STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EUREKA TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-1104
v.	)	PERB Decision No. 702
EUREKA CITY SCHOOL DISTRICT,	)	October 19, 1938
Respondent.	)	

Appearances: Ramon E. Romero, Attorney, for the Eureka Teachers Association, CTA/NEA; Harland & Gromala by Richard A. Smith for the Eureka City School District.

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

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Eureka City School District (District) to the attached proposed decision of a PERB administrative law judge (ALJ) finding that the District violated sections 3543.5(a), (b), and (c) of the Educational Employment Relations Act (EERA or Act)[1] by failing to meet and negotiate with the Eureka

[1]EERA is codified at Government Code section 3540 et seq. 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

Teachers Association, CTA/NEA (Association or ETA) when it unilaterally established a policy which changed the contractual requirements for determining when certain substitute teachers would be classified as "temporary teachers."[2]

The District also excepts to the ALJ's failure to dismiss and defer this matter to the grievance machinery of the collective bargaining agreement and excepts to various factual and legal conclusions made by the ALJ on the merits of the dispute.

We reverse the ALJ's proposed decision and specifically hold that this Board is without jurisdiction to review this matter pursuant to the express mandatory proscription of section 3541.5(a)[3] since this matter is expressly covered by the parties' contract.

> 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.

2Temporary teachers, unlike day-to-day substitutes, are bargaining unit members and, thus, entitled to certain paid leaves and benefits specified in the collective bargaining agreement. The parties' dispute relates to whether the District unilaterally changed the verification standard required to determine when it is "known with absolute certainty" that a permanent teacher's absence will require the hiring of a temporary teacher as provided by the contract.

3section 3541.5 provides, in pertinent part, as follows:

DISCUSSION

We find the ALJ's findings of fact regarding the jurisdictional question of whether this matter should have been dismissed and deferred to the grievance-arbitration procedure of the parties' contract undisputed and free of prejudicial error and adopt them as our own.[4] 4

Our decision is best understood by initially reviewing the grievance and unfair practice history of the instant dispute.

A. Grievance And Unfair Practice History

It is undisputed that the instant matter is covered by the contract and the parties' contract contains a grievance procedure that culminates in binding arbitration.

In March 1986, the Association filed a grievance over the District's replacement of two permanent teachers with substitute teachers rather than temporary teachers. The

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> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not . . . issue a complaint against conduct' also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. (Emphasis added.)

4Because of our decision today dismissing the instant matter for lack of jurisdiction, we find it unnecessary to consider any of the ALJ's factual findings related to the underlying merits of the dispute.

grievance was denied by the District at the first and second levels on the basis that, as alleged in the grievance, no contract violation existed and that the grievance was untimely filed. The Association claimed that the use of substitutes rather than temporary teachers demonstrated a "continuing contract violation." This assertion was rejected by the District.

In April 1986, the Association appealed to level III of the grievance procedure by requesting arbitration. However, on September 26, 1986, three days prior to the scheduled arbitration hearing, ETA unilaterally withdrew, "without prejudice," its grievance. ETA's withdrawal was due to (1) the District's refusal to waive its timeliness defense and (2) a complaint that had been issued by PERB.

ETA initially filed an unfair practice charge with PERB on June 9, 1986, alleging that the District violated sections 3543.5(a), (b), and (c) by unlawfully transferring work out of the bargaining unit when it assigned day-to-day substitutes rather than temporary teachers to perform the duties of two permanent teachers who were absent due to long-term illnesses. After ETA amended its charge on August 7 and 28, 1986, a complaint was issued on August 29, 1986. The complaint alleged that the District's conduct constituted a unilateral change in policy (as embodied in the contract) without providing ETA notice and an opportunity to negotiate, in violation of section 3543.5(c) and, derivatively, sections (a) and (b) of EERA.

The District, on September 4, 1986, answered the complaint and on October 3, 1986, amended its answer. In its initial answer, the District made certain admissions but denied it changed the contractual "policy" regarding temporary teachers. It also raised certain affirmative defenses including the Untimeliness of the charge, deferral to the grievance procedure of the contract, Government Code section 3541.5(b), and charging party's "duty of fair representation" and "irreconcilable conflict of interest" with respect to the permanent teachers affected. In its amended answer, the District again urged deferral, emphasizing that the procedural issue of timeliness as well as the merits of the dispute were proper for consideration by the arbitrator, and that nothing in section 3541.5(a) required the District to waive the procedural defense of timeliness. The District further argued that ETA's voluntary abandonment of the grievance constituted a failure to exhaust the grievance machinery.

For the reasons which follow, we find that the employer's waiver of procedural defenses is not required by section 3541.5(a) and, accordingly, this matter must be dismissed and deferred to the contractual grievance-arbitration process.

B. PERB Has No Jurisdiction Over This Matter

The ALJ's rationale for determining that the District was required to waive its procedural defense of Untimeliness as a prerequisite to deferral was based primarily upon the Board's erroneous interpretation of section 3541.5(a) in Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a.

In Lake Elsinore School District (1987) PERB Decision No. 646, this Board expressly overruled Dry Creek to the extent it concluded that section 3541.5(a) "essentially codified" any aspect of the National Labor Relations Board (NLRB) pre-arbitral deferral policy articulated in Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931].[5]

The Court of Appeal affirmed PERB's decision in Lake Elsinore, holding that PERB's interpretation of Government Code section 3541.5(a) was reasonable. (Elsinore Valley Education Association, CTA/NEA v. PERB (Lake Elsinore School District) (July 28, 1988) Cal.App.4th, E5078; [nonpubl. opn.].)

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[5]In Collyer Insulated Wire, supra, the NLRB established pre-arbitral deferral standards as follows:

> 1. The dispute must arise within a stable collective bargaining relationship where there is no enmity by the respondent towards the charging party;
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> 2. The respondent must be ready and willing to proceed to arbitration and must waive contract-based procedural defenses; and
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> 3. The contract and its meaning must lie at the center of the dispute. (Id. at p. 842.)

The dissent attempts to distinguish the Lake Elsinore decision on the theory that the Collyer waiver of procedural defenses requirement was not before this Board in Lake Elsinore, and seeks to have us read the Collyer requirement into EERA section 3541.5. But in Lake Elsinore, this Board discussed the Collyer criteria and section 3541.5, and held the Collyer criteria were not applicable, including the requirement of waiver of procedural defenses. (Lake Elsinore, supra, pp. 28-32.) The Board specifically overruled prior Board decisions which had applied the Collyer criteria in connection with section 3541.5.

In Lake Elsinore, this Board held:

> While the NLRB standards set forth in Collyer Insulated Wire apply in the private sector, such NLRB guidelines are not controlling or even instructive in administering EERA. Unlike the NLRA, under EERA, where a contract provides for binding grievance arbitration, it [the grievance process] is elevated to a basic, fundamental and required component of the collective bargaining process. Quite simply, the Legislature did not "essentially codify" the Collyer requirements. In fact, there is absent even the suggestion in the language of section 3541.5, any other provision in EERA, or in its legislative history of an intent of the Legislature to codify Collyer. On the contrary, by its choice of prohibitory language, the Legislature plainly expressed that the parties contractual procedures for binding arbitration, if covering the matter at issue, precludes this Board's exercise of jurisdiction. Accordingly, we overrule Dry Creek and its progeny [fn. omitted] to the extent that they would condition the proscription of section 3541.5 on an application of the Collyer prearbitration deferral factors. (Ibid., pp. 31-32.) (Emphasis added.)

Thus, contrary to the ALJ's conclusion, PERB has no legislative authority to exercise its jurisdiction to issue a complaint until or unless the grievance process is exhausted or futility is demonstrated, irrespective of respondent's willingness to waive procedural defenses. In this case, futility was not raised by either party, and, as stated previously, the Association unilaterally withdrew its grievance and thereby negated the "availability" of a resolution of the merits of the dispute.[6]

[6]Contrary to the assertion made by the dissent that this Board must exercise its jurisdiction in cases were the arbitral

There being no evidence that the grievance process in this case has been exhausted either by arbitration award or settlement, the statutory proscription imposed upon PERB by section 3541.5(a) requires dismissal of the instant unfair practice charge.

ORDER

Based upon the entire record in this case, the unfair practice charge in Case No. SF-CE-1104 is hereby DISMISSED.

Members Porter and Shank joined in this Decision.

Member Craib's dissent begins on page 9.

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forum may no longer be available due to the charging party's inaction, the Court of Appeal held that:

> . . . if the arbitral forum is no longer available, no settlement or arbitration award could be reached. Under such circumstance it would be pointless to invoke the Board's "discretionary jurisdiction," for there would be no such jurisdiction to preserve.

Member Craib, dissenting: This case squarely presents the issue of whether EERA section 3541.5(a)(2)[1] requires deferral to arbitration even where the respondent has refused to waive procedural defenses. In Lake Elsinore School District (1987) PERB Decision No. 646, the Board held that, due to the mandatory language contained in section 3541.5(a)(2), this provision is jurisdictional in nature.[2] Thus, where the requirements and conditions of section 3541.5(a)(2) are met,

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[1]Section 3541.5(a)(2) states, 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: . . . (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. . . .

[2]The Board's decision in Lake Elsinore was upheld in an unpublished opinion by the Fourth District Court of Appeal. The California Supreme Court denied the Board's request for publication on October 12, 1988. As the appellate decision is nonprecedential, the majority's quotation of that decision (majority opinion fn. 6, pp. 7, 8) is of no force or effect.

the Board must defer to binding arbitration and may not assert initial jurisdiction. The issue of waiving procedural defenses was not raised in the Lake Elsinore case and the Board did not address it. The majority's assertion to the contrary is simply in error. The Board merely dealt with whether the deferral defense itself could be waived. As I believe the language of section 3541.5(a)(2) is most reasonably read to require the waiver of procedural defenses, I must dissent from the majority's holding in the instant case.

First, it is instructive to keep in mind some basic precepts of statutory construction. In analyzing the usage of certain words, the objectives sought to be achieved by the statute is of prime consideration. The People ex. rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville (1968) 69 Cal.2d 533; Redevelopment Agency v. Malaki (1963) 216 Cal.App.2d 480. Further, the provisions of a statute should be construed together, significance being given to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose. Turner v. Board of Trustees, Calexico Unified School District (1976) 16 Cal.3d 818; Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 230. Thus, it is necessary to examine the purpose to be served by the deferral provisions of section 3541.5(a)(2) and consider each word or phrase in light of that purpose. Unfortunately, the majority has chosen to ignore important portions of section 3541.5(a)(2).

The concept of deferral was not invented with the passage of EERA, but had been applied in both the public and private sectors years earlier. Any deferral requirement, whether mandatory or discretionary, constitutes an exception to the normal statutory enforcement scheme. It is based on the theory that the parties' contractual grievance machinery should be allowed to operate where resolution of the contractual dispute will also effectively resolve inextricably intertwined statutory issues. Thus, the National Labor Relations Board (NLRB) requires, inter alia, that "the contract and its meaning must lie at the center of the dispute" (Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931]). Similarly, EERA section 3541.5(a)(2) requires that the contract "cover(s) the matter at issue."

Deferral is thus a principle whereby arbitration is viewed as an alternative forum for the resolution of certain unfair practice issues. It represents not an abdication of authority, but simply a limitation upon initial jurisdiction. It is difficult to see how the contractual grievance machinery can protect statutory rights by providing an alternative forum for the enforcement of such rights where resolution on the merits is not assured. Indeed, a careful review of the language of section 3541.5(a)(2) reveals that the limitation upon the Board's jurisdiction is conditioned upon the availability of resolution of the merits of the dispute by way of settlement or binding arbitration.

The key passage in section 3541.5(a)(2) provides that the Board shall not issue a complaint until the parties' contractual grievance machinery, "if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration." This passage contains conditional language which makes deferral dependent upon an eventual determination on the merits of the dispute. The first portion of the passage requires that the grievance machinery "exist" and "cover the matter at issue." This clearly states that the grievance machinery must be available to resolve the intertwined statutory issue.

The next phrase also logically assumes resolution on the merits, for it conditions the Board's jurisdiction on exhaustion of the grievance machinery "by settlement or binding arbitration." While "settlement" indisputably refers to a resolution on the merits, the term "binding arbitration" carries some ambiguity, as an arbitrator could rule solely on a procedural matter having no statutory analog. However, the portion of the provision which provides for Board review of "such settlement or arbitration award" (for the purposes of determining whether it is repugnant to the EERA) resolves the ambiguity.

The provision for Board review of an arbitration award makes little sense unless it refers to a determination on the merits. It is difficult to conceive how the Board could decide whether a procedural ruling concerning the grievance procedure was repugnant to the statute. Such matters simply do not

implicate any statutory issues. On the other hand, a determination on the merits of an alleged contract breach would implicate statutory issues (i.e., whether the alleged breach constituted a failure to bargain in good faith). Thus, a scenario in which the grievance machinery ends with a ruling on a procedural issue simply does not mesh with the repugnancy review scheme set out in section 3541.5(a)(2).

In sum, section 3541.5(a)(2) requires this Board to defer to binding arbitration when the parties' contractually-based procedure will serve as an alternative forum in which statutory rights may be effectively enforced. It does not require the Board to defer to a determination which fails to address the statutory issues involved. The most efficient and logical way to implement this reading of the statute is to require the waiver of procedural defenses. This ensures that the statutory issues will be addressed and gives effect to the provision for subsequent review by the Board by providing that there will be something to review.

I must emphasize that requiring the waiver of procedural defenses does not allow a party to evade the grievance machinery in favor of adjudication by PERB. The respondent may always force the charging party to proceed to arbitration by waiving procedural defenses. Alternatively, the respondent may stand on its procedural defenses, in which case the matter could come before PERB. Admittedly, this approach does have an effect upon contractual timelines for the filing of grievances. However, any interference with contractual

timelines must be balanced against the public interest in the enforcement of rights granted by the EERA. In light of the purpose of deferral as outlined above, in conjunction with the fact that this Board's authority is limited to enforcing the statutes it is charged with administering,[3] the balance must favor the furtherance of statutory rights. When viewed in that context, the waiver of procedural defenses is not an onerous requirement.[4]

In this case, the District has refused to waive procedural defenses. Consequently, it was proper for the matter to be heard initially by this agency and the ALJ's proposed decision should be reviewed in the normal manner. As the majority has not considered the merits of the proposed decision, it is unnecessary for me to do so and I will reserve judgment on that issue at this time.

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[3]In fact, the Board has no authority to enforce contracts between the parties. EERA section 3541.5(b) states:

> The board shall not have authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of such an agreement that would not also constitute an unfair practice under this chapter.

[4]The notion that deferral properly requires the waiver of procedural defenses is not a novel one. The NLRB has long required such a waiver as part of its deferral policy. See Collyer Insulated Wire, supra, 192 NLRB 837. While NLRB precedent is not controlling, the EERA was not created in a vacuum, and established principles of labor law as they have arisen in the private sector are instructive in interpreting the EERA. San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1; McPherson v. Public Employment Relations Board (1987) 189 Cal.App.3d 293.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

EUREKA TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. EUREKA CITY SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-1104 PROPOSED DECISION (5/27/87)

Appearances: Ramon E. Romero for the Eureka Teachers Association, CTA/NEA; Harland & Gromala by Richard A. Smith for the Eureka City School District.

Before: Barry Winograd, Administrative Law Judge

PROCEDURAL HISTORY

The initial charge in this proceeding was filed June 9, 1986, by the Eureka Teachers Association, CTA/NEA (Association) against the Eureka City School District (District). Subsequently, two amended charges were filed, and, by separate letter, certain allegations were withdrawn. In essence, the Association alleged that the District unilaterally established a new policy regarding the use of temporary teachers. The District's adoption of certain criteria, in the Association's view, violated sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

or Act).[1]

The PERB General Counsel issued a complaint on August 29, 1986. The complaint stated that in January, 1986 the District, without notice or negotiations, had changed a contractual policy that temporary teachers be hired rather than substitutes to fill second semester vacancies created by the absence of permanent teachers. Violations of sections 3543.5(a), (b) and (c) were alleged.

Respondent's answer, filed September 8, 1986, and amended on October 3, 1986, admitted certain facts, denied the allegations of unlawful conduct, and advanced affirmative defenses. One defense raised by the District was that the dispute was subject to binding arbitration and should be dismissed pursuant to section 3541.5(a) of the Act. This objection previously had been rejected by the Board's

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[1]The EERA is codified at Government Code section 3540, et seq., and is administered by the Public Employment Relations Board (hereafter PERB or Board). Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3543.5 provides in relevant part that 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.

Regional Attorney in a letter dated August 29, 1986. He advised the parties that deferral was inappropriate because the District was unwilling to waive procedural defenses in arbitration, particularly a claim of grievance Untimeliness. The District's renewed deferral objection, as well as other admissions, denials and defenses, will be considered below where relevant.

A settlement conference on October 29, 1986, failed to resolve the dispute. The formal hearing was conducted in Eureka, California on January 14 and 15, 1987. Post-hearing briefs were filed by the parties and the matter was submitted on April 27, 1987.

FINDINGS OF FACT

A. Relevant Contract Terms

At the time this dispute arose, the parties were subject to a bargaining agreement effective through June 1988.[2] Article 18 of the contract recognizes the Association as the exclusive representative of District teachers. The parties

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[2]See Charging Party Exhibit No. 5. Hereafter, Association and District exhibits will be designated "C. P. Exh." and "Resp. Exh.", respectively. References also will be made to the transcript ("Tr."), followed by the cited volume and page. A separate transcript was prepared for one witness, Richard Stroud, whose testimony necessitated a court reporter. (See "Tr. (RS)," infra.)

have agreed in Article 18 that day-to-day substitutes are not part of the unit. Under certain circumstances, however, teachers serving as long-term replacements for absent employees will be considered bargaining unit members, to be classified as temporary teachers. The present controversy distinguishing those circumstances turns upon the application of the following contract provisions within Article 18:

> 4. Temporary teachers are a part of the ETA unit. Temporary teachers are teachers serving under a contract which identifies the employment as being temporary in nature and who are temporarily taking the place of a probationary or tenured teacher who is on leave. Temporary employees shall be paid a salary based upon the same salary schedule as probationary and permanent teachers:
>
> A. The District will fill vacancies caused by the absence from service of probationary or permanent teachers with temporary employees where the absent probationary or permanent teacher is: (1) known with absolute certainty not to return to service for the entire school year; or (2) is known with absolute certainty not to return for either the entire first semester or the entire second semester of a school year; or (3) where the absent teacher leaves active service during the first semester of any given school year with at least 50 percent of the teacher duty days in the first semester remaining unserved, and it is known with absolute certainty that the absent teach will not return during the balance of the school year.[3]

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[3]The next section of the contract establishes five-day posting and selection periods to fill regular teacher absences with temporary hires. In the interim, a daily substitute can be used.

The key language at issue in Article 18(4)(A) is the phrase "known with absolute certainty."

Other provisions of the contract also are relevant to this proceeding, including several leave-of-absence sections. The contract in Article 13 provides for paid sick leave and, after sick leave expires, extended illness leave. Payment during an extended illness leave of up to five months is based on a differential between the regular teacher's salary and that of the replacement teacher. In addition, the contract permits unpaid health leaves.

Employees absent on sick leave for five days or more may be asked for "verification of illness." Employees seeking unpaid health leave status may need a "substantiating statement from a licensed physician . . . ." Neither the sick or health leave provisions establish cut-off dates for notice of the illness as a condition either for the leave request or for hiring a temporary teacher as the replacement.

Teachers on paid leave have the right to "[R]eturn to the same, a similar, or mutually agreed upon position . . . ." Those on unpaid leave have the same return rights for a one year period.

The contract also establishes a paid maternity leave for pregnancy and related health conditions. The length of such leaves is to be fixed by the employee and her physician. In addition, extended unpaid maternity leaves are permitted without reference to a physician's opinion.

Another aspect of the contract that is relevant is the grievance and arbitration procedure set forth in Article 12. The three-step process may be initiated by an employee or the Association within 20 days of the grievable event. The grievance procedure ends with final, binding arbitration. The contract also states:

> The arbitrator's decision will be limited to only those alleged violations and facts raised at Levels I and II of this grievance procedure.

B. The Stroud Case

During the fall 1985 semester, Richard Stroud became increasingly ill with throat and voice problems. He began daily sick leave, utilizing accrued time. Soon after the New Year, Stroud was tentatively diagnosed as having cancer of the larynx. While further tests were undertaken, Stroud told his school principal, Larry Olson, about the developments. Stroud and Olson had been good friends for more than 25 years, and they were in regular contact about Stroud's situation in January. (Tr. (RS) 5, 8.) On January 21, following full testing, Stroud's cancer diagnosis was confirmed, and surgical and radiation treatments were under consideration.

Once diagnosed, Stroud informed Olson that Stroud would be out for the balance of the school year. (Tr. (RS) 9.) This conversation took place on January 21, a week before the second semester started. Olson asked Stroud to get a doctor's verification of his illness and his inability to keep working

during the next semester. Stroud immediately contacted his doctor, was told such verification would be forthcoming, and reported that fact to Olson. (Tr. (RS) 10-11.) It also appears that Olson conveyed news of Stroud's condition to Dodie Scott, the District's personnel coordinator. (Tr. 2:64.)

Stroud testified that as of January 21 he was certain, based on medical communications, that he would be out of school the second semester, and that Olson also understood Stroud's long-term status. (Tr. (RS) 9-10, 15.) Stroud's testimony on this point was not contradicted as Olson did not testify.[4]

Although Stroud on January 21 requested a verification letter from his doctor, the letter, dated January 22, did not arrive at the District's headquarters until February 3, the date stamped on the letter by the main personnel office. Unfortunately, the limited testimony failed to fully account for the time lapse. An employee in the doctor's office indicated that dictated letters were transcribed once or twice a week by an outside typist, suggesting that, based on the usual schedule during the relevant time period, the letter might have been typed and sent by January 24, or possibly later. (Tr. 2:84-85.) There also was testimony by the District's superintendent that the letter was transmitted to

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[1]Stroud, moreover, was an exceptional witness. Despite forced reliance on an electronic voice box, his manner was confident and forthright. Stroud's recollection of key conversational details also was sharp.

the District's main office by Olson, the addressee shown on the letter, and that the envelope, now lost, bore a January 30 postmark. (Tr. 1:82, 86.). As noted above, Olson did not testify. There was no other direct evidence on the time gaps in the chain of custody.

Stroud, who underwent cancer surgery, remained absent through the balance of the second semester. There was no evidence that the District disputed either his illness or the sufficiency and timing of the verification Stroud supplied to support his use of sick leave. Throughout Stroud's absence, beginning in the first semester, his classes were taught by Jim Steinberg. Steinberg was considered a non-unit substitute teacher for the entire period. According to Stroud, Olson had stated on January 21 that Steinberg would continue as Stroud's replacement. (Tr. (RS> 10.)

C. The Crossan Case

Joan Crossan became ill with depression in fall 1985. She submitted a doctor's verification of the illness in October as part of a planned three-month absence. On January 9, 1986, Crossan wrote a letter requesting an extension of her absence. The letter was prepared with the assistance of Richard Schuster, the California Teacher Association's field representative in Humboldt County. The extension request cited the relevant contract provision for a health leave, and expressly sought unpaid status for the last part of the second semester, after extended illness differential pay would be exhausted.

During January, Crossan also spoke about her needs with her school principal and with Dodie Scott, the personnel coordinator. In a conversation with Scott, Crossan volunteered to submit a supplemental doctor's verification. Crossan testified that she assumed such a statement was required, similar to the substantiation supplied for her original leave in fall 1985. (Tr. 1:21.) At the hearing, there was no testimony about the precise date for this conversation with Scott, although from the context of related events it probably took place near the start of the second semester on January 27, 1986.

Regardless of this uncertainty, it is clear that Crossan sought the medical verification. Initially, according to Crossan, the doctor or someone in his office mistakenly sent a copy of Crossan's January 9 letter to the District. (Tr. 1:19-20.) Thereafter, in a letter dated January 27, Crossan's doctor sent a proper verification of her illness. This was received by the District on January 29, two days after the semester began.

During the second semester, Crossan was given the extended illness and health leaves she had requested. There was no evidence that the District disputed either her illness or the sufficiency and timing of the verification she supplied. Throughout Crossan's absence, beginning in the first semester, her classes were taught by Lori McFarland. McFarland was considered a non-unit substitute for the entire period.

Crossan's salary through the March 7 expiration of her paid leave status was based on the difference between her regular pay and the substitute cost for McFarland.

D. The Association Grievance

In March 1986, several weeks after the start of the second semester, the Association filed a grievance asserting that the District failed to classify Steinberg and McFarland as temporary teachers to replace Stroud and Crossan for the second semester, and, instead, had treated them as substitute employees. (See, generally, grievance materials collected in C. P. Exh. 4 and Resp. Exh. 2.) The remedy sought by the Association was to post and fill the positions in accord with Article 18 of the bargaining agreement.

The grievance was denied at both the first and second levels. The second level of the procedure, an appeal to the superintendent's designee, resulted in a statement of facts and a contractual interpretation by the District. The Association asserted that notice by the employee plus subsequent written medical verification satisfied the District's contractual rights, and that past practice with respect to the issue was not definitive in terms of denying temporary teacher classification. (Resp. Exh. 2 (Grievance Hearing Transcript) at pp. 10, 16-17.)[5]

[5]The hearing transcript, offered by the District, is entitled to evidentiary weight, even though Schuster, the Association's representative, did not testify at the unfair practice hearing.

The hearing officer rejected the grievances. His report stated that the employer knew that Stroud and Crossan would be absent "with absolute certainty" on February 3 and January 29, respectively, when "corroborating" physician statements were received after the beginning of the semester. (C. P. Exh. 4, Level II Decision at p. 3.) In the hearing officer's view, since their medical verifications were not submitted before the semester started, the temporary teacher provision of Article 18 did not apply and no contract violation was found.

The Level II decision reasoned that requiring medical notice to be received prior to the semester's start was a necessary condition in order to avoid potential double salary payments if an employee on leave wished to return to work. As an alternative ground to deny the grievance, the hearing officer concluded that the filing was untimely, apparently rejecting the Association's argument that the ongoing use of a substitute constituted a continuing violation of the contract.

Following the second level decision in April 1986, the Association sought arbitration. An arbitrator was selected and a date was set, but in September the Association withdrew its grievance. In its letter to the arbitrator, the Association claimed that the District refused to waive its timeliness argument, and that the substantive issue was pending before the PERB. (The unfair practice charge was filed in June 1986.)

E. Negotiating History

The temporary teacher provision in Article 18 was the mid-1982 product of unfair practice settlement negotiations in Case No. SF-CE-649. (See, generally, Resp. Exh. 6; Tr. 1:89-110; 2:87, 94.) In that dispute, the Association alleged that the District unilaterally adopted a new policy regarding the unit-member status of long-term substitute employees working under fixed contracts. The settlement was negotiated with the assistance of a PERB hearing officer. The parties conferred once in a face-to-face meeting, and thereafter through correspondence and telephone calls. (Tr. 1:96-97.) Eventually, the settlement was incorporated in the bargaining agreement that preceded the current contract. The text has remained unchanged throughout this period.

Richard Smith, the District's counsel in this proceeding, negotiated the unfair practice settlement in SF-CE-649. He testified that the "absolute certainty" language was intended to protect against the risk of double employment and salary payments. (Tr. 1:94, 97.) At first, the District had proposed using temporary teachers, who would be part of the bargaining unit, only for absences of "known duration." After discussion assisted by the mediator, the District expanded the scope of temporary teacher employment to include replacements for employees on leaves of absence of unknown but extended length. For further protection, the District utilized the absolute

certainty concept in order to minimize the risk of a person returning from leave after a temporary teacher was in place. (Tr. 1:95-97.) The Article 18 phrase "known with absolute certainty" was drafted by Smith and was sent to the Association in September, 1982. (Tr. 1:93.) The settlement was agreed upon the next month.

Smith testified that although there were some conversations with Schuster, the Association representative, about the District's fear of potential double employment and double salary payments, there was no conversation that Smith could recall that involved the specific means for determining that an employee would be absent with "absolute certainty." (Tr. 1:97, 103-104, 108.)[6] Hence, as Smith conceded, there was no discussion between the parties that classifying a temporary teacher under Article 18(4)(A) would require that medical verification be received prior to the start of a semester, (Id.) Smith also confirmed that subsequent events demonstrated a lack of clarity in the absolute certainty provision. (Tr. 1:108.)

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[6]The Association also offered testimony about bargaining history. An Association negotiator who was present at the settlement talks, and who was a participant on the Association side thereafter, could recall no discussion of how and when the concept of "absolute certainty" would apply. (Tr. 2:87.)

F. Past Practice

Substantial evidence was offered at the hearing regarding the District's past practice of hiring temporary teachers for health and illness absences for the period 1983-84 through 1985-86, the years in which the 1982 settlement agreement was implemented. (See Resp. Exhs. 1, 8 and related testimony.)

Temporary teachers were hired for four employees absent for an entire semester while utilizing sick leaves in 1984-85 and in 1985-86. These employees were designated as *"MB,"* "JD," "LM," and "GB" in the record. (Initially, GB was misidentified as "JB.") Of these, one employee (GB) in 1984-85 did not submit a doctor's verification before the start of the semester, but still a temporary teacher was hired. A second employee (MB) in 1984-85 did submit a physician's statement before the semester began.

In 1985-86, the same year that Stroud and Crossan's cases arose, two other employees were absent on sick leave and were replaced by temporary teachers. One employee (JD) did not submit medical verification before the first semester began, although subsequent extensions of the leave for part of the second semester were supported by a suitable statement, albeit after the start. (Tr. 2:63-65.) Another employee (LM) in 1985-86 did convey an advance, pre-semester doctor's statement.

The District's personnel coordinator, Scott, testified that it was her mistaken contract interpretation that led to the 1984-85 hiring of a temporary teacher for the employee (GB) who did not submit a medical verification before the first semester began. (Tr. 1:127-128, 130-131; 2:50-52.) Since the District was aware that GB had suffered a heart attack during the summer and was going to be absent for most of the semester, Scott had believed a temporary teacher was appropriate. (Tr. 2:50-51, 57-58.) Later, in an early 1985 discussion with District administrators (Tr. 1:128-129; 2:52), she was instructed to limit such hires to instances in which the teacher would be absent the remainder of the year, thereby making Article 18(4)(A)(3) inapplicable.[7]

Scott also was responsible for the 1985-86 temporary teacher classification without advance medical verification being received by the District. In this instance, the employee (JD) was known personally to Scott, who knew with certainty that the employee would be absent through the entire first semester.

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[7]This explanation, which Scott said should have applied in GB's case (Tr. 2:68-69), did not square with the record evidence showing that GB was absent the entire first semester. (Tr. 2:50-51, 57-58; Resp. Exh. 1.) Article 18(4)(A)(3) applies when an employee is absent for a portion of the first semester and all of the second semester.

(Tr. 2:63-64.)[8]

With respect to sick leave and other illness absences, the District did not have a policy to seek second or additional medical opinions prior to accepting the verification offered by the employee. (Tr. 1:61.) Nor was there evidence that the District referred employees to a physician selected by the employer for an independent assessment of employee and doctor claims.

In addition to the evidence regarding temporary teacher practices in relation to medical substantiation, there was abundant evidence that the District utilized retroactive hiring authorizations, often reclassifying substitutes as temporary teachers weeks after a semester began. (See Resp. Exh. 8.) Retroactive authorizations were involved in the temporary teacher classifications for all four of the sick leave

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[8]Evidence also was offered regarding the use of maternity leave and temporary teachers. The District has urged that such leaves are not returnable (Tr. 1:117), as are other illness and health leaves, and thus have limited applicability in resolving the present dispute. This claim is questionable since the contract does not distinguish between the return rights related to paid and unpaid leaves for periods up to one year. Regardless, since one type of maternity leave may involve unpaid absences of a specific duration, there is a similarity to Crossan's request for an unpaid leave of absence for the balance of the 1985-86 second semester. Overall, the record indicates that employee notice to the District was by itself sufficient to trigger the unpaid maternity leave and classification of the replacement as a temporary teacher. (See Resp. Exh. 1.) For present purposes, the District apparently would treat the cases differently by requiring a further, outside verification for an employee in Crossan's situation.

replacements in 1984-85 and 1985-86, approving such status for the replacement's first or second semester. (See Tr. 2:30 (MB); 2:34-35 (JD); 2:47-48 (LM), and 2:50-51 (GB).) The employees who originally served as substitutes continued serving as temporary teachers in each instance. (Id.; 2:95.)

From the evidence at the hearing, it may be inferred that the Association knew of the school board's retroactive authorization practice, which covered maternity leave cases as well, because organizational representatives attended meetings and regularly received board agendas and personnel reports reflecting the authorizations. (Tr. 2:88-89.) In contrast, prior to the Stroud and Crossan cases, and the Level II hearing officer report, there is no indication that the Association could have inferred a District policy requiring that a physician's verification be received by the District prior to the start of a semester as a precondition to hiring a temporary teacher. The Association, for example, was not involved in the sick leave replacement classification for the two employees (MB, LM) who submitted medical verifications prior to the semester's start. (Tr. 2:54-55.)

Additionally, there was no District policy statement or other written guideline, for internal consumption or otherwise, that established its criteria for applying the contractual "absolute certainty" text. (Tr. 2:56.) Nor was there any written document correcting Scott's purported mistaken interpretation. (Tr. 2:57.) In brief, there was no evidence

that the employer's interpretation of the absolute certainty-provision had been communicated to the Association during the years the District claims it was in effect.

CONCLUSIONS OF LAW

A. Introduction

The charging party contends that the District unilaterally adopted a new policy governing temporary teacher classification under Article 18(4)(A) by defining the phrase "known with absolute certainty" to require receipt of a physician's verification of an employee's absence prior to the start of a semester. The Association views such a requirement as adding specific criteria to the general language of the bargaining agreement. The Association concludes that the District violated the EERA because its new policy involved a matter within the scope of representation, and was adopted without notice and negotiations with the exclusive representative.

The respondent counters that its policy requiring pre-semester verification was in accord with the contract, negotiating history and past practice in the District. In addition, the District argues that a complaint should not have been issued because the PERB dispute should have been deferred to binding arbitration.

For the reasons stated below, it is concluded that the District's defenses are without merit, a violation of the EERA has been demonstrated, and an appropriate remedial order should be issued.

B. Deferral

As a threshold defense that would preclude deciding the substantive unfair practice issue, the District maintains that the Board should have deferred the Association's claim to binding arbitration, citing the mandatory deferral language of section 3541.5(a).[9]

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[9]In that section, the EERA provides in relevant part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not . . . ; (2) issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to the contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review such settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that such settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits; otherwise, it shall dismiss the charge. The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

The District argues that an arbitrator could have decided the Association's contract violation theory on the merits, even if the District also was advancing a procedural defense based on the alleged untimely filing of the grievance. On this point, the Level II hearing officer had reached the merits of the contract case, while also holding alternatively that the grievance was untimely. The contract itself describes the arbitrator's jurisdiction broadly, allowing the decision-maker to consider the violations and facts alleged at the lower levels of the procedure. The District observes that since the Association failed to demonstrate that submission to arbitration would be futile because of the employer's Untimeliness defense, the Association should not be permitted to bypass the contractual remedy that had been bargained for by the parties.

The District's analysis, while logical from a strictly contractual viewpoint, fails to consider the separate statutory enforcement interest of the Board, as reflected in Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81(a). In that decision, the PERB concluded that an arbitrator's award was repugnant to the EERA, thus not justifying deferral, because it failed to provide for full restoration of the status quo ante. The Board's decision relied on federal precedent under the National Labor Relations

Act (NLRA).[10]

In Dry Creek, following this precedent, the Board set forth four requirements for PERB deferral to an arbitration award:

> 1. The matters raised in the unfair practice charge must have been presented to and considered by the arbitrator;
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> 2. The arbitral proceedings must have been fair and regular;
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> 3. All parties to the arbitration proceedings must have agreed to be bound by the arbitral award; and,
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> 4. The award must not be repugnant to the Act.[11]

The first of the four listed criteria contemplates the exercise of the PERB's jurisdiction if the unfair practice issues "are not encompassed by the arbitration proceeding and included in the

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[10] **Id.** at p. 4, citing Speilberg Manufacturing Co. (1955) 112 NLRB 1080 [36 LRRM 1152], and Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931]. The NLRA, 29 U.S.C, sec. 150 et seq., does not have a mandatory deferral requirement. The deferral doctrine has evolved as an exercise of discretionary jurisdiction by the National Labor Relations Board (NLRB). (See Morris, The Developing Labor Law (2d ed.), at pp. 924-933.)

[11] Subsequent Board decisions have reaffirmed the deferral requirements: see, e.g., Lancaster Elementary School District (1983) PERB Decision No. 358; Conejo Valley Unified School District (1984) PERB Decision No. 376; Los Angeles Unified School District (1986) PERB Decision No. 587.

arbitrator's disposition of the case."[12] [12]

Since, in the proceedings before the Regional Attorney, the District declined to waive its Untimeliness defense, if the case was deferred the arbitrator necessarily would have to consider an alleged procedural objection that could preclude resolution of the substantive unfair practice dispute. If this was the outcome, in the District's view, the Association could return to PERB after the award issued, and seek a repugnancy determination that would permit the PERB's consideration of the merits of the unfair practice charge.[13] Such a protracted speculative course, however, would serve no practical statutory end, and, instead, would inflate the time, costs and attorney fees to be incurred by all parties to the dispute.

This conclusion is consistent with federal labor relations precedent. Cases cited by the Regional Attorney when he initially dismissed respondent's objection, support the principle that deferral of the merits of an unfair practice claim to arbitration must be unconditional, including a timeliness waiver, in order to justify a stay of the statutory

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[12]Dry Creek, supra, PERB Order No. Ad-81(a) at p. 5.

[13]In a footnote to the District's brief, respondent also suggests that a time-bar holding by the arbitrator would block the PERB's jurisdiction. (See District Brief at p. 11, fn. 9.) This result, precluding statutory enforcement at any stage, is clearly at odds with the principles expressed in Dry Creek.

enforcement mechanism.[14] The District has argued that these cases are distinguishable, relying, however, on factual variations from the present dispute that do not detract from the basic principle. Simply stated, under the NLRA, deferral to arbitration is justified only if there is an assurance that resolution of the contractual dispute also will resolve the underlying statutory claim.[15]

Similar reasoning should apply under the EERA because section 3541.5(a) requires pre-arbitration deferral only where the contract "covers" the unfair practice dispute. If a time bar could or does preclude the arbitrator's consideration of the unfair practice issue, and the employer is unwilling to abandon the procedural objection to ensure that the contractual dispute mechanism "covers" the statutory issue, it cannot be said that the literal jurisdictional command of the EERA has been satisfied for the purpose of mandatory deferral. Absent a

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[14]See Columbus Foundries, Inc. (1977) 229 NLRB 34 [95 LRRM 1090]; United States Postal Service (1976) 225 NLRB 220 [93 LRRM 1089]; Pilot Freight Carriers, Inc. (1976) 224 NLRB 341 [92 LRRM 1338].

[15]The emphasis on this point was central to the NLRB's reasoning in Collyer Insulated Wire, supra, 192 NLRB at 841-43. Other NLRB decisions also have rejected deferral when a threshold issue of grievance timeliness could impede a prompt unfair practice ruling. (See, e.g., Coast Valleys Typographical Union (1975) 221 NLRB 1048, 1050-51 [91 LRRM 1078]; Raymond International, Inc. (1975) 218 NLRB 202, 203, fn. 1 [89 LRRM 1461]; cf. Gary Hobart Water Corporation (1974) 210 NLRB 742 [86 LRRM 1210].)

showing of forum-shopping in bad faith, which perhaps might justify the PERB's refusal to exercise its jurisdiction, deferral on the present record would invite a duplicative waste of public resources, procedural delay, a deteriorating evidentiary record, and continued uncertainty in labor-management relations as the merits of the unfair practice dispute remained up in the air.

C. The Unilateral Change

The Board's precedent, as affirmed by appellate courts, requires an employer to provide notice and an opportunity to negotiate before unilaterally establishing a new policy or practice affecting a subject within the scope of representation.[16]

In this case, there is no dispute that the District's verification standard for temporary teacher classification was expressed in 1986 without explicit notice or negotiations at that time, and was of generalized effect for the bargaining

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[16]Oakland Unified School Dist. v. Public Employment Relations Bd. (1981) 120 Cal.App.3d 1007, aff. PERB Decision No. 126; Moreno Valley Unified School Dist. v. Public Employment Relations Bd. (1982) 142 Cal.App.3d 191, aff. PERB Decision No. 206.

unit.[17] Indeed, one of the District's principal defenses is that new bargaining was not required because the subject matter had been negotiated previously. The District believes that its verification policy was consistent with the agreement, the bargaining history, and the past practice.

Before reviewing this contention, however, consideration first must be given to the District's argument that the subject matter of its action is beyond the scope of representation because the hiring of non-unit employees is within management's discretion, citing Healdsburg Union High School District (1984) PERB Decision No. 375. But the respondent's reliance on Healdsburg is misplaced because the Association is not seeking to negotiate on behalf of employees outside the bargaining unit. Rather, the organization by its charge proposes to bargain over the appropriate classification, and wages and hours, of employees within the unit, as previously recognized by the employer. Bargaining also would be relevant to such issues as work preservation, and transfers or reassignments of unit work. Healdsburg applies this unit distinction, for example, in its discussion of negotiable

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[17]See Grant Joint Union High School District (1982) PERB Decision No. 196 (distinguishing contract violation without general effect).

proposals regarding "restricted" and "student" employees."[18] 18

More precisely on point, the PERB previously has held that negotiations over classification criteria for temporary certificated employees were within the scope of representation.[19] Other Board decisions also affirm the principle that classification issues related to wages and hours, and to work preservation, transfers and reassignments, fall within the scope of representation.[20]

Were the rule otherwise, an employer, regardless of contractual recognition commitments as in this case, could unilaterally determine that a particular employee was outside the bargaining unit and beyond the scope of representation, and then hoist its unfair practice defense onto this unilateral determination. This circular approach toward the scope of representation would strip the statutory definition of meaning, and bargaining would be dependent on the transitory preference

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[18] Id. at pp. 19-20.

[19] Jefferson School District (1980) PERB Decision No. 133 at pp. 21-23. (Also see id., at pp. 24-25 distinguishing unit and non-unit employee negotiations.)

[20] See, e.g., Alum Rock Union Elementary School District (1983) PERB Decision No. 322 at pp. 10-12; Mt. San Antonio Community College District (1983) PERB Decision No. 297 at pp. 7-9; Goleta Union School District (1984) PERB Decision No. 391 at pp. 19-20; Davis Joint Unified School District (1984) PERB Decision No. 393 at pp. 25-26.

of an employer.

Regarding the core of the parties' dispute, the District maintains that it has negotiated over the temporary teacher classification, and that its verification standard was in accord with the contractual text, negotiating history and past practice. In resolving this argument, it should be observed that any review of the disputed contractual phrase "known with absolute certainty" must come to grips with the obvious: absolute certainty can be ephemeral, dependent on timing, circumstance and the beholder's point of view. The District's negotiator admitted that events have demonstrated a lack of clarity for the phrase. In the District's brief, it also concedes that even the respondent's chosen verification standard does not offer complete absolute certainty against double employment, but instead provides "limited protections." (District Brief at p. 4.) In this respect, there was no evidence that reasonable steps toward greater certainty were required, such as second medical opinions or opinions from physicians selected by the employer. Hence, any review of the present dispute must strive to be sensible, recognizing that the parties selected an ambiguous contractual phrase in their quest for assurance.

Under such circumstances, the Board examines disputes over contractual intent in light of negotiating history and previous

practice.

The negotiating history, however, does not support the District's claim that its pre-semester verification requirement was consistent with the contract. First, and most important, the specific means of applying the phrase "known with "absolute certainty" were not discussed by the parties. At most, during their settlement talks, the expressed intent of the parties was their agreement on the need to minimize the District's risk of double employment and salary payments.

Second, the contract language cannot fairly be read to impliedly incorporate the District's requirement as applied to the replacements for Stroud and Crossan. As is plain in the health and sick leave portions of the agreement, the parties knew how to write and incorporate language that expressly established verification rules. In this context, a similar verification rule cannot be implied in an independent article of the contract without flaunting the general principles of

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[21]See, e.g., Morgan Hill Unified School District (1986) PERB Decision No. 554(a) at p. 9; Modesto City Schools and High School District (1984) PERB Decision No. 414.

contract interpretation.[22]22

Third, in light of these contract principles, the Association's understanding of the absolute certainty phrase is more consistent with the negotiating history, and with the agreement as a whole. Thus, a temporary teacher should be hired once an employee gives advance, pre-semester notice under Article 18(4)(A), and the employee complies with the District's

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[22]Under California law, a contract must be interpreted to give effect to the expressed intent of the parties as of the time of agreement. (Civil Code sec. 1636.) The contractual text is the starting point for this analysis (Civil Code secs. 1639-40), with effect being given to every portion of the agreement. (Civil Code sec. 1641.) Interpretation of the contract must be definite and reasonable, capable of being carried out without violating the parties' intention. (Civil Code sec. 1643.) When interpreting an ambiguous contract provision, evidence is relevant demonstrating what the promisor believed the promisee's understanding to be at the time of the agreement. (Civil Code sec. 1649.) If these principles of interpretation are not sufficient to resolve an uncertainty, the text shall be interpreted against the party drafting the disputed language. (Civil Code sec. 1654.) (See, generally, Witkin, Summary of California Law (8th ed.), secs. 520-540.)

Not only should the trier of fact be hesitant to imply a verification rule where none was expressed, but, in this case, other rules also are relevant. Here, the promisor was the District, since it offered a temporary teacher classification under certain conditions. According to the testimony of the District's negotiator, the Association's understanding during bargaining was that the employer wanted an assurance against the risk of double employment, without reference to specific criteria. Under these circumstances, the promisee's understanding is the proper interpretation, assuming it is consistent with the text and the agreement as a whole. Ultimately, if other interpretative approaches fail, an adverse finding is appropriate against the District as the party drafting the disputed text.

request for medical verification, assuming one is sought by the District. If the employee's response to the request is satisfactory for the purpose of granting health and sick leaves, as were Stroud and Crossan's, the two separate provisions of the agreement can operate in tandem. This interpretation, described during the grievance hearing below, is more plausible than the District's, which would permit both express and implied verification rules operating at the same time. The District's interpretation of different provisions could function in an inconsistent fashion, rejecting a verification for one purpose while allowing it for another. When gauged by the test of plausibility, the District's action is not in accord with the agreement.[23]

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[23]Compare Victor Valley Community College District (1986) PERB Decision No. 570 at pp. 16, 24 (no unilateral change found where the employer's action was based on a plausible contract interpretation).

In the District's brief, it mischaracterizes the Association's contractual interpretation, contending that the organization would allow verbal notice of a projected semester absence, without regard to a cut-off date, as sufficient notice to require temporary teacher classification. As an argumentative device, this characterization is helpful to the District's case, but it misses the mark (and lacks support in the record). Instead, as noted above, the Association has urged that notice, whether written or verbal, is subject to the District's discretionary verification rights, and that Stroud and Crossan did all that was and could be required of them under the contract. The temporary teacher requirement was effective, therefore, because their prospective absences were corroborated to the District's satisfaction. Had the corroboration been unreasonably delayed or otherwise insufficient, a different case would be presented, one more in keeping with the District's characterization.

The Association's interpretation is sensible as well, in light of other contractual considerations. The contract, for example, expressly circumscribes return rights, apparently creating reinstatement leeway that provides another limit on the possibility of double employment in the same position. Additionally, while the contract does establish return rights, such rights cannot be interpreted in a vacuum. It is hard to imagine how an employee who has been granted an unpaid leave request could then have a change of heart, and prevail on a demand for restoration of a previous position by bumping a temporary teacher in the process. If the employer has already acted in reliance on the promise and to its detriment by hiring a temporary teacher, the absent teacher should be held to the original promise. Presumably, employees on other types of leaves make similar commitments, and these serve as adequate protection for the District. To believe that a doctor's note alone makes an employee's promise binding, credits too much to the magic of the medical profession.

The District's interpretation of the verification rule as an implied term consistent with the agreement also is unsupported by past practice. According to traditional labor relations principles, a practice can be an implied term in an agreement, as the District urges in this case, only if it is clearly established and ascertainable over a period of time,

and if it is accepted by the parties.[24] The record, however, does not substantiate the employer's past practice contention.[25]

First, the District's practice was limited and varied with respect to pre-semester verification for temporary teacher classification in sick and health leave situations. Aside from Crossan and Stroud, there were only four relevant absences in three years, two of which did not involve advance, pre-semester physician verifications. While it is true, as the District contends, that the existence of exceptions does not disprove a practice, there must be an ascertainable practice in the first instance, something the respondent has not demonstrated.

Second, accepting Scott's misinterpretation as the cause for one of the two classifications in apparent violation of the District's policy, the correction of such a mistake reflects, at most, the state of mind of the District. More significantly, there was no written guideline or document, either before or after the mistaken interpretation, suggesting

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[24]See, e.g., Elkouri and Elkouri, How Arbitration Works (3d ed.) at pp. 391-92. Also see cases cited supra, fn. 21.

[25]Respondent was in error in suggesting in its brief that the Association bore the ultimate burden of proof on the past practice issue. The complaint alleged a change in contractual policy. This was evident in the Association's prima facie case. Once the Association showed that the employer's practice cast a new light on the contract, it was the District's burden to demonstrate that its actions were consistent with the practice and the agreement. (See, e.g., fn. 24, supra: Pajaro Valley Unified School Dist. (1978) PERB Dec. No. 51.)

to the Association that there was an established practice implementing the contract's absolute certainty text.

Third, contrary to the employer's claim in its brief, the organization's agreement cannot be implied on the basis of Crossan's testimonial admission that she voluntarily sought a doctor's verification because she believed it was required. Read as a whole, her testimony indicates that she was referring to the requirements of the contract's sick and health leave provisions, which gave the District the discretion to ask for verification. Hence, Crossan's statement at the hearing has little bearing on the main issue in the case.

In sum, the District's requirement that a doctor's verification be received before the start of the semester as a precondition to hiring a temporary teacher, establishes by unilateral action a policy that is not reflected in the agreement, the negotiating history, or the past practice. The District did not propose such a policy in bargaining, and the Association had no reason to know this was the employer's policy during the period it was purportedly in effect.

D. Violations

The District's unilateral decision, without notice or negotiations, to establish a new policy that a teacher's absence for a semester would be known with absolute certainty only when a physician's verification was received by the

employer prior to the start of the semester, thereby changing temporary teacher classification criteria under the contract, constituted a refusal to negotiate in violation of section 3543.5(c). The District's unlawful unilateral conduct also constituted concurrent violations of sections 3543.5(a) and (b), interfering with the representational rights of employees and employee organizations.[26]

REMEDY

Section 3541.5(c) provides:

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

The traditional remedy for unilateral employer action establishing new terms and conditions of employment without notice and negotiations, is an order that the employer cease such conduct, make employees whole for any losses they have suffered, and negotiate with the exclusive representative.[27]

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[26]Oakland Unified School Dist. v. Public Employment Relations Bd., supra. 120 Cal.App.3d 1007; San Francisco Community College District (1979) PERB Decision No. 105.

[27]See Oakland Unified School District v. Public Employment Relations Board, supra, 120 Cal.App.3d at p. 1014

Relief of this nature has been required in cases of unilateral employer action affecting the assignment and allocation of unit work, and the resulting loss of unit wages or stipends.[28]

The District argues that utilization of a traditional remedial approach is not warranted in this proceeding. First, respondent contends that McFarland and Steinberg should not be made whole because the contract required that Crossan" and Stroud's positions be filled by a posting procedure for temporary teachers. Although the District did not follow the contractual procedure in this instance, this does not justify depriving McFarland and Steinberg of appropriate relief for the work they performed.

Contrary to the District's assertion, there was sufficient proof that both McFarland and Steinberg suffered a loss, as it was undisputed that they worked in a substitute status for an

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[28]See, e.g., Lincoln Unified School District (1984) PERB Decision No. 465; Goleta Union School District, supra, PERB Decision No. 391; Holtville Unified School District (1982) PERB Decision No. 250; South Bay Union School District (1982) PERB Decision No. 207.

entire semester while filling in for Crossan and Stroud.[29] -- The District, in compliance with this order, can resume utilization of the contractual posting procedure in future semesters, as the make-whole award shall be limited to the single semester of work that was at issue in the hearing.

Second, the District contends that any additional payment to McFarland, Crossan's substitute, would amount to taking money from Crossan. Thus, McFarland would be made whole by raising her substitute salary to the temporary teacher level, but this difference, under the contract, would decrease the pay Crossan otherwise has received. This result, in the District's view, would be too harsh. The short answer to this objection is that the District might have a claim against Crossan for a contractual overpayment, but, for equitable reasons related to its own wrongdoing, the District might not seek to recoup from Crossan the funds the District already has paid. In any event,

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[29]For this reason, the District' reliance on Fair v. Fountain Valley School District (1979) 90 Cal.App.3d 180 is mistaken. In Fountain Valley, an employee who was not selected sought make-whole relief for loss of a position.' There were several other teachers with hiring rights comparable to those of the plaintiff, and he had made no showing that he would have been offered an available position. In the present dispute, in contrast, not only were McFarland and Steinberg actually hired, albeit in a disputed classification, but there was substantial evidence that the District had a past practice of retroactively hiring and reclassifying teachers who were working as substitutes.

if the District does have a repayment claim and Crossan advances an equitable or legal defense, another forum with jurisdiction over that action will resolve the dispute.

Before the Board, however, in a case alleging a unilateral change violation, the Association serves as the exclusive representative. As such, consistent with the Association's duty of fair representation, it has the authority recognized by the PERB to make honest and reasonable decisions involving potentially competing interests, even if such decisions may not please all members of the negotiating unit all of the time.[30] The Association's exercise of its representational prerogative to pursue this charge, and to seek the make-whole relief it has proposed, may not be pleasing to the District, or to Crossan herself, but it is a course of action that the Association is free to choose absent a showing, which was not demonstrated in this case, that its decision was arbitrary, discriminatory or made in bad faith.

In addition, the order should include a requirement that the District post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating it will comply with the terms thereof. The notice shall not be reduced in size. Posting

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[30]See, e.g, Castro Valley Teaches Association (McElwain). (1980) PERB Decision No. 149; Rocklin Teachers Professional Association (Romero). (1980) PERB Decision No. 124; Mt. Diablo Education Association (DeFrates). (1984) PERB Decision No. 422.

such a notice will inform employees that the employer has acted in an unlawful manner and is being required to take the prescribed remedial measures. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy.[31] 31

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(c) of the EERA, it is hereby ORDERED that the Eureka City School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Failing and refusing to meet and negotiate in good faith with the Eureka Teachers Association, CTA/NEA, by unilaterally establishing a policy to determine when employees would be classified as temporary teachers;

(b) By the same conduct, denying to the Eureka Teachers Association, CTA/NEA, the right to represent its members; and,

(c) By the same conduct, interfering with the right of employees to be represented by the Eureka Teachers Association, CTA/NEA.

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[31]See Placerville Union School District (1978) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587.

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

(a) Upon request, meet and negotiate with the Eureka Teachers Association, CTA/NEA, over the standards for classifying employees as temporary teachers;

(b) Pay Lori McFarland and Jim Steinberg for any loss of pay and other benefit(s) resulting from the District's unilateral establishment of a policy to determine when employees would be classified as temporary teachers. The District's make-whole obligation to these employees shall be limited to their replacement status in the 1986 second-semester period;

(c) Pay interest at the rate of 10 percent per annum on the amount of backpay owed pursuant to the make-whole provision of this Order;

(d) Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to certificated employees are customarily placed copies of the Notice attached hereto as an Appendix. 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; and,

(e) Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions. Continue to report in writing to the Regional Director thereafter as directed. All reports to the Regional Director shall be concurrently served on the Charging Party herein.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with 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. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. Any statement of exception and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall

accompany each copy served on a party or filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: May 27, 1987

Barry Winograd
Administrative Law Judge