STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MOUNT SAN ANTONIO COLLEGE FACULTY ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-C-77
v.	)	
	)	PERB Decision No. 691
MOUNT SAN ANTONIO COMMUNITY COLLEGE DISTRICT,	)	
Respondent.	)	June 30, 1988

Appearances; Reich, Adell & Crost by John Rubin for Mount San Antonio College Faculty Association, CTA/NEA; Wagner, Sisneros & Wagner by Patrick D. Sisneros for Mount San Antonio Community College District.

Before Hesse, Chairperson; Craib and Shank, Members

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Respondent Mount San Antonio Community College District (hereafter District) and cross-exceptions filed by the Mount San Antonio College Faculty Association, CTA/NEA (hereafter Association) to the proposed decision arising out of a compliance hearing wherein a PERB administrative law judge (ALJ) found that the District failed to comply with Mount San Antonio Community College District (1983) PERB Decision No. 334, which ordered the District to, among other things, negotiate: 1) the transfer of unit work; 2) the modification

of chairperson stipends; and 3) the change of hours of department chairpersons. In addition, the Board ordered the District to pay back-pay.

For the reasons set forth below, the Board reverses in part and affirms in part the proposed decision in which the ALJ determined that the District is not in compliance with PERB Decision No. 334.

FACTUAL SUMMARY

Prior to the advent of collective bargaining under the Educational Employment Relations Act (hereafter EERA)[1], department chairs (hereafter chairs) were largely responsible for the administration of their respective departments. The chair's responsibility varied from department to department but generally involved class scheduling, ordering/selecting textbooks, promoting the department within the community, preliminary hiring duties (creating job announcements, interviews, etc.) and whatever else was necessary to "do the job." The chair was elected by fellow instructors and served a four-year term with the approval of the District.

Each chair received a monthly stipend based on the application of a standard formula. The amount of the stipend was influenced by the size (i.e., number of full/part-time instructors) and the amount of administrative work to be done

[1]The Educational Employment Relations Act is codified at Government Code section 3540, et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

in each department. Each chair also received a one-time payment equivalent to two weeks salary, at the beginning of each year, which was characterized as pay for preparation time. This payment was for any pre-school administrative work that was necessary to have the department ready for the academic year. Finally, each chair received "release time." The minimum amount of release time given was 20 percent. Some chairs received 100 percent release time. Again, this was determined by size of the department and the scope of the chair's responsibility.

With the advent of collective bargaining, the District elected to reorganize its organizational structure. Pursuant to its reorganization plan, the District created the position of division dean. This position was classified as supervisory and was intended to supplant at least the managerial/supervisory duties which were theretofore performed by department chairs.

On June 6, 1977 the Association first filed its charge of an alleged unfair practice concerning the District's unilateral implementation of its reorganization plan. It charged that the District: 1) created the new classification of division dean, which is a supervisory classification excluded from the bargaining unit; 2) required department chairs to teach a full-time class load without granting release time to fulfill administrative obligations; 3) eliminated two weeks of compensated preparation time; and 4) created a monthly stipend,

the amount of which was fixed, irrespective of the department in which the chair worked.

The June 6 charge was precipitated by negotiations beginning February 23, 1977, at which time both parties first submitted proposals. On that same day, the District indicated its intent to the Association to reorganize the departments as described above. On March 23, and April 14, 1977 the District rejected specific requests by the Association to negotiate the reorganization. The Board of Trustees approved the reorganization on May 18, 1977.

PERB issued a complaint pursuant to the June 6, 1977 charge and a hearing was held on September 20, 22 and 23, 1977. A proposed decision issued on October 26, 1978 which dismissed the Association's complaint except for the District's unilateral decision as it effected a change (i.e., eliminated the formula) in the stipend. With regard to the monthly stipend, the ALJ found a 3543.5(c)[2] violation. The Association filed exceptions on the grounds that the decision to reorganize had to be bargained in all respects.

2Section 3543.5(c) states:

> It shall be unlawful for a public school employer to:
>
> . . . . . .
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

Prior to the issuance of the proposed decision on October 26, 1978, the parties had entered into a collective bargaining agreement (CBA) which was ratified on March 15, 1978. The CBA, which was for a two-year period, was made retroactive to July 1, 1977, save the provision relating to department chair stipends which was effective Spring 1978. Just before the parties reached agreement on the CBA, on March 3, 1978, the parties executed a separate document they described as a memorandum of understanding (MOU). The MOU reads:

> Both parties agree, understand and recognize that the ratification of the collective bargaining agreement between them on or about March 15, 1978, does in no way abrogate or in any way limit or restrict the reservation of the Association's legal rights to pursue the unfair practice charges contained in Case No. LA-CE-133 [now final and designated as PERB Decision No. 334] now pending before PERB.
>
> The parties further agree that upon the ratification of the collective bargaining agreement between them, the Faculty Association will request PERB to dismiss pending unfair practice charges contained in PERB Case Nos. LA-CE-139 and LA-CE-159.

The record is unclear as to how much negotiation was going on during the 13-month period between February 23, 1977 and March 15, 1978 but there is consensus between the parties that there was "a lot of negotiation." Both parties testified that each of the topics of the reorganization at issue here (i.e.,

monthly stipend, preparation time and release time) was discussed in negotiations. In the 1977-79 CBA, the parties negotiated provisions covering unit work, hours and stipends. Each of these provisions, inter alia, covered department chairs. The parties have continuously reached agreement on subsequent CBA's—each containing provisions covering unit work, hours and stipends similar to provisions in the first CBA.

Beyond the first CBA, the parties did not execute a MOU akin to the one set out above.

On August 18, 1983, the Board issued its decision affirming the ALJ's decision with regard to the monthly stipend and the District's right to unilaterally decide to create the position of division dean, but reversed the ALJ in all other respects, finding a 3543.5(c) violation and, concurrently, a violation of 3543.5(a) and (b)[3] when the District failed to negotiate the change in the chairs' hours of employment and the transfer of unit work to nonunit employees.

3section 3543.5(a) and (b) state:

> 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.

That part of the Board's order which is now in dispute is as follows:

> B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:
>
> 1. Upon request of the Association, meet and negotiate with the Association concerning the transferring of unit work, the modification of department chairperson stipends, and the change of hours of department chairpersons.
>
> 2. Pay to the affected employees the difference in wages between that which they earned and that which they should have earned in the absence of the employer's unilateral action, minus any mitigation, from May 18, 1977 until the occurrence of the earliest of the following conditions: (a) the date the District negotiates an agreement with the Association concerning the issues raised by this Decision; (b) a bona fide impasse in bargaining occurs; or (c) failure of the Association to request bargaining within 5 days of this Decision.

Service of PERB Decision No. 334 was attempted at the addresses of record on the attorneys for both parties. Both attorneys moved prior to the issuance of the decision and service was frustrated. With regard to the parties themselves, the District received its copy of the decision, while the Association claimed its copy was not received because it was mailed to a former officer. There was no evidence in the record as to whether the former officer received the decision.

On September 12, 1983 the District wrote the PERB Los Angeles Regional Director informing PERB of its compliance with the Board's posting requirement. Since the District had

failed to serve the Association with a copy of the letter, PERB advised the District to resubmit its letter with proof of service. The District did so on September 20, 1983.

September 20, 1983 was the date upon which the Association first learned of the decision. Thereafter, on September 21, the Association President, Marilyn Kaecke, wrote the District asking to negotiate pursuant to PERB's order.

On October 31, 1983 the District, through its Personnel Officer, Walter Collins, sent PERB another compliance letter which stated in pertinent part:

> On September 21, 1983 [the Association] submitted a request to meet and negotiate the matters set forth in the PERB Order. The Association has indicated that, when documentation has been compiled regarding the issues to be negotiated, a meeting date and time may be established. At such time, the District will comply with the PERB Order to meet and negotiate the matters specified.

Thus the District acknowledged that the Association made a request to negotiate and agreed that once the Association compiled the documentation it needed, the District would "comply with the PERB order to meet and negotiate the matters specified."

On November 10, 1983 PERB issued the parties a letter of compliance which said in pertinent part:

> This office is in receipt of a Statement of Compliance filed by Mt. San Antonio Community College District in [PERB Decision No. 334].

> The statement indicates that compliance with the Board order in question has been achieved. If any party believes further action in this matter is required, please file a written statement with this office, no later than 10 days from the date of service of this letter. If no such statement is received within the 10-day period, the regional office will not require further reporting from the respondent in this matter.

Thus PERB indicated that compliance had been achieved to the extent that no further reporting would be required, and that if either party disagreed they should file a statement to that effect. Neither did.[4]

Between October 31, 1983 and July 10, 1984, the parties engaged in casual conversation (i.e., exchanging pleasantries in the hallways), but there were no negotiations pursuant to PERB Decision No. 334. During this time the Association was still "gathering information" with regard to the reorganization.

On July 13, 1984 the Association through its newly elected President Don Greeley, verbally told Collins it had enough information to negotiate. Collins told him to make the request in writing, which he did on October 2, 1984. On October 10, 1984 the District indicated, in writing, it would not

[4]The only fair meaning that can be attributed to the District's October 31 letter is that the District and the Association agreed to meet and negotiate at some unspecified date in the future. Because of the parties open-ended agreement, compliance proceedings may be brought at this time. We note that this decision's order is limited to compliance with the original back-pay award set forth in PERB Decision No. 334.

negotiate. By letter dated November 11, 1984, the Association advised the District that it represented to PERB, on November 10, 1983, that it would negotiate on demand.

By February 25, 1985 the parties conducted a meeting. The District's purpose for the meeting, acknowledged by all, was to "pin down" the Association as to what it was seeking through negotiations. At the meeting, the following four questions were asked of the Association: 1) Do you intend to negotiate stipends?; 2) Do you intend to negotiate the reorganization or structure of the instructional division?; 3) Do you intend to negotiate the work hours of department chairs for the work year?; and 4) Do you intend to negotiate release time? The Association's response to each of the four questions was "no." The Association represented at the February 25 meeting that it wanted to recover the losses suffered by department chairs but they purposefully did not express the nature of those losses because they wanted to "keep it broad."

The next event occurred on April 16, 1985, when the Association wrote a letter to the Board of Trustees requesting negotiations. On May 28, 1985 the Trustees refused the Association's request.

On June 6, 1985 the Association filed its unfair practice charge alleging that on October 10, 1984 the District repudiated its agreement to negotiate.

On August 2, 1985, the PERB General Counsel's office advised the Association that its charge was untimely but that a compliance proceeding would be the proper recourse. On August 7, 1985, a petition seeking compliance with PERB Decision No. 334 was filed by the Association.

The compliance hearing was conducted on January 28, March 12, March 24-27, April 29-30, May 1, and May 7-9, 1986.

PROPOSED DECISION IN CASE NO. LA-C-77

The ALJ concluded that the District did not comply with the Board's order to negotiate on demand, nor did it comply with the order to pay back-pay to the affected employees. Nevertheless, the ALJ found that, with respect to the District's negotiating obligation, the obligation was, at the time of her proposed decision, excused. The Association's protracted delay between its initial request to negotiate (i.e., September 20, 1983) and its follow up (i.e., July 10, 1984) constituted an effective abandonment of its demand to negotiate. L.A. Community College District (1982) PERB Decision No. 252.

With regard to the back-pay order, the ALJ set forth some limitations. As to stipends, the ALJ held that department chairs are entitled to the difference between what was bargained under the 1977-79 CBA and the previously applied formula for that period of time between February 1977 and

June 30, 1979, which is the date of expiration of the first collective bargaining agreement. Similarly, the ALJ held that department chairs are entitled to the two-week preparation period which was unilaterally eliminated but, again, only for the same period as the stipends (i.e., during the term of the 1977-79 CBA).

The ALJ reasoned that liability for stipends and preparation time is limited based on this Board's decisions in Rio Hondo Community College District (1986) PERB Decision No. 279(b) and Pittsburgh Unified School District (1984) PERB Decision No. 318(a) because the "basic subjects" of stipends and preparation time were bargained for and agreed to by the parties in its initial (i.e., 1977-79) CBA and subsequent CBA's. Further, the reason liability extends to the period covering the 1977-79 CBA is due to the parties having executed the MOU which was incorporated into the 1977-79 CBA. By entering into the MOU, the ALJ concludes, the first CBA cannot be considered an agreement "concerning the issues raised by" PERB Decision No. 334.

With regard to release time, the ALJ concluded that the affected employees are entitled to compensation for the "additional hours worked as a consequence of their reassignment to full-time teaching responsibilities without a concomitant elimination of the duties and responsibilities" which were

previously accomplished during that release time. To that extent, the ALJ concludes back-pay is owing from February 1977 through the 1982-83 school year (i.e., June 1983).

The ALJ's reasoning in support of the release time back-pay entitlement (i.e., her reason as to why the CBA does not cutoff back-pay liability) is that:

> Although the contracts cover the basic subject of hours, they cannot be viewed as covering the basic subject matter found in the unfair practice proceeding in light of the evidence that the District refused to negotiate release time or the reassignment of department chairpersons to full-time teaching duties.

As set out above, the ALJ cut off back-pay liability for release time as of June 1983, due to the Association's failure to pursue negotiations with due diligence which, she concluded, was tantamount to failing to request negotiations.

In addition to back-pay, the ALJ ordered interest at the rate of 10 percent per annum, accumulated on the unpaid balance at the end of each semester. She further ordered that interest payments will not be required for the period between September 20, 1983 (the date the Association learned of the Board's decision) and August 7, 1985 (date compliance proceedings were initiated), since the delay is attributed to the Association's failure to pursue this matter.

In addition to finding a failure to satisfy the bargaining obligation against the District, the ALJ concluded that the District is estopped from using the five-day limitation period

set out in the Board's order. She reasoned that, in the past, the Board has recognized the doctrine of equitable estoppel. Eastern Sierra Unified School District (1983) PERB Decision No. 312. Here, the ALJ concluded, the District's letters of compliance to PERB constituted representations which led the Association to believe that the failure to make a demand to bargain would not impact upon the matters covered by PERB Decision No. 334. Thus, having failed to assert the five-day limitation period when PERB Decision No. 334 was issued, and having affirmatively indicated it would negotiate with the Association, the District cannot now assert the five-day limitation.

Further, the ALJ rejected the District's argument that, while there is no express statute of limitations on enforcement proceedings, analogy rests in section 3541.5(a)(1)[5] and, as such, PERB should adopt an equitable statute of limitations. Conti v. Board of Civil Service Commissioners (1969) Cal.3d 351. The ALJ concluded that, as established in Conti,

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[5]Government Code section 3541.5(a)(1) states:

> (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 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; . . .

prejudice to a public sector defendant will not be presumed when there is an unreasonable delay. Here, while there is a showing of prejudice, to wit: running of interest during the Association's delay (September 20, 1983 - August 7, 1985), the remedy is not dismissal of the compliance proceeding but tolling of interest.

Finally, the ALJ rejected the District's argument that it should not be liable for an award of back-pay for the five-year period in which it took PERB to issue PERB Decision No. 334. Pittsburgh Unified School District (1984) PERB Decision No. 318(a); Mt. San Antonio Community College District (1983) PERB Decision No. 297; and, NLRB v. J.H. Rutter-Rex Mfg. Co. (1969) 396 U.S. 258 [72 LRRM 2881, 2883] (NLRB is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers'.

DISTRICT'S EXCEPTIONS

The District excepts to the ALJ's proposed decision on three principal bases. First the District argues that, contrary to the ALJ's conclusion, no liability should attach to its unilateral change since the basic subject matter of the reorganization was negotiated in the initial CBA and all subsequent CBA's between it and the Association.

The District argues that evidence of the parties negotiation on the basic subject of reorganization is contained in three provisions of the CBA. The unit work provision

expresses the recognition and agreement between the parties of the existence of the then newly created position of division dean which would be excluded from the bargaining unit. This provision is relevant to the extent that it establishes that the Association knew that it was bargaining the subject of reorganization, since the creation of the division dean was the quintessential first step. The second provision, work hours, clearly includes department chairs, and expressly requires them to work 30 hours,[6] which includes teaching, holding office hours and other appropriate nonclassroom responsibilities. Subsumed within "nonclassroom responsibilities" are the remaining duties associated with carrying out the administrative functions of the chairs. The final provision, that for department chair stipends, is specifically included in the appendix to each CBA.

The District further argues that the MOU, which was incorporated by reference into the 1977-79 CBA, does not hold the issue of the unfair practice decided in PERB Decision No. 334 (i.e., the reorganization) in abeyance. Rather, what the MOU does is dismiss two unrelated unfairs while preserving the right of the Association to pursue the underlying unfair

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[6]We note that the parties negotiated increased chair hours in subsequent CBA's, but this fact is of no consequence to this decision.

herein. That is, it gave the Association "hope" that PERB would abrogate the reorganization. If the MOU had the effect of holding the issues of the unfair in abeyance, the District argues, then the provisions concerning unit work, stipends and work year/hours would be "tentative"; to view the provisions as "tentative" is incongruous with the parties having reached "agreement" in the CBA. Since the provisions to the CBA discussed supra do include the basic subject of the reorganization here in dispute, no liability attaches—even as to conduct during 1977-79 (Rio Hondo, supra, PERB Decision No. 279(b); Pittsburgh, supra, PERB Decision No. 318(a)).

The District's final argument in support of its first exception is that the ALJ erred by labeling the release time provision as "extra hours" in an attempt to "create" an issue. That is, the ALJ concluded that, the subject of "excess hours" (i.e., hours over and above the basic teaching week) was not passed on in Rio Hondo or Pittsburg and, as such, it is an issue of first impression.

The District concedes that release time is not mentioned in the 1977-79 CBA. However, there was testimony that it was bargained (i.e., the Association proposed it but the District rejected the proposal). Furthermore, the "basic issues" of the unfair, including hours, were negotiated. The hours provision contemplates the release time (or "extra hours") in that part of the provision covering "other appropriate non-classroom responsibilities."

The second exception is taken on the grounds that the ALJ erred in awarding back-pay to unit members who were not incumbent chairs at the time of the decision, but rather, assumed the position after the decision to reorganize had already been implemented. The District argues that the Board's order called for back-pay to "affected employees", thereby limiting recovery to those who were in the chair positions at the time of the decision to reorganize because they are the only ones whose hours and stipends "changed." The record is devoid of any reliance by subsequent chairs on pre-negotiation hours/stipends; hence, they had no expectation and their recovery would create a windfall for them. Even if there were some expectation, their act of accepting the chair responsibilities in light of the reorganization, which had been effected, constituted a waiver.

The third and final exception simply restates the first, to wit: the Board's delay is unreasonable and is grounds for PERB to exercise its discretion to mitigate the chairpersons' back-pay award (citing Justice Douglas' dissent in NLRB v. J. H. Rutter-Rex Manufacturing Co., supra.)

ASSOCIATION'S RESPONSE

The Association argues that the ALJ properly found that the MOU preserved the Association's remedial rights during the term of the first CBA. The MOU was broadly drafted and expressly reserved all of the Association's rights to pursue the unfair.

The District's argument that the Association preserved only the right to contest the reorganization plan—and not its constituent parts is illusory. To argue that the Association intended to preserve its right to contest the reorganization, without contesting the substance of the reorganization, would render the MOU meaningless.

Second, the District's exception to the ALJ's finding that release time was not bargained is wrong. While the CBA's contain a general reference to hours, they do not include a provision for the additional hours required of department chairs in the performance of their duties. In that vein, noticeably, the District does not except to the ALJ's finding that the chairs' hours dramatically increased with the elimination of release time.

Finally, with regard to the remedial relief ordered for "affected employees," the ALJ's conclusion, affording an award of back-pay to post-decision chairs, is supported by case law. In Schnadig Corp. (1982) 265 NLRB 147 [112 LRRM 13 31] the board modified the administrative law judge's decision to include compensation for employees hired after the unilateral change had occurred. Second, the District's "volunteer" theory is meritless because the obligation to bargain is with the Association. To argue that only incumbents are entitled to back-pay would cause employees to be faced with the "draconian choice" of quitting or continuing to work under the

unilaterally changed conditions which would, in effect, create a waiver of the union's right to a remedy. Furthermore, there is no evidence of a waiver by any employees.

ASSOCIATION'S EXCEPTIONS

The Association has filed four exceptions. It first excepts to the ALJ's finding that the MOU expired at the end of the 1977-79 CBA's term. The Association argues that if the MOU had not referred to the 1977-79 CBA, it would still be a full reservation of rights and, since the language does not explicitly limit it to the 1977-79 CBA, the MOU has no termination date. While the ALJ credited the Association's chief negotiator, Greeley's, testimony that the District represented that it was unnecessary to negotiate the issues raised in the unfair because the MOU was still in effect, she nevertheless concluded that, absent express written agreement extending the MOU, it expired. The ALJ's conclusion places form over substance. In light of the intent of the parties to allow the Association to pursue the case to its conclusion, there was no need to reduce the MOU to writing with each new CBA.

Secondly, the ALJ erred when she concluded that liability under subsequent CBA's was cutoff, because the MOU continued to survive as discussed above.

The third exception is to the ALJ's conclusion that the Association unreasonably delayed negotiating following the that a collective bargaining agreement entered into after the

District's October 31, 1983 letter. The Association argues that its attempt to gather the necessary information, in an effort to reach voluntary resolution with the District, was entirely reasonable. Given the voluminous documents necessitated in this proceeding, the Association's difficulties are understandable and not sufficient to constitute a waiver of any of its remedial rights. Once the Board of Trustees finally refused to negotiate, the Association promptly contacted PERB.

Finally, the Association excepts to the ALJ's calculation of back-pay with regard to release time. The Association argues that the Board should adopt its formula because it compensates for the actual increase in the chairs' hours of employment. Corning Union High School District (1984) PERB Decision No. 399.

DISCUSSION

We hold that the ALJ's conclusion that the District's liability regarding release time[7] continues to run until June 30, 1983 is incorrect. For the reasons set forth below, we conclude that the District's back-pay liability with regard to stipends, the two-week preparation period, and release time is limited to the duration of the first CBA negotiated between the parties; that is, July 1, 1977 through June 30, 1979.

As the ALJ correctly pointed out, this Board has determined

[7]While the District excepts on the ground that the ALJ's use of the term "excess hours" in lieu of release time, constitutes error, we do not find the ALJ's use of the term of any consequence.

commission of an unfair practice may cut off back-pay liability if the CBA addresses the basic subject matter raised in the unfair practice proceeding. Rio Hondo Community College District (1986) PERB Decision No. 279(b); Pittsburg Unified School District (1984) PERB Decision No. 318(a).

From our review of the record and based on the testimony of both parties, we conclude that the District first refused to discuss the subject of the reorganization with the Association between February 23, 1977 and May 18, 1977, thus precipitating the June 6, 1977 filing of the unfair practice charge.[8] Negotiations continued, however, through March 15, 1978, at which time the parties reached agreement. While the record is unclear as to precise dates, it is undisputed that sometime between the June 6, 1977 filing of the unfair practice charge and the March 15, 1978 agreement, the District relented and bargained about stipends, preparation time and release time (the result of those negotiations has no provision for release time), each of the topics at issue here, with the Association. Since each of the three topics was fully bargained, the basic subject matter of the reorganization was fully bargained prior to the issuance of the proposed decision on the underlying unfair practice charges dated October 26, 1978.

[8]We note that our conclusions reached in PERB Decision No. 334 were based on the conduct of the parties up to the date of the filing of the charge (i.e., June 6, 1977).

While we agree with the ALJ's conclusion that back-pay liability regarding the topics of stipends and preparation time is limited to the term of the 1977-79 CBA, we disagree with her rationale in support thereof. The ALJ reasons that liability attaches for the 1977-79 period because the parties' execution of the MOU prevents one from being able to conclude that the 1977-79 CBA is an agreement which covers the basic subject matter raised in the unfair proceeding. The ALJ concludes, however, that CBA's subsequent to the 1977-79 CBA did cover each of those subjects and limited liability on that basis. In our view, the genesis for our conclusion that the basic subject matter, inclusive of stipends, preparation time and release time, was bargained stems from the first series of negotiations which led to the 1977-79 CBA. Rather than say that, based on the MOU, the 1977-79 CBA does not cover the basic subject matter raised in the unfair proceeding, we think it more accurate to say that the District waived the tolling of liability for the duration of the 1977-79 CBA. Had the District not executed the MOU, its liability would have been tolled as of July 1, 1977 (the retroactive date of the agreement).[9]

Just as we conclude that stipends and preparation time were bargained under the terms of the 1977-79 CBA and, solely as a

[9]We recognize that the record conclusively establishes that had the District not entered into the MOU, the parties would not have reached agreement when they did.

result the MOU's waiving the tolling of liability, liability attaches, we so conclude with regard to release time.

We also find that the ALJ correctly concludes that the terms of the MOU expired consonant with the 1977-79 CBA. Just as the ALJ correctly found that the expiration of the MOU precludes extending the District's liability with regard to stipends and preparation time, we so conclude with regard to release time.

Since our determination of back-pay liability is limited to the time of the 1977-79 CBA and our review of the appendix attached to the ALJ's proposed decision establishes that all the unit members entitled to compensation were incumbents at the time of the reorganization, we do not reach the issue of whether our earlier order in PERB Decision No. 334 includes unit members who became chairpersons thereafter.

Based on the facts before us, we also affirm the ALJ's conclusion that the District has not made an adequate showing of prejudice to require adoption of an equitable statute of limitations precluding these enforcement proceedings because the only prejudice shown is the running of interest. Conti v. Board of Civil Service Commissioners (1969) 1 Cal.3d 351. As the ALJ correctly points out, we can toll the running of interest and we do so here as of September 20, 1983.[10] We reverse the ALJ's conclusion that interest should resume as of

[10]Section 3541.5(c) vests this Board with power to order such relief as will effectuate the policies of the EERA.

the date of the institution of the enforcement proceedings (i.e., August 7, 1985), in part based on our view that the Association's failure to exercise due diligence is not absolved and cannot be rewarded with the payment of additional interest and due, in part, to the reasons enunciated by Chairperson Hesse in her concurrence and dissent in Modesto City and High School Districts (1987) PERB Decision No. 566(a), where she states:

> This justification for imposition of interest in the private sector does not fit the public sector situation. A school district does not have the "use" of wrongfully unpaid monies during the time this agency takes to decide cases. Nor can it increase "sales" in order to discharge interest penalties. Public school districts receive a certain amount of money each year to perform their duties. They adjust their expenses within that framework. They cannot do the things private employers do to raise additional monies, nor can they invest their funds in anticipation of large interest awards. Thus, a hefty interest charge on top of a substantial back-pay award could devastate a school district. In such a circumstance, no one would win. (Id., p. 11)

Finally, we reject each exception filed with this Board by the Association for the reasons set forth in our discussion, supra. As to the ALJ's calculation of back-pay with regard to release time, we adopt her conclusion and rationale in support thereof to the extent that it is not inconsistent with our decision limiting the award to the term of the 1977-79 CBA.

As to the rate of interest to be paid on the principal, we reverse the ALJ's order of 10 percent per annum on the unpaid

balance at the end of each school semester and instead conclude that the proper rate should be 7 percent per annum from the date ordered in PERB Decision No. 334, May 18, 1977 through June 30, 1983, and 10 percent per annum from July 1, 1983 through September 20, 1983. This rate of interest is consistent with California Code of Civil Procedure Section 685.010. and its amendment effective July 1, 1983 increasing the rate of interest,

REMEDY

Consistent with our remedial authority, we find that the employees set forth in the attached appendix to the proposed decision who were chairpersons between May 18, 1977 and June 30, 1979 shall be compensated in the amount set forth in the appendix, plus interest accrued at the rates consistent with this decision.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, and pursuant to section 3541.5(c) of the Educational Employment Relations Act, it is hereby ordered that the Mount San Antonio Community College District shall:

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

A. Pay to the employees or former employees listed in the Appendix to the ALJ's Proposed Decision, attached hereto, each of whom was employed in the position of department chairperson and affected by the District's unlawful action

between May 18, 1977 and June 30, 1979, the amount of principal set out next to each person's name, plus 7 percent interest per annum on the unpaid balance at the end of each school semester from May 18, 1977 through June 30, 1983 and 10 percent interest per annum on the unpaid balance from July 1, 1983 through September 20, 1983. In addition to the payment of principal and interest to the employee or his/her beneficiaries, the employer must make those payments for pensions or other benefits which would have been made if the employees had been paid the money during the years covered.

B. 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.

It is further ORDERED that all other allegations in Case No. LA-C-77 are hereby DISMISSED.

Member Craib's concurrence and dissent begins on page 28.

Chairperson Hesse's dissent begins on page 30.

Craib, Member, concurring and dissenting: I concur with the conclusions reached in Member Shank's lead opinion, with the exception of the tolling of interest from August 7, 1985 forward. While the tolling of interest accrual is appropriate, due to the Association's lack of diligence, for the period of September 20, 1983 to August 7, 1985, any delay thereafter has not been the fault of the Association and, therefore, it should not be penalized for that delay.

Any unreasonable delay after August 7, 1985 is the fault of this agency. While I consider unreasonable delay by this agency in the issuance of its decisions to be inexcusable and while, in theory, no party should shoulder the burden of such delay, simply shifting the entire burden onto the innocent employees is no solution. They have been denied the use of money rightfully owed to them, which the awarding of interest is designed to account for. In sum, we are faced with the rather unpalatable choice of placing the burden on one party or the other. Given that choice, I would agree with the overwhelming weight of authority which holds that the burden should be placed on the wrongdoing party.[1]

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[1]**See**, e.g., NLRB v. J.H. Rutter - Rex Mfg. Co. (1969) 396 U.S. 258 [72 LRRM 2881]; Bagel Bakers Council v. NLRB (1977) 555 F.2d 304 [95 LRRM 2444]; M.B. Zaninovich, Inc. v. ALRB (1981) 114 Cal.App.3d 665. Moreover, PERB precedent clearly supports this approach. Modesto City and High School Districts (1987) PERB Decision No. 566(a); Pittsburg Unified School District (1984) PERB Decision No. 318(a); Mt. San Antonio Community College District (1983) PERB Decision No. 297.

Nor is there a distinction in the public sector that warrants a different approach. Public employees suffer from the loss of monies owed in the same way as private sector employees. While public sector employers are unable to raise additional revenues in order to completely cover the cost of interest awards on monies wrongfully withheld, they do in the interim have the "use" of the principal owed. In sum, the choice remains that of placing the burden on either the wrongdoing party or on the innocent party. I would also note that this case does not present a situation in which the school employer would be "devastated" by the amount of the back-pay or interest award.

Hesse, Chairperson, dissenting: I respectfully dissent. I would dismiss this case on the grounds that the charging party failed to reactivate compliance proceedings in a timely manner.

On November 10, 1983, the parties were put on notice that, absent a request from the parties not to do so, the compliance proceedings were at an end and the case would be closed. The parties were given 10 days in which to lodge a request that the case remain open, but neither did. At that point, all monitoring by PERB ceased.

Nearly a year later, on October 2, 1984, the Association made a request to bargain pursuant to the Board's 1983 decision and order. On October 10, 1984, the District, in writing, refused to negotiate. Several other demands to negotiate were made, all of them refused by the District. On June 6, 1985, the Association filed an unfair practice charge, alleging that the District refused to bargain. The charge was dismissed as untimely because it was filed more than six months after the District first refused to bargain the issues set forth in the Board's 1983 decision. No one connected with this case has suggested that the regional attorney was incorrect in his calculation of the six-month period, and its effect of barring the unfair practice charge.

For reasons that escape me, however, the majority decision does not apply a similar six-month limitation on compliance claims. While the six-month statute of limitations on unfair practice charges is statutory in fact, the reasons behind the

limitation period are equitable in nature. A respondent has the right to protect itself from stale claims. The defense against an unfair practice charge may be frustrated if records are lost or destroyed, or if witnesses are no longer available. Thus fairness, as well as the statute, dictate a six-month limitations period on unfair practice charges.

This same reasoning has equal force when applied to a compliance matter.[1] Here, the District was under the reasonable impression that the original case was closed in November 1983. A year later, it refused to bargain. Six months following the refusal to bargain, neither an unfair practice nor a request to reactivate compliance proceedings was filed. Only some eight months after that refusal to bargain was the unfair practice charge filed, and ten months after the refusal to bargain was the request for compliance proceedings made. The District would now be faced with a compliance proceeding not only based on a refusal to bargain 10 months previously, but also concerning an order that was issued in 1983 over activities that actually occurred in 1977.

The Association was under an obligation to pursue compliance within six months of the closure letter in 1983. It did not do so for nearly 19 months. Even if the charging party was unaware of the import of the letter closing the case, it

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[1] In addition to a timely claim, in an unfair practice charge a charging party must state a prima facie case in order to get a hearing. In a compliance case, charging party has merely to request a hearing with no further showing required.

was under a reasonable and good faith obligation to seek compliance when it became aware of the District's actions in October 1984. Instead, 10 months elapsed before a hearing was sought. Certainly, the District could not help but be prejudiced by the proceedings.

I do not mean by this opinion that compliance must always be requested within six months of a Board decision. Certainly, the parties may, by request, seek PERB's continuing jurisdiction over a Board order. But when the case has been closed, and both parties were on notice but did not oppose that closure, a six-month limitations period on subsequent activity related to the compliance case is reasonable and fair.

Furthermore, I can see no threat posed by this case to PERB's ability to enforce compliance with our orders. Compliance jurisdiction will always remain with the Board while the parties, or PERB, wish it to. The greater harm of this decision is in the destablizing effect it will have on labor relations. This effect will occur because the majority has, in effect, told advocates under our jurisdiction that a case before PERB is never ended. Parties may now be put on notice that at <u>any</u> point in the future after an order is issued by the Board, a dissatisfied party may reopen the case to litigate more. That the opposition, in mistaken reliance on PERB's closure of the case, may have destroyed all documents related to defending itself is simply too bad. In other words, the majority will, in the name of protecting one party, deny any

due process to another. With the possibility that jeopardy before PERB on any given issue may last indefinitely, parties may certainly resist settlement or compliance in favor of recalcitrance.

APPENDIX

Angle, Stewart

Stipend	Spring 1978	$ 1140.00*
1/2 month prep time	Fall 1978	1392.50
Stipend	1978-79	2509.50

Boyd, Richard

3 units of overload 1979-80	$ 1871.23
3 units of overload 1981-82	2269.05
3 units of overload 1982-83	2282.02

Clarke, T. Bruce

Stipend Spring 1978	$ 35.00
3 units of overload Spring 1978	832.66
1/2 month prep time Fall 1978	1109.50
Stipend 1978-79	459.00
3 units of overload 1978-79	1748.74
3 units of overload 1979-80	1871.23
3 units of overload 1980-81	2058.14

Dillon, Clifford F.

Stipend Spring 1978	$ 240.00
3 units of overload Spring 1978	832.66
1/2 month prep time Fall 1978	1392.50
Stipend 1978-79	139.50
3 units of overload 1978-79	1748.74
3 units of overload 1979-80	1871.23
3 units of overload 1980-81	2058.14
3 units of overload 1981-82	2269.05

Elliott, Robert T.

Stipend Spring 1978	$ 15.00
4.75 units of overload Spring 1978	1318.37
1/2 month prep time Fall 1978	1392.50
Stipend 1978-79	139.50
4.75 units of overload 1978-79	2768.83
4.75 units of overload 1979-80	2962.78
4.75 units of overload 1980-81	3258.73

*A11 figures have been rounded to the nearest cent.

Forney, Lewis

Stipend	Spring 1978	$ 1025.00
Stipend	1978 Summer Session	125.00

Hawkins. William Richard

3 units of overload 1981-82	$ 2269.05
3 units of overload 1982-83	2282.02

Hendricks, Homer Lloyd

Stipend Spring 1978	$ 495.00
3 units of overload Spring 1978	832.66
1/2 month prep time Fall 1978	1392.50
Stipend 1978-79	213.00
3 units of overload 1978-79	1748.74

Hoyt, Franklyn

Stipend Spring 1978	$ 480.00
4 units of overload Spring 78	1110.21
1/2 month prep time Fall 1978	1392.50
Stipend 1978-79	664.50
4 units of overload 1978-79	2331.65
4 units of overload 1979-80	2494.98
4 units of overload 1980-1981	2744.19
4 units of overload 1981-1982	3025.40
4 units of overload 1/2 1982-83	1521.35

Moolick, Charles

Stipend Spring 1978	$ 240.00
3 units of overload Spring 1978	832.66
1/2 month prep time Fall 1978	1392.50
Stipend 1978-79	139.50
3 units of overload 1978-79	1748.74
3 units of overload 1979-80	1871.24
3 units of overload 1980-81	2058.14

Munday, George

Stipend Spring 1978	$ 230.00
3 units of overload Spring 1978	832.66
1/2 month prep time Fall 1978	1327.50
Stipend 1978-79	244.50
3 units of overload 1978-79	1748.74
3 units of overload 1979-80	1871.23
3 units of overload 1980-81	2058.14
3 units of overload 1981-82	2269.05
3 units of overload 1982-83	2282.02

O'Sullivan, John G.

Stipend	Spring 1978	$ 240.00
7.5 units of overload	Spring 1978**	2081.64
1/2 month prep time	Fall 1978	1349.00
Stipend	1978-79	139.50
7.5 units of overload	1978-79	4371.84
7.5 units of overload	1979-80	4678.08
7.5 units of overload	1980-81	5145.36
7.5 units of overload	1981-82	5672.63

Ownbey, Ronald

Stipend	Spring 1978	$ 270.00
5 units of overload	Spring 1978	1387.76
1/2 month prep time	Fall 1978	1392.50
Stipend	1978-79	213.00
5 units of overload	1978-79	2914.56
5 units of overload	1979-80	3118.72
5 units of overload	1980-81	3430.24
5 units of overload	1981-82	3781.75
5 units of overload	1982-83	3803.360

Peth, Howard

3 units of overload	1981-82	$ 2269.05
3 units of overload	1982-83	2282.02

Ruh, Donald L.

Stipend	Spring 1978	$ 1250.00

Tan, Colleen W.

Stipend	Spring 1978	110.00
3 units of overload	Spring 1978	832.66
1/2 month prep time	Fall 1978	1436.00
Stipend	1978-79	13.50
3 units of overload	1978-79	1748.74
3 units of overload	1979-80	1871.23
3 units of overload	1980-81	2058.14

Thomas, James Robert

Stipend	Spring 1978	1235.00
1/2 month prep time	Fall 1978	1392.50
Stipend	1978-79	2719.50

**The Association calculated O'Sullivan worked an extra 10 hours per week. Based upon the record, it is found he worked an additional 15 hours, translated to half a full load or 7.5 units.

TOOPS, Gary

Stipend Spring 1978	$ 350.00
3 units of overload Spring 1978	832.66
1/2 month prep time Fall 1978	1207.50
Stipend 1978-79	102.00
3 units of overload 1978-79	1748.74
3 units of overload 1979-80	1871.23
3 units of overload 1980-81	2058.14
3 units of overload 1981-82	2269.05
3 units of overload 1982-83	2282.02

Warren, Kenneth W.

3 units of overload 1982-83	$ 2282.02