization and the exclusive representative of an appropriate unit of certificated employees of the District and that the Respondent is a public school employer as those terms are defined by the EERA. The SDAE was granted voluntary recognition in 1976 as the exclusive representative of a certificated bargaining unit of adult education instructors which includes, among others, "all full-time and part-time certificated adult faculty." The unit consists of approximately 1000 employees. The District is governed by a five-member board of trustees and its chancellor, who at the time of the hearing was Garland Peed.

Geographically, the District consists of three main college campuses -- San Diego City, Mesa College and Miramar College ~~wh~~ combined have four sep

At the time of the events giving rise to the instant charge, the parties were signatories to a collective bargaining agreement (hereafter CBA) which, by its terms, was in effect from July 1. 1981 to June 30. 1984. Article XXI of the CBA provided for reopening of renegotiations over salaries and any of the salary provisions and any two other articles selected by each party prior to the end of the contract years 1982 and 1983.

B. Discontinuance of Certain Adult Education Classes

On March 9. 1983. the District board of trustees adopted a resolution to discontinue approximately 14 classes taught on a non-credit, fee basis in the adult and continuing education program, including driver improvement and all Spanish, French and German language classes, and to decrease the number of employees in permanent positions requiring certification qualifications in adult education. This decision was made because the District board determined that the fee income from these courses was not sufficient to support their continuation. "Fee classes" are supported only by the student fees paid directly to the District, and not by apportionment funds from the State or elsewhere.

Following this decision, the District board listened to presentations by members of the public who presented petitions during the May 4, 1983, board meeting, asking that the board reconsider its action of March 9 cancelling the foreign language classes. The board then referred the matter to Chancellor Peed and requested that he develop a list of

alternative funding sources for the discontinued language classes for the board to consider at a future meeting.

At a special public meeting held on May 23, 1983, the board formally adopted a proposed decision recommending the termination of seven adult education faculty, pursuant to the board's March 9 decision. The board voted to decrease the number of employees in the adult education division by the equivalent of 4.1 full-time positions. The positions eliminated were filled by the seven instructors of fee-based Spanish, German and French languages classes. These instructors were all "contract" or tenured faculty. The driver improvement instructor was not terminated.

The remaining foreign language, fee classes, which were taught by temporary or hourly employees, were not eliminated. Those instructors of the fine arts, fee classes (which were also discontinued by board action on March 9) were reassigned to teach non-fee or credit-level classes in their respective subject areas.

Following this termination action, the board listened to additional public presentations concerning its March 9 decision. It then reviewed a report presenting four alternative funding sources for the discontinued foreign language classes. Part of the background material included for this docket (agenda) item was a summary of the District's cost of offering the discontinued courses using contract instructors. The cost per class was \$33-\$47 per hour. The



income from these classes, based upon a fee of \$1.25 per instructional hour per student (with a minimum of 15 enrollees per class), was \$18.75 per hour. The summary further stated that in order for the fees to support the program, either the minimum enrollment would have to be increased to 27-38 students per class or the fees would have to be increased to \$2.20-\$3.13 per hour (based on a minimum enrollment of 15 students). The four alternatives prepared by Chancellor Reed were: (1) providing the classes as college-level (credit) courses, (2) requesting that the city department of parks and recreations provide the courses under its operations, (3) using other agencies such as the YMCA or the YWCA and (4) using the San Diego Community College District Foundation, Inc.

The board then voted for alternative number 4 and directed the chancellor to inform the Foundation that the District wanted the Foundation to offer certain foreign language classes which the District had discontinued because of the high costs of such classes. The chancellor was asked to prepare contractual language to that effect in order to facilitate the provision of such classes by the Foundation.

At its board meeting of June 22, 1983, the District board of trustees reviewed and approved a proposed agreement between the District and Foundation which stated, in relevant part, as follows:

WHEREAS, the DISTRICT desires to enter into such an agreement with the FOUNDATION for the provision of

certain continuing education fee classes which have been discontinued by the DISTRICT due to the limited income and high cost of such classes;

NOW THEREFORE. THE PARTIES HERETO MUTUALLY AGREE as follows:

1. DISTRICT

The DISTRICT hereby agrees to provide services to the FOUNDATION as follows:

- a. Facility usage. Classes provided by the FOUNDATION in the disciplines covered by this AGREEMENT may be offered in DISTRICT-leased or owned facilities.
- b. Promotion. The DISTRICT will include the FOUNDATION classes in the DISTRICT'S class schedules and fliers which are disseminated to prospective students.
- c. Supervision. DISTRICT employees will provide on-site class supervision, assist in teacher selection and determination of class offerings, collect and deposit fees to specified accounts in accordance with FOUNDATION procedures, and provide other accounting and payroll supportive services so that funds may be accurately accounted for and instructors employed and paid.
- d. Security Services. The DISTRICT will provide as part of its normal security operations the same level of security provided to other classes and services on the site as if the the class were operated by the DISTRICT.
- e. Insurance. The DISTRICT will provide appropriate insurance coverage to insure the sites, security operations. DISTRICT personnel, etc. The facilities are to be maintained in a safe and usable condition.

2. FOUNDATION

The FOUNDATION shall provide the following services:

- a. Employees. The FOUNDATION shall provide appropriate instructional staff for each class.

- b. Accounting and payroll services. The FOUNDATION shall pay each instructor in accordance with the salary schedules of the FOUNDATION. All payroll services shall be provided by the FOUNDATION, including the issuance of checks, the filing of required State and federal reports, taxes, etc.
- c. Scheduling. The FOUNDATION shall provide the DISTRICT with the classes to be scheduled in a timely manner so that such classes can be publicized to meet DISTRICT publication deadlines on class schedules and fliers. Information to be included will be the fee, date, time and location of the class, and the name of the instructor.
- d. Insurance. The FOUNDATION will provide insurance for all appropriate liability, worker's compensation, and other required insurances for FOUNDATION employees and activities.

3. COMPENSATION

The FOUNDATION shall pay the DISTRICT \$7.00 (Seven Dollars) per class hour or fraction thereof of actual class meetings.

4. INDEMNIFICATION

FOUNDATION shall save and hold harmless DISTRICT and its officers, agents and employees from any liability, claims or causes of action resulting from its activities or those of its officers, agents or employees. DISTRICT shall save and hold harmless FOUNDATION and its officers, agents and employees from any liability, claims or causes of action resulting from its activities or those of its officers, agents, or employees.

5. TERM OF AGREEMENT

The term of this AGREEMENT shall be from June 22, 1983, until rescinded with 30 days' written notice by either party. Termination of the AGREEMENT will not affect the duties and obligations of either party as to instruction that has already commenced as of the effective date of termination, and as to that instruction, the AGREEMENT remains in effect until completion of the course.

This agreement contained a signature line for Chancellor Peed as the District representative.

At the District board meeting of August 3, 1983, a number of students and concerned citizens, including Fanny G. Miller, one of the Spanish instructors who was placed on layoff status on May 23, 1983, addressed the board concerning the cancellation of the fee classes in Spanish. Ms. Miller proposed, on behalf of the other adult faculty whose positions were terminated, that the District reconsider and reverse its decision of March 9 to eliminate the foreign language classes. During her presentation. Ms. Miller raised several questions about the validity of the Foundation as a corporation. The board referred these questions to the chancellor for a response and further discussion at a future board meeting.

On August 22, 1983. the board held another special meeting, at which time the questions raised at the August 3 meeting were publicly addressed. Following this discussion and some deliberation, the board voted to discontinue all remaining non-credit, foreign language classes offered through the continuing education program and to request that the Foundation include these classes in the agreement that was approved by the District on June 22, 1983. No explanation was offered in the record for this latter action by the board.

The parties stipulated that no contract between the District and the Foundation for the provision of the

discontinued foreign language classes, including the June 22, 1983, contract, was ever presented to the District by the Foundation.

C. The San Diego Community College District Foundation, Inc.

The Foundation was established sometime around 1973 or 1974 as a general nonprofit corporation under the California General Nonprofit Corporation Law. Chancellor Peed was involved with the development of this organization prior to the beginning of his employment with the District in 1976. The articles of incorporation and the bylaws of the Foundation were amended in June 1983 to change the status of the organization to a nonprofit, public benefit corporation pursuant to section 5310(b)(1) of the California Nonprofit Public Benefit Corporation Law. The stated purpose and objective of the Foundation is to assist and promote the educational activities of the District. The Foundation, which has no members, is governed by a five-member board of directors. According to the June 1983 amendments to the bylaws, each individual member of the Foundation board is to be designated by a member of the District board of trustees. Prior to the June 1983 amendment, it is unknown how the board members were selected. The Foundation board formerly met on a monthly basis. The amended bylaws provide for quarterly meetings.

Chancellor Peed has held various administrative and elective positions with the Foundation since its inception. Until mid-June 1983 he served as president of the Foundation.

The administrative offices of the Foundation are located in the same building and on the same floor as the District's administrative offices. The Foundation's chief administrator is an executive director, who at the time of the hearing was Hollie Elliott. The Foundation and the District have a contractual agreement whereby the Foundation rents office space from the District and the District pays the lessor. The Foundation owns some office equipment and pays the District for the use of some of its equipment. It also pays the District for certain other services, including the rental of various District facilities for its educational activities.

As of January 1985, the Foundation did not have a separate telephone listing for its administrative offices. Instead, it shared the telephone number used by Chancellor Peed's office.

The Foundation has approximately 20-30 employees who are not involved in instructional activities. It has its own personnel policies, some of which are patterned after the District personnel policies and were adopted following the June 1983 amendments to the bylaws. The Foundation funds are managed by a bank which administers the payroll for the Foundation's employees. The Foundation has its own checking and investment accounts.

The Foundation first began offering educational programs in the early 1980's. In 1982, for example, the District and the Foundation entered into a contract for the Foundation to

perform special coordination services for the District's contract instructor program with the United States Navy. The District and the Foundation also entered into a five-year contract in 1982 for the District to provide instruction and grant certificates and other recognition for the Foundation and its students in various subject areas, as provided for in the California Education Code section 18300 et seq. The Foundation also provided a management training program for the San Diego Zoo management personnel, offered programs in such areas as nursing, real estate, vocational rehabilitation, mobility training for the mentally retarded, a program for United States Marine Corps personnel in Yuma, Arizona, and a high school diploma program for United States Navy personnel stationed throughout the Pacific Ocean area.

The salaries of the instructors and/or consultants for these courses were either negotiated on an individual basis or based on a schedule established by the Foundation.

Following the District's decision on May 23, 1983, to contract with the Foundation for the discontinued foreign language classes. Chancellor Peed met with the District's site deans (administrators) on June 2, 1983. concerning the planned operation of the continuing education classes that would be offered by the Foundation during the 1983 summer session. That meeting focused on the involvement of the deans in providing "on-site supervision" for the Foundation. Specifically, the

site deans were to be responsible for assessing the qualifications of applicants and selecting the regular and substitute teachers for the foreign language classes. They were also to review curriculum content of the class offerings to insure that a certain level of quality in the instruction was maintained. The deans were also to be responsible for arranging substitute teacher coverage in event that a regular teacher was unable to perform. No evidence was presented concerning whether the site deans had responsibility for evaluating, in any way, the performance of the teachers hired to teach the Foundation's foreign language classes. The site deans were also responsible for collecting the student fees for submission to the Foundation. Chancellor Peed testified that responsibilities of the site deans, as outlined above, were what he viewed as the meaning of the "on-site supervision" services to be provided for the Foundation by the District.

Approximately one week following this meeting, the District continuing education office notified inquiring members of the public that the foreign language classes which had been discontinued by the District would be offered by the Foundation during the summer of 1983.

From June 20 to July 29, 1983, the Foundation offered six Spanish and French classes at various continuing education centers. Two former District adult education foreign language



instructors. Ms. Miller and Carlos Herrera, were among those individuals hired by the Foundation to teach the summer classes referenced above.

In the 1983 fall session, the Foundation offered seven foreign languages courses, including Spanish, French and German, at six of the District's continuing education centers. Brigitte Halvorson, a former contract instructor who taught German, was hired by the Foundation to teach a course in the fall 1983 session. It is not known if any hourly instructors employed by the District prior to August 1983 were subsequently hired by the Foundation to teach classes in the 1983-84 school year.

In early 1984 the District received \$10,570 from the Foundation for the services that it provided, i.e., use of facilities, publication of the classes in the District's class schedules and administrative support (for the fall session classes which were taught from September to November 1983).

D. 1983 Negotiations and Meetings Between SDAE and the District

In accord with the reopener provisions of Article XXI of the CBA, the parties commenced negotiations for the 1983-84 school year in early 1983. The SDAE submitted its proposals to the District sometime in late January or early February 1983. SDAE President John Sullivan, III, was also the chairperson of the negotiating team. The SDAE team consisted of six members of the bargaining unit. Sullivan was also a member of the

District executive council, a body which regularly meets with the chancellor prior to a scheduled District board meeting to review the board's docket items which will be considered at the forthcoming meeting.

The chief spokesman for the District negotiating team was Cecil Hannan, the director of administrative services and the person responsible for the District's employer-employee relations. The parties met for negotiations an average of two times per month between March and November 1983.

These negotiations culminated in an agreement that was finally ratified by the parties in December 1983. with terms retroactive to July 1. 1983. At no time during this period of negotiations did either party make a specific proposal to the other to negotiate over any matters related to the District's decisions to eliminate the foreign language courses, to lay off instructors affected by these decisions, and to subsequently contract with the Foundation to provide the discontinued courses.

In mid-March 1983 Sullivan was contacted by 17 members of the bargaining unit concerning the layoff notices that they had received from the District in connection with the District's March 1983 decision to discontinue certain fee-based adult education classes. In April and May 1983 the SDAE represented some of these unit members in layoff hearings.

Sullivan was present as an SDAE representative at the May 23, 1983, District board meeting when the board of trustees took final action to approve unit member layoffs, to reduce unit positions and to contract with the Foundation for the provision of its discontinued foreign language classes. No evidence was presented that Sullivan or any other SDAE representative registered a protest or objection to the board at that meeting about the contracting-out decision.

Sometime in late June 1983 Sullivan went to see Hannan about the District's May 1983 layoff action. Sullivan and Hannan met briefly and then agreed to meet again and discuss the matter more fully with Chancellor Peed and Raoul Martinez, SDAE's grievance chairperson.

Sullivan, Hannan and Peed met on July 20, 1983, without Martinez who was unable to attend because of another commitment. The discussion during this meeting centered on the feasibility of the District's reinstating the discontinued classes on a different financial basis than before and reinstating the teachers who were on layoff. No specific agreement or commitment was reached at the July 20 meeting except for some "understanding." according to Sullivan, that there would probably be another meeting on this subject. However, no definite date or time was set. No mention was made during this meeting that the District was considering the possibility of eliminating the remaining fee-based foreign

language classes and asking the Foundation to also offer these classes.

Sullivan attended the District executive council meeting that was held prior to the board's special August 22, 1983. meeting. However, there was no discussion at this meeting that the board would be considering a proposal to discontinue the remaining fee-based foreign language classes in the continuing education program.

Following the August 22 board action, SDAE did not meet, negotiate or discuss with the District the Board's decision of August 22 or the effects of this decision. Sullivan testified that SDAE decided not to pursue the matter for two reasons. First, SDAE leadership felt that after the August 22 meeting there was a change in the attitudes and feelings of the parties regarding informal resolution of the issue, i.e., both sides seemed less receptive. Thereafter, their differences seemed to focus more on personalities than issues. Secondly, the SDAE felt that there was inadequate time between the August 22 board action and the commencement of the fall 1983 semester to effect any change of the board's actions.

Between March and November 1983, SDAE filed no complaints or grievances concerning either the June 22 or the August 22 board decisions to contract with the Foundation for teaching services.

E. Relevant Contract Language

Article II, sections 2.4 and 2.11. and Article III, section 3.2 of the CBA obligated the District to provide SDAE with two copies of all board docket materials, including all action items that the board would be considering at its next meeting. Sullivan was one of the SDAE representatives designated to receive board docket materials and regularly did so.

Article XVIII (Reduction in Force) of the CBA contains provisions related to the layoffs of unit members and their rights to reduction leave and reinstatement.

There is no language in the agreement pertaining to unit work or the transfer or contracting out of work or services performed by unit employees.

ISSUES

1. Is the charge barred by the six-months statute of limitations established by subsection 3541.5(a)(1)?
2. Should the District and the Foundation be considered a single employer?
3. If they do not have single employer status, is the Foundation a public school employer under EERA?
4. Did the District, in contracting with the Foundation for the provision of its discontinued classes, engage in either a unilateral transfer or contracting out of bargaining unit work?
5. Did SDAE waive the right to negotiate over the District's decision to contract with the Foundation?

CONCLUSIONS OF LAW

A. The Charge is not Time-Barred by the Statute of Limitations Provision of Section 3541.5(a)(1)

During the hearing and in its post-hearing briefs, the Respondent made a motion for reconsideration of the order denying Respondent's motion to dismiss complaint on the grounds that this charge is time-barred by the statute of limitations provision of section 3541.5(a)(1).<sup>3</sup>

In its original motion Respondent argued that in accord with PERB Regulations sections 32140 and 32615,<sup>4</sup> the filing of an unfair practice charge is Procedurally defective until there has been effective service on all opposing parties has been obtained. In this case the Charging Party filed the original unfair practice charge with the PERB on December 21, 1983, one day before the six-months statute of limitations expired. However, it did not serve a copy of the charge on the Respondent until January 18, 1984, which was 28 days after the filing date.

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<sup>3</sup>Subsection 3541.5(a)(1) states as follows:

- (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
  - (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . . .

<sup>4</sup>PERB Rules and Regulations are codified in the Cal. Admin. Code, title 8, part III. section 31001, et seq.

Hence, Respondent argued, the charge was not properly "filed" within the statutory time period and was thus time-barred by the requirement of subsection 3541.5(a)(1).

In the order issued by the undersigned, it was concluded that although the charge was technically deficient at the time it was filed with the PERB, the deficiency was subsequently cured by the Charging Party with no demonstrable prejudice or harm to the rights of the Respondent as a result thereof. This ruling was made because under the PERB procedure utilized for processing an unfair practice charge. Respondent had both notice of the charge and an opportunity to respond to the allegations prior to any significant action being taken by the PERB, including the decision to issue the complaint. Since, in this case. Respondent suffered no denial of its due process rights by the initial delay in service, it was deemed reasonable and permissible to conclude that the processing of this charge was not barred by the statute of limitations provision of EERA nor by PERB's administrative interpretation of its own regulations.

In its motion for reconsideration. Respondent argues that prejudice need not be shown in determining the application of the statute of limitations. In support of this contention. Respondent cites recent private sector case law applying the statute of limitations provision of section 10 (b) of the National Labor Relations Act (hereafter NLRA) where the court

of appeal held that a "hybrid" action involving claims of a breach of contract and duty of fair representation, though filed within the six-month statute of limitations, was not served on the parties within that time. In a "choice of law" decision, the court determined that section 10 (b) of the NLRA governed the action and required in "intent, spirit and plain language" that the complaint be both filed and served within the six-month limitations. Simon v. Kroger (11th Cir. 1984) 743 F.2d 1545 [117 LRRM 2700]

This case is distinguishable from the Simon case. Simon involved a single claim presenting both a federal and a state cause of action which were each governed by different statutes of limitations. In deciding on the applicable statute of limitations for the claim, the court relied on the "Del Costello" rule adopted by the United States Supreme Court in a case factually similar to Simon. (See Del Costello v. Teamsters (1983) 462 U.S. 151 [113 LRRM 2737].) Del Costello and Simon are clearly applicable in the case, where a "hybrid" claim presents a question with respect to the appropriate statute of limitations to be applied. However, the case does not present a "hybrid" claim. This charge arises under a State statute -- the EERA. The applicable statute of limitations governing this charge is provided by the EERA and the relevant interpretations of this statute by PERB.

For the same reasons that the original motion to dismiss was denied, the motion for reconsideration of that order is



also denied. The instant charge was not time-barred by the six-months statute of limitations of EERA. Respondent's renewal of its motion to dismiss on this ground is denied.

B. The Foundation Is Not an "Alter Ego" of the District; the District and the Foundation Are Not a Single Employer; the Foundation is Not an Employer Under EERA

SDAE argues that the operations of the District and the Foundation are so closely interrelated as to warrant a finding that they constitute a single employer for collective negotiations purposes. SDAE says that the Foundation is, in effect, the "alter ego" of the District. Thus, the agreement between the District and the Foundation whereby the Foundation would teach classes formerly taught by District employees should be viewed as a unilateral transfer of unit work to non-unit employees, without prior notice to SDAE or an opportunity for SDAE to meet and negotiate over the propriety of this action.

The District maintains that the Foundation is a separate entity that is not a public school employer within the meaning of EERA subsection 3540.1(k).<sup>5</sup> The District further argues that the Foundation is not within PERB's jurisdiction since it

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5subsection 3540.1(k) states that,

"Public school employer" or "employer" means the governing board of a school district, a county board of education, or a county superintendent of schools.

is neither an auxiliary organization created by the District<sup>6</sup> nor is it subject to statutory control or regulation by the District. The Respondent contends that the only obligations between the District and the Foundation arise from the terms of the contract between them covering the disputed foreign language classes.

Before a conclusion can be made about the legal effect of the contract that the District and the Foundation made in June and August 1983, it is important to examine the nature of the relationship that exists between these two entities.

This opportunity is taken to distinguish between the concepts of "single employer" and "alter ego" status because it is evident from the Charging Party's arguments during the hearing and in its post-hearing brief that the two terms have been used interchangeably. It is unclear whether Charging Party views the concepts as alternative theories of attack or actually considers them to be synonymous. In any event, regardless of which doctrine is applied to the facts of this case, it cannot be concluded that the District and the Foundation are one employer.

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<sup>6</sup>California Education Code, section 72670 et seq. authorizes the governing board of a community college district to establish auxiliary organizations for the purpose of providing supportive services and specialized programs for the general benefit of its college or colleges. The District has auxiliary organizations, for example, which operate the food services and the student book stores.

1. Alter Ego Argument

SDAE makes its "alter ego" theory argument without citing any statutory or case law in support thereof.

There is no PERB precedent regarding this doctrine. As is true with many labor law concepts, the "alter ego" theory has been developed primarily in the private sector. The doctrine was developed by the National Labor Relations Board (hereafter NLRB) to prevent employers from evading obligations under the NLRA merely by changing or altering their corporate form. Alter ego is applied, when appropriate, to two nominally separate business entities as if they were a single continuous employer. (Alkire v. NLRB (4th Cir. 1983) 716 F.2d 1014 [114 LRRM 2180]) To determine whether application of the doctrine is appropriate, the circumstances surrounding a change in corporate form must be examined to be determined whether the change resulted in a "bona fide discontinuance and a true change of ownership or was merely a "disguised continuance of the old employer." See NLRB v. All Coast Transfer, Inc. (6th Cir. 1986) 780 F.2d 576 [121 LRRM 2393], citing Southport Petroleum Co. v. NLRB (1942) 315 U.S. 100 [9 LRRM 411].

The NLRB has stated that it will find "alter ego" status "where the enterprises have one substantially identical management, business purpose, operation, equipment, customers and supervision, as well as ownership." See Crawford Door Sales Co. (1976) 226 NLRB 1144 [94 LRRM 1393]. If it is determined that the former and present employer are, in

reality, the same or substantially identical entity, then the predecessor's labor contract is binding upon the new employer.

This latter point is the basis for SDAE's argument that the Foundation is the "alter ego" of the District. It asserts that since the District and the Foundation are, in reality, substantially identical entities, the Foundation should be bound by the terms of the CBA between the District and the SDAE with respect to hours, wages and other terms and conditions of employment of its employees who are performing unit work formerly provided by employees of the District.

The threshold linkage establishing alter ego status is a showing of common ownership and control between the predecessor entity and the successor entity. In this case there is clearly no indication of common ownership. The District is a public school employer as defined by the EERA and the Foundation is a nonprofit, public benefit corporation established under the State Corporation Code. The Foundation does not appear to fall within the meaning of an "auxiliary organization" as defined by Cal. Ed. Code, section 72670. The District and the Foundation are governed by two separate governing boards. There is no evidence of common membership on the two boards. The governing board of the District operates pursuant to numerous powers conferred by the California Education Code.<sup>7</sup> The governing

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<sup>7</sup>see Education Code section 931 et seq.

board of the Foundation operates on the basis of powers granted by its articles of incorporation and its bylaws. The District and the Foundation have separate administrative personnel. Except for the presidency of Chancellor Peed, which ended in mid-June 1983, there is no evidence that any employees of the District were concurrently employed by the Foundation.

Although it is acknowledged that Chancellor Peed helped establish the Foundation and, over the years, has held various administrative and elective positions with the organization, this fact alone does not establish common ownership between the District and the Foundation.

There is also insufficient evidence to make a finding that there is common control between the two entities. The District and the Foundation have separate administrative personnel. There is no evidence that the District and the Foundation exercised common control over their respective personnel programs or the adoption of policies by the governing boards. Furthermore, there is no evidence of interchange of employees between the District and the Foundation which would demonstrate that these entities are so closely related that they exercise mutual control over the employees of the District and the Foundation. Nor can it be said that the terms and conditions of employment are the same for the employees of the District and the Foundation as to demonstrate that there is common control in the day-to-day operations of the Foundation and the District. (See Crawford Door Sales Co... supra.)

It is therefore concluded that no alter ego status exists between the District and the Foundation.

2. Single Employer Argument

As an alternative argument. SDAE contends that the District and the Foundation should be regarded as a single employer for collective bargaining purposes and. for this reason. PERB should find that the District and the Foundation engaged in an unlawful unilateral transfer of unit work to non-unit employees.

The "single employer" concept reflects a judgment that two or more business entities may properly be considered as one for various statutory purposes.<sup>8</sup>

The PERB has previously considered the question of whether two or more legal entities constituted a single school employer. See Joint Powers Board of Directors Tulare County Organization for Vocational Education. Regional Occupational Center and Program (1978) PERB Decision No. 57; Fresno Unified School District (1979) PERB Decision No. 82; Paso Robles Union School District and San Raphael City High School District

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<sup>8</sup>The term "single employer" is distinct from the term "joint employer." Even though the terms are used almost interchangeably, the NLRB distinguishes between the two. Joint-employer cases are usually marked by the absence of common ownership of the enterprises involved and the effective control of one entity over the working conditions of the employees of another entity. (See Morris, The Developing Labor Law. (2d Ed. 1983. Vol II, p. 1444, citations omitted.) See also Turlock School Districts (1977) EERB Order No. Ad-18, at p. 16. (Prior to January 1, 1978. PERB was known as the Educational Employment Relations Board or EERB.)

(1979) PERB Decision No. 85 and Turlock School Districts (1977) EERB Order No. Ad-18. In Turlock and Fresno, the Board applied the Broadcast Service test employed by the NLRB for determining single employer status. (See Radio and Television Broadcast Technician's Union, Local 1264 v. Broadcast Service 380 U.S. 255 [58 LRRM 2545]).

The Broadcast Service test involves the examination of four factors: (1) interrelation of operations; (2) common management, (3) centralized control of labor relations and (4) common ownership or financial control. There is no established rule about the amount of weight that is attached when applying each of these four elements to a particular case. However, Charles Morris, the well-known labor law expert notes that,

. . . single-employer status does not require the presence of all four criteria, but depends upon all the circumstances of the particular case. However, certain factors carry more weight than others. Common control of labor relations has been described as a critical factor, while common ownership is least important. See Morris, The Developing Labor Law, supra, p. 1442.

In the Turlock case the Board analyzed all four criteria and determined that the two school districts in question were separate employers within the meaning of EERA. In Fresno the Board again applied the Broadcast Service test to determine whether the District and a private bus company which provided transportation for some District pupils were a single employer for jurisdictional purposes. In that case, the Board found

that the District and the bus company were separate entities and that the bus company was not a public school employer within the meaning of the EERA, nor was the District considered to be the employer of the bus company's drivers. In Paso Robles-San Rafael, the Board did not apply the Broadcast Service test. Instead, the Board said that the critical factors in determining single employer status in that instance were separate economic status and exclusive policy-making authority. The Board, while not expressly rejecting the Broadcast Service standard in favor of the test applied in Paso Robles, still found that the high school districts in question were not single employers for collective bargaining purposes.

The Broadcast Service standard will be applied to the facts of this case. It appears that there is some interrelation of operations between the District and the Foundation. In Fresno, for example, the Board found interrelation of operations in the District's involvement with the pickup schedule, but held that the designation of routes and pickup time by the District did not alter the independent nature of the bus company.

By analogy here, it is noted that the District does have control over the scheduling of the foreign language classes presented by the Foundation. The District's involvement includes advertising of the classes in the District's class schedules and a role in determining which classes are to be presented. Additionally, security at classroom sites is provided by the District. However, the existence of this



interrelation of operations is not enough, in and of itself, to determine that a single employer relationship exists.

There is also some evidence of common management between the District and the Foundation. Just prior to the date that the District and the Foundation entered into the contract concerning the discontinued foreign language classes. Chancellor Peed was the president of the Foundation. Chancellor Peed's home address is the address of Foundation's corporate office. The Foundation's administrative or operating offices are located in the same building and on the same floor as the District administrative offices. The telephone number for the Foundation's administrative office is the same as that for Chancellor Peed's District office.

While the requirements of common management seem to be squarely met. it is important to note that PERB has disregarded common management as being significant in determining single employer status. In Paso Robles-San Rafael, the Board held that an elementary school district and an secondary school district should not be considered a single employer, even though the district shared administrative employees, including the superintendent and a common administration which recommended hirings and negotiated on behalf of both districts.

Centralized control of labor relations is perhaps the most critical factor in determining single employer status. In this

case, it is difficult to determine to what extent the District and Foundation have centralized control of labor relations. Although the Foundation has its own personnel policies, salary schedules and payroll procedures, the District "assisted" in the hiring of Foundation employees who were to teach the foreign language classes. It is unclear from the facts exactly what "assist" means. Although it is evident that the District's site deans were involved in the initial interviewing of the instructors selected by the Foundation to teach the foreign language classes, the facts do not indicate what responsibility the site deans had, if any, for the actual hiring, promotion, evaluation or termination of these employees.<sup>9</sup> . Additionally, there is no indication that the

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<sup>9</sup>In Prospect Lefferts Garden Neighborhood Assoc. (1984) 269 NLRB 114 [116 LRRM 1072], the NLRB held that a nonprofit corporation and its association members were not a single employer where the corporation had performed only paper work functions in the hiring process of employees by member organizations. In this case the nonprofit corporation, which developed programs and advocacy on behalf of its members (25 neighborhood low income housing associations), recommended and referred eligible CETA workers to its members and set up interviews for interested members. The NLRB found that the corporation did not have centralized control of labor relations because it did not participate in the screening, hiring or firing of employees.

Conversely, in North American Soccer League v. NLRB (5th Cir. 1980) 613 F.2d 1379 [103 LRRM 2796], the court held that a single employer relationship was present between a league and its constituent soccer clubs. The court found that the league "exercised a significant degree of control over the selection, retention and termination of players." In addition, the league board of directors was composed of one representative from each constituent club.

District is in any way involved in any contract negotiations or grievance handling that might involve Foundation employees.

Although there is evidence that the District site deans were also involved in "supervising" the foreign language classes that were to be taught, the supervision appeared to be more an oversight function to insure that the classes were actually taught as scheduled and that the Foundation's use of District facilities was in compliance with District policy. While it is fairly evident that the Foundation establishes the working conditions, assignments, hours, wages and benefits for the employees hired to teach the foreign language classes, it is less clear what impact the District's "supervision" has in these areas beyond that described above. Further, there is no evidence whatsoever that the District has any involvement in the labor relations matters of other Foundation employees. For these reasons, therefore, it is found that there is no common control of labor relations between the District and the Foundation.

The fourth criteria, common ownership or financial control, is also not present in this case. The Foundation clearly has separate control over its financial operations. It establishes the tuition fee to be charged for its courses, sets the salary of its employees, has its own bank accounts and payroll procedures, and submits its own state and federal tax statements and any other financial reports that are required. There is no evidence that the District has any involvement with

this aspect of the Foundation's operations. Although the District collects tuition fees for the foreign language classes presented by the Foundation, it turns this money over to the Foundation for processing.<sup>10</sup> In this case it is determined that the District serves as a conduit for the funds that it collects for the Foundation. The collection or channeling of funds, alone, is not significant in determining financial control. Additionally, here it does not alter the relationship between the Foundation and the District. For this reason it is concluded that common ownership or financial control is not present.

In summary, it has been found that two of the four criteria in the Broadcast Service test are satisfied in this case. However, under PERB precedent where the test has been applied, it appears that the Board does not consider these two factors -- interrelation of operations and common management -- to be significant enough to establish a single employer relationship. Even if the Paso Robles standard -- separate economic status and exclusive policy-making authority -- is applied to these facts, it cannot be found that these criteria are met. Thus, it is concluded that no single employer relationship exists between the District and the Foundation.

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<sup>10</sup>In Prospect Lefferts Garden Neighborhood Assoc., supra, the association received CETA funds to pay CETA workers employed by member organizations. However, the association was viewed as a conduit for the funds and, as such, the relationship between the parties remained separate.

3. The Foundation is not An Employer under EERA

Having now determined that the District and the Foundation do not have a single-employer relationship, it is further appropriate to decide whether PERB has any basis for asserting jurisdiction over the Foundation and its employees who are involved in teaching the disputed foreign language classes.

Section 3540.1(k) defines a public school employer as follows:

"Public school employer" or "employer" means the governing board of a school district, a school district, a county board of education, or a county superintendent of schools.

Subsection 3540.1(j) defines a public school employee as:

. . . any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

The Foundation is a nonprofit corporation whose primary objective and purpose is to assist and promote educational activities of the District. While it is evident that the District and the Foundation have had contractual relationships since at least 1982. there is no evidence that the Foundation is an instrumentality or an auxiliary of the District as the latter term is statutorily defined. From the record, it appears that the Foundation does not fall within any of the specifically enumerated categories of public employer as defined by the Act and is. therefore, not a public school

employer.<sup>11</sup> For the same reason, the employees of the Foundation who teach foreign language classes cannot be considered "public school employees" as defined in the EERA. Thus, PERB lacks authority to assert jurisdiction over the Foundation and its employees concerning the Foundation's provision of the foreign language classes that were discontinued by the District in March and August 1983.

C. The District's Agreement with the Foundation for the Provision of the Discontinued Foreign Language Classes Amounted to a Unilateral Removal of Unit Work

As stated earlier. SDAE argues that since the Foundation is an alter ego of the District, the agreement between the District and the Foundation for the Foundation to provide certain discontinued foreign language classes formerly taught by unit employees should be viewed as an unlawful unilateral transfer of unit work to non-unit members.

The District counters this claim by maintaining that it neither contracted out for services nor transferred unit work to non-unit employees. Consequently, there was no obligation to negotiate over the decision to contract with the Foundation regarding the courses in question. Instead, the District asserts that it exercised its management prerogative to eliminate a service and lay off affected employees. Its subsequent role in procuring foreign language courses for interested students was limited to responding to community

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<sup>11</sup>See Fresno Unified School District, *supra*, at pp 3-4.

concerns, identifying alternatives to District-supplied services, and then, once an acceptable alternative was identified, to contract with that body, as a an independent entity, to ensure that community members continued to receive a quality product which was both convenient and affordable. Additionally, the District argues that since its conduct with the Foundation did not involve either contracting out or transferring of bargaining unit work, it did not violate any of the District's obligations under the EERA.

The main issue here is how to construe the District actions on June 22, 1983, and again on August 22, 1983, when the District board voted to expand the contract between the District and the Foundation to include the remaining fee-based foreign language classes that were offered by the District's continuing education program.

The terms "contract out or subcontract" and "transfer" of work have also been carried from the private sector to public employment. Although no single definition of "subcontracting" or "contracting out" exists, a review of NLRB cases indicate that the term normally relates to the use of personnel outside a plant to perform work previously performed by employees in the bargaining unit.<sup>12</sup> "Transfer of work" cases normally

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<sup>12</sup>see Fibreboard Paper Products Corp. v. NLRB (1964) 379 U.S. 203 [57 LRRM 2609]; Westinghouse Electric Corp. (Mansfield Plant) (1965) 150 NLRB 1574 [58 LRRM 1257]; First National Maintenance Corp. v. NLRB (1981) 452 U.S. 666 [107 LRRM 705].

involve determining whether the unit or persons performing work still under the control of the employer had jurisdiction to

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perform the work in dispute.

PERB has identified employer actions to contract out services or to transfer work from one bargaining unit to another as distinct subjects and has held that both decisions (as well as the effects of such decisions) are negotiable.

(See Rialto Unified School District (1982) PERB Decision No. 209; Solano County Community College District (1982) PERB Decision No. 219; Arcohe Union School District (1983) PERB Decision No. 360 and Oakland Unified School District (1983) PERB Decision No. 367.)

Although subcontracting of unit work is not specifically enumerated as a scope item in section 3543.2,<sup>14</sup> the PERB has applied the Anaheim test of negotiability to the subject and

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<sup>13</sup>Boeing Company (1977) 230 NLRB 696 [96 LRRM 1355], enf. denied (CA 9 1978) 581 F2d 793 [99 LRRM 2847]; University of Chicago (1974) 212 NLRB 190 [86 LRRM 1073], enf. denied (CA 9 1975) 514 F2d 942 [89 LRRM 2113]; Office and Professional Employees v. NLRB (DC Circ. 1969) 419 F2d 314 [70 LRRM 3047], enfd. (1968) 168 NLRB 677 [67 LRRM 1029].

<sup>14</sup>Section 3543.2 provides in pertinent part as follows:

- (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits . . . . leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be



determined that subcontracting of unit work is within scope under EERA. The basis for this finding is that subcontracting,

. . . is a subject logically and reasonably-related to wages, hours, and transfer and promotional opportunities for incumbent employees. . . . Actual or potential work is withdrawn from unit employees, and wages and hours associated with the contracted-out work are similarly withdrawn. Further, such diminution of unit work weakens the collective strength of employees in the unit and their ability to deal effectively with the employer. Such impact affects work hours and conditions, and thus is logically and reasonably related to specifically enumerated subjects within the scope of representation. Arcohe Union School District, supra, pp. 5-6.

In examining this case, it is concluded that the District's contested actions more closely resemble a contracting out of services than a transfer of work from one bargaining unit to another. It was determined above that the Foundation is not the alter ego of the District nor do the two entities have a single-employer relationship. Therefore, there is no basis for deciding that the District's action in contracting with the Foundation amounted to a transfer of unit work to non-unit employees. Rather, it is appropriate that this action should be characterized as a subcontracting or contracting-out of services.

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used for the evaluation of employees,  
organizational security . . . . procedures  
for processing grievances . . . . and the  
layoff of probationary certificated school  
district employees . . . .

### Unilateral Action

An employer commits an unfair practice in violation of its duty to bargain in good faith when it unilaterally makes a change in the terms and conditions of employment of unit employees within the scope of representation without notifying and affording the employee organization an opportunity to bargain. Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94; San Francisco Community College District (1979) PERB Decision No. 105.

An unlawful unilateral change will be found where the charging party proves, by a preponderance of evidence, that an employer unilaterally altered an established policy. Grant Joint Union High School District (1982) PERB Decision No. 196. The nature of existing policy is a question of fact to be determined from an examination of the record as a whole. It may be embodied in the terms of a collective agreement (Grant supra) or, where a contract is silent or ambiguous as to a policy, it may be ascertained by examining past practice or bargaining history. Marysville Joint Unified School District (1983) PERB Decision No. 314; Rio Hondo Community College District (1982) PERB Decision No. 279.

It should be clarified here that this charge does not challenge the District's original decision in March 1983 to eliminate certain fee-based foreign language classes, to lay

off unit employees who taught the classes and eliminate positions from the unit. The right to determine whether there was insufficient work to justify the existing number of employees or insufficient funds to support the work force is a matter of fundamental managerial concern which is outside the scope of representation. See Healdsburg Union High School District (1984) PERB Decision No. 375. and Newman-Crows Landing Unified School District (1982) PERB Decision No. 223 at p. 13. Although the decision to initiate a layoff is within the managerial prerogative, bilateral negotiations are required as to the effects and implementation of such decision. (Healdsburg Union High School District, supra.)

The evidence discloses that the CBA had a provision pertaining to reduction in force, layoff procedure and reinstatement rights. Additionally, it is shown that the layoffs initiated in March 1983 were carried out in accord with the relevant contract provisions and was therefore lawful under the Act.

However, the District's actions on May 23, 1983, following the implementation of its March 1983 layoff decision, show that a unilateral decision was made to contract out services that had been performed by unit employees and which the District had earlier determined to discontinue.

Contrary to the District's assertion that it relinquished any responsibility for the provision of these courses when it announced in March 1983 that it was discontinuing certain

courses, the record shows that it was the District who took the initiative to consider alternative sources for funding teaching services that had traditionally been provided by its own employees. Even though the board docket for May 23, 1983, indicated that the board would be discussing and considering funding alternatives, there is no evidence that the board was obligated to act as a "procurer" for the community and to contract with the Foundation for alternative services. Additionally, there was no contractual authority for the District to contract out teaching services without first meeting and negotiating with SDAE over the decision. If, as the District asserts, it had truly intended to divest itself of any interest in the services that it had decided to discontinue, the District could have left the initiative for procuring alternative services to the Foundation or to the community itself.

The District's unilateral action of August 22, 1983, is even more obvious than the June 22, 1983 action. At a special public meeting of the board on that date, the board voted to place all remaining fee-based foreign language classes offered by the continuing education program under the auspices of the Foundation. The decision was to include the provision of these teaching services in the contract that was made with the Foundation on or about June 22, 1983.

In essence the August 22 action was specifically designed to continue services that were to be provided by unit employees

through a separate non-District entity. This conduct is distinguished from the March action to discontinue services which were later continued through a separate entity, the Foundation. It is unknown to what extent this latter decision impacted members of the bargaining unit since the remaining courses were taught by hourly instructors. Additionally, there is no evidence concerning whether this decision necessitated any layoffs or led to any elimination of unit positions. Nonetheless, as the Board held in Arcohe Union School District, supra, both decisions to contract out services resulted in "actual or potential withdrawal of work from unit employees, and wages and hours associated with the contracted-out work"

Additionally, these contracting-out decisions altered an existing District policy and practice of offering fee-based, non-credit, foreign language classes through the District's continuing education program, using adult education instructors who were unit employees. This change of policy has had, by definition, a generalized effect and continuing impact upon wages, hours and other terms and conditions of employment of bargaining unit members. Grant Joint Union High School District, supra. Absent a valid defense, such conduct constitutes an unlawful unilateral change of matters within the scope of representation in violation of subsection 3543.5(c).

The District's characterization of its role as a mere procurer "of alternative teaching services" in response to

community pressure is not persuasive.<sup>15</sup> Thus, the District's argument against a finding that it contracted out unit work with the Foundation must be rejected.

D. Waiver Defenses

Respondent argues in its defense that even if it is construed that the District contracted out or transferred bargaining unit work, the SDAE waived whatever rights it may have had to negotiate over the subject by its acquiescence to a past practice of the District's subcontracting of bargaining unit work and by its failure to request negotiations despite notice and an opportunity to do so.

1. Past Practice

The record shows that prior to June 1983. the District had entered into agreements with the Foundation for the Foundation

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<sup>15</sup>This case is distinguished from the Board's decision in Stanislaus County Department of Education (1985) PERB Decision No. 556. Stanislaus provides a narrow holding limited to a unique factual situation. In that case the Board considered the issue of whether the County had failed to negotiate its decision and the effects of that decision to cease operation of three child development centers for migrant children and to select an outside nonprofit corporation to perform that function. The Board held that the decision to cease operations was not one appropriately relegated to the negotiations process because it would have significantly abridged the employer's freedom to exercise managerial prerogatives essential to its mission. Since the migrant child program was a federal program, federally financed and not mandated by State law, it was not a county program which would have survived as such, had federal funds been withdrawn. Thus, since the County's role in the program was that of a conduit for federal funds, the County's decision to cease direct operation, but continue its role as regional administrator of the migrant program, was a matter outside the scope of representation.

to present various educational offerings in such subjects as real estate, nursing, zoo management and military education. However, there is no evidence that any of these courses were ever taught by bargaining unit employees or, in fact, could have been taught by bargaining unit employees if the District had chosen to offer such instruction.

Furthermore, the District has failed to present any evidence that the Foundation has previously offered non-credit foreign language courses that were previously taught by District employees in the continuing education program or that the parties had ever considered such an arrangement

For these reasons, it is concluded that the District has failed to show that there is an established past practice of the District contracting out unit work to the Foundation. The past contracts between the District and the Foundation for the Foundation to sponsor or coordinate educational programs for the District did not involve services that had been provided by adult education unit employees. Thus, the past practice argument is rejected.

## 2. Failure to Request Negotiations

Prior to unilaterally changing a matter within scope, an employer has the obligation to provide the exclusive representative of its employees with notice of, and a reasonable opportunity to negotiate over, the contemplated change. In this regard the District has failed to prove that

it provided SDAE with prior notice of either decision to contract out the teaching services or a reasonable opportunity to negotiate prior to implementation of these decisions.

As a first part of this defense, the District asserts that SDAE had notice of its intent to contract with the Foundation by virtue of SDAE President Sullivan's regular attendance at the District executive council meetings which preceded the board meetings and through information provided in the board's docket about action items that were to be considered.

Although it has been shown that SDAE received copies of the board of trustees' dockets, which included action items, prior to the board meetings of May 23, June 22 and August 23, 1983, the listing of action items in the agendas was insufficient notice to SDAE that the District was actually contemplating a concrete proposal to contract with the Foundation.

The May 23 docket listed the subject as funding alternatives for certain discontinued continuing education classes to be presented for the board's consideration and discussion. However, there was nothing in the docket which indicated that the board would make a firm decision on that date to contract for services with any of the alternative services that were presented.

The June 22 docket, which contained a proposed agreement between the District and the Foundation for such classes, was an indication that the District had already taken steps to implement its May 23 decision.



The PERB has held that general publication of a board of trustees agenda does not constitute effective notice of proposed changes in scope matters. Arvin Union School District (1983) PERB Decision No. 300. Neither does the fact that SDAE President Sullivan attended District executive council meetings, where the docket items were reviewed just prior to the board meeting, constitute effective notice to SDAE. Los Angeles Community College District (1982) PERB Decision No. 252.

Neither the discussion at the District executive council meeting prior to the board's special public meeting on August 22, 1983, nor the docket of action items for that meeting gave any hint that the board was considering a proposal to discontinue the remaining foreign language classes and include them in the June 1983 contract with the Foundation.

It is, therefore, found that the District failed to provide adequate notice to SDAE through its executive council meetings, the board dockets, or any other effective means of proposed actions to remove unit work.

In order to prove that SDAE waived its right to negotiate over the District's decision to contract with the Foundation in June and August 1983 for services formerly provided by unit employees, the District must show demonstrative behavior on the part of SDAE waiving a reasonable opportunity to bargain over the decision and the effects of such decision once it had notice. San Mateo Community College District (1979) PERB Decision No. 94.

Even if it is argued that the District gave prior notice, of its intent, the District failed to provide a reasonable opportunity for bargaining prior to taking action in May. June and August 1983.

Although Sullivan was present at the May 23 board meeting when the decision was made to approve a contractual arrangement with the Foundation, it is clear from the facts that shortly after this date, on or about June 6, 1983. the District's administration took steps to implement the decision by meeting with the site deans to plan for a summer session. The District has offered no explanation for its haste in moving forward with this program even before the board of trustees had formally approved the contract with the Foundation. These steps were taken without SDAE's knowledge. Even if SDAE had demanded to bargain on May 23, it appears that it would have been an act of futility considering the District's actions shortly thereafter. Likewise, a SDAE request for negotiations after the District's approval of the proposed contract on June 22 and its subsequent action on August 22, 1983 would have been further acts of futility. The failure to undertake a futile act does not constitute a waiver. Arvin, supra. Here the District has failed to present any convincing evidence that SDAE had a reasonable opportunity to request bargaining over its decisions to contract out unit work and thereby waived its right by the failure to make a timely request.

E. Summary

It has been determined that the decision in March 1983 to discontinue certain continuing education courses, terminate some teaching services and institute unit member layoffs was within the District's managerial discretion as a matter outside the scope of representation. However, prior to the District's decision on May 23 and again on August 22, 1983, to contract with the Foundation for the provision of the foreign language courses traditionally taught by the District's adult education faculty unit employees, it was obligated to provide SDAE with notice of its proposed decisions and a reasonable opportunity to negotiate over the decisions and the effects of such decisions prior to taking action. The District has failed to prove that it fulfilled its statutory bargaining obligation under EERA prior to taking unilateral action on matters within the scope of representation. It is thus concluded that, by this conduct, the District violated its duty to negotiate in good faith with SDAE, the exclusive representative of its adult faculty bargaining unit. Such unilateral action on a matter within the scope of representation is a per se refusal to negotiate in good faith and a violation subsection 3543.5(c). NLRB v. Katz, supra; San Francisco Community College District (1979) PERB Decision No. 105.

The District's failure and refusal to negotiate with SDAE concurrently violates the organization's right as the exclusive

representative to represent unit members in their employment relations and interferes with the subject employees because of their exercise of representational rights in violation of sections 3543.5(b) and (a). San Francisco Community College District, supra.

#### REMEDY

Subsection 3541.5(c) of the EERA empowers the Board:

. . . to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action . . . as will effectuate the policies of this chapter.

Since it has been found that the District committed an unfair practice by unilaterally contracting out bargaining unit work without first negotiating with the exclusive representative, it is appropriate to order the District to cease and desist from taking unilateral actions on matters within the scope of representation without first affording the exclusive representative SDAE with notice and an opportunity to negotiate over such matters.

Absent unusual circumstances, where an employer has made an unlawful unilateral change, a remedy requiring the restoration of the status quo is appropriate to effectuate the purposes of the Act because it restores, to the extent possible, the positions the parties occupied prior to the unilateral change. Oakland Unified School District (1983) PERB Decision No. 367; Rio Hondo Community College District (1983) PERB Decision No. 292; Plycoma Veneer Co. (1972) 196 NLRB 1009 [80 LRRM 1222],

Accordingly, the District will be ordered to rescind whatever contractual arrangement it may currently have with the Foundation to provide the foreign language classes that were contracted for on June 22, 1983, and, on or about August 22, 1983, and restore the work to the unit until it has satisfied its obligations to negotiate with the SDAE over such decisions and their effects.

Additionally, the District is ordered to reinstate (at the earliest practicable time) all unit employees who were placed on layoff status as a result of the August 22 decision and make these affected employees whole for any wages or other benefits lost as a result of the unlawful unilateral change. Back pay is to be calculated from the effective date of layoff until the status quo is restored and will be offset by any wages actually earned during the interim period through other employment. All back pay is to include interest at the rate of 10 percent per annum.

Since the original decision on March 9, 1983, to lay off employees and the procedure followed in doing so was not improper, there is no basis to order restoration of the eliminated positions and reinstatement of those employees laid off by the final board action of May 23, 1983. This remedy can impose a bargaining obligation on the District only as of the time of its illegal act, which was the contracting out of work, not the layoffs. However, those employees affected by the layoffs still possess certain legal rights which provided for

their possible recall from layoff. It is therefore appropriate to order that those recall rights be reinstated from the effective date of layoff. (See Solano County Community College District, supra at p. 16.)

It is also appropriate that the District be required to post the Notice to Employees attached to this Proposed Decision as Appendix A, which incorporates the terms of the Proposed Order. Posting such a notice will provide employees with notice that the employer has acted in an unlawful manner, and is being required to cease and desist from this activity. It also effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the employer's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Board (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, conclusions of law and the entire record in this case, and pursuant to EERA subsection 3541.5(c), it is hereby ORDERED that the San Diego Community College District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the exclusive representative of its adult

education faculty bargaining unit by taking unilateral action on matters within the scope of representation, specifically with reference to the decisions, and the effects of such decisions, to contract out with the San Diego Community College District Foundation, Inc., for the provision of teaching services formerly provided by members of the adult education faculty bargaining unit.

2. Denying to the San Diego Adult Educators, Local 4289, American Federation of Teachers. California Federation of Teachers, AFL-CIO, its right to represent unit members by failing and refusing to negotiate about matters within the scope of representation.

3. Interfering with employees represented by the San Diego Adult Educators, Local 4289, because of the exercise of their right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without first providing the exclusive representative with notice and the opportunity to meet and negotiate about such matters.

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

1. Unless the parties reach a contrary agreement, the District shall rescind any current contractual arrangement that it has with the Foundation to provide foreign language courses that were formerly taught by its adult education

faculty unit employees and restore the work to the unit until it has satisfied its obligation to meet and negotiate with the San Diego Adult Educators Association, Local 4289.

2. Meet and negotiate with the San Diego Adult Educators Association, Local 4289, about the decisions of June 22 and August 22, 1983, (and the effects of these decisions) to enter into an agreement with the Foundation for the provision of foreign language classes that were formerly taught by unit employees until the parties reach agreement or exhaust the statutory impasse procedure.

3. Reinstate all eliminated positions and offer employment to unit employees placed on layoff status as a result of the August 22, 1983, contracting out decision. Additionally, make these employees whole for any loss of wages or benefits as a result of unlawful unilateral change, from the effective date of the unilateral change until the status quo is restored.

4. Restore all reinstatement rights to employees who were placed on layoff status by action of the District board of trustees on May 23, 1983.

5. Within ten (10) workdays from service of the final decision in this matter, post at all school sites and all other work locations where notices to unit employees are customarily placed, copies of the Notice to employees attached as an Appendix hereto. The Notice must be signed by an



authorized agent of the District indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

6. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on May 19, 1986, unless a party files a timely statement of exceptions. In accordance with the PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, 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 itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on May 19, 1986, or sent by telegraph, certified or Express 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, section 32300 and 32305.

Dated: April 28, 1986

W. JEAN THOMAS  
Administrative Law Judge