STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SAN MATEO FEDERATION OF TEACHERS, AFT LOCAL 1493, AFL-CIO,	)	
Charging Party,	)	Case No. SF-CE-1414
v.	)	PERB Decision No. 1030
SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT,	)	December 23, 1993
Respondent.	)	

Appearances: Robert J. Bezemek, Attorney, for San Mateo Federation of Teachers, AFT Local 1493, AFL-CIO; Brown & Conradi, by William E. Brown, Attorney, for San Mateo County Community College District.

Before Hesse, Caffrey and Carlyle, Members.

DECISION

CARLYLE, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the San Mateo County Community College District (District) to a proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District violated the Educational Employment Relations Act (EERA or Act) section 3543.5(b)[1] by refusing to provide the San Mateo

[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:
>
> (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.

Federation of Teachers, AFT Local 1493, AFL-CIO (Federation), a reasonable amount of released time for meeting, negotiating and processing grievances. The ALJ also found that the District violated EERA section 3543.5(c) by refusing to negotiate in good faith about released time and conditioning a final agreement on the Federation's waving the right to a reasonable amount of released time. Finally, the ALJ found that the District violated EERA section 3543.5(e) when it failed to participate in the impasse procedures in good faith.

We have reviewed the entire record in this case, including the proposed decision, the District's exceptions and the Federation's response thereto. Based upon this review, we affirm in part and reverse in part the proposed decision of the ALJ as discussed below.

FACTUAL SUMMARY

The District is made up of three campuses: Skyline College in San Bruno, Canada College in Redwood City, and College of San Mateo in San Mateo. Total faculty is approximately 1,103. Approximately 543 faculty are Federation members.

In 1978, under the California Teachers Association's representation, a contract was negotiated which provided three units of released time. In 1981, after a change of

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

representation to the Federation, the parties agreed to three faculty load credits (FLC) of released time.[2]

In 1983, negotiations between the parties provided for released time without loss of compensation for up to four members of the Federation's team when negotiation sessions conflicted with normal District assignments.

In 1986, the Federation initially proposed 30 FLCs of released time. The District did not respond, and the status quo remained. During 1987 reopener negotiations, the parties agreed to increase released time from three FLCs to six FLCs per semester.

During 1987-88 negotiations, the Federation proposed 42 FLCs of released time. The District proposed no change, and released time remained at six FLCs.

The 1989-90 negotiations took place from April 1989 to January 1990. There were 32 negotiating sessions. Initially, the Federation proposed 30 FLCs of released time and the District proposed no change. By the Fall of 1989 the District had not changed its position on released time. The Federation reduced its released time proposal to 24 FLCs, and by December of 1989, the released time proposal was further reduced to 18 FLCs. Around this same time, the parties agreed to salary increases for full-time and part-time instructors. However, these increases

[2]Under the contract, a full-time unit member is expected to provide services corresponding to 30 FLCs per year, or 15 per semester. One FLC is equivalent to one unit.

could not be implemented until the parties reached agreement on the remaining issues, including released time.

The parties were unable to reach agreement. In 1990, PERB certified that an impasse existed. Outstanding issues included seniority for part-time instructors, personnel necessity leave, and released time.

After mediation, the parties agreed to a contract which included no increase in released time. During negotiations, the Federation on several occasions raised the released time issue. However, the District's counter-proposals simply ignored released time. Testimony indicates that the District believed that the status quo was reasonable.

Joe Barry, the Federation's executive secretary, conducted a survey to determine the amount of time elected and appointed officers devoted to Federation business during the Fall of 1990. The survey contained information about Federation activities in which released time may be granted. For instance, the survey indicated that a Federation official spent an average of 30 hours per week performing these duties. These duties included being a chief grievance officer for bargaining team members.

Additionally, there was testimony that time spent in grievances has increased as they had become more numerous and complicated.

At each campus, the Federation has three chapters that are served by chapter chairpersons. The survey indicated that the

three chapter chairpersons spent an average of eleven hours per week on Federation activities involving representational duties.

The Federation president historically has received three FLCs. The chief grievance officer receives the remaining three FLCs. Other stewards, negotiators, or representatives received no released time.

In 1984-85, District representatives spent approximately 68 hours preparing for negotiations, and approximately 46.5 hours at the table. In addition, the District representative spent approximately 37 hours processing grievances. Total costs billed by the District under SB 90 for 1984-85 was approximately $9,283.00.

In 1985-86, District representatives spent approximately 38 hours preparing for negotiations, and approximately 73 hours at the table. The total amount submitted under SB 90 for 1985-86 was $5,156.00.

In 1987-88, District representatives spent approximately 37 hours preparing for negotiations, and approximately 60 hours at the table. In addition, approximately 55.75 hours was spent processing grievances. Total costs submitted by the District under SB 90 was approximately $10,000.00.

In 1988-89, District representatives spent approximately 114 hours preparing for negotiations, and 177.5 hours at the table. In addition, District representatives spent approximately 549.5 hours processing grievances. Total costs billed by the District under SB 90 was approximately $71,000.00.

In 1989-90, District representatives spent approximately 59 hours preparing for negotiations, and 105 hours at the table. In addition, District representatives spent approximately 633.75 hours processing grievances. The total costs billed by the District under SB 90 was approximately $91,000.00.

ALJ PROPOSED DECISION

The ALJ reviewed PERB's policy underlining the right to reasonable released time found in section 3543.1(c)[3] (Magnolia School District (1977) EERB Decision No. 19 (Magnolia)[4]) and that released time may be granted for time spent in the negotiating process. (Sierra Joint Community College District (1981) PERB Decision No. 179 (Sierra).)

The ALJ concluded that the same approach should be applied to the processing of grievances and not to time spent in grievance meetings or arbitration hearings. The ALJ determined that the processing of grievances is a "form of continuing negotiations" of the contract in which "adjustment of the grievance provides the meaning and content to the general and often deliberately ambiguous terms of the agreement." (Chaffey Joint Union High School District (1982) PERB Decision No. 202.)

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[3]Section 3543.1(c) states:

> 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.

[4]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

The ALJ also stated that whether the amount of released time is reasonable is a question of fact and must be determined based on the circumstances of each case. (Sierra, p. 7.) Based on the following, the ALJ concluded that six FLCs per semester of released time was not "reasonable" under EERA section 3543.1(c).

The ALJ found that the Federation had documented its need for more released time in the areas of negotiations and overall contract administration. He relied on the District's substantial increase in the amount of time and money devoted to negotiations and grievance processing in the past three years. Additionally, the cost to the District for six FLCs of released time, approximately $8,000 annually, was not excessive when compared to the District expenditures during the same period.

Further, the amount of released time awarded to the Federation had remained fixed at the 1987 level. The ALJ concluded that the evidence showed that it is apparent that circumstances had changed and the need for released time had greatly increased.

The ALJ also used comparative data of other college districts in regards to their released time provisions. (Sierra, p. 7.) Although he ruled that it was not dispositive of the issue presented here, released time granted in other community college districts could be examined.

In conclusion, the ALJ found that the Federation received less released time than any comparable Bay Area district, with

few exceptions. Therefore, he found that the District violated EERA section 3543.1(c) and thus section 3543.5(b).

The complaint further alleged that the:

> . . . Respondent's [District's] only proposal on the subject of released time was to maintain that amount delineated in the expired contract . . . which fell vastly short of Charging Party's requirements for released time.

The ALJ construed the regional attorney's allegations as encompassing two separate court related issues: (1) whether the District refused to negotiate about released time by presenting only one proposal which fell "vastly short" of the Federation's requirements; and (2) whether the final agreement was based on waiver of the statutory right to reasonable released time.

Between April 1989 and January 1990, the ALJ found that the Federation raised the matter of released time on numerous occasions. The Federation initially proposed 30 FLCs, reduced it to 24 FLCs, and dropped it again to 18 FLCs in an attempt to reach agreement. It was found that the District made no counter-proposal, and did not respond in any meaningful way. Eventually, the District representative replied to the Federation that the District had rejected the Federation's proposals and there was no room for movement. It appears that this short exchange between a representative of the District and Federation was the only discussion of released time during the entire round of negotiations prior to mediation.

The ALJ determined that the District plainly had not "exhibited an open attitude in its consideration of the amount of

released time to be allowed." (Magnolia, p. 5.) The ALJ further concluded that the District violated EERA section 3543.5(c) when it refused to negotiate in good faith about released time in excess of six FLCs.

Additionally, the ALJ determined that the ultimate effect of the District's refusal to bargain in good faith on released time was to condition final agreement on the Federation waiving its statutory right to reasonable released time.

Finally, the ALJ determined that the District continued its refusal to discuss or make concessions on released time during two mediation sessions. By its unyielding conduct before the mediator, the ALJ determined that the District failed to participate in the impasse procedure in good faith, in violation of EERA section 3543.5(e).[5]

DISTRICT'S EXCEPTIONS

On appeal, the District makes numerous factual and legal exceptions to the proposed decision. The District contends that the 1989 collective bargaining agreement ratified by the Federation precludes any argument that the statutory right to released time was violated. Further, the District argues that although the ALJ was correct in allowing comparative data be entered into the record concerning other districts, the ALJ accorded too much weight to the data. The District also contends the ALJ should have used the totality of the circumstance test

[5]In its amended complaint, the Federation also alleged that the District unlawfully assisted the Academic Senate by awarding it 24 FLCs of released time. The ALJ's proposed decision determined that there was no basis to conclude that the released time given to the Senate was unreasonable as alleged. As no exception was raised regarding this issue, we affirm the ALJ.

instead of finding a per se violation of the District's obligation to negotiate in good faith. Finally, the District contends that the Federation's allegation that the District bargained in bad faith is barred by the statute of limitations.

FEDERATION'S RESPONSE TO DISTRICT'S EXCEPTIONS

The Federation first argues that the District's statement of exceptions should be rejected as not complying with Board regulations regarding the form and content of the exceptions. Specifically, the Federation alleges that the District failed to comply with PERB Regulation 32300[6] and that numerous factual statements were made by the District without any citation of the record.

The Federation also contends that it was appropriate for the ALJ to consider released time practices in other districts. The Federation points out that the District does not except to the ALJ's consideration of "industry practice" regarding released time, but urges the Board to reverse the decision as the ALJ "accorded great weight" to industry practice evidence that was "hopelessly inadequate to support a legal conclusion." The Federation argues that in raising this argument the District does not challenge this part of the Sierra precedent. Further, the Federation contends the ALJ acknowledged that the released time practices of other districts was but one factor in his

[6]PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

determination that the Federation was not provided reasonable statutory required released time.

Finally, the Federation argues that the ALJ was correct in finding the District negotiated in bad faith and that the District did not bargain in good faith during impasse.

DISCUSSION

Conformance with PERB Regulation 32300

The Federation urges the Board to dismiss the District's appeal for failure to comply with PERB Regulation 32300. Under Regulation 32300. a party filing exceptions to a proposed decision must comply with specific guidelines that the statement of exceptions include: (1) a statement of the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identification of the page or part of the decision to which exception is taken; (3) designation of the portions of the record relied upon; and (4) the grounds for each exception. (PERB Reg. 32300, subd. (a)(l)-(4).)

Although the Board agrees that the District's statement of exceptions could have been better defined with clearer references made to the record, the Board finds the District's brief to be in substantial compliance with PERB regulations.

Per Se Violation of Obligation to Negotiate in Good Faith

The District asserts that only the bad faith bargaining allegations during impasse are timely. The District argues that the negotiating in bad faith charge should be dismissed as barred by the statute of limitations. To the contrary, the Board finds

that the complaint sufficiently included refusal to bargain in good faith allegations under paragraphs (4) and (5) of the complaint which was issued by PERB on October 31, 1990. Impasse was declared on January 16, 1990. The charge was filed on July 16, 1990. As the Board finds this allegation was timely filed,[7] the Board will consider the argument on its merits.

The District contends the ALJ erred in finding that the District committed a per se violation of the District's obligation to negotiate released time in good faith.

During 32 negotiating sessions between the parties, the Federation provided data to the District concerning its request for increased released time. When the Federation asked for information concerning the proposal, the District failed to discuss in any meaningful way its position to keep the status quo. Testimony indicates that the District may have refused to provide reasons for its position out of fear that its position and rationale would be "misquoted" in the Federation's publication. However, this position was not conveyed to the Federation nor was any other rationale given by the District for its reasons to maintain the status quo.

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[7] In San Dieguito Union High School District (1982) PERB Decision No. 194, the Board held that an unfair practice charge may still be considered to be timely filed if the alleged violation is a continuing one. A continuing violation occurs if the violation has been revised by subsequent unlawful conduct within the six month statute of limitations. In this case, the District's refusal to negotiate regarding released time was consistent and continuing throughout negotiations and impasse proceedings. As the allegations of bad faith bargaining constitute a continuing violation, we reject the District's exception regarding the statute of limitations.

Based on the facts as presented in this case, the Board finds that the District's flat refusal and failure to negotiate about released time constitutes by itself, a refusal to bargain in good faith. Accordingly, the Board affirms the ALJ's finding that the District refused to bargain in good faith on the issue of released time, in violation of EERA section 3543.5(c). (See Modesto City Schools (1983) PERB Decision No. 291, p. 45; Davis Joint Union High School District (1984) PERB Decision No. 474, pp. 25-26.)

As the Board finds a per se violation of the duty to bargain in good faith, and for the discussion to follow, the Board finds it unnecessary to review the District's exceptions concerning the ALJ's use of comparative data.

Bargaining in Bad Faith During Impasse

The ALJ concluded that the District bargained in bad faith during impasse. During impasse, three issues were on the table before the parties: personal necessity leave; issue of part-time employment and an increase in reassigned time for the union.

The Federation argues that it only agreed to the contract as the issues on the table during impasse concerned nonmonetary issues, and Federation negotiators were under pressure from bargaining unit members to settle the contract so certain employees could receive salary increases retroactively.

The parties met for two mediation sessions. On all three issues, the District did not support changes until impasse. The District representative testified that in conversations with the

mediator, he offered a proposal to have the Federation buy released time. This statement was not contradicted nor challenged by the Federation. The question that arose in testimony was whether or not the mediator had actually presented the proposal to the Federation. Although it would seem that this proposal would have shown movement on the District's part, the ALJ nonetheless correctly ruled that it was not dispositive of the issue.

The Board finds that the record of the case is not sufficient to reverse the ALJ's finding that the District failed to participate in the impasse procedure in good faith. Therefore, the Board affirms the ALJ's finding that the District, during mediation, violated EERA section 3543.5(e) by refusing to participate in the impasse procedures in good faith.

Released Time as Both a Mandatory Subject of Bargaining and a Statutory Right

This case presents an opportunity to clarify and thus make more consistent, the concept of released time as it appears and is applied under the Educational Employment Relations Act, the Ralph C. Dills Act (Dills Act or Act) and the Higher Education Employer-Employee Relations Act (HEERA or Act).[8]

Effective in 1976, EERA section 3543.1(c) created a statutory right to released time:

> A reasonable number of representatives of an exclusive representative shall have the right

[8]The Dills Act is codified at Government Code section 3512 et seq. and HEERA is codified at Government Code section 3560 et seq.

> to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

In the subsequent years and cases, PERB has determined that released time is also a mandatory subject of bargaining. (Magnolia.)

Effective July 1, 1979, the HEERA treated released time (or reassigned time) in a similar manner, but with one significant difference concerning the effect of a memorandum of understanding.

HEERA section 3569 states:

> A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released or reassigned time without loss of compensation when engaged in meeting and conferring and for the processing of grievances prior to the adoption of the initial memorandum of understanding.. When a memorandum of understanding is in effect, released or reassigned time shall be in accordance with the memorandum.
> (Emphasis added.)

A year earlier, the Dills Act[9] was passed and a virtually identical section concerning released time is found.

Dills Act section 3518.5 states:

> A reasonable number of employee representatives of recognized employee organizations shall be granted reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the state on matters within the scope of representation.

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[1]Prior to January 1, 1987, the Dills Act was known as SEERA.

> This section shall apply only to state employees, as defined by subdivision (c) of Section 3513., and only for periods when a memorandum of understanding is not in effect. (Emphasis added.)

Given the legislative history and progression of the three Acts in question, the Board does not believe that it was intended under EERA that employees would be accorded special privileges relative to released time; that is, be afforded the protection of bargaining the matter as a mandatory subject of bargaining and, regardless of the degree of good faith bargaining which occurs, be given the right to attack an agreement previously reached with the employer through the unfair practice process only because the quantity may not be equal to the average of surrounding jurisdictions or some other empirical standard. Here, the Federation complained about the District's bargaining conduct and filed an unfair practice charge on July 16, 1990, long after the per se bad faith bargaining conduct took place and also after the parties reached agreement. The timing of the filing of the charge belies the Federation's assertion that the District failed to provide reasonable released time in such a bilateral agreement.

The Board does not believe that such a notion is consistent with how released time is treated in the other two Acts nor with the concept of finality once a collective bargaining agreement has been ratified by both sides.

Accordingly, under the facts of this case, the Board finds that released time, as a mandatory subject of bargaining, is not

subject to a further level of review or scrutiny under EERA section 3543.1(c) when the unfair practice charge is filed after a memorandum of understanding is in effect or the terms of said document are in effect. Released time shall be in accordance with the memorandum of understanding. The Board finds that the statutory provisions concerning released time are applicable at the onset of first time negotiations in order to ensure the ability to get to the negotiating table and in subsequent years when there are no controlling provisions of released time from prior agreements in operation. Therefore, the Board reverses the ALJ's finding that the District violated section 3543.1(c) and thus section 3543.5(b) by failing to provide for reasonable released time.[10]

Conditioning Agreement on Waiver of Statutory Right of Reasonable Released Time

The ALJ found that conditional bargaining on released time was based on the Federation's "firm position concerning its statutory right to released time." In the proposed decision, the ALJ analyzed released time as a statutory right. The ALJ found this to be a violation based on cases involving insistence to impasse on nonmandatory subjects of bargaining. For instance, in Lake Elsinore School District (1986) PERB Decision No. 603 (Lake Elsinore), the Board concluded that a settlement proposal

[10]Member Hesse further finds that the District violated EERA section 3543.5(b) as a result of the per se refusal to bargain conduct. As the remedy in this case is essentially the same as that of a section 3543.1(c) violation, she would not disturb the Board order.

included nonmandatory subjects of bargaining, and that the District's insistence on the nonmandatory aspects of the settlement proposal constituted a violation of section 3543.5(c) of EERA.

Unlike Lake Elsinore, released time is a mandatory subject of bargaining. However, there is also a statutory right to reasonable released time under EERA.[11] The Board has held that insistence upon negotiations on a mandatory subject of bargaining, such as released time, is not a per se violation of the duty to bargain. (Anaheim Union High School District (1981) PERB Decision No. 177; Healdsburg Union High School District and Healdsburg Union School District, et al. (1984) PERB Decision No. 375; State of California (Department of Personnel Administration) (1991) PERB Decision No. 900.) Therefore, there is no violation based on the theory of conditional bargaining of a mandatory subject of bargaining.

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[11]As with a nonmandatory or permissive subject, the employer cannot insist to impasse on a proposal concerning a statutory right. The distinction is that while statutory rights are not directly rooted in terms and conditions of employment, as is the case with nonmandatory subjects, statutory rights are directly based on rights protected by the Legislature.

To reach impasse unlawfully on a nonmandatory or permissive subject is to engage in bad faith bargaining by injecting extraneous subjects in preference to subjects on wages, hours, and other terms and conditions of employment. With statutory rights, the employer cannot insist to impasse because to do so is an infringement on a right not given the employer.

Further, while an employer can implement both mandatory and nonmandatory proposals contained in its last, best, and final offer, the employer cannot implement those items that concern statutory rights. To do so would be destructive of those rights.

In the instant case, however, the Board has found released time to be a mandatory subject of bargaining. Thus, since there can be no violation based on the theory of conditional bargaining on a mandatory subject of bargaining, the Board reverses the ALJ's finding that the District violated EERA section 3543.5(c) by refusing to negotiate in good faith and by conditioning a final agreement on the waiver of the right to reasonable amount of released time.

Assuming arguendo, that released time was a nonmandatory subject of bargaining and a statutory right and the Board applied the test for insistence to impasse on a nonmandatory subject, the ALJ's finding of a violation must still be reversed. Under Lake Elsinore, the Board held that parties may engage in negotiations dealing with permissive, nonmandatory subjects of bargaining, but once a party subsequently decides to take a position that the nonmandatory subject not be included in the collective bargaining agreement, that party must express its opposition to further negotiation on the proposal as a prerequisite to charging the other party with bargaining to impasse on a nonmandatory subject of bargaining. After reviewing the record, the Board finds no evidence that the Federation put the District on notice that released time should not be included in the collective bargaining agreement. While the Federation raised the issue of released time during negotiations and impasse proceedings, there is no testimony that the Federation informed the District that it would

not bargain over reasonable released time because it had a statutory right to reasonable released time.

ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the San Mateo County Community College District (District) violated section 3543.5(c) of the Educational Employment Relations Act (EERA) by refusing to negotiate in good faith with the San Mateo Federation of Teachers, AFT Local 1493, AFL-CIO (Federation) on the issue of released time for meeting and negotiating and processing grievances. By engaging in the same conduct during mediation, the District failed to participate in the impasse procedures in good faith in violation of EERA section 3543.5(e).

Pursuant to EERA section 3541.5 (c), it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing to negotiate in good faith about released time for meeting and negotiating and for the processing of grievances.

2. By the same conduct during mediation, refusing to participate in good faith in the impasse procedures.

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

1. Upon request by the Federation, negotiate in good faith about released time for meeting and negotiating and for the

processing of grievances through mediation and factfinding, if necessary.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at 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.

3. 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.

Member Hesse joined in this Decision.

Member Caffrey's concurrence and dissent begins on p. 22.

CAFFREY, Member, concurring and dissenting: I concur in the majority's conclusion that the San Mateo County Community College District (District) violated sections 3543.5(c) and (e) of the Educational Employment Relations Act (EERA) when it failed to engage in good faith negotiations and participate in impasse procedures in good faith with regard to the subject of released time.

I dissent from the majority's reversal of the administrative law judge's (ALJ) finding that the District refused to grant a reasonable amount of released time under EERA section 3543.1(c), thereby interfering with the San Mateo Federation of Teachers, AFT Local 1493, AFL-CIO's (Federation) right to represent its members in violation of section 3543.5(b). I affirm the ALJ's finding and expressly reject the majority's analysis of this issue.

I further concur in the dismissal of the allegation that the District engaged in conditional bargaining in violation of EERA section 3543.5(c). I write separately, however, to distance myself from the majority's discussion on this issue.

Finally, I concur in the dismissal of the allegation that the District violated section 3543.5(d) by unlawfully assisting the Academic Senate when it granted the Academic Senate more released time.

Reasonable Released Time Amount

The ALJ determined that based on the circumstances in this District, six faculty load credits (FLC) was not a reasonable

amount of released time under EERA section 3543.1(c).[1] By denying the Federation a reasonable amount of released time, the ALJ concluded that the District interfered with the Federation's right to represent its members in violation of section 3543.5(b).

In Magnolia School District (1977) EERB Decision No. 19, (Magnolia),[2] the Public Employment Relations Board (PERB or Board) established the policy underlying the right to reasonable released time found in section 3543.1(c). The Board stated:

> "Reasonable released time" means, at least, that the District has exhibited an open attitude in its consideration of the amount of released time to be allowed so that the amount is appropriate to the circumstances of the negotiations. The District may have to readjust its allotment of released time based upon the reasonable needs of the District, the number of hours spent in negotiations, the number of employees on the employee organization's negotiating team, the progress of the negotiations and other relevant factors. A district's policy does not provide for reasonable periods of released time if the policy is unyielding to changing circumstances.

The Board has further concluded that the "Legislature considered the matter of released time too important to the statutory scheme to be left either to the employer's discretion or entirely to the vagaries of negotiations." (Anaheim Union High School District (1981) PERB Decision No. 177, p. 11,

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[1]EERA section 3543.1(c) states, in pertinent part:

> 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.

[2]Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.

(Anaheim).) Thus, there exists in section 3543.1(c) a "minimum released-time standard . . . against which the parties' good faith in negotiating on the subject could be measured." (Id.) Whether the amount of released time is reasonable is a question of fact which must be determined based on the circumstances of each case. (Sierra Joint Community College District (1981) PERB Decision No. 179.)

In this case, the Federation first received six FLCs of released time in 1987, at an annual cost to the District of approximately $8,000. While the amount of released time afforded the Federation over the last three years remained constant, the amount of financial resources channeled by the District into grievance processing and negotiations during this period increased dramatically.

The Federation documented the time spent by Federation representatives in processing grievances and negotiations. The evidence shows that the number and complexity of grievances increased over this period, requiring Federation representatives to expend time in the resolution of grievances well beyond the amount of available released time. For example, the chapter chairpersons charged with contract administration at each of the three campuses spent an average of 11 hours per week in representational functions and grievance handling, yet they received no released time. Other Federation representatives routinely spent varying amounts of time in negotiations, without the benefit of released time.

In contrast, the District's bargaining team was made up of an in-house chief negotiator, outside legal counsel, and other District employees. The increasing amount of District resources directed into grievance processing and negotiations in the past three years strongly supports the Federation's claim that the current allotment of released time is not reasonable.

As noted by the ALJ, the Federation sufficiently documented its need for more released time in the areas of negotiation and processing of grievances. While six FLCs of released time may have been reasonable in 1987, it is apparent that circumstances in the District have changed and the need for released time has greatly increased. Yet the amount of released time awarded to the Federation remains fixed at the 1987 level.

These facts lead to the conclusion that the amount of released time granted to the Federation does not satisfy the "minimum released time standard" of Anaheim and, therefore, is not reasonable under section 3543.1(c). By refusing to award additional released time, the District has adopted a policy which "is unyielding to changing circumstances" (Magnolia) and creates a "dominance over the process" which was rejected by the Board in Anaheim.

In further support of its argument, the Federation contends that the amount of released time in other community college districts is relevant and should be taken into account. The District argues that use of such evidence is extraneous as the

bargaining requirements of other districts are too varied to provide appropriate comparison.

In determining reasonable released time under section 3543.1(c), the Board has held that "evidence of practices in other districts may be relevant and probative." (Sierra Joint Community College District, supra, PERB Decision No. 179, p. 7.) The ALJ appropriately noted that while evidence of released time granted in other community college districts was not dispositive of the matter in this case, it lends support to the conclusion that six FLCs of released time is not reasonable for a bargaining unit consisting of approximately 1,100 faculty spread over three campuses.

Based on the foregoing, I concur in the ALJ's determination that six FLCs is not a reasonable amount of released time pursuant to section 3543.1(c). By refusing to grant more released time, the District interfered with the Federation's right to represent its members in violation of section 3543.5(b).

The majority seeks to overrule the Board's longstanding precedent regarding released time under EERA, as embodied in Magnolia and Anaheim. The majority compares the reasonable released time provisions in EERA section 3543.1(c) with the differing released time provisions of the Ralph C. Dills Act (Dills Act)[3] and the Higher Education Employer-Employee Relations

[3]The Dills Act is codified at Government Code section 3512 et seq. Section 3518.5 states:

> A reasonable number of employee representatives of recognized employee organizations shall be granted

Act (HEERA).[4] The majority concludes that although a specific provision found in the Dills Act and HEERA is not included in the EERA released time section, each of these statutes is to be applied identically, with the effect of barring the Board from determining whether an employee organization has been granted its statutory right to a reasonable amount of released time under EERA when a memorandum of understanding (MOU) is in effect.

I expressly reject this view.

The general principles of statutory construction provide that "where a statute contains a given provision with reference to one subject, the omission of such provision from a similar statute containing a related subject is significant to show that a different intention existed." (Cumero v. PERB (1989) 49 Cal.3d

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> reasonable time off without loss of compensation or other benefits when formally meeting and conferring with representatives of the state on matters within the scope of representation.
>
> This section shall apply only to state employees, as defined by subdivision (c) of Section 3513. and only for periods when a memorandum of understanding is not in effect.
> (Emphasis added.)

[4]HEERA is codified at Government Code section 3560 et seq. Section 3569 states:

> A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released or reassigned time without loss of compensation when engaged in meeting and conferring and for the processing of grievances prior to the adoption of the initial memorandum of understanding. When a memorandum of understanding is in effect, released or reassigned time shall be in accordance with the memorandum.
> (Emphasis added.)

575, 596 [262 Cal.Rptr.46].) In Regents of University of California v. PERB (1985) 168 Cal.App.3d 937 [214 Cal.Rptr. 698], the court reversed the Board's decision when it found the Board without authority to "rewrite the statute to suit its notion of what the Legislature must have intended" when the Board ignored the omission of certain language from the provisions of HEERA. The court concluded the Legislature would be rendered nearly powerless to make changes in the law if the courts were to permit the Board to interpret statutes to suit the Board's favored construction.

EERA section 3543.1(c) does not contain a provision limiting the statutory right to reasonable released time to periods when an MOU is in effect as do the Dills Act and HEERA. To interpret EERA section 3543.1(c) as if it does contain such a provision is not only without any legal basis, it is to subject released time under EERA "entirely to the vagaries of negotiations" and reverse the Board's longstanding policy as enunciated in Magnolia and Anaheim. I reject the majority's misguided analysis.

Conditional Bargaining

The Federation alleged that the District unlawfully conditioned agreement to the contract on the Federation's waiver of its statutory right to reasonable released time. I concur in the majority's dismissal of the conditional bargaining allegation to the extent that the discussion addresses released time as a mandatory subject of bargaining.

The majority further analyzes released time as a statutory right, however, and reaches an impractical result. The majority contends that the special statutory status accorded released time under EERA[5] bars an employer from reaching impasse on the subject of released time or implementing a released time proposal as part of its last, best and final offer. This conclusion leads to results which are disruptive of the collective bargaining process. The inability to implement a provision concerning released time as part of a last, best and final offer, even when that provision is not disputed by the parties, creates a scenario in which no released time provision may be in effect. The majority is silent as to the status of released time under these circumstances, and provides no guidance as to how this disruptive situation is to be resolved. This uncertainty is inherently contradictory of EERA's goal of expeditious resolution of the bargaining process.

As a mandatory subject of bargaining, the traditional bargaining process, including bargaining through impasse and implementation continues to attach to released time. An exclusive representative's statutory right to a reasonable amount of released time is not relinquished in the bargaining process, however, since the Board has determined that reasonable released time is not to be left "entirely to the vagaries of

[5]The majority does not reconcile its finding of the special statutory status of released time under EERA with its earlier decision to limit that right to periods when a memorandum of understanding is not in effect, even though EERA contains no such limitation.

negotiations." (Anaheim.) On the contrary, the Board has also determined that a minimum released time standard exists, "a standard against which the parties' good faith in negotiating on the subject could be measured." (Id.) This approach encourages collective negotiations on the subject of released time, while maintaining an avenue for consideration by PERB of the statutory right to reasonable released time when the Board determines that it is appropriate to do so.

I see no legal or policy based justification for replacing this longstanding Board approach with the uncertainty and disruption which follows from the majority's analysis, and I wish to distance myself from it.

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-1414, San Mateo Federation of Teachers, AFT Local 1493, AFL-CIO v. San Mateo County Community College District, in which all parties had the right to participate, it has been found that the San Mateo County Community College District (District) has violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c) and (e).

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

A. CEASE AND DESIST FROM:

1. Refusing to negotiate in good faith about released time for meeting and negotiating and for the processing of grievances.

2. By the same conduct during mediation, refusing to participate in good faith in the impasse procedures.

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

1. Upon request by the Federation, negotiate in good faith about released time for meeting and negotiating and for the processing of grievances through mediation and factfinding, if necessary.

Dated: _____ SAN MATEO COUNTY COMMUNITY COLLEGE 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.