STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

COMPTON COMMUNITY COLLEGE FEDERATION OF EMPLOYEES, AFL-CIO, Charging Party, v. COMPTON COMMUNITY COLLEGE DISTRICT, Respondent.	)	Case No. LA-CE-2276
COMPTON COMMUNITY COLLEGE DISTRICT, Charging Party, v. COMPTON COMMUNITY COLLEGE FEDERATION OF EMPLOYEES, AFL-CIO, CERTIFICATED SECTION, Respondent.	)	Case Nos. LA-CO-350 LA-CO-353 LA-CO-360 PERB Decision No. 728 April 4, 1989
COMPTON COMMUNITY COLLEGE DISTRICT Charging Party, v. COMPTON COMMUNITY COLLEGE FEDERATION OF EMPLOYEES, AFL-CIO, CLASSIFIED SECTION, Respondent.	)	Case Nos. LA-CO-352 LA-CO-359

Appearances: Lawrence Rosenzweig, Attorney, for Compton Community College Federation of Employees, AFL-CIO, Certificated/Classified Sections; Jones & Matson by Urrea C. Jones, Jr., Attorney, for Compton Community College District.

Before Craib, Shank and Camilli, Members.

DECISION

CRAIB, Member: The above-listed cases, which were consolidated for hearing and decision, are before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Compton Community College District (District) to the attached proposed decision of a PERB administrative law judge (ALJ). In Case No. LA-CE-2276, the ALJ found that the District failed to bargain in good faith during contract negotiations in 1985-86 and failed to participate in good faith in statutory impasse procedures in the latter part of that same period. In Case Nos. LA-CO-350, 352, 353, 359 and 360, the ALJ found that the District failed to establish that the Compton Community College Federation of Employees, Certificated Section and/or the Compton Community College Federation of Employees, Classified Section (hereafter referred to collectively as the Federation) engaged in bad faith bargaining or failed to participate in good faith in statutory impasse procedures.

We have reviewed the entire record in this case, including the ALJ's proposed decision, the District's exceptions and the responses thereto. We find the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopt them as our own. However, we believe that two of the District's allegations against the Federation present close questions which warrant further comment. These involve the District's contention that the Federation engaged in "coalition" or "merged" bargaining and sanctioned an unlawful "sick out."

DISCUSSION

As the ALJ noted, "coordinated" bargaining is generally regarded as lawful, but "merged" or "coalition" bargaining is not. Coordinated bargaining would include joint bargaining sessions involving more than one unit or monitoring of (or assistance in) negotiations by representatives of another unit. Coalition bargaining, on the other hand, has been described as a "de facto merger of bargaining units, or an effort to achieve that end." (Morris, The Developing Labor Law, Second Edition, at p. 666.)

The Board has had only one previous occasion to address coalition bargaining. In Gilroy Unified School District (1984) PERB Decision No. 471, the Board discussed the issue in the context of a school district's refusal to provide release time for nonunit negotiating team members. In reaching its decision, the Board reviewed precedent under the National Labor Relations Act (NLRA) and adopted the following definition of coalition bargaining:

> [n]egotiations are directed toward similar contracts, containing the same or similar provisions. Further, the settlement of each contract is usually dependent upon the settlement of the others.

(Ibid. at p. 8.) Additionally, the Board found that

> the use of common bargaining sessions to negotiate separate agreements merely goes to the time and place of negotiations and does not impinge upon the integrity of individual units or the employer's right to consider unit proposals on their own merits.

(Ibid.) However,

> [t]he merger of two or more unit negotiations inherently alters the finding of unit appropriateness[1] . . . and affects the employer's resulting bargaining obligation.

(Ibid.)

In the ALJ's view, the District, in order to have prevailed, must have proven that the Federation refused to bargain unless the units met jointly with the District or that the Federation conditioned the settlement of one contract on the settlement of the other. We agree that this accurately reflects the holding of the Board in Gilroy Unified School District, supra,[2] and is consistent with analogous precedent arising under the NLRA. (See, e.g., Harley Davidson Motor Co., Inc., AMF (1974) 214 NLRB 433, 437 [87 LRRM 1571] (participation of one unit's members on bargaining team insufficient to demonstrate coalition bargaining); Utility Workers Union of America (Ohio Power Co., et. al) (1973) 203 NLRB 230 [83 LRRM 1099], enforced, (6th Cir. 1974) 490 F.2d 1383 [85 LRRM 2944] (acceptance of offer unlawfully conditioned upon submission of identical offers to other units).)

In the instant case, the District's allegations focus on the Federation's conduct at two October 1985 negotiating sessions. First, the District alleged that on October 15, 1985, classified

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[1]Section 3545, subdivision (b)(3) of the Educational Employment Relations Act prohibits classified and certificated from being included in the same bargaining unit.

[2]In citing the Board's discussion of coalition bargaining in Gilroy Unified School District, we do not address the propriety of the Board's holding in that case on the narrower issue of released time for nonunit negotiating team members.

unit negotiator Bruce McManus responded to the District's suggestion to settle the whole contract by stating that the classified agreement would not be settled "without the certificated unit." The ALJ credited McManus' denial that he ever conditioned settlement of the classified contract on joint settlement of both contracts. She concluded that

> McManus' unwillingness to settle the contract was related to his perception of its inadequacy, not the fact that the certificated representatives were not present.

Furthermore, she credited McManus' testimony that he did not condition agreement on the presence of the certificated unit. The District also alleged that, on October 21, 1985, certificated unit negotiator Darwin Thorpe refused to discuss individual proposals, instead conditioning any settlement on settlement of all issues for both contracts. Thorpe denied the allegation and the ALJ credited his testimony over that of District negotiator Urrea Jones.

While the Board is free to consider the entire record and draw its own conclusions from the evidence presented, the Board has consistently given deference to an ALJ's findings of fact which incorporate credibility determinations. (Los Angeles Unified School District (1988) PERB Decision No. 659; Santa Clara Unified School District (1979) PERB Decision No. 104.) Here, the ALJ's conclusion that the Federation did not engage in coalition bargaining is based primarily upon credibility determinations. Our review of the record has revealed no basis for disturbing

those determinations and, consequently, there is no basis for overturning the dismissal of these allegations.

The "sick out" issue is also a close question. It is undisputed that a "sick out" occurred. As the ALJ noted, given the absence of clear evidence of who orchestrated the "sick out," it is certainly a possibility that the Federation was involved. However, we agree with the ALJ that the District simply failed to meet its burden of proof,[3] as there was no evidence presented that the Federation encouraged, planned, authorized or ratified the "sick out."

The District contends that it provided the requisite proof by showing that some of the callers (who encouraged others to call in sick) were union members and that most of the Federation's officers and all of the members of its Job Action Committee called in sick. However, the critical element of proof that the District failed to provide was a showing that those participants were in fact acting as agents of the Federation rather than as individuals.

In discussing the application of common principles of agency in determining a union's liability for acts of its members (see pp. 65-66 of attached proposed decision), the ALJ cited the

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[3]PERB Regulation 32178 states:

> The charging party shall prove the complaint by a preponderance of the evidence in order to prevail.

PERB Regulations are codified at California Administrative Code, title 8, part III, section 31001 et seq.

following passage from North River Energy Corporation v. United Mine Workers, (11th Cir. 1981) 664 F.2d 1184 [109 LRRM 2335, 2340]:

> In showing union complicity, the company must therefore prove that the agents of the union participated in, ratified, instigated, encouraged, condoned, or in any way directed the authorized strike for the union to be held liable.

We believe the following additional passage from North River Energy Corporation, 109 LRRM at 2340, describes more fully a charging party's burden in a case such as the instant one and further demonstrates the correctness of the ALJ's proposed decision:

> It is necessary, however, that the acts of a union agent be committed within the scope of his general apparent authority and on behalf of the union . . . . The only activity which North River relies upon which is indicative of union authorization, ratification, or approval, is the fact that all of the union officials and committeemen failed to work their shifts in each of the six subsequent strikes. This fact, in itself, cannot be construed as participation and authorization by the union as an entity in the strike.

Similarly, in the instant case, the District has established only that most Federation officials called in sick. This, in and of itself, is insufficient to demonstrate Federation involvement in the "sick out."

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the Compton Community College District has violated the Educational

Employment Relations Act. Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the Compton Community College District, its board of trustees, superintendent and agents shall:

A. CEASE AND DESIST FROM:

1. Refusing to meet and negotiate in good faith and refusing to participate in good faith in impasse proceedings by failing to present clear and consistent positions or proposals on salary negotiations, reneging on tentative agreements during bargaining and impasse proceedings, violating ground rules, and altering last and final offers.

2. Denying the Federation its right to represent members of the classified and certificated units in negotiations and impasse proceedings conducted in good faith.

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

1. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites and at all other work locations where notices to certificated and classified 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.

2. 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 her instructions.

Members Shank and Camilli joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-2276, Compton Community College Federation of Employees, AFL-CIO v. Compton Community College District, in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5 by failing to bargain in good faith and by failing to participate in good faith in impasse proceedings.

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

A. CEASE AND DESIST FROM:

1. Refusing to meet and negotiate in good faith and refusing to participate in good faith in impasse proceedings by failing to present clear and consistent positions or proposals on salary negotiations, reneging on tentative agreements during bargaining and impasse proceedings, violating ground rules, and altering last and final offers.

2. Denying the Federation its right to represent members of the classified and certificated units in negotiations and impasse proceedings conducted in good faith.

Date

COMPTON COMMUNITY COLLEGE DISTRICT

By _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

COMPTON COMMUNITY COLLEGE FEDERATION OF EMPLOYEES, AFL-CIO, Charging Party, v. COMPTON COMMUNITY COLLEGE DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-2276 PROPOSED DECISION (4/19/88)
COMPTON COMMUNITY COLLEGE DISTRICT, Charging Party, v. COMPTON COMMUNITY COLLEGE FEDERATION OF EMPLOYEES, AFL-CIO, CERTIFICATED SECTION, Respondent.	Unfair Practice Case Nos. LA-CO-350 LA-CO-353 LA-CO-360
COMPTON COMMUNITY COLLEGE DISTRICT, Charging Party, v. COMPTON COMMUNITY COLLEGE FEDERATION OF EMPLOYEES, AFL-CIO, CLASSIFIED SECTION, Respondent.	Unfair Practice Case Nos. LA-CO-352 LA-CO-359

Appearances: Lawrence Rosenzweig, Attorney, for Compton Community College Federation of Employees, AFL-CIO, Certificated/Classified Sections; Jones & Matson by Urrea C. Jones, Jr., Attorney, for Compton Community College District.

Before Barbara E. Miller, Administrative Law Judge.

I. BACKGROUND AND PROCEDURAL HISTORY

During 1985 and 1986, the Compton Community College Federation of Employees, AFL-CIO (hereinafter Union or Federation) and the

Compton Community College District (hereinafter District) were engaged in negotiations and then mediation and factfinding. The Federation is the exclusive representative of the District's certificated and classified units. For the certificated unit, the Federation was negotiating a successor agreement to the contract which expired on June 30, 1985. For the classified unit, the Federation was negotiating its first collective bargaining agreement. Previous classified agreements had been negotiated by the District and the California School Employees Association (hereinafter CSEA), which had been defeated by the Federation in a decertification election, the results of which were certified on June 4, 1985.

Case No. LA-CE-2276

Case No. LA-CE-2276 was originally filed on November 5, 1985, on behalf of the certificated and classified units. After an investigation conducted by the Office of the General Counsel of the Public Employment Relations Board (hereinafter PERB or Board) a Complaint was issued on February 28, 1986, and was subsequently amended on August 20, 1986. The Complaint, as amended, alleges that the District violated various provisions of the Educational Employment Relations Act (hereinafter Act or EERA) [1], by

[1]The EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3543.5 provides, in relevant part, as follows:

engaging in bad faith bargaining and by threatening to retaliate against employees because those employees or the Federation on their behalf, engaged in protected activity.

In terms of bad faith bargaining, the Complaint alleges that the District: reneged on a promise to accept a salary proposal; reneged on agreements with respect to "hours of employment," "maintenance of operations," and a paid lunch period; reneged on agreed-upon ground rules; conditioned bargaining on matters outside the scope of representation; failed and refused to respond to Federation proposals; and repeatedly identified proposals as "last and final offers" and then reduced or withdrew those "last and final offers."

> 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.
>
> . . . . . .
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

In terms of individual acts of retaliation and interference, the Complaint alleges that the District, in negotiations with the classified unit, threatened to place every complaint against an employee in the employee's personnel file if the Federation did not agree to change the language in the contract article then being negotiated.

Case No. LA-CO-350

Unfair Practice Case LA-CO-350 was filed by the District against the Federation, in its capacity as exclusive representative of the certificated unit, on December 2, 1985. The charge alleges various violations of section 3543.6.[2] The Complaint, issued on March 6, 1986, and amended on August 20, 1986, alleges that the Federation violated the Act

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[2]Section 3543.6 provides as follows:

> It shall be unlawful for an employee organization to:
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> (a) Cause or attempt to cause a public school employer to violate Section 3543.5.
>
> (b) 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.
>
> (c) Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.
>
> (d) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

by engaging in merged/coalition bargaining, failing to make counterproposals on the subject of division chairs, being consistently 30 minutes late to bargaining sessions, and failing to respond to the District's salary proposals. The Complaint further alleges that the Federation failed to participate in good faith in impasse procedures by increasing its salary and fringe benefit demands, refusing to respond to proposals on salary benefits and temporary employment, and refusing to meet, upon request, with the District.

Case No. LA-CO-352

The District filed Unfair Practice Case No. LA-CO-352 against the Federation, in its capacity as exclusive representative of the classified unit, on December 2, 1985. The Complaint, issued on February 14, 1986, and amended August 20, 1986, alleges, in relevant part, that the classified unit engaged in unlawful coalition bargaining by refusing to settle a collective bargaining agreement with the District unless the certificated unit also reached agreement. The Complaint further alleges that the Federation unlawfully increased its salary and fringe benefits demands during mediation.

Case No. LA-CO-353

Unfair Practice Case No. LA-CO-353 was filed by the District against the Federation, in its capacity as exclusive representative of the certificated unit, on December 2, 1985.

The Complaint, issued on February 14, 1986, alleges that on or about October 21, 1985, the Federation met with the District and, at that time, Darwin Thorpe and Bruce McManus, co-presidents of the Federation, informed the District that the classified unit would not negotiate separately with the District and that the classified and certificated units would not reach agreement on any single issue without agreement "on the whole thing." The Complaint alleges such conduct violates sections 3543.6(a) and (c).

Case Nos. LA-CO-359 and LA-CO-360

The District filed Unfair Practice Case No. LA-CO-359 against the Federation's classified unit and Unfair Practice Case No. LA-CO-360 against the Federation's certificated unit on March 26, 1986. Each case concerns an alleged sick-out engaged in by District employees on March 7, 1986.

In Case No. LA-CO-359, the Complaint, issued on April 4, 1986, and amended on August 20, 1986, alleges that on March 7, 1986, the Federation organized and caused employees to participate in a sick-out, in violation of the collective bargaining agreement, for economic reasons and with no prior notice to the District. The Complaint in Case No. LA-CO-360 issued on April 4, 1986. It concerns the same event but differs from Case No. LA-CO-359 in one respect; no violation of a collective bargaining contract is alleged.

All the above-referenced cases were consolidated for hearing and proposed decision. A pre-hearing conference was conducted on September 9, 1986, at the Los Angeles Regional Offices of the PERB. Thereafter, a formal hearing was conducted on September 17-19, and 22-23, 1986. The parties submitted post-hearing briefs.

On April 27, 1987, the District filed a request to reopen the record to admit a factfinding report into evidence. The parties were given an opportunity to further brief the question of reopening the record and the District filed a document entitled "Motion and Argument in Support of Compton Community College District Motion to Reopen Record; Motion and Argument for Partial Dismissal of Charges; Declaration of John D. Renley." Thereafter, the Federation filed an opposition to the District's motions. On May 12, 1987, the undersigned denied the motion to reopen the record and denied the motion for partial dismissal. At that time, the matter was finally submitted for proposed decision.

II. FINDINGS OF FACT

A. The Stage and the Primary Cast of Characters

The District is an employer and the Federation is an employee organization as those terms are defined in the EERA. Since the parties began the round of negotiations at issue herein, 14 unfair practice charges have been filed by either

the Federation against the District or the District against the Federation. Before that, but after January 1980, the Federation, which then represented only the certificated unit, was a party in seven unfair practice cases. Two other cases against the District were filed by the Federation's predecessor in the classified unit, the CSEA. In addition, the undersigned was asked, during the course of the formal hearing, to take official notice of at least two California Court of Appeal decisions involving the same litigants.

Obviously, the disputes between the parties have various degrees of intensity and importance. What the numbers reflect, however, is what the evidence also established. The parties do not have a stable or strife-free collective bargaining relationship. Although the hearing disclosed very few instances of temper or hostility, the testimony about the bargaining history between the parties suggests that the parties often failed to communicate effectively.

Darwin Thorpe, an instructor at the District since 1963, was a primary spokesperson for the Federation and, for a good many years, has served as its president. At all times relevant herein, he was one of the co-presidents with responsibility for the certificated unit.

Thorpe's counterpart in the classified unit is Bruce McManus. McManus has been employed by the District since

January 1980 and, prior to his involvement with the Federation, was an active leader in the classified unit when it was represented by the CSEA. During the course of this hearing, McManus demonstrated that he was the detail person; he was well versed and precise when it came to budget figures, budget documents, and what was said, when, and by whom at the bargaining table.

Urrea C. Jones, Jr. is an attorney for the District and, during the course of these hearings, was the District's primary advocate and one of its leading witnesses. At all times relevant herein, Jones was also a negotiator for the District and he acknowledged that he was looked upon as the chief negotiator and spokesperson. Jones testified he was brought into negotiations by the District to make sure the District avoided legal difficulties which had followed previous negotiations.[3] As a witness, Jones did not have the facility with details demonstrated by McManus. By his testimony, Jones did, however, present a good sense of the tenor of negotiations.

B. Case No. LA-CE-2276

1. Classified Negotiations on Matters Other Than Salary

The contract proposal for the classified unit was "sunshined" in February 1985. Representatives of the classified unit met with the District on May 15, 17, and 31, to

[3]In previous years, there had been serious miscalculations regarding District resources.

establish ground rules for negotiations. On June 4, 1985, agreement was reached regarding the ground rules. McManus was involved in those negotiations. Jones was not involved in those preliminary negotiations; the first time he became familiar with the classified ground rules was during mediation, some six months later. Jones was similarly unfamiliar with the classified contract or the terms and conditions of employment which governed classified personnel prior to the round of negotiations relevant herein. His lack of familiarity with those matters explains some of the problems and misunderstandings which arose during the course of negotiations. McManus was quite familiar with those matters and, not unreasonably, he held the District's negotiators to the same standard.

Negotiations continued between the District and the classified unit until October 21, 1985, when impasse was declared. Thereafter, mediation efforts began in January 1986, continuing through June 20 of that year. Factfinding began on September 16, 1986.

a. A Paid Lunch Period and Work Year Determinations

Early in negotiations, sometime in June 1985, the District and the classified unit discussed an article entitled "Hours of Employment." According to McManus, the District generally accepted the Union's proposal, which included provision for a

paid lunch period. The District did, however, have serious reservations about a provision which allowed employees the right to refuse overtime assignments and a provision pertaining to shift differential. For its part, the Union had difficulty with a provision in the previous contract which stated that "the work year shall be determined by the District." The Union was concerned because, in a previous year, buttressed by that provision, the District successfully defended a challenge when it reduced the classified work year from 12 to 11-1/2 months.

The parties discussed these issues during numerous bargaining sessions. The Union presented alternative proposals on June 24, June 27, July 8, and July 11, 1985. McManus credibly testified that on the latter date, the parties reached agreement on all aspects of the hours of employment article, with the exception of the section pertaining to shift differential. In other words, the District agreed to the article which included a paid lunch period. The District also agreed to the Union's demand to eliminate the District's unilateral ability to determine the length of the work year, although a conditional District right to set the work year, subject to negotiations, was placed in a separate provision of the contract entitled "District Rights."

The District asserts it never knowingly agreed to a paid lunch period. Although the District representatives did not

recall any specific discussion of the paid lunch period, Jones' bargaining notes from late June reflect that the word "paid" was circled with a question mark next to it. Jones acknowledged that the notation meant he probably questioned a paid lunch period, although he could not recall doing so. I credit McManus' specific testimony that on or about June 20, 1985, Jones asked whether a paid lunch period was legal and McManus said it was; there was no further discussion or debate. Some months later, in October 1985, Jones stated he carefully compared all the proposed agreements against the previous CSEA contract. It must be presumed he saw and acknowledged the change from an unpaid to a paid lunch hour.

After making the above-described comparison, the District printed a master copy of all matters which had been agreed to at the bargaining table. In that "master agreement," the District deviated from the matters agreed to on or before July 11, 1985, and reintroduced, in the article on hours of employment, a provision that the work year would be determined by the District. The master agreement did include the provision for a paid, uninterrupted lunch period.

Subsequently, on June 2, 1986, at the Union's request the District distributed to all affected employees a copy of a collective bargaining agreement which it labeled "last and final offer" and which purportedly included all those matters

previously agreed to by the Union and the District. The document included a provision for a paid, uninterrupted lunch period. Notwithstanding that document, at Jones' direction and without prior consultation, discussion, or notice to the Union, on June 5, 1986, the District sent a memorandum to all classified employees which accompanied a copy of the offer. The memorandum was from Floranell Shearer, the director of data processing and a member of the District's negotiating team. The communication stated the following:

> On page 22, 2.a. of subject Draft, which reads: "The unit member is entitled to paid, uninterrupted lunch period of not less than thirty (30) minutes for bargaining unit members working six (6) or more consecutive hours per day. At the request of the unit member and on approval of immediate supervisor, the compensated lunch period shall be set" is incorrect.
>
> The paragraph should read as follows:
>
> The unit member is entitled to unpaid, uninterrupted lunch period of not less than thirty (30) minutes for bargaining unit members working six (6) or more consecutive hours per day. At the request of the unit member and on approval of the immediate superviser, the compensated lunch period shall be set.
>
> Please correct your copy.

According to Jones, since the District did not have a specific recollection of consciously agreeing to a paid, uninterrupted lunch period, the District thought it could modify the agreed-upon language with impunity. The legal consequences of

the District's action will be discussed below. As a matter of fact, however, the conclusion that the District reneged on a tentative agreement is unmistakable.

b. The Maintenance of Operations or "No Strike" Clause

The Union also alleges that the District reneged on a tentative agreement to eliminate, from the new contract, the "no-strike" or "Maintenance of Operations" provision which had been in the CSEA contract. Jones admitted the District had no intention of holding the Union to a "no-strike" clause. As Jones explained, the District considered a "no-strike" clause the quid pro quo for binding arbitration. Since the District was unwilling to provide binding arbitration, Jones reasoned the District would not insist upon a "no-strike" clause.

Jones testified that, although the District indicated that a "no-strike" clause would not be included in the new contract, the District never made a firm commitment as to when and exactly under what circumstances the clause would be deleted or not included in the contract. Jones testimomy was general. I credit the more precise testimony of McManus who stated that the parties agreed to drop the Maintenance of Operations provision on June 17, 1985. The fact that the provision was dropped was again discussed on July 1. On that date, Jones approached McManus and stated, "I know that Maintenance of Operations is dropped, but would you consider including the last paragraph of that article in the contract." The last

paragraph of the article provided that nothing precluded the parties from seeking any judicial relief to which they might be entitled. McManus indicated he would have to check with the Federation's attorney. He did so and on July 8, McManus told Jones the judicial relief language could be included in the "General Provisions" section of that contract.

Based upon the conversations described above, McManus and the Federation reasonably concluded there was an agreement to exclude the Maintenance of Operations provision from any future agreement. Notwithstanding that agreement, when the District prepared the "master agreement" for the parties' negotiating session in October, the District put the Maintenance of Operations article back in the contract.

c. The Alleged Violation of the Ground Rules

On June 4, 1985, the District and the CSEA agreed upon ground rules for negotiating the 1985-88 collective bargaining contract. The District agreed that, upon certification of the Federation as the exclusive bargaining agent for the classified bargaining unit, the ground rules would continue in effect. Ground Rules No. 6 and 7, at issue herein, provide as follows:

> 6. Once language of any item has been tentatively agreed upon, a clean copy shall be prepared, with confidentiality ensured, and presented at the next regularly scheduled meeting for each party's initials. These agreements shall be considered tentative until such time as final ratification by the parties. No tentative agreement shall be reached except at formal negotiating sessions.

7. The negotiating team shall have the authority to reach tentative agreements for their respective party.

There is no dispute that the parties reached a verbal tentative agreement on the issue of organizational security on or around July 25, 1985. On July 29, 1985, at the next regularly scheduled bargaining session, McManus brought clean copies of the agreement for the District's signature. The District refused to sign, stating that it was not going to sign off on anything else until after the marathon negotiating session, scheduled for October 8, 1985. The tentative agreement on organizational security was not initialed until that time.

The District proffered some reason for not signing the organizational security agreement at the next meeting, essentially claiming it was no "big deal" and that the District did not have a role to play in the Union's organizational security concerns.[4]

d. The Threat to Change District Practice with Respect to Employee Personnel Files

During the course of negotiations, the Federation proposed various changes in the previous collective bargaining agreement with respect to employee personnel files, including when

[4]As a matter of law, the District plays a critical role in whether or not the Union has an organizational security provision. Pursuant to section 3546, in order to be effective, an organizational security arrangement must either be agreed to by both parties or, at the demand of the employer, subjected to a vote by qualified electors in the bargaining unit.

material should be purged or not available for use in disciplinary proceedings. The District never proposed any changes in the previous provision. By October 8, 1985, when the parties had failed to reach agreement on that issue, the Federation suggested a continuation of the contractual language on employee rights which existed in the previous CSEA contract. Article II, entitled "Employee Rights," provided under the subheading of "Personnel Files" as follows:

> The personnel file of each classified employee shall be maintained in the District's personnel office. Adverse action shall be taken against an employee based only upon materials which are in the employee's personnel file, except in circumstances when immediate remedy is necessary.
>
> . . . . . .
>
> Upon written request of the member, or the members designated representative, the District agrees to remove and destroy any materials of a derogatory nature which have remained in the file for more than three (3) years.

Jones was apparently unfamiliar with the previous CSEA contract. Jones and McManus had a heated exchange.

McManus characterized the conversation as "hostile." Jones conceded that the discussions on the issue were "intense." McManus testified that the hostility or intensity was not characteristic of previous "disputes" and that he did not consider Jones' comments or behavior to be typical bargaining table sparring. Eventually, as if to end the conversation,

Jones told McManus that if the contract included the language proposed by the Federation, Jones was going to tell all the District's supervisors to place each and every complaint in the personnel file of concerned employees.

Jones does not deny making essentially the remarks attributed to him. He did testify, however, that the comments made at the bargaining table were not carried out, although he admittedly failed to tell the Union he had not given a directive to all District supervisors.

2. Certificated Negotiations on Matters other than Salary

The Federation and the District began negotiating for the certificated unit in May 1985. At the outset, the Federation and the District each presented areas of concern and focus for upcoming negotiating sessions. In this case, the Federation's primary focus, with respect to certificated negotiations on matters other than salary, is the District's failure to respond to proposals regarding the transfer and reassignment of faculty.

The Transfer and Reassignment of Faculty

On or about August 20, 1985, the Federation set forth a comprehensive proposal with respect to the transfer and reassignment of faculty. The Federation did not receive a counterproposal from the District until the parties were engaged in mediation on February 26, 1986.

Prior to that date, on October 21, 1985, at the final bargaining session, the Federation asked for a counterproposal

to its written proposal. The District said a counterproposal would not be forthcoming because the Union's proposal violated affirmative action. On behalf of the Federation, Thorpe asked Jones to tell him what the violation was and give citations. In addition, Thorpe told Jones if he gave such citations, the Federation might agree with him and drop the proposal ..... completely. The Federation was told it should look at the District's affirmative action policy. At the hearing, the District explained that the Union's proposal gave preference for employment in vacant positions to current faculty members. The District believed such a proposal would unlawfully foreclose job opportunities for minorities. Without commenting upon whether such a position is legally correct, I find the District did not provide this explanation at the table in October.

3. Negotiations on Matters Pertaining to Salary

Basically, when negotiations between the Federation and the District concerned matters other than compensation, the District met separately with representatives of the classified unit and the certificated units. When salaries were being discussed, however, the bargaining sessions were combined.[5]

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[5]See section II.C.I at pp. 30-33 infra on the issue of coalition bargaining.

From the beginning, the parties were far apart on several issues. First, the parties did not agree on the amount of money that should be paid to employees. Next, and perhaps more important, the District and the Federation did not agree on the question of whether the District had the ability to meet any of the Federation's economic demands.

a. The Union's Position

The thrust of the Union's argument is that the District repeatedly changed its position on the amount of resources available for salaries. Underlying that argument was the Union's apparent belief that the District did not really know what resources were available, that the District concealed its resources, and that the District did not properly allocate its resources.

The Federation representatives from both the certificated and the classified units met with the District on June 17, 1985. At the meeting, the Federation contended the District had adequate funds in the budget for the coming year, such that classified and certificated salaries could be brought in line with the average salaries paid in other districts whose general ability to pay was comparable to the District's. The Federation did not accept and claims it did not understand the District's explanation of its alleged inability to pay. The Federation was told the District had no objection to improving

the salaries of certificated and classified employees, but, such a result was impossible because the District did not have the money.

At that meeting, McManus and Thorpe assert the District promised to make money available for salary increases if the Federation could "find money" that was suitable for general fund apportionment. Federation representatives understood "found money" to mean either money the District did not know about because of an underestimate of resources or reserves, or money which was, for some reason, concealed in the budget presented by the District.

In order to "find money," the Federation sent Pat McLaughlin, a union member of the District's budget committee, to the business office to inspect and analyze District ledger sheets. McLaughlin was accompanied by Wanda Reilly, a nonunit, confidential employee from the budget committee. Based on the work done by the two members of the budget committee, the Federation concluded the District had a higher net ending balance than disclosed at the meeting of June 17. The Union found the net ending balance was in excess of $700,000. The District had claimed it was closer to $400,000. Having found close to $300,000, at the next meeting on June 28, the Federation proposed settlement of both the classified and certificated contracts that very day. The Federation proposed a formula for dividing the money so that each unit would

receive a percentage of the available money until a salary increase cap of 11.1 percent for certificated and 15.8 percent for classified had been reached. The Federation proposals were rejected on the ground that the money allegedly "found" did not fit the District's definition of newly-found resources.

Although the District had originally said that its expenditures for the 1985-86 year would be comparable to its expenditures for the 1984-85 year, when the Union presented the large net ending balance, the District said that the additional money in the net ending balance had already been budgeted. Thus, found money would have to be money from new revenue sources. The Union claims that when it found those new revenue sources, the District similarly discounted those discoveries as well.

The District told the Union that there were some problems with the budget and if the Union were to find money for salary increases, it would have to be in excess of $516,000 above the increase in budget expenditures. Although frustrated, the Union representatives continued to work on the budget throughout the summer. According, to McManus, whenever the Union presented a salary offer based on budget projections, the District manufactured some new basis for rejecting it.

Throughout negotiations, the Union maintains it was unable to get reliable information from the District. Historically,

the Union claims the District has mismanaged its money, placed the same items in the budget twice under different categories, and underestimated its available resources. In an attempt to compile its own data, the Union carefully reviewed budget documents and did meet with the District's chief business officer, Ben Lett. Nevertheless, the Union contends that the District's information was either incomplete, inaccurate, or inconsistent with information provided through the State Chancellor's Office. Moreover, the District totals were not consistent with the figures calculated by the Union after the Union's own audit of the District's records.

In addition to the Federation's dissatisfaction with the District's salary proposals and its budget data, the Federation claims the District violated the Act by conditioning salary proposals on a Union waiver of constitutional and statutory rights. The Union claims the District insisted that any salary proposal or agreement include a provision that the District would not be required to pay that salary if it determined sufficient resources were not available. The Union generally refers to this matter as the District's 72500 proposal.

Education Code Section 72500 entitled "Liability for Debts and Contracts" provides, in relevant part, as follows:

> The governing board of any community college district is liable as such in the name of the district for all debts and contracts, including the salary due any instructor not made in excess of the moneys accruing to the district and usable for the purposes of the

> debts and contracts during the school year for which the debts and contracts are made. The district shall not be liable for debts and contracts made in violation of this section.

Education Code section 72500 is similar to the debt limitation provisions of California Constitution, art. XVI, section 18, and does not relieve the District of the requirement that it pay obligations imposed by law. Collective bargaining agreements on salaries are such obligations. Wright v. Compton Unified School District (1975) 46 Cal.App.3d 177 and Compton Community College Federation Teachers v. Compton Community College District (1985) 165 Cal.App.3d 82.[6] By insisting on a section 72500 provision, the District wanted the Union to waive its constitutional and statutory rights. The Union maintains it told the District such a matter was a nonmandatory subject of bargaining and was, in any event, unacceptable. Nevertheless, Jones repeatedly raised the matter throughout negotiations and impasse proceedings.

b. The District's Position

The District readily admits it has had difficulty in the past because of its inability to get a proper or fully accurate

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[6] In the Compton CCD case, the Union sued the District for a salary increase agreed upon in a collective bargaining agreement. The District unsuccessfully tried to avoid liability for the increase by asserting the Constitutional debt limitation provision as a defense. The Court discussed Education Code section 72500 at footnote 3, page 95.

statement of its financial status. During negotiations, Jones was responsible, in part, for making sure that the District did not promise or commit resources it did not have. On behalf of the District, Jones explained that the amount of money available for salaries was contingent upon a number of factors including, inter alia, a reduction in average daily attendance (ADA) and a possible payment from the State to compensate for ADA decline, the effect of the Court of Appeal's decision in Compton Community College District, supra, an increase in insurance premiums, an increase in utility bills, and the District's debt service (the effect of paying off loans).

From the District's perspective, the Union was unwilling to properly consider the impact of the above-listed budget factors. The District concluded the Union had no intention of reaching agreement on salaries until certain measurements such as the cost of living allowance, the amount of money for ADA decline, and the amount of money available through the lottery were less speculative. The District's view that the Union was not seriously interested in negotiating salary was, in the District's opinion, reinforced when the District repeatedly suggested that the Union meet with Lett, the business officer, and the Union failed to do so. (The Union, in fact, went to Lett's office on several occasions to review underlying budget documents and it met with him at least once after District negotiators made the suggestion. No explanation was provided

as to why neither Jones nor Shearer was advised of the office visits and/or the meeting.)

In terms of Education Code section 72500, the District does not deny it raised the matter on numerous occasions. The District raised the matter only because some alternative was needed to resolve an apparently irreconcilable conflict. The District argues, with support in the record, that it made a series of salary proposals during the course of negotiations. The Union, however, found those proposals unacceptable, perhaps because of the fundamental dispute concerning the District's ability to pay. Accordingly, the District contends, it could only agree to the Federation's salary proposals, which were contrary to the District's understanding of its budget, if the Union would insulate the District from liability and ultimate financial ruin. In other words, the District raised the matter as part of a bargaining strategy, perhaps to convince the Union that the District was not merely posturing when it said it lacked the requisite funds to meet its salary demands. Supporting this hypothesis is the fact that the District never presented the Union with a written proposal concerning Education Code section 72500.

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[7]The District did not specifically characterize its position regarding Education Code section 72500 as part of the bargaining strategy. The characterization is mine.

c. Findings About Salary Negotiations

The failure of the parties to communicate effectively was attributable, in part, to difficulties which occurred in the past as distinguished from events related to the round of negotiations at issue herein. The failure was also attributable to fundamental differences in the way the principal negotiators communicated. McManus was extremely precise. He took statements such as "find the money and it's yours" quite literally. I find such statements were made. But, Jones never intended that such statements be taken in any but the most general way.

The Union complains that it did not understand what the District was trying to communicate with respect to its budgetary constraints or its available resources. McManus and Thorpe each indicated they did not understand Jones. As a witness, I found Jones to be respectful and congenial. Frequently, however, I did not understand the District's position in salary negotiations. Under the circumstances, I credit the Union's assertions that the District did not adequately clarify its position and that it kept changing its position so that meaningful negotiations were not possible.

Notwithstanding whatever subjective intentions the District may have had, the record supports the conclusion that the District did not present a clear picture of its resources or

the extent to which it was willing or able to commit those resources to certificated and classified salaries. Although the District asserts Ben Lett fully explained matters to the Union, Lett never testified nor did other witnesses testify as to what was involved in Lett's explanation. There is also some confusion as to when Lett came to the table. Whether it was in late July or late August, it was well after more than two months of bargaining generally and six weeks of bargaining over the budget. Lett did send a letter explaining why the year-end balance, which was considerably higher than projected, would not be considered "found money." That letter, however, dated July 30, 1985, also arrived late in the day.

Given the date of Lett's later and the date he was ultimately brought to the table, I credit McManus' persuasive testimony that the District's various explanations, provided through Jones, were either not understandable, not reasonable, or not consistent with the underlying data base. I find no reason to conclude District negotiators intentionally misled the Union; but, they did not come to the table with sufficient accurate information or expertise. Circumstances may have made that difficult; but, the record does not disclose the nature of those circumstances with sufficient precision. It must also be noted that the District never requested a deferral of salary negotiations to give it more time to get a more certain financial picture.

Finally, the record does disclose that two members of the District's budget committee came up with figures of available resources which exceeded figures presented by the District at the table. The committee had been in existence more than six years and was composed of representatives selected by management, as well as a Union representative, No adequate explanation was provided to discredit the findings of that committee.

4. The Modification of the "Last and Best Offers"

The Federation alleges that the District repeatedly changed its last and best offers and in so doing frustrated the bargaining process. The incident focused on, at the hearing and in the Union's brief, was the District's withdrawal of its final salary proposal.[8] During mediation, on April 3, 1986, the District made its final salary offer for each unit. Later, at the request or insistence of the Federation, those offers were included in proposed contracts submitted to all the concerned employees on June 2, 1986.

Then, on July 2, 1986, Edison Jackson, the superintendent, wrote to McManus and explained that a change in projected finances had forced the District to change its offer, reducing the proposal for the 1986-87 school year for the classified employees from 6.5 percent to 1 percent. The change was

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[8]See pp. 10-14, supra, for a discussion of the withdrawal of the District's agreement to a paid, uninterrupted lunch period.

presented as a decision already made. The Union was not given any opportunity to give input as to whether the reduction should occur at all or whether it would be preferable to come from some other aspect of the District's economic offerings. Moreover, the letter itself indicates that some money was available to meet the offer, even if one accepts the District's calculations about reduced revenues; nonunit employees were still getting a salary increase, just a reduced one.

Although the District defends its action on the ground that the Governor had vetoed ADA-decline revenues, the District never explained why the avenues discussed above were not explored first. Moreover, the District failed to demonstrate it lacked the resources necessary to meet the offer. Thus, even though the District had less money on paper, there was no evidence the District would have been unable to meet the offer it had made to the Union.

Darwin Thorpe received a similar letter for certificated employees. For them, the offer was reduced to a one-half percent on-schedule increase.

C. Case Nos. LA-CO-350. LA-CO-352 and LA-CO-353

1. Coalition Bargaining

As previously noted, beginning in May 1985, a certificated representative sat in on classified bargaining sessions and vice versa. Jones initially thought such monitoring was illegal but he said he would do nothing to challenge it

because, he testified, "bargaining was going so well." There is no evidence that the presence of the "monitor" interfered with negotiations.

Salary negotiations were carried on simultaneously. Thorpe testified that on June 28 the Union told the District it wanted to have members from each unit present to jointly discuss matters that pertained to both units. Jones agreed. There is no evidence the Union insisted upon joint negotiations. The parties met at least twelve times on the issue of compensation between June and October 21, 1985. The District never refused to meet with the classified and certificated units jointly. Indeed, the District always dealt with the salary issue as one which concerned all employees, not just those in the certificated and classified units. Jones himself testified:

> And the increase was for everybody. It wasn't just for the classified or certificated, it was for everybody, for all managers, everybody else, everyone involved.

In keeping with that testimony, it was always made clear to the Union that any resources which were allocated for salaries would have a fixed percentage allocated to the nonunit employees of the District. There is no evidence the District ever disputed the way in which the classified and certificated units chose to divide the remaining funds among themselves.

On October 15, 1985, the representatives of the classified section met separately with representatives of the District.

Jones claims he spoke to McManus about settling the entire contract and that McManus refused because compensation could only be discussed jointly. Although the parties had tentatively agreed on a number of items, they were clearly not ready to settle the contract. They were still far apart on the issue of binding arbitration and on the issue of salaries. In addition, the Maintenance of Operations article and the language regarding the District's right to determine the work year were still outstanding issues.

I have no doubt that Jones believed the contract could have been settled if McManus had been willing. I conclude, however, that McManus' unwillingness to settle the contract was related to his perception of its inadequacy, not the fact that the certificated representatives were not present. In other words, I find McManus did not insist to impasse on the presence of the certificated unit or the settlement of its contract. Indeed, I credit McManus's testimony that he did not condition agreement on the presence of the certificated unit.

Thereafter, the Federation sought assistance of the superintendent because the District had cancelled a meeting set for October 17. Jackson did intervene and the classified and certificated units met jointly with the District on October 21, 1985. The District attended the meeting expecting to discuss compensation only since it was a joint session. The Union attended with the intention of reviewing all the

outstanding issues in an attempt to reach closure on both contracts.

Although surprised, the District claims it tried to discuss separate proposals and that Thorpe refused, allegedly responding that the Federation was not going to discuss proposals separately and that all issues had to be settled with both units or there would be no settlements. Nevertheless, the parties did discuss separate issues, never even reaching the issue of compensation.

Thorpe denies ever conditioning settlement of one contract on settlement of the other. I credit his testimony. Given the discussion of separate proposals on October 21 and given the long history of bargaining for separate contracts, I find Thorpe did not try to merge the contracts or condition settlement of one upon settlement of the other.

There is no dispute, however, that if the District had made resources available for salaries, each contract would have settled shortly thereafter. Thorpe admits stating he wanted to settle both contracts on that day. Thorpe was undoubtedly assertive and Jones misconstrued what was said. October 21, 1985, was the last day of bargaining before the impasse procedures were invoked.

2. Division Chairpersons

When the District and the certificated unit first met on May 7, 1985, the District generally identified the division

chairperson structure as an area of concern. The District first presented a written proposal on that issue on August 8, 1985. The District contends that the Union's bad faith bargaining is particularly evidenced by its failure to respond, in writing, to that proposal.

The Union did not submit a comprehensive written or oral response to the District's initial written proposal. Based upon the record as a whole, however, the District's allegation that the failure to submit a written proposal is evidence of bad faith is without factual support. The District's sole witness on this subject, Dr. Joan Clinton, the associate dean of liberal arts and developmental studies, testified that the District made changes in its proposal after ongoing discussions with the Union. Clinton admitted the original District proposal was not complete. To be complete, she stated it needed additional information on release time, compensation, duties and responsibilities, and the manner of selection.

After presentation of the original District proposal, Thorpe went to Clinton's office to discuss ways in which the Union considered it deficient. During the time remaining for negotiations, the District, after discussions with the Union, continued to make modifications in its proposal, presenting the Union with a revised version on October 21, 1985. Thereafter, in January 1986, during mediation, the District and the Union agreed to "breakout" the chairperson issue and submit it to a joint committee for study.

3. Failure to Arrive on Time for Bargaining Sessions

The District asserts and the Complaint alleges that the Union consistently arrived 30 minutes late to bargaining sessions. The evidence presented simply does not support this allegation. Floranell Shearer was the only District witness to address this matter and, although she stated that it never seemed the Union was on time, she had no independent recollection of when the Union was late or how late. Her contemporaneous notes did not refresh her recollection, which remained vague.

The only documentary evidence on this issue was a list compiled from the above-referenced notes. It included the scheduled bargaining sessions, the scheduled starting time, the time the meeting actually started, and, on occasion, a reason for the late start. On the dates when the sessions did start 30 minutes or more after the scheduled starting time, no reason was given for the late start. Of the 25 listed bargaining and mediation sessions, the notation after only 3 indicates that one Union representative arrived late. Even in those cases, however, there is no way to attribute the late start of the session to the late arrival of one of many bargaining representatives.

4. Failure to Respond to District Salary Proposals

The nature of salary negotiations is discussed earlier at pages 19-30. Allegation 4(d) in the Complaint in Case No. LA-CO-350 specifically alleges that the bad faith bargaining of

the Union was evidenced by its failure to respond to District proposals in writing and its refusal to bargain about factors used in determining District resources available for salaries.

The record does not support a finding that the Union failed to respond in writing. Indeed the Union introduced written salary proposals although most presentations were verbal. Moreover, there is no evidence that the District ever insisted or even asked the Union to reduce its verbal proposals to writing and the District cites no authority which required that proposals be submitted in writing. Throughout the hearing, witnesses testified that the parties used a chalkboard for the presentation and discussion of salary proposals. Matters would be discussed and then reduced to writing on the board.

The meaning of the allegation regarding the Union's refusal to bargain about the factors used to determine the District's resources is unclear. Based upon the arguments set forth in the District's brief, it appears to mean that, by failing to fully consider the District's budget and the explanation of that budget, the Union evidenced its intent not to reach agreement or bargain seriously. In the brief, this argument seems to rest, in significant part, on the allegation that the Union did not meet with Lett when it had an opportunity to do so. But, as previously noted, the Union did meet with Lett and the Union did exhaustively review budget documents maintained in Lett's office. It is clear that the Union did not accept

the District's calculation of or explanation of various budget factors. There is no factual support for the allegation that the Union failed to consider or discuss those factors.

5. Increase of Salary Demands and Refusal to Meet During Mediation

The District claims that the Federation increased its salary proposals at the start of mediation. The Union claims that, at the request of the mediator, it summarized what its previous bargaining proposals had been and the District misinterpreted that presentation. I credit the testimony of Thorpe and McManus.

I also find that the Union did not increase its salary demands later during mediation. Throughout negotiations and mediation most salary proposals put forth by the Union included provision for a percentage increase on the salary schedule. After that, there were a number of proposed increases which were a percentage of an indeterminate amount. For example, in June 1, 1985, the certificated unit wanted an 11.1 percent increase on the schedule, plus $3,000 in fringe benefits plus 42 percent of each dollar of new money up to a certain level. Proposals during mediation were dependent upon the amount of lottery money and covered three years. Without knowing the amount of "new money" or the amount available through the lottery it is impossible to conclude that the Union increased its salary demands during mediation.

The District also alleges that the Union failed to meet face to face with the District during mediation. The District contends that the Union refused to meet on June 20, 1986, to discuss the District's last and best offers which had been transmitted to unit employees at the Union's request on June 2, 1986. The District does not dispute the facts presented by the Union. On June 20, the Union did meet the mediator and the Union's attorney met with the chief negotiator and attorney for the District. The latter meeting was face to face. The District cites no authority for its contention that something different was required.

D. Case Nos. LA-CO-359 and LA-CO-360

The District alleges the Union organized, caused, and engaged in a concerted sick-out during meditation on March 7, 1986. The evidence establishes and the Union does not dispute the fact that a higher percentage than normal of certificated and classified employees were absent on March 7, 1986. Thirty-two percent of full-time certificated unit employees were absent and approximately 26 percent of classified unit employees were absent on that date. What the Union disputes is the allegation that it organized, caused, or engaged in or supported the alleged sick-out.[9]

The Union officially established a Job Action Committee in

[9]Several years earlier when a job action was sanctioned, the rate of employee participation was at least 78 percent.

January or February 1986. The committee was to investigate, evaluate, and report back on various pressure tactics the Union might use on the District. The designated members of the committee were Toni Wasserberger and Fred Broder, although membership was open to any other interested Union member. The committee was not authorized to call for any job action; it was merely to report back. As of March 7, the committee had not reported back.

On March 7, the leaders of the classified unit were: McManus as president, Matthew Smith as vice president; Ray Ramirez as treasurer; and Florence Morton as secretary. For the certificated unit the leaders were: Darwin Thorpe as president; Gloria Schleimer as either vice president or secretary; Don O'Brien as treasurer, and Pat McLaughlin as the employee representative.

The Union leaders called as witnesses deny any job action was called for or sanctioned. No job action of any kind had been authorized by the Union but the Union did not repudiate the actions taken by employees on March 7.

To establish that an unlawful job action had taken place, the District called a number of witnesses who called in sick on March 7 or who allegedly had some information pertaining to the sick-out. A review of their testimony is appropriate.

Floyd "Hank" Smith is a professor of library services and the head librarian for the District. He has been a District employee for 32 years. On the evening of March 6, 1986, Smith received a telephone call from John Carroll. Carroll, who is a member of the Union but not an officer, told Smith, that many faculty members did not plan to be at work the next day. Smith does not recall the Union being mentioned during that conversation. Smith testified that he was neither encouraged nor discouraged from not going to work the next day.

Smith, who did go to work on March 7, testified that on March 6 his colleagues were quite agitated about remarks made by President/Superintendent Jackson at a faculty meeting. Although Smith was not present at the meeting, he heard other faculty members complain that Jackson had said words to the effect that the Union leadership "was trying to lead the black faculty around like monkeys or baboons."

John Carroll is a certificated employee of the District. He was absent from work on March 3 and March 7. He testified he was undoubtedly out because he was tired or sick. He testified that no one told him to stay home from work on the 7th, although he is sure he discussed a variety of job actions with Toni Wasserberger on a number of occasions in the context of discussing a thousand other things. Wasserberger teaches karate to Carroll's teenage daughters and they speak with one another frequently.

When asked whether anyone called him to discuss a sick-out or called to ask him to enlist other employees in a sick-out on or about March 6, 1986, Carroll responded as follows:

> Not that I know. People were discussing thousands of different things at the time. The faculty was upset, to the extreme. I imagine the telephones were going off the hooks at everyone's house.

When asked why the faculty was upset to the extreme, Carroll added that he could look in his wallet for one reason. He went on to further explain his answer.

> A. I do recall, there had been a faculty meeting called by Dr. Jackson somewhere around this active time, where accusations were made about the faculty that were not clear.
>
> Q. What sort of accusations?
>
> A. Oh, I recall the one that puzzled me the most was that we were told that certain of us were being duped, we were puppets being pulled around some mystery person pulling the strings, and I was kind of wondering who the puppets were and who the string-pullers were.

Joyce Mills is a certificated employee who has worked for the District for more than 10 years. In March 1986 she was a faculty advisor to the learning center and she taught two classes. She was not scheduled to work on March 7, but as a form of protest she called in sick anyway.

Prior to that date Mills had discussed working conditions with other employees who agreed that March 7 was a good date to let the District know they had had enough. Mills testified

that she may have discussed the matter with McManus because they worked together but she wasn't positive and she couldn't remember any reaction he may have had.

Mills also testified that she had a conversation about the sick-out with Floyd Smith, the librarian, who had called for another reason. She said that Smith felt that staying out was a good idea. (Smith did report for work on March 7, however.) Mills also testified about the faculty meeting which took place on March 6. She stated it was a very professional meeting until the superintendent got quite upset and angry. She testified as follows:

> I only remember it because it upset me so much. He said our union leadership was using — this is not a quotation — our union leadership was using a black woman to destroy black men. And I remember it full well because all the — a number of black women on campus kept saying, "Is it you?" to each other, "Is it you? Is it you?" We all kept looking at each other.

Mills indicated that at least ten of her colleagues were angry about the faculty meeting and the statements attributed to the superintendent. In addition to any general dissatisfaction she may have had with her working conditions, Mills indicated that she was upset with the faculty meeting which left her confused.

Mills was a forthright witness who stated she was nervous in the role but expressed herself well. Generally she stated

the faculty was upset and that various job actions were discussed. She was able, however, to distinguish what happened on March 7 from what happened when the Union sanctioned a job action. When employees went on strike several years earlier, she knew it was Union sanctioned because of Union meetings. On March 7, she had no reason to conclude the activity was Union sanctioned; it was an expression of employee discontent, not necessarily connected with the Union. She did express her opinion that the Union did not object to the sick-out because no one called her and told her not to stay out and because "certainly, the union officers and other union members must have heard about it."

Saul Panski is an associate professor of library services. On the night of March 6, 1986, Panski arrived home from work late. A colleague called and indicated she would be sick the next day. He informed her he was also sick and would be going to the doctor the next day. Panski did not speak with anyone else about not being at work on March 7.

Panski testified that, to his knowledge, there was no Union-sanctioned job action because the membership never took a vote. He understood that the job action committee had no authority to sanction a job action, but was to bring recommendations back to the membership. Panski did not deny that many employees who were active in the Union were probably

pleased that a number of employees were sick on March 7. With regard to the faculty meeting on March 6, Panski testified that the president talked about the employees not being misled and not following the actions of a few like a bunch of orangutangs.

Pieter Jan Van Niel is the head of the District's Theater Arts Department. On March 6, Van Niel was on campus until around 11:15 p.m. When he returned home, a message, taken by his children, indicated that some of his colleagues were going to be out sick the next day. Van Niel did go to work on March 7, but was apparently late. The administration, thinking he was not coming in, had cancelled his class. Van Niel testified that there was great confusion as to whether there had been any sanction whatsoever for the sick-out or whether individuals had simply made a choice to stay out. Van Niel described a general sense of confusion and frustration at the District. He testified as follows:

> I think you need to understand that this event on Friday created such a sense of confusion that there was a great deal of cross-talk among many different segments, and to identify even the segments as pro or con on that issue would be an incorrect assumption. I think there is a great deal of gray matter which occurred during that time and a great deal of gray matter that came up in the discussions, a lot of frustration, a lot of anger, a lot of upset. So to ask me to attempt to nail down with a specific person the substantive issues which I talked about with that specific person would be really impossible for me to do.

Dr. Rhoda Lintz Casey is a certificated employee of the District who serves as the division chair for basic skills and developmental studies. Casey recalled that she was absent from work the day after there was a faculty meeting and that she did receive a phone call from, she believed, Gloria Schleimer, telling her that "some people were not feeling too well and probably would not be working." Casey noted, however, there was nothing specific in terms of an outright plan. Casey specifically testified that Schleimer did not suggest that Casey take any action and she had no knowledge as to whether Schleimer was an officer of the Union.

Casey testified that faculty meetings at the District had become quite stressful. Although she was not specific about the meeting on March 6, she offered the following testimony:

> [H]e (the President) made some really irrational statements. He talked about a group of 10 people who were trying to undermine the college, trying to close its doors; I'm giving substance now, not exact quotes. And he said things like, "I know about your secret meetings, both here on campus in your offices and in your homes. I know about the things you're writing and you need to stop all this writing." It was pretty clear that I was one of the 10 that he was referring to, basically the people who are active at school, working, trying to keep the place together.

Casey testified that such statements were an example of the type of stress placed upon the faculty.

Earline S. Brokenbough is a classified employee of the District who, on March 7, 1986, was assigned to work on the

disbursement and preparation of grant checks, along with other duties. Ms. Brokenbough did not have any clear recollection of events prior to March 7. Ms. Brokenbough does believe a sick-out occurred but she had no discussions with anyone after the alleged event and the only conversation she recalls, before involved a telephone call from a female who was not an officer of the Union. The phrase "sick-out" was used in that conversation and Brokenbough did testify that she was asked to participate in a sick-out. Brokenbough did not indicate if she had participated. Her calendar indicated that she was out sick on March 3, 4, and 7.

Carol Beal is a classified employee of the District. Based upon rumors which she believed began circulating prior to March 6, Beal thought that March 7 was to be a union-sponsored job action day. She stayed home from work, in part, because she wanted to support the Union. Although she could provide no concrete evidence of Union sponsorship, Beal could think of no one else who would want the job action.

Steven Lupold is a classified employee of the District who did not work on March 7 because, he claimed, he was out the night before bowling and did not feel very well. Lupold testified that he had participated in general discussions with Toni Wasserberger and Fred Broder about informational picketing or other actions which might facilitate bargaining but there

was no specific discussion of any job action on March 7. Lupold did not receive any calls either directing him not to come to work, suggesting he not come to work, or telling him others were not coming to work on March 7.

Linda McKray is also a classified employee of the District. Although she was not at work on March 7, she does not recall any plan not to be there and, in fact, she was subsequently surprised to learn her co-worker had also been absent that day. She recalled no specific discussions about a job action on March 7 although she admitted that there were general discussions about taking some action against the District.

Dorsey Randolph is a classified employee of the District who, in March 1986, worked as a senior clerk-typist in the developmental research office. Randolph testified that he was absent from work on March 7 because he had the flu and that he learned that other employees were absent that day only when he returned to work.

Bruce McManus was not at work on March 7, 1986. McManus testified about events prior to that date which may have contributed to absenteeism on the 7th. He stated that the superintendent met with the classified employees in December, January, February, and on March 6. In December the superintendent told the employees they were the best in the state, but they were severely underpaid. He told them how

important it was that they get a raise. In January, he again told them they were underpaid and he intended to put most of the lottery money towards their salaries. In February, he again repeated his alleged belief that lottery money should go to their salaries. On March 6, however, the superintendent brought Ben Lett to the meeting with classified staff. Lett read to the employees from the state Chancellor's guidelines advising them that lottery money was only to be used for instructional purposes; in other words, it was not available for classified salaries.

After the meeting, according to McManus, employees were depressed and upset. Nevertheless, McManus flatly denied having any information which would have led him to conclude that classified employees were not going to be at work on March 7. He attributed his absence to exhaustion.

Darwin Thorpe was not at work on March 7, 1986. His absence was for reasons of personal necessity since he had to take his wife to the doctor, an appointment which was scheduled earlier in the week. The District did not count Thorpe among those sick on March 7.

Thorpe testified that he did not encourage any employees to stay away from work on March 7 and he did not know of a planned sick-out. When asked if he had discouraged such activity, he testified as follows:

> A. Kind of, in a fashion. In all the discussions that were taking place in March

> and about all matter of job actions that might bring the District around to negotiating, various people would make suggestions about what should be done. And in my capacity as Union President I would indicate in all those occasions whether or not I personally thought it would be useful or timely and so forth. And to the suggestions of some people that there should be a complete at least work stoppage or slowdown at the point, I indicated that the timing was wrong and that I didn't feel that that kind of thing was warranted because mediations were still in kind of an ongoing process. That we weren't really in a concluded station or stage with mediation.
>
> Q. Can you remember the names of anybody you expressed that sentiment to?
>
> A. There were several people. One of them I remember distinctly because we had a discussion on it, it was Pat McLaughlin. And some — I'm trying to think. Most members were pretty argumentative, some had lots of reasons why they thought that a general work slowdown should be put into effect immediately. But it was the contention of the people that I talked with, you know officers, that that was not the time to do anything. (Emphasis added.)

In addition to the testimony from the many employees who had or had not been at work on March 7, 1986, the District offered testimony from Joan Clinton and Floranell Shearer. The testimony that the District had no advance notice of a work action and the testimony that a higher percentage of employees than normal were absent is uncontroverted.

Clinton and the superintendent also testified regarding the faculty meeting on March 6 and the superintendent's comments.

Clinton recalled Jackson gave a factual presentation on the budget, but she admitted that, since it was nothing new, she did not pay a great deal of attention. Jackson denied making any disparaging remarks about the faculty.[10]

In addition to its claims that the sick-out violated section 3543.6(d), the District claims that the alleged job action violated the provisions of the expired CSEA classified contract. That contract provided, in relevant part, as follows:

> It is recognized that the need for continued and uninterrupted operation of the District is of paramount importance and that there should be no interference with such operations.
>
> The District agrees it should not, during the term of the Agreement, lock out members of the bargaining unit as a result of a work stoppage by other District employees.
>
> The Association agrees that neither it nor any person acting in its behalf will cause, authorize, engage in, sanction, nor will any or its members take part in a strike against the District, or the concerted failure to report for duty, or willful absence from duty.
>
> Nothing contained in this Agreement shall be construed to restrict or limit the District of the Association in its right to seek and obtain such judicial relief as it may be entitled to have under law for any violation of this or any other Article.

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[10]For purposes of the decision herein it is unnecessary to make a finding as to whether or not Jackson made the statements attributed to him. Whatever was said, employees believed he made negative remarks and responded accordingly.

No evidence was presented to indicate that the Federation had agreed to be bound by or had accepted any portion of the CSEA contract which expired on June 30, 1985.

III. ISSUES

A. Did the District engage in bad faith bargaining and fail to participate in good faith in the impasse proceedings set forth in the EERA?

B. Did the Union violate the EERA when the classified and certificated units bargained jointly on some issues?

C. Did the Union violate the EERA when employees it represents in both the classified and certificated units engaged in a sick-out on March 7, 1986, while the parties were engaged in mediation?

IV. CONCLUSIONS OF LAW

A. Case No. LA-CE-2276

In determining whether there has been a pattern of bad faith bargaining, the totality of a party's conduct must be reviewed. Stockton Unified School District (1980) PERB Decision No. 143; Pajaro Valley Unified School District (1978) PERB Decision No. 51. In the instant case, it is found that the District failed and refused to bargain in good faith and failed to participate in good faith in the impasse procedures with respect to the classified bargaining unit. Although District representatives assert the District had the subjective intent to reach agreement, the District's repeated violation of

the rules relevant to good faith bargaining belie that assertion.

Some of the same District conduct impacted upon negotiations with the certificated unit. Again, using the totality of conduct standard, the evidence is sufficient to find that the District violated the Act with respect to that unit, although it is a much closer question.

1. The Classified Unit

At critical times during the District's negotiations with the Federation, the District frustrated the Union's attempt to secure a collective bargaining contract. First of all, the District failed to take a clear, cohesive, or consistent position in salary negotiations. To some extent, the District's failure to state with specificity the amount of money it had available is understandable. Some resources such as the cost of living adjustment (COLA), ADA decline money, and lottery fund allocations were not known to the District. PERB authorities suggest the District could have requested a deferral of negotiations on salaries until its financial picture was better defined. State of California, Department of Personnel Administration (ACSA). (1986) PERB Decision 569-S; San Mateo County Community College District (1979) PERB Decision No. 94. The District did not, however, request deferral.

The District's general conduct with respect to salary negotiations fits the description of bad faith bargaining set forth by the Board itself in Muroc Unified School District

(1978) PERB Decision No. 80. In that case, the Board described surface bargaining and noted:

> It is the essence of surface bargaining that a party goes through the motions of negotiations, but in fact is weaving otherwise unobjectionable conduct into an entangling fabric to delay or prevent agreement. Specific conduct of the charged party, which when viewed in isolation may be wholly proper, may, when placed in a narrative history of the negotiations, support a conclusion that the charged party was not negotiating with the requisite subjective intent to reach agreement. Such behavior is the antithesis of negotiating in good faith. Id at p. 13. (Footnotes omitted.)

In the instant case, when the whole fabric of salary negotiations is reviewed, it is concluded that the District's conduct meets the Muroc standard of not bargaining in good faith.

The record reflects the District was not merely evasive about the amount of money available. The District also vacillated about the amount of money it needed to operate. Accordingly, the District sent signals to the Union suggesting money could be used for salaries and then the District inexplicably altered its position. Thus, it is concluded that the District couldn't decide what it had available and wanted to allocate to salaries, or the District's designated negotiators were unable to explain the District's position. In either event, the District's vacillation on the salary issue implies the District did not intend to bargain about salaries or reach agreement.

Salary negotiations were further frustrated and confused by the District's repeated introduction of the Education Code section 72500 provision. Jones stated that he knew from the beginning that any provision regarding Education Code section 72500 would not be acceptable. Thus, his repeated introduction of that subject can only be seen as a deliberate attempt to frustrate negotiations. Accordingly, without even reaching the question of whether the District unlawfully conditioned bargaining on matters within the scope of representation on the Union's agreement to bargain a nonmandatory subject, I find that, in the repeated introduction of Education Code section 72500, the District demonstrated it did not have the subjective intent requisite to good faith bargaining.

Other District conduct further supports a finding of bad faith bargaining. For example, the conclusion is inescapable that the District reneged on several tentative agreements. Reneging on tentative agreements is an indicator of bad faith...4. bargaining. Stockton Unified School District, supra; San Ysidro School District (1980) PERB Decision No. 134. First, the District agreed to give up its unconditional right to establish the length of the work year. There had been considerable discussion at the table and the parties agreed the District would retain a conditional right to establish the work year. On or about October 8, the District reneged on that agreement.

The District also repudiated the tentative agreement to provide a paid, uninterrupted lunch period. The latter subject was agreed to unconditionally in late June or early July 1985. It was included in the "master agreement" prepared by the District itself for a meeting in October 1985 and was initialed on October 15. Provision for a paid, uninterrupted lunch period was also included in the District's proposed contract which was transmitted to the employees in early June 1986. Without prior consultation, notice or discussion with the Union, the District told the employees that the provision for a paid, uninterrupted lunch period was a mistake. Since the matter was discussed at the table, and repeatedly included in every draft of tentative agreements, it is concluded that the District agreed to a paid, uninterrupted lunch period and reneged on that agreement.[11]

The evidence further established that the District reneged on the agreement to delete the maintenance of operations provision from the contract. After several discussions and agreement on the retention of some language from the article, the parties reached agreement on July 8, 1985. On October 8, 1985, the District repudiated that tentative agreement.

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[11]When the District repudiated the agreement, it demonstrated it had failed to bargain in good faith. The act of repudiation took place during impasse proceedings, however. Accordingly, the conduct must be considered a violation of section 3543.5(e).

The District also failed to abide by agreed-upon ground rules. As noted above, when viewed in isolation, the failure to adhere to the ground rules was not an egregious act. When viewed in context, however, it is evidence of the District's casual, perhaps cavalier, approach to negotiations. The parties agreed on a provision for organizational security on July 25, 1985. Under the agreed-upon ground rules, the matter should have been initialed by the Distinct at the next regularly scheduled bargaining session on July 29. Jones, who had no familiarity with the ground rules, did not see any necessity to sign it at the next regular session, although the Union had prepared a clean copy of the agreement and although the District did not dispute that agreement had been reached. When Jones was questioned about the organizational security provision, he indicated nothing would be signed until October 1985. PERB has held that negotiating "ground rules" is equivalent to a mandatory subject of bargaining. Stockton Unified School District, supra; Gonzalez Union High School District (1985) PERB Decision No. 480. In other words, the ground rules are as important as other matters to be negotiated. Accordingly, violation of the ground rules must be viewed as reneging on an agreement and is yet another indicia of bad faith bargaining.

In addition to the matters discussed above, the District does not dispute the evidence that it dramatically altered its

last and final offer to the Union while the parties were participating in the impasse proceedings, in between mediation and factfinding. The District alleges, but did not establish, that modification of its last and final offer was the result of an economic imperative.

Although the District's offer had not yet been accepted by the Union and, thus, was not binding upon the parties, the significant reduction in the 1986 through 1987 salary proposal, without any apparent examination of alternatives, frustrated the mediation and factfinding process and evidenced the same casual approach the District brought to the negotiating table.

Finally, negotiations for a collective bargaining agreement in the classified unit were hampered by threats against Union members to add negative materials to personnel files if the Union insisted upon a return to language contained in the previous collective bargaining contract on the subject of employee personnel files. (See section B.1.d. pp. 16 to 18 supra.)

There is no evidence that the District sought to change the provisions in the old contract, during the course of negotiations. On the other hand, the Union did try to change that language to reduce the amount of time derogatory material would remain in a personnel file. When the parties were unable to reach agreement, on October 8, 1985, the Union offered to abandon its proposal and accept the language in the previous collective bargaining contract.

Jones rejected the suggestion. Unfamiliar with the previous contract, he thought the language suggested by the Union was far too liberal. Jones argued that, pursuant to a case identified as Cockburn v. Santa Monica Community College District Personnel Commission (1984) 161 Cal.App.3d. 176, materials derogatory to an employee could be used in a disciplinary action provided that they had previously been shown to the employee, whether or not such materials were in the employee's personnel file. After Floranell Shearer advised Jones that the language sought by the Union was in the previous contract, he was still reluctant to accept it. It was at that time that he stated that all supervisors would be advised to place every negative event in an employee's personnel file.

Although the parties testified the discussion was more intense than previous bargaining sessions, given it was a bargaining session and given that no adverse action was taken, I am reluctant to find that Jones' statements constitute an independent violation of the EERA. The actors on a collective bargaining stage must be given a certain amount of latitude and must be allowed to posture, spar or otherwise engage in theatrics which might, in their opinion, enhance the cause of the party they represent.

Although not constituting a basis for an independent violation of the EERA, the District's position on employee personnel files is yet one more indication of bad faith

bargaining. From February until October 8, 1985, there is no evidence the District was dissatisfied in any way with the provisions in the previous contract regarding classified employees' personnel files. Yet, on October 8, 1985, the District refused to accept the language which would have maintained the status quo. Indeed, the District went further and threatened to change terms and conditions of employment as a condition for returning to the language which maintained the status quo. Such conduct is indicative of the District's conduct in negotiations which supports the conclusion that it did not have the subjective intent to reach agreement.

2. The Certificated Unit

The District's negotiations with the certificated unit were characterized by many of the same difficulties which pervaded negotiations with the classified unit. The difficulties with salary negotiations, the Education Code section 72500 provision and the last and final salary offer were identical. Negotiations for the certificated unit were also somewhat hampered because the District was evasive and nonresponsive to the Union's proposal on the transfer and reassignment of faculty. In addition to these events which were taking place at the table, the District was taking unilateral action with respect to the certificated calendar.[12]

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[12]I take official notice of the findings which were made in two other PERB cases, and not appealed. In Unfair Practice Case No. LA-CE-2273, I found that the District had violated

There is no dispute that many issues which concerned the certificated unit were resolved during the course of negotiations for a new contract. There is some evidence that there was an established network for resolving disputes outside of conventional bargaining channels. For example, Thorpe and Clinton seemed to discuss the resolution of matters, such as a question concerning division chairs, without the intervention or even knowledge of Jones.

There can also be no dispute that the primary issue concerning the certificated unit was salaries. The Federation's certificated unit had negotiated the previous collective bargaining contract and presumably could live with most of its provisions, in contrast to the classified unit which found many of the earlier CSEA provisions unacceptable. Accordingly, the positions taken by the District on the issue of salaries impacted on the entire fabric of negotiations and those negotiations alone must be studied to determine if the District evidenced the subjective intent to reach agreement.

Since the evidence overwhelmingly supports the conclusion that the District did not clarify its proposals, did not

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section 3543.5(c) and derivatively sections 3543.5 (a) and (b) when it unilaterally established the calendar for intersession and Saturday classes. That case was consolidated with Unfair Practice Case No. LA-CE-2272, to which exceptions were filed. Accordingly, the Order in Case No. LA-CE-2273 is not final. In Case No. LA-CE-2393 (HO-U-327), I again found the District had violated the Act by unilaterally establishing intersession calendars. That aspect of the case was bifurcated from all other issues and the Order issued therein is final.

present a picture of the resources it could or would commit, did confuse bargaining by the introduction of predictably-unacceptable proposals and did label offers as firm and then withdraw them, it is found that enough indicia of bad faith bargaining are present to conclude the District violated the Act.

B. Case Nos. LA-CO-350, LA-CO-352 and LA-CO-353

As set forth in the Findings of Fact above, the evidence presented on many issues raised in the above-referenced matters was insufficient to sustain the factual allegations set forth in the Complaints. Accordingly, there will be no discussion of those matters in this section. On the issue of coalition bargaining, however, the evidence was sufficient to raise a question as to whether the Federation violated the Act.

It is generally accepted that coordinated bargaining is acceptable but merged or coalition bargaining is not. As noted in Morris, The Developing Labor Law, Second Edition:

> The terms "coalition" or "coordinated" bargaining are often used interchangeably, although there is a logical difference between the terms which corresponds to the intent and nature of the mutual bargaining activity. "Coordinated" bargaining connotes communication and accommodation among different bargaining agents but independent decision making in separate bargaining processes. Such activity is therefore not illegal as such. "Coalition" bargaining, on the other hand, implies a de facto merger of bargaining units, or an effort to achieve that end. Thus to the extent such a merger

> is forced on a nonconsenting bargaining partner, a refusal to bargain, by virtue of insistence on a nonmandatory bargaining subject, results. Id. at pp. 666-667.

The Board itself has subscribed to the above-quoted analysis in Gilroy Unified School District (1984) PERB Decision No. 471 and Savanna School District (1982) PERB Decision No. 276. In Gilroy, the Board also noted:

> The use of common bargaining sessions to negotiate separate agreements merely goes to the time and place of negotiations and does not impinge on the integrity of the individual units or the employer's right to consider unit proposals on their own merits. ... It follows that a proposal to negotiate two separate contracts during the same bargaining sessions falls within the right of a party to suggest reasonable times and intervals for bargaining sessions. Id. at pp. 8-9.

On the other hand, the Board noted, "the merger of two or more unit negotiations inherently alters the finding of unit appropriateness."

The bargaining described in the instant cases does not neatly fit into either the definition of coordinated or coalition bargaining. Bargaining about noneconomic items could probably be described as coordinated bargaining. Not long after certificated bargaining began and the classified unit had its ground rules, a representative from one team monitored the bargaining sessions of the other team. There is no evidence that anything which took place at those sessions was improper or violative of the Act.

The bargaining which took place with respect to salaries was something more than coordinated bargaining. It was never suggested or proved, however, that the certificated and classified units were trying to merge or obtain the same contract. They were trying to coordinate the way in which the monies available for salaries were distributed. This seems something less than the hornbook definition of coalition bargaining.

No matter what label the bargaining is given, whether or not it violates the Act is contingent upon whether the Federation refused to bargain unless the District agreed to meet jointly or whether the Federation conditioned settlement of one contract upon settlement of the other. I find that it did not. At all times relevant hereto, the District agreed to meet jointly with the certificated and classified units on the issue of salaries. At no time did either McManus or Thorpe refuse to go forward without the other and at no time did any representative of the Federation condition the conclusion of negotiations for one unit upon the conclusion of negotiations for the other. Under the circumstances presented herein, the Complaint must be dismissed.

C. Case Nos. LA-CO-359 and LA^CO-360

The District has alleged that the Federation, as the representative of the classified and certificated units, violated the Act by engaging in an unlawful sick-out on

March 7, 1985. The evidence established that a higher than expected percentage of employees were out sick on that date. The Union leadership denies having anything to do with that absenteeism. A review of the governing law is appropriate. It is well established that a union violates its duty to participate in the Act's impasse procedures in good faith when it engages in an unprotected work stoppage during the mediation process. In San Diego Teachers Association v. Superior Court (1979) 24 Cal.3d 1, the Supreme Court reviewed the impasse procedures of the Act, and concluded on pages 8-9;

> . . . since [the impasse procedures] assumed deferment of a strike at least until their completion, strikes before then can properly be found to be a refusal to participate in the impasse procedures in good faith, and thus, an unfair practice under section 3543.6 (d).

In Modesto City Schools (1983) PERB Decision No. 291, the Board dealt with the legality of work stoppages prior to the completion of the statutory impasse procedure. The Board held that work stoppages occurring prior to exhaustion of the impasse procedures create a rebuttable presumption that such action is an unlawful tactic in violation of the union's duty to negotiate in good faith.

In El Dorado Union High School District (1986) PERB Decision No. 537a, the Board, citing Moreno Valley Unified School District (1983) 142 Cal.App.3d 191, found that a partial work stoppage occurring during the pendency of the impasse

procedures of the Act violated the union's duty to participate in the impasse procedures in good faith. See also Westminster School District (1982) PERB Decision No. 277; Fresno Unified School District (1982) PERB Decision No. 208; San Ramon Valley Unified School District (1984) PERB Order No. IR-46; and San Mateo City School District (1985) PERB Order No. IR-48.

In order to prevail on its charge the District must prove: (1) that a sick-out occurred; (2) that it occurred prior to exhaustion of the impasse procedures of the Act, and (3) that the Federation planned and/or authorized the sick-out.

There is ample evidence that a sick-out occurred. Approximately 32 percent of the District's full-time certificated employees were absent on March 7 as compared to an average of 2.9 percent for the entire month of March. For the classified unit, approximately 26 percent were out on March 7 as compared to an average sick rate in the entire month of March of 7 percent.

There was also no dispute that the parties had not yet exhausted the impasse procedures of the Act at the time of the sick-out. A mediator had been appointed, and the parties were in the midst of mediation.

The final element of the complaint which must be proven by the District in order to prevail is that the Federation planned and/or authorized the sick-out. In establishing liability of the union for acts of its members, common law

principles of agency apply. Antelope Valley Community College District (1979) PERB Decision No. 97; Los Angeles Community College District (1982) PERB Decision No. 252; Carbon Fuel Co. v. United Mine Workers (1979) 444 U.S. 212. "A union will not be held liable unless some one or more persons in authority were responsible for what transpired." Longshoremen and Warehousemen v. Hawaiian Pineapple Co. (9th Cir. 1955) 226 F.2d 875. " . . . it must be clearly shown, . . . that what was done was done by their agents and in accordance with their fundamental agreement and association." Coronado Coal v. United Mine Workers (1925) 268 U.S. 295, 304. "In showing union complicity, the company must therefore prove that the agents of the union participated in, ratified, instigated, encouraged, condoned, or in any way directed the authorized strike for the union to be held liable." North River Energy Corporation v. United Mine Workers, (11th Cir. 1981) 664 F.2d 1184.

It is in this element of the complaint where the District's case fails. It's proof that the union planned and/or authorized the March 7 sick-out amounts to little more than rumor and speculation. No witness, either District manager or Union member, testified that the Union in any way encouraged them to stay home from work. No one testified that the Union was mentioned in any discussion about staying home from work on March 7. The Federation did not, either before or after March 7, ratify the acts of the employees in staying home from work.

The District's case was not buttressed by the bargaining unit members it called. Of those witnesses six had received calls regarding employees being out sick the next day; two of those in fact reported to work the next day. Although there were rumors, discussions and speculation among both employees and management of a possible job action of some sort at some time, the District has presented no credible evidence that the March 7 sick-out was planned and/or authorized by the Federation.

The fact that the Federation had not taken a strike vote also works against a finding that it authorized or sponsored a job action. A job action committee had just been formed and was to discuss and explore alternatives only. That committee had not even reported back to the membership. In the past, when the Union did authorize job actions, the membership was informed through Union votes and Union meetings. Employees who were knowledgeable about such matters knew that the action on March 7 was not Union sanctioned. Moreover, when the Union did put its support behind a job action, the response was greater than demonstrated on March 7.

In short, there was no evidence presented that the Union authorized a sick-out; or even that the subject of a sick-out arose at meetings. There was no evidence that anyone in a Union leadership role called for or encouraged the sick-out.

(There was testimony that Gloria Schleimer might have told one employee that other employees were going to be out sick. She did not, however, mention the Union or encourage that employee to stay home from work. She did not identify herself as a Union officer.) There was no evidence of statements to the press indicating a connection between the job action and the Union. There were no claims of responsibility made afterward by the Federation. There were no flyers, placards, picket signs or handouts linking the Federation to the sick-out. There were no minutes of the Federation's governing board's ratification of the action. There was no evidence of speeches made by Union officials indicating any responsibility for or authorization of the action.

Nor can any conclusion be drawn from the failure of the Federation to renounce the sick-out, or to urge employees to return to work. For the certificated unit, there was no evidence of any contractual provisions in effect at the time of the sick-out which required the Union to renounce the action. Nor was there evidence that the District ever asked the Union to make efforts to secure the return of employees. Furthermore, the question is not whether the Federation did everything it might have done, but rather whether the Federation adopted, encouraged, or prolonged the continuance of the action. United Construction Workers v. Haislip Baking Company (4th Cir. 1955) 223 F.2d 872.

In the classified unit, the Complaint alleges that the sick-out violated the collective bargaining agreement which had been signed by CSEA and the District and which expired on June 30, 1985. The District has cited no authority for the proposition that the Union should be bound by any aspect of that contract in general, or the maintenance of operations clause in particular. Although there is no evidence that the representatives of the classified unit participated, encouraged, or sanctioned the sick-out on March 7, even if they had, the action would not have been a violation of the expired contract signed by another union. It is well settled that "when a union is decertified, . . . the succeeding union . . . is not bound by a prior contract, even if the terms of the contract have not yet expired." NLRB v. Burns International Security Services. Inc. (1972) 406 U.S. 272, fn. 8; American Sunroof Corp. (1979) 243 NLRB No. 172 [102 LRRM 1086]

Absent clear evidence regarding who did orchestrate the sick-out, it is certainly a possibility that the Federation played a role; however, the Courts have made clear that violations of this nature must be founded upon proof, not mere possibilities. Moreover, it is equally possible, given the state of the evidence, that employees engaged in a rather spontaneous protest. Classified employees were angry about the withdrawal of lottery money from the funds available for their salaries. Certificated employees were upset and angry about a

number of comments they thought the president/superintendent had made. Based upon the state of the record, the Federation cannot be held liable for the job action in either the classified or certificated units. Therefore, the allegations that the Federation refused to participate in the impasse procedures in good faith as alleged in Case Nos. LA-CO-359 and LA-CO-360 must be dismissed.

V. CONCLUSIONS

Based upon the foregoing findings of fact and conclusions of law, in Case No. LA-CE-2276, it is found that the Compton Community College District violated section 3543.5(c) and, derivatively, sections 3543.5(a) and (b) when it engaged in surface bargain and did not display an intent to reach agreement with either its certificated or classified units who were trying to negotiate contracts to be effective beginning on July 1, 1985. It is also found that the employer's conduct during impasse proceedings constitutes a violation of section 3543.5(e). It is further found that the Compton Community College Federation of Employees, AFL-CIO did not establish that the District threatened to retaliate against members of the classified unit because of the Federation's insistence upon certain language pertaining to employee personnel files.

In Case Nos. LA-CO-350, LA-CO-352, LA-CO-353, LA-CO-359, and LA-CO-360, it is found that the District failed to establish that the Federation engaged in bad faith bargaining,

either by insisting upon coalition bargaining or by engaging in an unlawful sick-out, or by engaging in other acts allegedly violative of the EERA. All those cases are hereby DISMISSED.

VI. REMEDY

Section 3541.5(c) of the EERA states:

> 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 policy of this chapter.

A cease and desist order is the traditional remedy for an employer's failure to bargain in good faith. Stockton Unified School District, supra

In Case No. LA-CE-2276, the employer will be ordered to cease and desist from its unlawful activity. The District should be required to cease and desist from engaging in surface bargaining by failing to clarify its position on salaries, by reneging on tentative agreements, by violating the ground rules. The District should also be ordered to cease and desist from failing to participate in good faith in the impasse proceedings by reneging on agreements and/or altering last and final offers.

It also is appropriate that the District be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized representative of the

District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal.App.3d 580, 587 the California District Court of Appeals approved a similar posting requirement. NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the Compton Community College District has violated sections 3543.5(c) and (e), and, derivatively, Section 3543.5 (a) and (b), of the Educational Employment Relations Act. Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the Compton Community College District, its officers and representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to meet and negotiate in good faith and refusing to participate in good faith in impasse proceedings by failing to present clear and consistent positions or proposals on salary negotiations, reneging on tentative agreements during bargaining and impasse proceedings, violating ground rules, and altering last and final offers.

2. Denying the Union its right to represent members of the classified and certificated units in negotiations and impasse proceedings conducted in good faith; and

3. Interfering with the employees* right to be represented by the Union in negotiations and impasse proceedings.

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

1. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and at all other work locations where notices to certificated and classified 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.

(2) Upon issuance of a final decision, make written notification of the actions taken to comply with these orders to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions.

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 exceptions 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: April 19, 1988

Barbara E. Miller
Administrative Law Judge