STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WILLITS TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. WILLITS UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-1413 PERB Decision No. 912 December 5, 1991

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for the Willits Teachers Association, CTA/NEA; Littler, Mendelson, Fastiff & Tichy by Richard J. Currier and C. Anne Hudson, Attorneys, for the Willits Unified School District.

Before Hesse, Chairperson; Camilli and Carlyle, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Willits Unified School District (District) to the attached proposed decision of a PERB administrative law judge (ALJ) which held that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally implementing a

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (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. For purposes of

change in policy regarding granting released time for negotiations.

We have carefully reviewed the entire record, including the proposed decision, the transcript, the District's exceptions, and the response of the Willits Teachers Association, CTA/NEA (Association).[2] Finding the ALJ's findings of fact and conclusions of law to be free from error, we adopt the proposed decision as the decision of the Board itself.[3]

The proposed decision is fully supported by the record and adequately addresses all but one of the District's exceptions. The District excepts to the ALJ's failure to address its request for attorneys' fees and costs in the proposed decision. The District contends it is entitled to attorneys' fees and costs on the ground that the original unfair practice charge (as opposed to the amended charge) was filed in bad faith, with reckless

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this subdivision, "employee" includes an applicant for employment or reemployment.

(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.

[2]It is noted that a typographical or technical error occurs in a portion of the proposed decision, wherein the April 2, 1990 PERB informal settlement conference is referred to as having occurred on April 4. This inaccuracy occurs at page 17, the first full paragraph, line 2, page 19, first full paragraph, lines 2 and 13, and page 21, line 2 of the proposed decision.

[3]It is noted that assuming, arguendo, the District was unaware the settlement conference would turn into negotiations at the time it denied released time to the Association negotiator, it could have rectified this error when it became apparent that negotiations were being conducted.

disregard for the truth and without any possible factual support. As the original and amended unfair practice charges state the same central allegation regarding the denial of released time, and the Board affirms the ALJ's findings and conclusions that the District committed an unfair practice when it denied released time, the Board denies the District's request for attorneys' fees and costs.

ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in the case, it is found that the Willits Unified School District violated section 3543.5(c) of the Educational Employment Relations Act by unilaterally changing the past practice on released time for negotiations. Because this act had the effect of interfering with the right of a negotiator for the "Willits Teachers Association,. CTA/NEA, to participate in the activities of an employee organization, the denial of released time also was a violation of section 3543.5(a). Because this act had the further effect of interfering with the right of the Association to represent its members, the denial of released time also was a violation of section 3543.5(b). Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing the past practice on released time for Association representatives to participate in negotiations.

2. By the same conduct, interfering with the right of a unit member to participate in the activities of an employee organization.

3. By the same conduct, interfering with the right of the Association to represent its members.

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

1. Reinstate the past practice on released time for Association representatives to attend negotiations with the District and refrain from making future changes in the released time policy without giving prior notice to the Association and the opportunity to negotiate.

2. Restore to Larry Stranske the day of personal necessity leave he expended to attend the April 2, 1990, Public Employment Relations Board settlement conference.

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 certificated employees customarily are posted, 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 ensure

that the Notice is not reduced in size, defaced, altered or covered with any other 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 accord with the director's instructions.

Chairperson Hesse joined in this Decision.

Member Carlyle's dissent begins on page 6.

CARLYLE, Dissenting: I would reverse the administrative law judge's (ALJ) conclusion that the Willits Unified School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).

The ALJ determined that the District violated EERA when it failed to grant paid released time to Larry Stranske (Stranske) to attend a Public Employment Relations Board (PERB or Board) settlement conference on April 2, 1990, concerning an unfair practice charge.

An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, per se refusal to negotiate and violative of EERA section 3543.5(c). (Pajaro Valley Unified School District (1978) PERB Decision No. 51; San Mateo County Community College District (1979) PERB Decision No. 94.)

EERA section 3543.1(c) expressly grants a right to a reasonable amount of released time to representatives of the Willits Teachers Association, CTA/NEA (Association) for negotiations and processing of grievances. PERB has held that proposals relating to released time are mandatory subjects for bargaining. (Anaheim Union High School District (1981) PERB Decision No. 177.)

The ALJ correctly noted that an established policy may be embodied in the terms of a collective bargaining agreement (Grant Joint Union High School (1982) PERB Decision No. 196), or, where a contract is silent or ambiguous, it may be determined from past

practice or bargaining history (Rio Hondo Community College District (1982) PERB Decision No., 279). The case at hand involves an alleged unilateral change in established policy where the collective bargaining agreement is silent. Therefore, the Association has the burden to show by past practice that the District established a policy of granting released time for the Association's members' attendance at PERB settlement conferences.

The facts indicate that the District, in the past, has granted released time for its employees to attend a California Teachers Association (CTA) leadership conference, a CTA-sponsored human relations conference and the District's budget committee meetings. However, the granting of released time for attendance at conferences for self-improvement, or at a budget committee hearing at the request of the District's superintendent, is vastly different from the situation that occurred here. Released time for a PERB settlement conference has never been granted as it has never been requested. Moreover, attendance at the settlement conference was based upon an unfair practice charge being filed. The situation of the parties was one of litigation and the parties were compelled to attend at the direction of the Board. The fact that the District has never refused a request for released time cannot be used to establish a binding past practice which grants Association representatives released time to attend PERB settlement conferences since no request had ever been made. Therefore, I conclude that the Association has failed to meet its burden of demonstrating a past practice regarding the

providing of released time for appearance at a PERB settlement conference.

As to whether a past practice has been established in regard to providing released time for negotiations, I would disagree with the rationale set forth by the ALJ.

It is apparent that, although the contract does not provide for released time for negotiations, it has been the policy of the District to grant released time for all negotiations meetings during the school day. However, based upon the findings of fact, the District was under a good faith belief that the settlement conference would not be considered negotiations.

In his proposed decision, at page 19, the ALJ states:

> It is apparent, moreover, that both sides knew, or should have known, of the clear possibility that the settlement conference would turn into a negotiating session. . . . It is true that the District superintendent and the Union officers were new to PERB unfair practice proceedings and might not have known what to expect. But counsel for the District and the CTA representative present for the Union were experienced professionals in PERB proceedings.

The facts of the case were undisputed. Stranske initially requested released time to attend the PERB settlement conference. The principal of Willits High School, G. Keller McDonald, approved Stranske's absence. However, McDonald, unsure whether released time was properly granted, contacted superintendent James Roberts (Roberts). Roberts believed that Stranske would be entitled to released time if the conference was part of negotiations. Roberts, unsure as to whether the PERB hearing

was negotiations, called the District's legal counsel for advice. District's legal counsel stated that the conference was not negotiations. Moreover, the District's belief that the hearing would not be negotiations is rather evident by the District's primary negotiator failing to attend the conference.

This record and the ALJ's findings fail to show that the District knew that negotiations would take place. Under PERB Regulation 32650(a):

> A Board agent may conduct an informal conference or conferences to clarify the issues and explore the possibility of voluntary settlement. No record shall be made at such a conference.

It is possible that either party may attend a settlement conference and state there was nothing to talk about. If this occurred here, an unfair practice charge would not have been filed. To put the burden upon the District to guess as to whether negotiations would take place at the settlement conference would do more to "chill" the possibility of settlement than to increase its likelihood. At the time of denying Stranske released time, the District was under a good faith belief that this session would not be considered negotiations. Therefore, when District administrators made their decision, which is the subject of the charge in this case, the District did not unilaterally change a past practice of providing released time for negotiations.

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-1413, Willits Teachers Association, CTA/NEA v. Willits Unified School District, in which all parties had the right to participate, it has been found that the Willits Unified School District (District) has violated sections 3543.5(a), (b) and (c) of the Educational Employment Relations Act. The District violated the **act** by unilaterally changing the past practice on released time for negotiations. This action amounted to a failure to negotiate in good faith and it interfered both with the right of Larry Stranske to participate in the activities of an employee organization and the right of the Willits Teachers Association, CTA/NEA (Association), to represent its members.

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing the past practice on released time for Association representatives to participate in negotiations.

2. By the same conduct, interfering with the right of **a** unit member to participate in the activities of an employee organization.

3. By the same conduct, interfering with the right of the Association to represent its members.

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

1. Reinstate the past practice on released time for Association representatives to attend negotiations with the District and refrain from making future changes in the released time policy without giving prior notice to the Association and **the** opportunity to negotiate.

2. Restore to Larry Stranske the day of personal necessity leave he expended to attend the April 2, 1990, Public Employment Relations Board settlement conference.

Dated: _____ WILLITS UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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

WILLITS TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. WILLITS UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. SF-CE-1413 PROPOSED DECISION (5/20/91)

Appearances: California Teachers Association by Ramon E. Romero, Staff Attorney, for the Willits Teachers Association, CTA/NEA; Littler, Mendelson, Fastiff & Tichy by Richard Currier, Attorney, for the Willits Unified School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

This case raises the issue of whether a school employer committed an unfair practice by denying released time for a union negotiator to attend a Public Employment Relations Board proceeding. The union contends that the denial of released time was a change in past practice and a failure to negotiate in good faith. In addition, the union contends, the action constituted a denial of the union's statutory right to released time. The school employer replies that its action was not a change from the past practice and thus not a failure to negotiate in good faith. The employer also rejects the contention that it denied the union any statutory right.

The Willits Teachers Association, CTA/NEA (Union), commenced this action on July 12, 1990, by filing an unfair practice charge against the Willits Unified School District (Employer or

District). The Union filed an amended charge on October 24, .1990. The general counsel of the Public Employment Relations Board (PERB or Board) followed on November 7, 1990, with a complaint against the District.

The complaint alleges that on or about April 2, 1990, the District changed its past practice on granting released time to all designated Union representatives. This practice, the complaint alleges, included attendance at "problem solving sessions relating to working conditions of employees, all Budget Committee meetings of Respondent, and all contract negotiations committee sessions." The complaint alleges that the District changed the past practice when it denied released time to a representative of the Union to attend a PERB informal conference.[1] The complaint alleges that the change in past practice was a failure to negotiate in good faith in violation of Educational Employment Relations Act section 3543.5(c) and derivatively (a) and (b).[2] As a separate cause of action, the

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[1]The informal conference concerned unfair practice case SF-CE-1357, Willits Teachers Association, CTA/NEA v. Willits Unified School District.

[2]Unless otherwise indicated, all statutory references are to the Government Code. The Educational Employment Relations Act (EERA) is codified 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:
>
> (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

complaint alleges that the denial of released time also was a denial of rights guaranteed to the Union under the EERA in violation of section 3543.5(b). The District answered the complaint on November 20, 1990, denying that it changed any policy or that it denied any rights to the Union or its members.

A one-day hearing was conducted in Ukiah on March 1, 1991. With the filing of briefs, the matter was submitted for decision on May 9, 1991.

FINDINGS OF FACT

The Respondent, Willits Unified School District, is a public school employer under the EERA. The Charging Party, Willits Teachers Association, CTA/NEA, is the exclusive representative of the District's certificated employee unit.

The events at issue are the product of a prior unfair practice case between these parties. That prior case, SF-CE-1357, involved a dispute over the application of a provision in the negotiated agreement between the Union and the District. The disputed provision, found in Appendix B[3] to the

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> 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.

[3]Appendix B, Certificated Salary Schedule Cost of Living Index, reads as follows:

> District base income shall be defined as the revenue limit per ADA.

agreement, sets out a formula under which teachers are entitled to share in increased District revenues. The formula provides that 80 percent of funding augmentations to the District's base income revenue limit shall be set aside for teacher salary cost-of-living increases.

Appendix B, however, fails to set out a timetable under which the cost-of-living increases are to be granted. By the fall of 1989 the parties were in a serious dispute about the timing of the pay increases. On October 11, Union President Lawren Giles wrote to the District demanding that under Appendix B teachers be given a 3.17 percent pay increase, retroactive to the previous July 1. District Superintendent James Roberts responded on October 23, denying the Union's request. The superintendent noted that Appendix B was a subject in reopener negotiations which had commenced on October 10.[4]

> An increase in District base income shall result in an across-the-board percent increase of the District certificated salary schedule. The percent salary schedule increase shall equal at lease [sic] 0.8 (8/10) of the District base income revenue limit <u>percent</u> [emphasis in original] increase. [F]or example, if the District's total base income, as defined above, increases 10%, teachers' salaries shall increase at least 8%.
>
> The salary increase may go higher, if additional funds, i.e. Prop 98 monies, increases of ADA by 10 or more over the fiscal year, or like monies, are available after representatives of the Board and staff have explored and evaluated other programs.

[4]Revision of Appendix B had been raised by the District as a subject in the reopener negotiations.

Because the parties were negotiating about Appendix B, he concluded that the District was not obligated by the provision to grant an immediate pay increase. Superintendent Roberts wrote that any salary adjustment would have to await the completion of collective bargaining.

The parties negotiated through the fall, meeting on eight occasions. The subject of Appendix B arose at every meeting. Superintendent Roberts testified that Appendix B was discussed "at length." The District continued to press for modification of the provision and the Union continued to press for an immediate pay increase under it. The superintendent acknowledged in testimony that the two issues became "enmeshed." Ultimately, the parties reached a stalemate in bargaining. On December 7, 1989, the PERB declared the existence of an impasse and appointed a mediator to assist the parties.

On December 11, 1989, the Union filed an unfair practice charge against the District, alleging a unilateral change for refusal to implement Appendix B. On February 27, 1990, the general counsel of the PERB issued a complaint against the District. The complaint alleged that the District had changed the past practice by its refusal to implement Appendix B and thereby failed to negotiate in good faith.

A settlement conference in the unfair practice case was scheduled for April 2, 1990, in San Francisco. Two representatives of the Union requested released time to attend, Lawren Giles, the chapter president, and Larry Stranske, the

chief negotiator. Mr. Giles testified that Mr. Stranske's presence at the informal conference was critical for the Union. He said that under the Union's rules,

> . . . any negotiated change in the language of Appendix B could only be done by the negotiating team or by the chief negotiator. The chief negotiator had been empowered by the executive council of the Association to act at the PERB hearing in their stead as a negotiator, and he [Mr. Stranske] was the only one with any empowerment or authority to do any negotiating or any changes in the language of Appendix B.

The District granted released time for Mr. Giles but declined it for Mr. Stranske. Mr. Stranske was able to attend the conference only by using a day of personal necessity leave.

District administrators initially were uncertain about whether Mr. Stranske should be granted released time to attend the PERB settlement conference. Mr. Stranske had assumed he was entitled to released time and completed the appropriate form to secure a substitute teacher to cover his absence. The principal of Willits High School, G. Keller McDonald, Mr. Stranske's supervisor, approved the absence and coded the form to charge the cost of the substitute to the District.

Had matters remained unchanged, Mr. Stranske would have received released time to attend the settlement conference. But Mr. McDonald was uncertain that he was correct in charging the cost of the substitute to the District. He raised the matter with the superintendent, Mr. Roberts, who also was uncertain. Mr. Roberts believed that if the conference were part of negotiations, Mr. Stranske would be entitled to released time.

But if the conference were not negotiations, then Mr. Stranske would not be entitled to released time. Mr. Roberts telephoned counsel for the District to ask if a PERB settlement conference was a part of negotiations. He was advised that the settlement conference was not negotiations.

On the basis of counsel's advice, Mr. Roberts concluded that Mr. Stranske could be excused to attend the settlement conference only if he used a day of personal necessity leave. Under the contract between the parties, a teacher can use up to 10 days of sick leave each year as personal necessity leave.[5] The superintendent instructed the principal to inform Mr. Stranske that if he wanted to attend the settlement conference he would have to take a day personal necessity leave.

When the principal advised Mr. Stranske of the superintendent's decision, he did not leave the teacher any other option. The decision to require use of personal necessity leave already had been made and it was conveyed firmly to Mr. Stranske. Mr. Stranske testified that both by content and tone he interpreted the superintendent's decision as final. Based on this, he believed it would have been futile to request negotiations about the decision.

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[5]Article X, section 5, of the contract between the parties permits teachers to take personal necessity leave,

> . . . for matters of a compelling personal concern which cannot be lightly disregarded by the employee and which cannot be handled outside of working hours.

Mr. Stranske, Chapter President Giles and California Teachers Association representative George Cassell attended the PERB settlement conference for the Union. Superintendent Roberts and Attorney Richard Currier attended for the District. Neither Mr. Roberts nor Mr. Currier were members of the District's negotiating team.

The settlement conference was conducted by a PERB administrative law judge. Initially, the parties met together with the administrative law judge. Later, they were separated. After the separation, the administrative law judge served as a mediator, carrying proposals back and forth between the two sides. At the beginning, the proposals were broad and covered several items that were the subject of the impasse in the parties' continuing contract negotiations. When this proved fruitless, the proposals became more narrow and focused solely on the dispute about Appendix B.

After approximately three hours, the parties reached a settlement agreement. Under the agreement, the District granted unit members an across-the-board pay increase of 3.63 percent, retroactive to July 1, 1989. The District further agreed to implement Appendix B "on or about September 1 of each year as long as Appendix B remains unchanged through negotiations."

Even though resolution of the unfair practice charge did not result in the removal of Appendix B from the on-going negotiations, Union leaders saw the settlement as a significant advance. Mr. Stranske testified that the District's concession

on an implementation date for Appendix B removed "a major stumbling block" from the negotiations.[6] He also testified that while the wage increase produced by the implementation of Appendix B did not resolve the salary issue in negotiations, "it made it a lot closer."

Historically, the District has been very liberal in granting released time to unit members. Prior Superintendent Robert Kirkpatrick, who was a witness for the Union, could not cite any example of the denial of released time requested by a Union representative. Four unit members who had served as chapter presidents similarly testified that they knew of no previous denial of released time requested by a Union representative.

A series of witnesses described numerous situations in which the District granted released time for a variety of activities. Released time was granted for a former chapter officer to attend a California Teachers Association (CTA) leadership conference. Released time was granted to unit members on at least two occasions to attend CTA-sponsored human relations conferences. It was granted on at least two other occasions for attendance at CTA-sponsored "stay well" conferences. Released time also was granted to various Union representatives to attend meetings of the superintendent's budget committee.

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[6]In agreeing to implement Appendix B on or about September 1 of future years, the District went well beyond the confines of the unfair practice charge at issue. While the PERB could have ordered the District to implement the clause forthwith for 1989 raises, it could not have fixed a date in the contract for implementation in future years.

Contractual language on released time is not comprehensive. Only one contractual provision specifically authorizes released time and it concerns grievances. This section provides that if a grievance meeting must be conducted during the regular work day,

> . . . any employee required by either party to participate as a witness or grievant in such meeting or hearing shall be released from regular duties without loss of pay for a reasonable time.

Although not specifically authorized by the contract, the District also grants released time to Union officers or others who represent grievants.

The contract makes no specific allowance for released time for negotiations,[7] but it is undisputed that Union representatives are granted released time for all negotiations meetings during the school day. The practice has included released time for mediation sessions[8] which occur during the day. The superintendent testified that if negotiations occur during the school day then the absence is considered school-related for purposes of released time. Typically, the parties negotiate both during and after school hours. Often, a negotiating session will

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[7]The only contractual reference is a provision that negotiations shall take place "at mutually agreeable times and places." It authorizes the Union to,

> . . . designate a representative from each school plus two (2) consultants as needed to attend negotiations and impasse proceedings. This number may be modified by the Association to a lesser number of representatives.

[8]"[I]mpasse proceedings" in the language of Article VI, section 3(e) of the agreement between the parties.

begin during the school day with teachers on released time and extend into the evening.

Prior to case SF-CE-1357, there never had been an unfair practice charge filed against the District. There is not now and never has been a written or unwritten policy which specifically requires the District to grant released time to Union representatives attending PERB settlement conferences.

LEGAL ISSUES

1) Should the charge be dismissed as untimely filed under Section 3541.5(a) (D?

2) Did the District unilaterally change its released time policy and thereby fail to negotiate in good faith in violation of Section 3543.5(c) and, derivatively, (a) and/or (b)?

3) Did the District unreasonably deny released time to a representative of the exclusive representative in violation of Section 3543.5(b) and, derivatively, (a)?

CONCLUSIONS OF LAW

Timeliness

The District argues that the charge must be dismissed as untimely because the amended charge was filed more than six months after the conduct at issue. The District argues that the amended charge attempts to state a "new and different past practice" from the original charge and was therefore untimely. The original charge alleged a past practice of released time to attend PERB informal conferences whereas the amended charge

alleged a past practice of released time "for problem-solving sessions relating to working conditions.

Under Section 3541.5(a)(1) the PERB is precluded from issuing "a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." However, an exception "may be made where an amended charge is found to 'relate back' to the original charge." (See Temple City Unified School District (1989) PERB Decision No. Ad-190 and cases cited therein.)

The original charge, filed on July 12, 1990, and the amended charge, filed on October 24, 1990, both state the same central allegation, i.e., that the District committed an unfair practice when it denied released time to Larry Stranske on or about April 2, 1990. All else is an elaboration of factual allegation and legal theory. Since both the original and amended charge are based on and allege the same central fact, the amended charge is timely under the relation back doctrine.

The District's argument on timeliness is therefore rejected.

Alleged Unilateral Change

It is well settled that an employer that makes a pre-impasse unilateral change in an established, negotiable practice violates its duty to meet and negotiate in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. (See Davis Unified School District et al. (1980) PERB Decision No. 116; State of

California (Department of Transportation) (1983) PERB Decision No. 361-S.)

Established practice may be reflected in a collective bargaining agreement (Grant Joint Union High School District (1982) PERB Decision No. 196) or where the agreement is vague or ambiguous, it may be determined by an examination of bargaining history (Colusa Unified School District (1983) PERB Decisions No. 296 and 296(a)) or the past practice (Rio Hondo Community College District (1982) PERB Decision No. 279; Pajaro Valley Unified School District (1978) PERB Decision No. 51).

An employer makes no unilateral change, however, where an action the employer takes does not alter the status quo. "[T]he 'status quo' against which an employer's conduct is evaluated must take into account the regular and consistent past patterns of changes in the conditions of employment." (Pajaro Valley Unified School District, supra, PERB Decision No. 51.) Thus, where an employer's action was consistent with the past practice, no violation,was found in a change that did not change the status quo. (Oak Grove School District (1985) PERB Decision No. 503.)

It is clear, initially, that the subject of this dispute, released time, is by specific Board holding a negotiable matter under the EERA. Released time is related to the enumerated subjects of wages and hours.[9] It is a subject well-suited to

[9]Section 3543.2 provides in relevant part as follows:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions

"the mediatory influence of negotiations" for resolution of disputes. (Anaheim Union High School District (1981) PERB Decision No. 177; See also, Compton Community College District (1990) PERB Decision No. 790.)

The alleged unilateral change at issue occurred when the District refused released time for the Union's chief negotiator to attend a PERB settlement conference. This settlement conference was conducted in an attempt to resolve a contract-based dispute between the parties. The Union had charged the District with failing to negotiate in good faith by its delay in implementing a salary increase. Specifically, the Union charged that the District had failed to grant employees a 3.17 percent raise retroactive to the previous July 1st as required under the contract between the parties. This claim was based on the Union's interpretation of the appropriate pay raise under Appendix B of the agreement between the parties. The

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> of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22515 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code. . . .

settlement conference ended with an agreement and withdrawal of the unfair practice charge.

Although the parties resolved the dispute over Appendix B at the settlement conference, they promptly fell into the present dispute over released time. The Union argues that in denying released time to its chief negotiator, the District unilaterally changed a past practice of liberal released time. The Union contends that by any description, the PERB settlement conference was in fact a negotiating session. Since the contract clearly provides for released time for negotiations, the Union argues, the denial was a unilateral change.

In support of its contention that the settlement conference constituted negotiations, the Union points both to the agreement that ultimately was reached and to the nature of the conference itself. Plainly, the Union asserts, the discussions at the PERB informal conference were "a continuation of the discussions that had been taking place in the negotiations and mediations earlier in the year." The only difference, the Union argues, between the discussion over Appendix B that occurred at the settlement conference and the discussions held in regular negotiations was the presence of a PERB agent. Citing the EERA definition of "meeting and negotiating,"[10] the Union argues that the parties at

[10]EERA section 3540.1 sets out the following definition:

> (h) "Meeting and negotiating" means meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope

the PERB conference engaged in the statutory activities of meeting, conferring, negotiating" and "discussing."

The District rejects the argument that the settlement conference was a negotiating session. The District argues that, under the contract, negotiations occur only at mutually agreeable times and places. There is no evidence, the District argues, that the parties ever agreed that the PERB conference was a negotiating session. Moreover, the District argues, a school employer is required to grant released time only for negotiating sessions which are required under the EERA. A PERB settlement conference is not such a meeting, the District concludes.

At the hearing, the District objected, on the basis of confidentiality, to the Union's introduction of evidence about the settlement conference. Although PERB regulation 32650[11] sets

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> of representation and the execution, if requested by either party, of a written document incorporating any agreements reached, which document shall, when accepted by the exclusive representative and the public school employer, become binding upon both parties and, notwithstanding Section 3543.7, shall not be subject to subdivision 2 of Section 1667 of the Civil Code. The agreement may be for a period of not to exceed three years.

[11]Regulation 32650 provides as follows:

> (a) A Board agent may conduct an informal conference or conferences to clarify the issues and explore the possibility of voluntary settlement. No record shall be made at such a conference.
>
> (b) A Board agent shall give reasonable notice of such conference to each party directed to attend.

out no specific rule on confidentiality, confidentiality may be inferred from the prohibition against the making of a record. Moreover, in Modesto City Schools and [High] School District (1981) PERB Decision No. Ad-117, the Board concluded that public policy requires confidentiality for settlement conferences. There, the Board refused to issue a subpoena for a Board agent's testimony about a settlement conference. The Board observed that exposure of "the content of settlement negotiations to the light of a public hearing [might] well discourage the parties from sincerely engaging in such discussions."

Despite the policy reasons favoring confidentiality, the District's objection to testimony about the April 4, 1990, PERB settlement conference is misplaced. An examination of the disputed testimony demonstrates that the Union does not rely on "the content of the settlement negotiations." (Modesto City Schools and [High] School District, supra, PERB Decision No. Ad-117.) The specific arguments or offers of compromise made by the District were not placed into evidence by the Union and are not at issue. Rather, the evidence introduced by the Union concerns the procedure, technique and method by which the conference was conducted.

The Union relies upon evidence about technique to show that what occurred was contractual negotiations about a disputed term of a collective bargaining agreement. Confidentiality of settlement discussions is designed to protect statements, not techniques or style. For this reason, consideration of the

evidence by the Union about the settlement conference is not barred by the policy favoring confidentiality.[12]

It is undisputed that at the time the charge was filed the parties were in negotiations about Appendix B as part of a reopener. Through an exchange of letters in October of 1989,[13] both parties acknowledged that the issue was then at the negotiating table. Indeed, it was the District's position that since Appendix B was a subject in the reopener, it would have been inappropriate to grant a pay increase at that time.

Evidence introduced by the Union shows that the administrative law judge who conducted the PERB settlement conference served as a mediator. He carried proposals back and forth, including proposals about impasse-related subjects other than Appendix B. The settlement agreement called for the District "as soon as possible, but not later than May 15, 1990" to provide a 3.63 percent pay increase, effective July 1, 1989. The District further agreed to implement future Appendix B pay increases on or about September 1 of each year so long as Appendix B remains unchanged by negotiations. The agreement simplified the remaining disputes in the on-going negotiations.

Moreover, any claim of confidentiality most likely was waived when the parties agreed to enter a copy of the settlement agreement, Joint Exhibit No. 3, into the record. By placing the agreement into the record, the parties opened the record to questions designed to clarify ambiguities in the agreement. This includes the bargaining history. Statements made at the settlement conference that would assist in interpretation would therefore be admissible.

[13]Charging Party Exhibits No. 4 and 5.

Regardless of what it was called and or how it was arranged, the meeting of the parties on April 4, 1990, was, in fact, a negotiating session. Representatives of the District and the Union met and engaged in a give-and-take to resolve one facet of an on-going dispute about wages. It is of no significance that the District's regular negotiator was absent. The superintendent and legal counsel, who attended the informal conference on behalf of the District, evidenced clear authority to reach an agreement binding on the District. At the conclusion, they executed a written settlement agreement which not only resolved the instant dispute but also established a policy for the date of future salary increases. Both in form and result the parties on April 4, 1990, engaged in "meeting and negotiating" as defined in the EERA.[14]

It is apparent, moreover, that both sides knew, or should have known, of the clear possibility that the settlement conference would turn into a negotiating session. Given that the dispute about Appendix B was a key issue in the on-going negotiations, the very subject matter of the settlement conference was a tip-off to the possibility of negotiations. It is true that the District superintendent and the Union officers were new to PERB unfair practice proceedings and might not have known what to expect. But counsel for the District and the CTA representative present for the Union were experienced professionals in PERB proceedings.

[14]Section 3540.1(h). (See footnote no. 10, supra.)

No matter, the District argues, the right to reasonable released time was not applicable to the PERB settlement conference. Citing Victor Valley Union High School District (1986) PERB Decision No. 565, the District argues that right to released time applies only when the meeting and negotiating is required by the EERA. There is nothing, the District argues, which would include a PERB settlement conference as a statutorily required meeting and negotiating session.

While the District's citation of Victor Valley is relevant to a denial of rights argument, it is not a persuasive rebuttal to the unilateral change theory set out in the complaint. Under a unilateral change theory, released time is simply another negotiable subject under "hours." When an employer makes a unilateral change in hours, its conduct is not excused if the change occurred during impasse procedures rather than during negotiations. It is the unilateral nature of the change itself that is the violation.

The negotiated agreement does not spell out specific rules for released time for negotiations. There is abundant evidence, however, that the District never previously declined released time on the frequent occasions when negotiations or mediation occurred during working hours. Numerous witnesses testified that they had been given released time for negotiations. The superintendent confirmed the practice, stating that teacher absences for negotiations occurring during the school day are considered school-related for purposes of released time. The

denial of released time for Mr. Stranske to attend the PERB informal conference on April 4, 1990, was a change in this past practice.

Accordingly, I conclude that by denying released time to the Union's chief negotiator to attend the PERB settlement conference, the District changed the past practice. This change was made without prior notice to the Union and without affording the Union a reasonable opportunity to negotiate. The change was a final action by the time the Union learned of it and any attempt by the Union to negotiate would have been futile. I find, therefore, that the District failed to negotiate in good faith in violation of section 3543.5(c).

The unilateral change in released time policy also interfered with Mr. Stranske's ability to participate in the activities of an employee organization.[15] The District's eleventh hour unilateral change required Mr. Stranske to either shirk what he felt were his obligations to the Union or to use his personal necessity leave. He chose to use his personal leave rather than skip the settlement conference. By requiring Mr. Stranske to make such a choice, the District interfered with his protected rights in violation of section 3543.5(a).

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[15]EERA section 3543 provides in relevant part that:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations....

The unilateral change in released time policy likewise interfered with the Union's ability to represent its members.[16] As the chairman of the negotiating committee, Mr. Stranske was an important participant at the settlement conference. Had he determined that he could not afford to use personal leave on Union business, the Union's interests would not have been as well represented at the negotiating session. By interfering with the right of the Union's agent to attend the meeting, the District interfered with the right of the Union. Such interference with organizational rights was a violation of section 3543.5(b).[17]

Alleged Denial of Organization Rights

As a separate cause of action, the general counsel alleges that the District unreasonably denied released time to a representative of the exclusive representative. This action is alleged to be in violation of Section 3543.5(b) and, derivatively, (a).

By this contention, the general counsel impliedly asserts that the settlement conference was in fact a negotiating session,

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[16]EERA section 3543.1 provides in relevant part that:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, . . .

[17]The holding here that the District failed to negotiate in good faith by denying released time to Mr. Stranske is dictated by the unique circumstances of this case. This holding is based entirely on the subject of the settlement conference and what happened during it. There is no intention to reach a conclusion about whether Mr. Stranske would have been entitled to released time to attend a PERB settlement conference that did not involve an on-going negotiations about a contractual provision.

as was found above. Also implicit is the theory that there exists some minimal amount of released time for negotiations to which an exclusive representative is entitled.[18] Inherent in the issuance of the complaint is the further assertion that denial of released time to attend the PERB settlement conference fell below the required minimal amount of released time.

There is support for an assertion that an exclusive representative is entitled to some undefined, minimal amount of released time for meeting and negotiating. The Board once observed that the Legislature had declined to leave released time to either the employer's discretion or the vagaries of negotiations. Rather, the Board wrote, "a minimum released time standard was established, and thus, in effect, a standard against which the parties' good faith in negotiating on the subject could be measured."[19]

However, the Board did not define the limits of the "minimum released time standard" in that decision or in any subsequent decision. Nor has the Board ever found that a particular refusal to grant released time amounted to a denial of organizational rights. Nevertheless, there are decisions which suggest how a

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[18]EERA section 3543.1 provides in relevant part that:

> (c) A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

[19]See Anaheim Union High School District, supra, PERB Decision No. 177.

specific denial of released time might be evaluated against a minimum standard. Generally, these cases would measure the denial against: (1) the history of the negotiations or (2) an objective "patently unreasonable" standard.

A "history of the negotiations" approach was suggested in Muroc Unified School District (1978) PERB Decision No. 80, a case involving the number of negotiators to be granted released time. There, the union complained that it needed more negotiators than the employer was willing to provide with released time. In evaluating the employer's position, the Board listed a series of factors which would contribute to determining what was a reasonable number of negotiators to be released.

Among the factors listed in Muroc were "the complexity of the negotiations," "the reasonable needs of the employee organization to include representatives of various groups on their negotiating team," and "the number of hours spent in negotiations." The Board also looked at the size of the District and the geographical disbursement of its facilities. There is no evidence here about the factors examined by the Board in Muroc. It is impossible, therefore, to judge the District's denial of released time on the basis of the Muroc test.

A "patently unreasonable" standard was suggested in Burbank Unified School District (1978) PERB Decision No. 67, a case involving denial of released time after late night negotiations. In that case, the union complained that its negotiators should have been given time off for rest the day after a late

negotiating session. The school district refused. In evaluating the employer's position, the Board concluded that there could be situations where released time would be appropriate for rest. Such a situation, the Board observed,

> . . . would occur when it would be patently unreasonable, given the legislative intent to limit the burden on employee representatives, to force employee organization negotiating team members to choose between working after the negotiating session ends or losing pay or sick leave. However, such circumstances are rare.

The Board found that the employer had not acted unreasonably in denying the union's request.

Here, the District authorized released time for the chapter president to attend the PERB settlement conference, but denied released time for the chief negotiator. Plainly, the presence of the chief negotiator was critical for the Union because only he had the authority to agree to the negotiated changes. Had the denial of released time preceded the declaration of impasse, it might well have been "patently unreasonable."

However, the Board's decision in Victor Valley Union High School District, supra, PERB Decision No. 565, precludes such a finding for a post-impasse negotiating session. In Victor Valley the Board rejected a union's contention that an employer had denied statutory rights when it refused released time for a negotiating session held outside the formal impasse procedures. The Board held that after a declaration of impasse, the parties have no obligation to meet and negotiate outside the presence of the appointed negotiator. In the absence of an obligation to

negotiate, the Board concluded, the employer has no obligation to grant released time.[20]

Because the PERB informal conference at issue was a post-impasse negotiating session, I find that the District had no statutory obligation to grant released time to the Union representatives. The District's released time obligation for post-impasse negotiations is based solely on past practice, not on statutory right.

Accordingly, I conclude that the Union's second cause of action (denial of organizational rights) must be dismissed.[21]

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.

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[20] The ~~Victor Valley~~ rationale presumably overrules the following statement from ~~Burbank Unified School District~~, ~~supra~~, PERB Decision No. 67, which is cited by the Union:

> Meeting and negotiating includes the time spent at the negotiating table. It includes mediation and factfinding, which are continuations of the negotiating process.

[21] This conclusion does not rest on Regents of the University of California (1981) PERB Decision No. 189-H. Regents stands for the proposition that an employer has no obligation to grant released time to employees attending a PERB settlement conference on behalf of a non-exclusive representative. In Regents, the Board specifically declined to consider the issue here, i.e., whether employees appearing at informal proceedings on behalf of an exclusive representative would be entitled to released time.

Here, the District unilaterally changed the past practice on granting released time to Union representatives for negotiations. The remedy in a unilateral change case is a return to the status quo ante and it will be ordered here. It also is appropriate that Larry Stranske be made whole for the loss of released time to attend a PERB settlement conference on April 2, 1990.

It is further appropriate that the District be directed to cease and desist from its unfair practice and to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent 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 this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)[22]

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Willits Unified School District (District) violated section 3543.5(c) of the Educational Employment Relations Act by unilaterally changing the past practice on released time for negotiations. Because this act had the effect of interfering with the right of a

[22]The District's request for attorney's fees, on the ground that the unfair practice charge was frivolously filed, is denied.

negotiator for the Willits Teachers Association, CTA/NEA (Union), to participate in the activities of an employee organization, the denial of released time also was a violation of section 3543.5(a). Because this act had the further effect of interfering with the right of the Union to represent its members, the denial of released time also was a violation of section 3543.5(b). Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing the past practice on released time for Union representatives to participate in negotiations.

2. By the same conduct, interfering with the right of a unit member to participate in the activities of an employee organization.

3. By the same conduct, interfering with the right of the Union to represent its members.

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

1. Within ten (10) workdays of the service of a final decision in this matter, reinstate the past practice on released time for Union representatives to attend negotiations with the District. Do not make future changes in the released time policy without giving prior notice to the Union and the opportunity to negotiate.

2. Within ten (10) workdays of the service of a final decision in this matter, restore to Larry Stranske the day of personal necessity leave he expended to attend the April 2, 1990, PERB settlement conference.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations 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 workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. 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.

Pursuant to California Code of Regulations, 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 Cal. Code of Regs.,

tit. 8, sec. 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 Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc. sec. 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 Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: May 20, 1991

Ronald E. Blubaugh
Administrative Law Judge