STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MT. DIABLO EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-1287
v.	)	PERB Decision No. 844
MT. DIABLO UNIFIED SCHOOL DISTRICT,	)	October 1, 1990
Respondent.	)	

Appearances: A. Eugene Huguenin, Jr., Attorney, for Mt. Diablo Education Association, CTA/NEA; Breon, O'Donnell, Miller, Brown & Dannis by Martha Buell Scott, Attorney, for Mt. Diablo Unified School District.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Mt. Diablo Unified School District (District) to a proposed decision (attached) issued by a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5(c), (e) and, derivatively (b) of the Educational Employment Relations Act (EERA or Act)[1] when it insisted to impasse that the Mt. Diablo Education Association, CTA/NEA (Association): (1) waive its right to file grievances in its own name; and, (2) waive its right to arbitrate grievances in cases where the individual grievant does not wish to pursue the grievance to arbitration. We have carefully reviewed the

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

entire record, including the proposed decision, the District's exceptions to the proposed decision, and the Association's response to the District's exceptions. We note that all of the arguments raised in the District's exceptions were considered and addressed by the ALJ. Except as noted below, we find the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopt them as the decision of the Board itself.

Furthermore, since the issuance of the proposed decision and the filing of the exceptions and response in this case, the Board issued a decision in the case of Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista) . The primary legal issues raised in this case were decided by the Board in Chula Vista. In Chula Vista, a majority of the Board found that: an exclusive representative has a statutory right to file grievances in its own name; proposals that an exclusive representative waive that right are nonmandatory subjects of bargaining; and, a school district violates EERA by insisting to impasse that an exclusive representative waive its statutory right to file grievances in its own name. (Id. at pp. 18-23.)

Additionally, the majority in Chula Vista found that the school district's insistence to impasse on a proposal limiting an exclusive representative's ability to take a grievance to arbitration without the grievant's approval violated EERA. The majority found that the proposal impinged upon the exclusive representative's statutory right to represent its members and was therefore also a nonmandatory subject of bargaining. (Id. at pp. 31-35.)

In reaching its conclusion regarding the District's insistence to impasse on the two grievance proposals discussed above, the majority in Chula Vista expressly rejected utilization of a modified version of the test set forth in Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim) to determine whether the proposals in question were mandatory subjects of bargaining. Similarly, in the instant case, although we agree with the ALJ that the grievance proposals in question are nonmandatory subjects of bargaining, we expressly reject that portion of his analysis that utilizes a modified version of the Anaheim test (See Prop. Dec, p. 15, par. 2 through p. 17, par. 1, 1st sentence; p.20, par. 1.) and adopt instead the "statutory right" analysis as set forth in Chula Vista.[2]

ORDER

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

[2]In Chula Vista, the majority found that application of the Anaheim test to determine the negotiability of the grievance proposals was unnecessary since the District was not actually insisting to impasse on a term or condition of employment, but was rather insisting that the Association waive a basic statutory right. (Chula Vista City School District, supra, PERB Decision No. 834, at pp. 22-23.)

A. CEASE AND DESIST FROM:

1. Insisting to and during impasse on contractual language outside the scope of representation which has the effect of restricting the Association's right to file grievances on behalf of individual unit members and to take grievances to arbitration.

2. Enforcing and giving effect to those portions of Article IX of the current agreement between the parties which restrict the right of the Association to file and arbitrate grievances to only alleged violations of the Recognition, Grievance Procedure, Organizational Security and Savings clauses of the agreement.

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

1. Accept grievances filed by the Association on behalf of individual unit members as appropriate under the timelines and subject matter requirements of the agreement between the parties.

2. Process grievances through all steps of the grievance procedure, including arbitration, initiated by the Association on behalf of individual unit members, regardless of whether the grievance was resolved "to the satisfaction of the grievant" during the initial steps.

3. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an Appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps

shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

4, Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

Member Camilli joined in this Decision.

Chairperson Hesse's concurrence begins on page 6.

Hesse, Chairperson, concurring: While I agree with the majority's conclusion that the Mt. Diablo Education Association, CTA/NEA (Association) has the statutory right to be a named grievant, I write separately to address the stipulated record and present my legal analysis for finding such a statutory right.

Before reaching the issue of whether the Association's right to be a named grievant is a mandatory or nonmandatory subject of bargaining or statutory right, the Board must determine whether the Mt. Diablo Unified School District (District) insisted to impasse on its grievance proposals. In his proposed decision, the administrative law judge (ALJ) states:

> The only remaining question is whether the Employer maintained its position to impasse. An employer fails to negotiate in good faith when it demands to impasse that the exclusive representative "abandon rights guaranteed" under the EERA. Modesto City Schools (1983) PERB Decision No. 291.
>
> The stipulation resolves this matter unequivocally. It is absolutely clear that, over Onion objections the Employer maintained its insistence on the disputed language to impasse. The parties stipulated that the District maintained its position on the grievance language through the meetings of October 10, 22 and 25, the last meetings prior to the Employer's declaration of impasse on November 8, 1988. [Fn. omitted.]
>
> The stipulation likewise makes it clear that the Employer continued its insistence on the disputed grievance language during the mediation process. When the Union finally acceded to the Employer's demand on January 25, 1989, it was with clear notice to the Employer that it intended to pursue the dispute through a PERB hearing. The Employer accepted this position and the dispute was kept alive despite the agreement. (Proposed Decision, p. 21.)

While I agree with the ALJ's finding that the District insisted to impasse, I do not believe that the stipulation is "absolutely clear." The stipulated record states that throughout bargaining and mediation, both the District and Association maintained their respective positions on the grievance article. However, the allegations in the amended unfair practice filed on January 4, 1989 and the March 15, 1989 letter from the Association's Executive Director to the District's Human Resources Director indicate that the District insisted to impasse on the grievance article. The amended unfair practice charge alleges the District insisted to impasse on a nonmandatory subject of bargaining. The March 15, 1989 letter indicates the Association placed the District on notice of its objections to the District's proposed grievance procedure on the grounds that the exclusive representative has a statutory right to file a grievance in its own name. As the District has not disputed these allegations or statements, it appears the stipulated record supports the conclusion that the District insisted to impasse. Further, the District did not except to this finding by the ALJ in his proposed decision.

Only after the Board has determined that the District insisted to impasse on its grievance proposals does the Board reach the issue of whether the Association's right to be a named grievant is a mandatory or nonmandatory subject of bargaining or statutory right. Consistent with my concurrence in Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista), I find that the Association has the statutory right to be a named

grievant. In reaching this conclusion, I relied upon the reasoning in a recent Court of Appeal decision in Lillebo v. Davis (1990) 218 Cal.App.3d 1588. I also noted that the decision had been vacated by the California Supreme Court with direction to the Court of Appeal to reconsider the case in light of the United States Supreme Court's opinion in Keller v. State Bar of California (1990) _____U.S._____[110 S.Ct. 2228],

Subsequent to my Chula Vista concurrence, the Court of Appeal amended and reissued its opinion in Lillebo v. Davis (August 20, 1990, C006009)_____Cal.App.3d_____. In analyzing the right of individual employees to represent themselves in their employment relations with the State, the court again reviewed the pertinent provisions of the Ralph C. Dills Act and concluded that the individual employee has the right to the grievance procedure only to the extent it is created by the collective bargaining agreement negotiated and administered by the exclusive representative. (See my concurrence in Chula Vista, supra, PERB Decision No. 834, pp. 82-84.)

Although I still believe the Educational Employment Relations Act does not contain explicit statutory language providing that an exclusive representative has the right to be a named grievant, I find the court's discussion in Lillebo v. Davis controlling. In the present case, as the enforcement of the individual employee's rights are dependent upon the exclusive representative's representation, I find the Association has the statutory right to be a named grievant.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-1287, Mt. Diablo Education Association, CTA/NEA v. Mt. Diablo Unified School District, in which all parties had the right to participate, it has been found that the Mt. Diablo Unified School District has violated section 3543.5(b), (c) and (e) of the Educational Employment Relations Act (Act). The District violated the Act when it insisted to and during impasse on clauses which would restrict the Association's ability to file and arbitrate grievances, matters outside the scope of representation, and continued to insist on these provisions during the impasse resolution procedures.

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

A. CEASE AND DESIST FROM:

1. Insisting to and during impasse on contractual language outside the scope of representation which has the effect of restricting the Association's right to file grievances on behalf of individual unit members and to take grievances to arbitration.

2. Enforcing and giving effect to those portions of Article IX of the current agreement between the parties which restrict the right of the Association to file and arbitrate grievances to only alleged violations of the Recognition, Grievance Procedure, Organizational Security and Savings clauses of the agreement.

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

1. Accept grievances filed by the Association on behalf of individual unit members as appropriate under the timelines and subject matter requirements of the agreement between the parties.

2. Process grievances through all steps of the grievance procedure, including arbitration, initiated by the Association on behalf of individual unit members, regardless of whether the grievance was resolved "to the satisfaction of the grievant" during the initial steps.

Dated:______________________________ MT. DIABLO UNIFIED SCHOOL 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

MT. DIABLO EDUCATION ASSOCIATION, CTA/NEA, Charging Party, v. MT. DIABLO UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-1287 PROPOSED DECISION (11/6/89)

Appearances: A. Eugene Huguenin, Jr., California Teachers Association Staff Attorney, for the Mt. Diablo Education Association, CTA/NEA; Breon, O'Donnell, Miller, Brown & Dannis by Gregory J. Dannis and Martha Buell Scott, Attorneys for the Mt. Diablo Unified School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

An exclusive representative here challenges a public school employer's insistence to impasse on contractual limits to the union's right to file and process grievances in its own name. The union contends that such limits restrict its right to serve as exclusive representative and that the employer's insistence upon them was a failure to negotiate in good faith.

The employer replies that the union has no statutory right to file and process grievances in its own name. Rather, the employer continues, the contractual grievance procedure is a mandatory subject of bargaining. Therefore, the employer concludes, it was entitled to maintain to impasse its insistence on the restrictive language.

The Mt. Diablo Teachers Association, CTA/NEA, (Union) filed the charge which commenced this action on November 23, 1988. The

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

Union amended the charge, adding the allegations at issue here, on January 5, 1989. The General Counsel of the Public Employment Relations Board (PERB or Board) followed on March 15, 1989, with a complaint against the Mt. Diablo Unified School District (District or Employer).

The complaint alleges that the District failed to negotiate in good faith by insisting to impasse on continuation of a grievance procedure which prevents the Union from filing and processing grievances on behalf of individuals in the Union's own name. Under the disputed language, grievances of an individual employee have to be filed by and signed by the aggrieved individual. Once filed, grievances cannot be processed through arbitration without the individual employee's continued assent.

In addition, the complaint alleges, the Employer maintained its position through the impasse procedure and thereby failed to participate in the impasse procedures in good faith.[1] The complaint alleges that the Employer's acts were violations of Educational Employment Relations Act sections 3543.5 (a), (b), (c) and (e).[2]

---

[1]The complaint also set out certain other allegations about a unilateral change in the health and welfare benefit plan. On July 25, 1989, all portions of the complaint dealing with the health and welfare benefit plan were removed from the case. Because these issues are no longer in contention it is unnecessary to here list them.

[2]Unless otherwise indicated, all statutory references are to the Government Code. The Educational Employment Relations Act (EERA) is found at Government Code section 3540 et seq. In relevant part, section 3543.5 provides as follows:

It shall be unlawful for a public school employer to:

The District answered the complaint on April 6, 1989, denying that it had failed to negotiate in good faith or had otherwise committed an unfair practice. On July 12, 1989, the parties filed a stipulated record in lieu of a hearing. Following several extensions, the parties completed the briefing of legal issues on October 27, 1989, and the case was submitted for decision.

FINDINGS OF FACT

The following findings of fact are drawn from the complaint and answer, the stipulation and the exhibits submitted by the parties.

The Mt. Diablo Unified School District is a public school employer. At all times relevant, the Mt. Diablo Education Association, CTA/NEA, has been the exclusive representative of an appropriate unit of the District's certificated employees.

During the period from April 1988 through October 1988, the parties were meeting and negotiating for a successor to a

---

(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).

collective agreement which expired, on June 30, 1988. On or about April 26, 1988, the Employer sunshined its initial proposal for the successor agreement. In this proposal the Employer proposed to continue, without change, provisions of Article IX, Grievance Procedure.

Under Article IX, the Employer will process as grievances only allegations made and signed by an individual employee or group of individual employees.[3] The provisions of Article IX limit the Union's right to file grievances to the following articles: Recognition, Grievance Procedures, Organizational Security and Savings.

In addition, Article IX restricts the advancement of a grievance from informal to formal status only where the issue is not resolved informally "to the satisfaction of the grievant."[4]

---

[3]Article IX sets out the following definitions:

> a. "Grievance" means a complaint of one or more unit members that they have been adversely affected by a violation, misapplication, or misinterpretation of this agreement.
>
> b. "Grievant" means the unit member or unit members filing the grievance. The Association may be the grievant on alleged violations of Recognition, Grievance Procedure, Organizational Security and Savings [clauses].

[4]Article IX, section 22 (a) provides in relevant part as follows:

> a. If an alleged violation is not resolved in informal discussion <u>to the satisfaction of the grievant</u>, a formal grievance may be initiated. . . .

The grievant must sign the grievance form for it "[t]o be accepted" as a formal grievance.[5] The grievance then can proceed to arbitration only if the "grievant is not satisfied" with the resolution of the formal process.[6]

The Union's initial proposal, dated February 1988, proposed to amend provisions of Article IX to allow the Union to file a grievance alleging violations of any article in the agreement. While meeting and negotiating during the months of May through September 1988, the Union steadfastly maintained its demand that the Employer agree to expand the definition of "grievant" to include the Union for all purposes. At the same time, the Employer steadfastly maintained its position to retain the status quo language on this subject.

---

[5]Article IX, section 22 (b) provides in relevant part as follows:

> b. A formal grievance shall be initiated in writing . . . . To be accepted the form must include . . . the signature of the grievant(s). [Emphasis added.]

[6]Article IX, section 24 provides in relevant part as follows:

> The Association may submit the grievance to final and binding arbitration if either:
>
> a. The grievant is not satisfied with the disposition of the grievance at Step 2 or
>
> b. No written decision has been rendered within fifteen (15) work days . . . . [Emphasis added.]

During the negotiations, the Employer's representative, Gloria Mikuls, stated time after time in negotiating sessions that the Board of Trustees would never agree to a provision under which the Union could initiate and process grievances other than those initiated by an individual employee. Union representative Diane Schmidtke objected that the Employer's position placed the Union and all employees in the bargaining unit in the hands of an individual employee, who might be afraid to process a grievance. In response, Mikuls stated on behalf of the Employer that it was the Union's responsibility to educate employees so they would come forward with grievances.

On October 10, 1988, and again on October 22, 1988, Employer representative Mikuls presented District proposals to maintain the status quo language on Article IX, section 16.[7] The Union continued to demand a change in the language of Article IX, section 16, during these meetings and in a proposal of October 25. On October 25, 1988, Union representatives appealed to the District that their position on the filing of grievances was supported by the decision of a PERB administrative law judge in another case.[8]

Proposals advanced by the Union on October 25 refer to grievance forms developed jointly by the Union and the District a year earlier, on September 23, 1987. Union representatives did

---

[7]Section 16 sets out the definition of "grievance" and "grievant."

[8]San Diego Unified School District (1987) PERB Decision No. HO-U-314.

not question the Union's organizational status as a grievant in discussions with District representative Gloria Mikuls during the meeting where the forms were developed. The grievance forms require the signature of the grievant. Under the Employer's proposal the grievant must be an individual employee whereas under the Union's proposal the grievant could be a Union representative.

On or about November 8, 1988, Employer representative Mikuls declared an impasse in the negotiations for the successor agreement. On November 10, 1988, Mikuls filed with the PERB a "Request for Impasse Determination/Appointment of Mediator." In this filing the Employer listed as among those issues remaining in dispute, "Grievance (Association as Grievant)."

During the mediation sessions which followed the Employer's declaration of impasse, Employer representatives maintained their negotiating position of status quo on the grievance procedure. Union representatives maintained their negotiating position that the contract should be changed by redefining "grievant" to include the Union for all purposes.

On or about January 4, 1989, the Union advised the Employer that it had filed an amended unfair practice charge with the PERB. The charge placed the Employer on notice that the Union believed that the Employer had failed to negotiate in good faith by its insistence on the grievance limitation language. On or about January 19, 1989, representatives of the Employer again insisted as a condition for settlement that the Union accept the

status quo grievance procedure proposed by the Employer. The Union refused, maintaining its demand for a redefinition of "grievant" to include the Union for all purposes.

On or about January 25, 1989, representatives of the Union counterproposed a settlement which again included, among other items, the redefinition of "grievant." Later that day, the PERB-appointed mediator suggested that the parties attempt to "clear the table" of unresolved issues. In response, representatives of the Union and the Employer considered a number of items for tentative agreement. Among those was Article IX, Grievance Procedures.

When Article IX was considered, representatives of the Employer stated that the grievance procedure proposed by the Employer was the same proposal offered on October 10 and 20, 1988. The Employer stated that the proposal was now offered: (a) with knowledge of the Union's pending unfair labor practice charge relating to the grievance procedure and (b) with the proviso that the Employer would abide by whatever decision was rendered by PERB in regard to the grievance procedure.

In response, representatives of the Union stated that: (a) the Union intended to pursue its unfair practice charge to a final PERB decision and (b) that any tentative agreement by the Union to the Employer's proposed grievance procedure was subject to the Union's unfair practice charge and any PERB order deriving therefrom. Representatives of the Employer stated that they understood the Union's position and accepted it. Thereafter, the

Union and the Employer made a tentative agreement on the grievance procedure.

On March 15, 1989, Diane Schmidtke, the Union's executive director, confirmed by letter the parties' positions at the January 25 negotiating session. The Employer did not dispute the contents of Schmidtke's March 15 letter. Thereafter, both the Union and the Employer ratified the tentative agreement for the grievance procedure which had been agreed upon by the parties on January 25, 1989, and reviewed in the March 15, 1989, letter.

Prior collective agreements between the parties have contained a grievance procedure identical to that proposed by the Employer for continuation during 1988-89. In all of the prior collective agreements, "grievant" has been defined as one or more individual employees in the bargaining unit. This has limited the Union under all prior collective agreements to the filing of grievances in only four specifically listed subjects.[9] In negotiations for the prior collective agreements, the Union unsuccessfully sought a provision under which the Union could process a grievance in its own name for all purposes without the signature of an individual employee.

LEGAL ISSUE

1) Did the Employer fail to meet and negotiate in good faith by insisting to impasse on restrictions on the Union's right to file and process grievances on behalf of individual unit members?

---

[9] See definition of "grievant" in footnote no. 3, *supra*.

2) Did the Employer fail to participate in the impasse procedures in good faith by insisting during mediation on restrictions on the Union's right to file and process grievances on behalf of individual unit members?

CONCLUSIONS OF LAW

Public school employers and exclusive representatives have a bilateral obligation to "meet and negotiate in good faith"[10] about "matters relating to wages, hours of employment and other terms and conditions of employment."[11] Refusal to meet and confer about any of these mandatory subjects is an unfair practice.

But the obligation to negotiate is not unlimited and a party may lawfully refuse to negotiate about nonmandatory subjects. When a party refuses to negotiate about a nonmandatory subject, it is an unfair practice per se for the other party to insist to impasse upon inclusion of that subject in the agreement. "[S]uch conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining." NLRB v. Wooster Division of Borg-Warner Corp. (1958) 356 U.S. 342, 349 [42 LRRM 2034]. See also, Lake Elsinore School District (1986) PERB Decision No. 603.

The Union argues that it is given the right under EERA section 3543.1(a) to represent its members "in their employment

---

[10]Failure of either party to meet this obligation is an unfair practice. See section 3543.5(c) for employers and section 3543.6(c) for exclusive representatives.

[11]The scope of representation is set out in section 3543.2.

relations with public school employers . . . ."[12] Moreover, the Union continues, it also possesses as a significant aspect of its status as exclusive representative the right to file grievances on behalf of all unit members. This right, which the Union finds in several federal cases, is in addition to the statutory right to represent its members.

Applying the PERB test for negotiability, the Union concludes that a proposal to waive either right is not a mandatory subject of bargaining. The Union then points to both PERB and federal cases which hold that a party may not maintain its position to impasse on a nonmandatory subject over the objection of the other party. Because the District insisted on the grievance language to impasse, the Union concludes, the District failed to negotiate in good faith.

The Employer argues first that the PERB already has resolved the issue in dispute by its decision in Temple City Unified School District (1989) PERB Decision No. Ad-190. That decision, the District argues, permits the parties to agree to contractual

---

[12] In relevant part, section 3543.1(a) provides as follows:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. . . .

language restricting the right of an exclusive representative to file grievances.

Alternatively, the Employer argues that the EERA, unlike the National Labor Relations Act, does not afford an exclusive representative with the right to file grievances on its own behalf. According to the Employer, the EERA is written so as to limit an exclusive representative's right to file grievances to only those situations where it acts at the behest of an individual employee. Thus, the Employer concludes, federal cases supporting the Union's argument are inapplicable.[13]

In federal labor cases, as the Union notes, employer proposals to limit a union's role in grievance processing are analyzed as scope of representation issues. In Marine & Shipbuilding Workers v. NLRB (3rd Cir. 1963) 320 F.2d 615 [53 LRRM 2878], a case cited by the Union, an employer's insistence upon a proposal that employees sign all grievances was held to be per se an unfair labor practice. The circuit court concluded

[13] In reaching this conclusion the District attaches considerable significance to various textual differences between the EERA and the National Labor Relations Act. The District also points to a provision in the Federal Service Labor-Management Relations Act, 5 U.S.C. 7103 et seq., which assures an exclusive representative of the right to file grievances "in its own behalf." 5 U.S.C. 7121. The District argues that the omission of such a provision from the EERA implies a different legislative intent, i.e., that unions do not have a statutory right to file grievances in their own name under the EERA. While the District correctly describes a principle of statutory interpretation, the principle is inapplicable here. The Federal Labor-Management Relations Act was enacted on October 13, 1978. The EERA was enacted on September 22, 1975. In drafting the EERA, the Legislature can hardly be charged with knowledge of a statute that was not yet written.

that the employer's proposal was not a mandatory subject for bargaining.[14]

Analogizing to the Supreme Court's rationale in NLRB v. Wooster Division of Borg-Warner Corp., supra. 356 U.S. 342 [42 LRRM 2034], the court concluded that the employer's proposal would substantially modify the collective bargaining system envisioned in the National Labor Relations Act "by weakening the independence of the representative chosen by the employees." Such a system, the court wrote, "enables the employer, in effect, to deal with its employees rather than with their statutory representatives." Marine & Shipbuilding Workers v. NLRB, supra, 53 LRRM at 2881 [citations omitted]. A clause requiring employees' signatures on all grievances,

> . . . would preclude the union from prosecuting flagrant violations of the contract merely because the employees involved, due to fear of employer reprisals, or for similar reasons, chose not to sign a grievance. Hence, redress for a violation would be made contingent upon the intrepidity of the individual employee. [53 LRRM at 2881]

A similar result was reached by the Supreme Court of New Jersey in Education Association v. Red Bank Board of Education (1978) 393 A.2d 267 [99 LRRM 2447], another case cited by the Union. Although the decision is based substantially on the interpretation of a New Jersey statute, the court points out that the denial to the exclusive representative of the right to file

---

[14]Accord, Latrobe Steel Co. (1979) 244 NLRB 528 [102 LRRM 1175], Enforcement was denied on other grounds, Latrobe Steel Co. v. NLRB (3rd Cir. 1980) 630 F.2d 171 [105 LRRM 2393].

grievances runs contrary to the very concept of collective action.

> Permitting a public employer to require individual action at the critical moment when vindication of employee rights is at stake would surely "short circuit" the system of collectivity the legislature sought to promote in the act and weaken its benefits . . . . Requiring an individual to put himself on the line as the sole means of initiating a grievance is inherently contrary to the very concept of collectivity and would, if sanctioned, bring about a "prejudicial dilution" of the basic right to organize secured by the [New Jersey] constitution. [99 LRRM at 2453]

The New Jersey court specifically held that an exclusive representative could file a grievance over the objection of the affected unit member. The court concluded that the right to file a grievance was inherent in the bargaining system created by the statute.[15]

Contrary to the District's assertions, the PERB has not yet considered the negotiability of proposals to restrict an exclusive representative's right to file and arbitrate grievances. The District's reliance on Temple City Unified School District (1989) PERB Decision No. Ad-190 is misplaced.

---

[15] The District finds any citation to Education Association v. Red Bank Board of Education, supra, 393 A.2d 267, to be "inapposite" because New Jersey law differs "so sharply" from the EERA. This argument dismisses the case too lightly. What is significant about the case is the court's analysis of the very nature of collective activity. Violations of collective agreements have the potential for impact upon all unit members. Grievances, therefore, are of interest to more than just the individual who was harmed. This significant point lies at the root of collective activity, and is not based upon the wording of the New Jersey statute.

The case simply does not deal with the issue. Temple City stands only for the proposition that deferral is not required where the collective bargaining agreement bars the exclusive representative from filing a grievance on the disputed act.[16]

Temple City leaves unresolved the underlying question, at issue here, of the negotiability of restrictions on a union's right to file grievances. Clearly, the Board considers the issue unresolved because it basically said as much in Calpatria Unified School District (1989) PERB Decision No. Ad-193. In Calpatria, the Board declared it unnecessary to resolve the issue of a union's right to file grievances, despite contractual restrictions, in order to dispose of the contested issue before it. Obviously, if the Board believed it had resolved the issue in Temple City it could not have declared the issue unresolved in Calpatria.

Although the PERB has yet to consider the negotiability of restrictions on the union's right to file grievances, the question can be decided under well defined rules regarding the scope of representation. Under the EERA, the parties are obligated to negotiate about matters relating to wages, hours of

---

[16]The District theorizes that the Board could not have reached this conclusion unless restrictions on the right to file grievances were legal. If such restrictions were an unlawful subject of bargaining, the District contends, the Board would have raised that question sua sponte in Temple City and proclaimed the clause illegal. The District's argument, however, fails to consider the possibility that the Board believes restrictions on the filing of grievances to be a permissive subject of bargaining. If the Board is of that view, then the disputed contract clause would be legal so long as the exclusive representative were willing to negotiate about it.

employment and nine specifically enumerated terms and conditions of employment.

The PERB will find a subject negotiable even though it is not specifically enumerated in section 3543.2 if: (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not specifically abridge the employer's freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission. Anaheim Union High School District (1981) PERB Decision No. 177; test approved in San Mateo City School District v. PERB (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800].[17]

The Anaheim test was devised in the context of an employer's refusal to negotiate about subjects proposed by an exclusive representative. To fit the context of this case the third prong of the test must be modified to reflect the Union's interests inherent in exclusive representation. Here, the question is whether compelling the exclusive representative to negotiate would "significantly abridge the organization's freedom to exercise those representational prerogatives essential to the

---

[17]Although in its brief the District argues that the right of the exclusive representative to file grievances is negotiable, the District at no point attempts to apply the Anaheim test.

achievement of the organization's mission as exclusive representative of the negotiating unit."

It seems self-evident that the limits the District would impose on the Union's ability to file and arbitrate grievances would significantly abridge the Union's capacity as an exclusive representative. As noted by the Courts in Marine & Shipbuilding Workers v. NLRB, supra, 320 F.2d 615 and Education Association v. Red Bank Board of Education, supra. 393 A.2d 267, limitations on a union's ability to file grievances fundamentally alter the concept of collective action.

The District rejects this analysis through attempts to make distinctions between the National Labor Relations Act and the EERA. It is the District's thesis that the National Labor Relations Act fosters the principle of majority rule to the point "where the rights of individuals may be subordinated to the will of the majority." By contrast, the District asserts, the EERA evidences a legislative intent that the primary rights "are those of individual employees and that labor organizations exist to serve them, not the other way around."

But the District's approach ignores the concept of collective action inherent in any system of collective bargaining.[18] As the Union argues in its reply brief, the District essentially "would limit the exclusive representative to

---

[18]Collective bargaining is a continuing process involving, among other things, day-to-day adjustments in the contract and working rules, resolution of problems not covered by existing agreements, and protection of rights already secured by contract. Conley v. Gibson (1957) 355 U.S. 41, at 46, [41 LRRM 2089].

the role of 'attorney' for individual employees." Under the District's approach, the idea of collective action loses entirely to the desires of individual workers. The District's approach does not recognize that sometimes the needs of the group as a whole may differ from those of an individual.[19] In these situations, the District would make the individual supreme.

Yet, such is not the system of labor relations created by the EERA. The statute envisions employees acting collectively through a chosen exclusive representative to bargain with their employer about wages, hours and other terms and conditions of employment. The grievance procedure is the contractual tool for enforcing the results of the negotiated bargain.[20] For contract violations to be grievable and arbitrable only at the instigation

---

[19]PERB decisions in duty of fair representation cases have long recognized the right of the union to consider the needs of the group in evaluating grievances. See, for example, Fremont Unified District Teachers Association, CTA/NEA (1980) PERB Decision No. 125. There, the Board held that an exclusive representative has the right to file a grievance over the explicit objection of the affected individual employee. In reaching this conclusion the Board wrote:

> [A]11 members of the unit have a vital stake in the enforcement of agreements by their exclusive representative. In the face of such compelling interests of the majority of the employees, the competing right of an individual employee must be subordinated.

[20]Indeed, "the processing of grievances is a form of continuing negotiations over the written agreement." Chaffey Joint Union High School District (1982) PERB Decision No. 202, citing NLRB v. Acme Industrial Co. (1967) 385 U.S. 432 [64 LRRM 2069].

of an individual employee, runs counter to the very idea of collective action.

An employer violation of a contract, even if it directly affects only one employee, has the potential of initiating a practice detrimental to the entire bargaining unit. In a system of collective bargaining, the ability to challenge contractual violations must lie with the party that negotiated the agreement, i.e., the union. Any other system makes the viability of the contract dependent upon the willingness of each unit member to stand individually. Whereas "[t]he individual employee has basically a purely personal interest in the contract . . . [t]he union has a significantly broader interest in the contract as well as the unique representational obligation to defend its integrity." Fair Lawn Board of Education v. Fair Lawn Education Association (1980) 417 A.2d 76 [6 NJPER 1127 at p. 526].

As a final argument the District contends that public policy justifies a requirement that grievances be brought on behalf of individual employees. The District argues that it cannot respond to an alleged contract violation if the allegation is "brought anonymously." It contends that contractual provisions which permit the Union to file in its own name would result in grievances "impossible to refute . . . if false and to remedy . . . if true."

It is unclear how the District reaches the conclusion that permitting the Union to file grievances in its own name would permit the Union to file grievances devoid of facts. Obviously,

even if the Union filed a grievance in its own name it still would have to disclose the particulars of the incident from which the grievance arose. This means disclosure of the identity of the aggrieved party as well as the nature of the circumstances claimed to be in violation of the contract. I find no merit in the District's argument.

For these reasons I conclude that the District-proposed limitation on the Union's right to file grievances would significantly abridge the organization's freedom to exercise those representational prerogatives essential to the achievement of the organization's mission as exclusive representative of the negotiating unit. Accordingly, the District's grievance procedure proposal was not a mandatory subject of bargaining.[21]

---

[21]Under NLRB decisions, nonmandatory subjects are generally characterized as being either permissive or illegal. A contract provision containing a permissive subject is enforceable if the parties voluntarily agree to its inclusion in the contract. NLRB v. Wooster Division of Borg-Warner Corp., supra, 356 U.S. at 349. A contract provision containing an illegal subject is null and unenforceable. NLRB v. Magnavox Co. of Tennessee (1974) 415 U.S. 322 [85 LRRM 2475].

The District argues that there is no such thing as a permissive subject under the EERA, citing Cumero v. Public Employment Relations Board (1989) 49 Cal.3d 575. This is a questionable contention since the issue of mandatory vs. permissive subjects of bargaining was not before the Supreme Court in Cumero.

Despite the District's assertion regarding Cumero, it is unnecessary here to decide whether the EERA creates only mandatory and illegal subjects or whether the statute also permits negotiations over permissive subjects. Even if the disputed grievance language be considered a permissive subject of bargaining, the Union contends that the District insisted upon the language over the Union's opposition. An employer fails to negotiate in good faith when it insists to impasse that permissive language be included in a collective agreement. See Lake Elsinore School District, supra, PERB Decision No. 603.

The only remaining question is whether the Employer maintained its position to impasse. An employer fails to negotiate in good faith when it demands to impasse that the exclusive representative "abandon rights guaranteed" under the EERA. Modesto City Schools (1983) PERB Decision No. 291.

The stipulation resolves this matter unequivocally. It is absolutely clear that, over Union objections the Employer maintained its insistence on the disputed language to impasse. The parties stipulated that the District maintained its position on the grievance language through the meetings of October 10, 22 and 25, the last meetings prior to the Employer's declaration of impasse on November 8, 1988.[22]

The stipulation likewise makes it clear that the Employer continued its insistence on the disputed grievance language during the mediation process. When the Union finally acceded to the Employer's demand on January 25, 1989, it was with clear notice to the Employer that it intended to pursue the dispute through a PERB hearing. The Employer accepted this position and the dispute was kept alive despite the agreement.

[22]It is of no significance that a succession of previous contracts between these parties contained limits on the rights of the Union to file and arbitrate grievances. "[O]nce a contract has expired, a party has no obligation to bargain over a permissive subject even though one or more past contracts contained a provision dealing with that subject." Morris, The Developing Labor Law, (2d ed. 1983), at p. 847, citing Columbus Printing Pressmen (1975) 219 NLRB 268 [89 LRRM 1553] enforced in NLRB v. Columbus Printing Pressmen (5th Cir. 1976) 543 F.2d 1161 [93 LRRM 3055]. See also, Poway Unified School District (1988) PERB Decision No. 680.

Accordingly, I conclude that by its insistence to impasse on clauses which would restrict the Union's ability to file and arbitrate grievances, matters outside the scope of representation, the District has failed to meet and negotiate in good faith in violation of EERA section 3543.5(c). Because the District maintained its insistence on the nonmandatory subjects through the statutory impasse procedure, the District also failed to participate in the impasse resolution procedure in good faith, a violation of section 3543.5(e). See generally Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191 [191 Cal.Rptr. 60].

A failure to negotiate in good faith is a derivative violation of EERA section 3543.5(b) but is not a derivative violation of 3543.5(a). Regents of the University of California (California Nurses Association) (1989) PERB Decision No. 722-H; Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.

In its brief, the Union for the first time asserts that the District, by limiting the Union's right to file grievances, also interfered with a protected right of employees. This right, according to the Union, is the right of an individual unit member to confidentiality when participating in protected conduct.

According to the Union, the protected right to confidentiality is exercised when an employee requests that the Union file a grievance on his/her behalf. By insisting that the employee be the filing party, the District makes the employee

disclose his/her participation in protected conduct and thus violates the right of confidentiality. The Union asserts that this interference is an independent violation of section 3543.5(a).

Unalleged violations may be entertained where the conduct at issue is intimately related to the subject matter of the complaint, where the communicative acts are part of the same course of conduct, where the unalleged violations are fully litigated and where the parties have had the opportunity to examine and be cross-examined on the issue. Santa Clara Unified School District (1979) PERB Decision No. 104.

The alleged interference with the protected rights of employees was not asserted in the original or amended charge. It was not alleged in the complaint. It is not addressed by the stipulated record. The District had no opportunity to present evidence on the question.[23] The issue, therefore, was not fully litigated. Accordingly, the allegation that the District interfered with employee rights in violation of section 3543.5(a)

[23]The introduction of evidence might show the alleged interference with individual rights to be more theoretical than actual. For example, it would be relevant on this issue for the employer to inquire whether there ever had been an employee whose participation in protected activities was unnecessarily revealed because of the disputed grievance language. Normally, it would be virtually impossible for a grievance alleging some harm to a particular employee to be filed without revealing the identity of that employee and the details of the alleged harm. Because such information is necessary to the processing of the grievance, it would be revealed even if the Union filed the grievance. If there can be no demonstration that the grievance process has resulted in the unnecessary disclosure of an employee's protected conduct, then the language might not violate individual rights.

by insisting on restrictions on the Union's ability to file and arbitrate grievances is DISMISSED.

REMEDY

The PERB in section 3541.5(c) is given:

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

A cease and desist order directing the District to stop its unlawful conduct is appropriate in this case. It also is appropriate to order the District to accept grievances filed by the Union on behalf of individuals as well as grievances designed to protect Union rights. It similarly is appropriate to order that the Union be permitted to file requests for arbitration regardless of whether the issue was resolved "to the satisfaction of the grievant" during the initial steps. These remedies will ensure that the Union is able to carry out its duties as exclusive representative without the limitations imposed upon it by the District's unlawful bargaining stance.

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. Placerville Union School District (1978) PERB Decision No. 69.

PROPOSED ORDER

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

1. CEASE AND DESIST FROM:

A. Insisting to and during impasse on contractual language outside the scope of representation which has the effect of restricting the Union's right to file grievances on behalf of individual unit members to take grievances to arbitration.

B. Enforcing and giving effect to those portions of Article IX of the current agreement between the parties which restrict the right of the Union to file and arbitrate grievances to only alleged violations of the Recognition, Grievance Procedure, Organizational Security and Savings clauses of the agreement.

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

A. Accept grievances filed by the Union on behalf of individual unit members as appropriate under the time lines and

subject matter requirements of the agreement between the parties.

B. Process grievances through all steps of the grievance procedure, including arbitration, initiated by the Union on behalf of individual unit members regardless of whether the grievance was resolved "to the satisfaction of the grievant" during the initial steps.

C. Within ten (10) work days of the service of a final decision in this matter, post at all work locations within the Mt. Diablo Unified School District where notices to certificated employees customarily are posted, 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 work days. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by any other material.

C. Upon issuance of a final decision make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

All other allegations in Unfair Practice Charge No. SF-CE-1287 and the companion portions of the complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, 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, 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, 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, sections 32300, 32305 and 32140.

Dated: November 6, 1989

RONALD E. BLUBAUGH
Administrative Law Judge