STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOS ANGELES CITY AND COUNTY SCHOOL EMPLOYEES UNION, LOCAL 99, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,	)	
Charging Party,	)	Case No. LA-CE-3189
v.	)	PERB Decision No. 1061
LOS ANGELES UNIFIED SCHOOL DISTRICT,	)	October 6, 1994
Respondent.	)	

Appearances: Taylor, Roth, Bush & Geffner by Hope J. Singer, Attorney, for Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL-CIO; Jesús Estrada-Meléndez, Attorney, for Los Angeles Unified School District.

Before Caffrey, Carlyle and Garcia, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Los Angeles Unified School District (District) to a PERB administrative law judge's (ALJ) proposed decision. The ALJ found that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] when it

[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

denied the request of the Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL-CIO (SEIU) to review certain magazines in preparation for an appeal of a disciplinary action before the District Personnel Commission.

The Board has reviewed the entire record in this case, including the proposed decision, transcript, exhibits, the District's statement of exceptions and SEIU's response thereto.[2] Based upon this review, the Board reverses the decision of the ALJ and dismisses the complaint and unfair practice charge in accordance with the following discussion.

FACTUAL SUMMARY

SEIU and the District are employee organization and public school employer respectively, as defined in the EERA. SEIU is the exclusive representative of Unit C, Operations-Support Services within the District.

Roberta DiMarco (DiMarco) provides custodial services as an employee of the District. As a result of an alleged use of profanity directed at her supervisor on April 15, 1991, DiMarco

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> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

[2]The Board denied the District's request for oral argument in this case.

was notified of the District's intent to suspend her for 20 days. During a pre-disciplinary meeting with District and SEIU representatives, DiMarco claimed her outburst was provoked by repeated acts of sexual harassment by her supervisor, Joe Guerrero (Guerrero), the plant manager at Canoga Park Elementary School. DiMarco alleged that those acts included requiring her to view pornographic magazines. As a result of DiMarco's allegations, Sue Campbell (Campbell), a District personnel representative, went to Guerrero's office and took possession of three magazines from the file cabinet maintained by Guerrero.[3]

When the District refused to modify the proposed suspension, DiMarco appealed the disciplinary action to the Personnel Commission.[4] Hope Singer (Singer) was retained by SEIU to serve as counsel for DiMarco in the appeal before the Personnel Commission. At Singer's direction, late in 1991 or early in 1992, Jim Oliver (Oliver), a SEIU field organizer, went to Campbell's office and asked to look at the magazines. Campbell made the magazines available for Oliver's inspection. Oliver viewed them briefly and stated that he would want to look at them

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[3]A forth magazine was obtained by SEIU representative William Freeman from a unit member who, concerned that children might find it, retrieved it from a trash can located on the school grounds. The magazine was turned over to the District during a pre-disciplinary meeting with DiMarco.

[4]Pursuant to the Education Code, disciplinary actions in this District are appealed to the Personnel Commission. Accordingly, the parties' collective bargaining agreement (CBA) specifically provides that appeals of disciplinary actions "are beyond the scope" of the CBA grievance procedures. (Article V Section 1.1.)

again. Campbell indicated that further review would not be a problem.

Beginning in mid-March 1992, Singer made various requests to the District for an opportunity to review the magazines in preparation for the April 30, 1992 Personnel Commission hearing. Singer insisted that she be allowed to view the magazines in private with DiMarco. There is some dispute as to whether Singer actually viewed the magazines prior to the hearing. Singer testified that she did not see them prior to the Personnel Commission hearing. Campbell testified that Singer viewed the magazines on March 25, 1992 during a meeting attended by Singer, Campbell and counsel for the District, Jesús Estrada-Meléndez, at which time Singer also reviewed DiMarco's personnel file. The ALJ resolved this conflict by crediting Singer's testimony.

The District responded to Singer's requests by reminding her of the Personnel Commission's procedure for obtaining access to the magazines by subpoena. In its letter of April 7, 1992, the District asserted that Singer's requested review of the magazines in preparation for the Personnel Commission hearing was not necessary and relevant to SEIU's collective bargaining obligations under EERA. The District further explained its refusal to voluntarily turn over the magazines in the absence of a Personnel Commission subpoena, by expressing concern that if Singer and DiMarco were to review the magazines privately before the hearing, DiMarco's testimony might be unduly influenced or altered. The District was also concerned with maintaining the

proper chain of evidence in the event of additional litigation which could involve the magazines.

Singer did not seek access to the magazines through a subpoena from the Personnel Commission. The District brought the magazines to the Personnel Commission hearing where Singer had access to them. After several days of hearings, the Personnel Commission hearing officer recommended that DiMarco's suspension be reduced to one day. Before the Personnel Commission acted on that recommendation, the District withdrew the proposed disciplinary action.

On May 5, 1992, SEIU filed the instant unfair practice charge. The PERB general counsel issued a complaint against the District on November 23, 1992, alleging that the District failed to bargain in good faith when it refused to provide the requested magazines to SEIU.

ALJ'S DECISION

In finding that the District unlawfully refused to provide the magazines in the absence of a Personnel Commission subpoena, the ALJ rejected the District's contention that SEIU's request for information was not made in its EERA-based representational capacity. The ALJ found that regardless of whether SEIU had a duty under EERA to represent DiMarco before the Personnel Commission, SEIU "had an ongoing duty and responsibility to represent Ms. DiMarco in her employment relationship with the District."

The ALJ also found that although SEIU did not specifically request the magazines for EERA-based representation purposes, they would be useful "for monitoring the contractual provisions of the contract relevant to sex discrimination." In summary, the ALJ stated:

> Although these reasons for production were not specifically stated in Singer's correspondence, the relevance of the material for that purpose is obvious and the District never challenged relevancy. The union is not required to show the precise relevance of information unless the employer rebuts the presumption of relevance.

DISTRICT'S EXCEPTIONS

On appeal, the District asserts that SEIU's review of the magazines requested to prepare for DiMarco's Personnel Commission hearing was not necessary and relevant to its representation of employees within the terms of EERA. The District argues that SEIU's obligations and rights under EERA do not extend to its representation of members in extra-contractual proceedings involving a separate administrative agency such as the Personnel Commission.

The District contends that SEIU's requests for the magazines were made solely for the purpose of preparing for the Personnel Commission hearing. SEIU did not inform the District that the magazines were needed for any other purpose, such as administration of the collective bargaining agreement. Thus, the District argues, SEIU did not request the magazines for general representational purposes in "meaningful and clear terms."

The District also contends that SEIU's requests to inspect the magazines in private with DiMarco would break the chain of custody and thereby breach applicable laws of evidence as well as federal and state guidelines and regulations on sexual harassment complaints.[5]

SEIU'S RESPONSE

SEIU rejects the District's arguments and concurs in the findings of the ALJ.[6] Based on Lane v. I.O.U.E. Stationary Engineers (1989) 212 Cal.App.3d 164 [260 Cal.Rptr. 634] (Lane), SEIU contends that it has a duty of fair representation to DiMarco since it elected to represent her at the Personnel Commission hearing, an extra-contractual forum. SEIU argues that once this duty attaches to the union, it creates a duty on the part of the employer to treat the union as it would in situations involving any EERA or contractually-based representational forum. Thus, SEIU contends that to enable SEIU to fulfill its elective representational obligation to DiMarco in the Personnel Commission hearing, EERA requires the employer to provide the union with information just as it does when the representation occurs in an EERA-based setting such as a grievance proceeding. Therefore, SEIU asserts that the District was obligated to

[5]The District offered other alternative arguments in its exceptions. The Board finds it unnecessary to address these arguments in deciding this case.

[6]In Los Angeles Unified School District (1993) PERB Order No. Ad-249, the Board granted SEIU an extension of time to file a response to the District's statement of exceptions.

provide the information without requiring SEIU to seek it through the Personnel Commission procedures.[7]

DISCUSSION

This case presents the issue of whether the District violated EERA section 3543.5(a), (b) and (c) when it failed and refused to provide SEIU with access to magazines which it requested for use in representing a bargaining unit member in an appeal before the Personnel Commission.[8]

It is well established that under EERA an exclusive representative is entitled to information sufficient to enable it to understand and intelligently discharge its duty to represent bargaining unit members. "Necessary and relevant" information must be furnished for purposes of representing employees in negotiations for a future contract and for policing the administration of an existing agreement. (Stockton Unified School District (1980) PERB Decision No. 143; Chula Vista City School District (1990) PERB Decision No. 834; Zerger, Cal. Public Sector Labor Relations (1989) Ch. 30, sec. 30.03, p. 12.) Absent a valid excuse, an employer's refusal to provide necessary and

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'Following the filing deadline, on December 6, 1993, the District filed a supplemental brief in reply to SEIU's response. On December 28, 1993, SEIU also filed a supplemental response consisting of a motion urging the Board to reject the District's supplemental brief. In its motion, SEIU also responded to the arguments raised in the District's brief. The Board declines to consider either party's supplemental brief.

[8]It is undisputed that the Personnel Commission had a procedure which provided SEIU with access to the magazines in question. This fact is irrelevant to the issue of whether the District was mandated by EERA to provide SEIU with the requested information.

relevant information is evidence of bad faith bargaining. (Stockton Unified School District, supra, PERB Decision No. 143.)

Certain information requested by an exclusive representative is presumed to be relevant. The Board has found various specific types of information relevant when requested for purposes of collective bargaining or contract administration. (Stockton Unified School District, supra, PERB Decision No. 143 (health insurance data); Trustees of the California State University (1987) PERB Decision No. 613-H (wage survey data); Newark Unified School District (1991) PERB Decision No. 864 (staffing and enrollment projections).) If the relevance of the requested information is rebutted by the employer, the exclusive representative must establish how the information is relevant to its EERA-based responsibilities such as collective bargaining or administration of the CBA. (Trustees of the California State University, supra, PERB Decision No. 613-H; San Diego Newspaper Guild v. NLRB (9th Cir. 1977) 548 F.2d 863 [94 LRRM 2923] (San Diego Newspaper Guild).)

Applying this precedent to the instant case, it is apparent that the magazines requested by SEIU, while relevant to SEIU's representation of DiMarco before the Personnel Commission, do not carry with them the presumptive relevance to SEIU's EERA-based obligations of information such as wage or health insurance data. The ALJ's conclusion that the relevance of the magazines to SEIU's monitoring of sex discrimination provisions of the CBA "is obvious," is simply incorrect. The District balked at providing

the magazines to Singer precisely because it was not obvious how they were relevant to SEIU's EERA-based responsibilities in the area of contract administration or collective bargaining.

SEIU responded to the District, not by addressing the issue of relevance, but by insisting that it was entitled to access to the magazines under EERA, and was not required to utilize the Personnel Commission procedures to obtain them. In its letter of April 7, 1992, the District contested SEIU's assertion, arguing that EERA does not require the disclosure of information for use in a forum outside of an exclusive representative's contractual jurisdiction. The District reiterated that the magazines were accessible through the procedures of the Personnel Commission.

Therefore, contrary to the ALJ's finding that "the District never challenged relevancy," the record is clear that the District did so in these communications with SEIU. The Board concludes that the District thereby rebutted any presumption of relevance which could be attributed to the magazines, and the burden shifted to SEIU to establish that access to them was necessary and relevant for EERA-based purposes such as developing proposals for collective bargaining or administering the provisions of the existing agreement.

In San Diego Newspaper Guild, the court described this burden stating:

> . . . the showing by the union must be more than a mere concoction of some general theory which explains how the information would be useful to the union in determining if the employer has committed some unknown contract violation.

In this case, Singer testified in response to questions of the ALJ that she and Oliver had generally discussed sexual harassment issues in the District around the time of DiMarco's Personnel Commission hearing. Singer also testified, however, that the union had recently come out of receivership and SEIU's primary focus was to address its backlog of cases. It is evident from the record that SEIU's goal was to handle the backlog of its bargaining unit members' cases, assisted by outside counsel, rather than research and develop bargaining proposals. Singer stated repeatedly that the review of the magazines was requested solely to prepare for DiMarco's disciplinary hearing before the Personnel Commission. The record is devoid of any evidence that the District was made aware of any need or desire by SEIU to acquire the magazines for purposes of monitoring sexual harassment issues in the District in accordance with the parties' CBA, for preparing bargaining proposals for presentation to the District, or for use in other EERA-based representational activity.

SEIU's response to the ALJ during the hearing that the magazines were essential to its monitoring of sex discrimination provisions of the CBA is clearly pretextual. An exclusive representative must advise the employer of the relevance of requested information, once that relevance is rebutted. This burden is not met by advancing an argument for the relevance of the information in dispute for the first time during a PERB-conducted hearing. It is evident in this case that SEIU failed

to demonstrate the relevance of the magazines to its EERA-based representational responsibilities when challenged by the District, and thus failed to meet the burden described in San Diego Newspaper Guild.[9]

Alternatively, SEIU cites Los Angeles Unified School District (1990) PERB Decision No. 835 (Los Angeles USD) to support its assertion that an employer's duty to provide requested information for collective bargaining and grievance proceedings has been extended by the Board to proceedings involving the representation of bargaining unit members in extra-contractual forums. Thus, SEIU asserts that the District was required to provide the requested magazines for use in DiMarco's hearing before the Personnel Commission, an extra-contractual forum, without SEIU bearing the burden of demonstrating their relevance to SEIU's bargaining or CBA administration responsibilities.

The reliance on Los Angeles USD is misplaced. In that case, the Board affirmed a Board agent's dismissal of an unfair practice charge which alleged, among other things, that the employer failed to provide information necessary for a Skelly[10]

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[9]The Board emphasizes that information requested by an exclusive representative for use in representing an employee in an extra-contractual forum can be relevant to its EERA-based responsibilities, thereby requiring the employer to furnish the information absent a valid excuse. It is the relevance of the requested information and not the nature of the forum for which it is requested, which determines whether the employer is mandated by EERA to provide it.

[10]Skelly v. State Personnel Bd. (1975) 15 Cal. 3d 194 [124 Cal.Rptr. 14] .

pre-disciplinary action meeting. The Board held, as a threshold matter, that a request for information is required before any duty to provide information attaches to the employer. In the absence of a proper request by the employee organization, the charge in Los Angeles USD was dismissed. The Board did not reach the issue and did not conclude in that case that an employer is required to provide information for use in an extra-contractual setting if it has been properly requested by an employee organization, regardless of its relevance to EERA-based responsibilities. Accordingly, this argument is without merit and is rejected.

SEIU further argues that although it has no duty under EERA to represent DiMarco before the Personnel Commission, under Lane, it acquired a duty equivalent to the EERA duty of fair representation when it voluntarily undertook DiMarco's representation before the Personnel Commission. SEIU argues that once this duty attaches to the union under Lane, a concurrent duty attaches to the employer to provide to the union all its rights as an exclusive representative under EERA. Therefore, SEIU asserts that once it assumed the representation of DiMarco before the Personnel Commission, the District was required under EERA to provide the magazines..

The Board has previously determined that an EERA duty of fair representation does not apply to a union's representation in an extra-contractual forum because that forum is unconnected to any aspect of negotiation or administration of a collective

bargaining agreement and the union does not exclusively control the means to the particular remedy. (San Francisco Classroom Teachers Association, CTA/NEA (Chestangue) (1985) PERB Decision No. 544.) The Board has not ruled on what duty or standard of care, if any, attaches to union representation in an extra-contractual forum, and finds it unnecessary to reach that issue in this case. (California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S.)

Lane originated in the context of the Meyers-Milias-Brown Act.[11] In ruling on the appeal of a demurrer to a complaint, the court in Lane determined that the union in that case owed a duty "akin" to that of fair representation when it voluntarily undertook representation of a bargaining unit member in an extra-contractual forum. While it addressed the union's representational duty to its own bargaining unit member, Lane categorically did not extend to the employer all its corresponding collective bargaining obligations simply because the exclusive representative voluntarily undertook a representational responsibility in excess of its obligation. Consequently, the Board rejects SEIU's contention that the District is obligated under Lane to provide an exclusive representative with information requested for use in representing a member in an extra-contractual forum regardless of its relevance to EERA-based responsibilities such as collective bargaining or administration of the CBA. To rule otherwise would

[11]Government Code section 3500 et seq.

potentially extend an employer's EERA obligation to provide information to situations normally outside of the collective bargaining realm, such as workers' compensation insurance and unemployment insurance appeals, and Equal Employment Opportunity Commission or Fair Employment and Housing Commission proceedings, simply because the exclusive representative voluntarily undertook representation.

In summary, the record clearly indicates, and SEIU emphasizes in its response to the District's exceptions, that it requested access to the magazines for use in representing DiMarco before the Personnel Commission. The District, contesting the assertion that EERA requires disclosure of information for use solely in an extra-contractual forum, rebutted the relevance of the magazines to SEIU's collective bargaining or CBA administration responsibilities. Faced with the burden of demonstrating the relevance of the magazines to its EERA-based responsibilities, SEIU failed to do so. Therefore, the Board reverses the ALJ's finding that the District violated EERA section 3543.5(a), (b) and (c) when it refused to provide the magazines to SEIU.

ORDER

The complaint and unfair practice charge in Case No. LA-CE-3189 is hereby DISMISSED.

Member Garcia's concurrence begins on page 16.
Member Carlyle's dissent begins on page 22.

GARCIA, Member, concurring: I concur in the lead opinion's conclusion that the Los Angeles Unified School District (District) did not violate section 3543.5(a), (b) or (c) of the Educational Employment Relations Act (EERA or Act) when it refused to provide certain magazines to the Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL-CIO (SEIU). However, my reasons for this conclusion differ from those of the lead opinion.

SEIU argued that under Los Angeles Unified School District (1990) PERB Decision No. 835 (Los Angeles USD), an employer's duty to provide requested information for collective bargaining and grievance proceedings extends to proceedings involving the representation of bargaining unit members in extra-contractual forums. Member Caffrey's opinion states that Los Angeles USD is not applicable to this case because the Public Employment Relations Board (PERB or Board) never reached that issue. I disagree; as I read Los Angeles USD, that case and other PERB cases[1] establish that an exclusive representative has a right under EERA to information necessary and relevant to fulfill its representation obligations. The National Labor Relations Board (NLRB) and United States Supreme Court have made this clear in

[1]See Los Angeles USD at p. 3, citing Stockton Unified School District (1980) PERB Decision No. 143 at p. 13, that the exclusive representative is entitled to all information that is "necessary and relevant" to discharging its duty to represent unit employees; an employer's refusal to provide such information evidences bad faith bargaining unless the employer can supply adequate reasons why it cannot supply the information.

cases under their jurisdiction[2] and with respect to that point, I agree with Member Carlyle's dissent. Under the federal precedent, the employer's duty to furnish information extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement.[3]

Los Angeles USD is consistent with NLRB precedent in that an employer's duty to supply the exclusive representative with information is subject to certain limitations. The duty does not arise until the union makes a request or demand that the information be furnished.[4] Once the union makes a good-faith demand for relevant and necessary information, the employer must

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[2]PERB has previously noted that federal precedents are relevant for guidance in interpreting EERA language when the statutes are similar. (Sweetwater Union High School District (1976) EERB Decision No. 4 (prior to Jan. 1, 1978, PERB was known as the Educational Employment Relations Board), and see Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]. Both the federal National Labor Relations Act (NLRA) and EERA establish the duty to negotiate in good faith. Section 8(a)(5) of the NLRA and section 3543.5(c) of the EERA make it an unfair practice for an employer to fail to meet and negotiate in good faith with an exclusive representative.

[3]See NLRB v. Acme Industrial Co. (1967) 385 U.S. 432 [64 LRRM 2069], which held:

> There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.

[4]NLRB v. Boston Herald-Traveler Corp. (1st Cir. 1954) 210 F.2d 134 [33 LRRM 2435], enforcing (1953) 102 NLRB 627 [31 LRRM 1337]; Westinghouse Elec. Supply Co. v. NLRB (3rd Cir. 1952) 196 F.2d 1012 [30 LRRM 2169].

make a diligent effort to provide the information in a reasonably-prompt manner and useful form.[5]

With these principles in mind, I read Los Angeles USD as placing a burden on the party requesting the information to explain the necessity and relevance of the information so that the potential supplier of the information can understand its obligation when that is not clear.[6] When it receives such a request, the supplier of the information has a duty to make the information available in a manner that is useful to the requester, yet may safeguard the documents themselves;[7] the exact conditions of access should be determined on a case-by-case basis.

In this case, in late 1991 or early 1992 an SEIU Field Organizer, Jim Oliver (Oliver) went to the District office where the magazines were being kept and requested to see the magazines. Oliver's stated purpose was to verify some dates to make certain that the magazines seized were the ones Roberta DiMarco (DiMarco)

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[5]General Elec. Co. (1988) 290 NLRB 1138 [131 LRRM 1230]; Quaker Oats Co. (1983) NLRB Gen. Counsel Advice Memo., Case No. 4-CA-13849 [114 LRRM 1277].

[6]Szabo v. U.S. Marine Corp. (1987) 819 F.2d 714 [125 LRRM 2572].

[7]For example, if the documents are unique or could be used for other purposes not contemplated by EERA, it would not be unreasonable to arrange for the documents to be viewed under controlled circumstances. See E.W. Buschman Co. v. NLRB (6th Cir. 1987) 820 F.2d 206 [125 LRRM 2642]; Detroit Edison Co. v. NLRB (1979) 440 U.S. 301 [100 LRRM 2728].

had allegedly been forced to view.[8] District personnel representative Sue Campbell (Campbell) made the magazines available to Oliver. He made note of some information and indicated he would want to look at them again; Campbell indicated that would not be a problem.

On or about March 25, 1992, SEIU's attorney made another request for the magazines to prepare for the April 30, 1992 Personnel Commission disciplinary hearing. The District responded that it would comply fully with a subpoena[9] to produce the magazines at the hearing; alternately, it offered to provide the documents earlier if SEIU agreed to certain conditions.[10]

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[8]Under Stockton Unified School District, supra, (1980) PERB Decision No. 143, and Acme, supra. 385 U.S. 432, I find that this is a valid reason since it is necessary and relevant to the union's duty to properly represent unit employees.

[9]The proposed decision states that, under the Personnel Commission process, subpoenas for documents are returnable the first day of a hearing only. Thus, the administrative law judge found that use of a Personnel Commission subpoena would not have permitted SEIU to prepare for the hearing.

[10]By letter dated April 3, 1992, the District offered to comply "promptly" with the union's request:

> . . . if you [SEIU attorney Hope Singer] can articulate in writing the purpose of your request to review them and if you agree unconditionally and also in writing to treat this matter as having no precedential value. In other words neither your office nor any of your clients, present or future, will refer to this matter for any purpose whatsoever. (Emphasis in original.)

SEIU did not accept those conditions, and the District continued to refuse to provide the magazines in advance of the hearing.[11]

SEIU contends that Lane v. I.U.O.E. Stationary Engineers (1982) 212 Cal.App.3d 164 [260 Cal.Rptr. 634] (Lane) created an obligation to represent employees and the information is necessary and relevant to meet that judicially created obligation. SEIU's view of Lane is erroneous and represents a misinterpretation of the case which seems to be shared by many contestants before PERB. This is a good time to clear the air.

Simply put, Lane is not a labor law case and represents precedent only on the issues of pleading, demurrer and the standard of care to be employed when measuring liability in implied contract cases.[12] Lane is not an applicable precedent to cite in any case before PERB.

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[11]The District representative testified that this refusal was based on a concern that if Hope Singer (Singer) and DiMarco had an opportunity to review the magazines before the hearing, DiMarco's testimony might be created or fabricated.

[12]Although it arose in a labor context, Lane was a breach of contract case in which a member sued his union for negligence in representation. The union was not obliged to represent the member but volunteered to undertake representation. On appeal, the court held that a duty of care could arise when the union assumed representation and then went on to define the standard of care that would apply if the duty arose. The court held that the standard of care, where the duty exists, is to be the same that applies to fair representation when unions represent members -- the representative must act fairly, honestly and in good faith, and must refrain from acting arbitrarily, discriminatorily, or in bad faith. In Lane, the court did not find that the facts and circumstances created a contract or duty to represent. Instead, the court reversed the decision of the lower court on pleading issues and returned the case.

The record shows that the District made the magazines available to SEIU on at least two occasions: to Oliver several months before the hearing, and to Singer on the first day of the disciplinary hearing.[13] Therefore, the District did provide access to the documents in a useful form, under controls that were reasonable, consistent with PERB and NLRB case law discussed above. Thus, there was no violation of EERA since the information was available and SEIU failed to establish that the District refused to provide the material or unduly limited access.

[13]See proposed decision, p. 8. As discussed above, SEIU could have subpoenaed the documents pursuant to the Personnel Commission process in their collective bargaining agreement, but the District apparently provided them without being subpoenaed.

CARLYLE, Member, dissenting: For the reasons set forth herein, I would affirm the proposed decision of the administrative law judge (ALJ) in holding that the Los Angeles Unified School District (District) violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA) when it denied the Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL-CIO's (SEIU or Local 99) request to review certain magazines in preparation for an appeal of a disciplinary action before the District Personnel Commission. Accordingly, I issue this dissent.

I disagree with the lead opinion's incorrect holding and with the myopic analysis which lead to that holding.

The issue as phrased by the ALJ on page 12 of the proposed decision was the one properly before her then and is the one properly before the Public Employment Relations Board (PERB or Board) now:

> Did the District violate section 3543.5(a), (b) and (c) of the EERA when it failed and refused to provide Local 99 with an opportunity to review certain magazines, which were relevant to settlement discussions concerning a disciplinary action and which were needed to prepare for the representation of an employee before the Personnel Commission.

I note that the collective bargaining agreement (CBA) between the District and Local 99 specifically defined grievance and the procedure to be utilized, exempting from its coverage:

> . . . those matters for which other methods of adjustment are provided by the District, such as reductions of force, performance evaluations, disciplinary matters. . . . (CBA, Art. V, sec. 1.1.)

I also note that notwithstanding the lead opinion's uncited assertion to the contrary,[1] the parties did have the ability to have work-related suspensions of employees covered by a procedure contained in the CBA but chose not to do so. First, Education Code section 45260(a) states in relevant part:

> The commission shall prescribe, amend, and interpret, subject to this article, such rules as may be necessary to insure the efficiency of the service and the selection and retention of employees upon a basis of merit and fitness. The rules shall not apply to bargaining unit members if the subject matter is within the scope of representation, as defined in Section 3543.2 of the Government Code, and is included in a negotiated agreement between the governing board and that unit.

Second, EERA section 3543.2 clearly includes such a concept under "[t]erms and conditions of employment" because it contains as a subject "procedures to be used for the evaluation of employees" as well as specifically mentioning "procedures for processing grievances." A process to ensure that work-related discipline can be properly challenged so that, if unwarranted, an employee's record can be kept in proper order when evaluations are performed, would clearly appear to be an integral part of "procedures to be used for evaluation of employees." Finally, the language contained in Education Code section 45305 also gives no comfort to the position that all disciplinary actions, including suspensions, are appealed to a Personnel Commission.

Now, with the preliminaries out of the way so that the proper foundation and position has been laid, what this case

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[1]Footnote 4 in the lead opinion makes no sense as written. I am unable to find a section in the Education Code which stands for the unsupported statement contained in that footnote.

really turns on is the language in Stockton Unified School District (1980) PERB Decision No. 143 (Stockton) and its subsequent application/interpretation. The other PERB cases cited by the lead opinion are premised on this case and the language contained on page 13 in that decision:

> In general, the exclusive representative is entitled to all information that is necessary and relevant to discharging its duty to represent unit employees.

Stockton went on to determine that "necessary and relevant" would certainly include information pertaining immediately to mandatory subjects of bargaining; hence, the beginning of a path of cases relying upon Stockton in a collective bargaining table atmosphere as cited in the lead opinion. All of those cases are fine, but none stand for the proposition that the information or documents must be turned over when requested or violate EERA only when pursuant to negotiations or only in carrying out the terms of the collective bargaining agreement as signed. Similarly, the discussion on "rebutting the relevance" contained in the lead opinion is also not dispositive of the real issue in this case.

Accordingly, I am unpersuaded that the "duty to represent" unit employees is confined to the negotiating table or to the "four corners" of the collective bargaining agreement. In Chula Vista City School District (1990) PERB Decision No. 834 (Chula Vista), the Board cited NLRB v. Acme Industrial Company (1967) 385 U.S. 432, 437-438 [64 LRRM 2069] for the proposition that requested information must be provided in the processing of grievances:

> . . . if it likely would be relevant and useful to the union's determination of the merits of the grievance and to their fulfillment of the union's statutory representation duties.

Some may point out that this case is not overly helpful because even though it introduces the concept of a union's statutory representation duties in a setting other than the negotiating table, it presumably involved the carrying out of the terms of the signed collective bargaining agreement. However, two weeks after deciding Chula Vista, the Board decided Los Angeles Unified School District (1990) PERB Decision No. 835 (Los Angeles USD). In this case, as properly noted by the ALJ, the non-exclusive representative maintained that it had a right to obtain from management copies of statements relevant to a Personnel Commission disciplinary proceeding (clearly, an "extra-contractual" forum). In a unanimous 3-0 decision in which all three members were also on the panel deciding Chula Vista, the Board did not even question the right of the material to be produced under EERA even though the forum involved was the Personnel Commission. It found no violation of EERA because the union had not made a request for copies of the documents.

If the nature of the forum was the deciding and critical factor, certainly the Board would have commented upon it, especially since all three PERB members had just decided Chula Vista two weeks earlier. In other words, it appears under PERB statutes and case law that the "duty to represent" (Stockton) and the "fulfillment of the union's statutory representation duties" (Chula Vista) are not necessarily limited

to the negotiating table or to what is solely contained in a signed collective bargaining agreement (Los Angeles USD).

Local 99, in an attempt to perhaps give an additional argument for its position, unfortunately cited Lane v. I.O.U.E. Stationary Engineers (1989) 212 Cal.App.3d 164 [260 Cal.Rptr. 634] for the proposition that when it exercised its duty to represent, it arguably exposed itself to a liability should it back out or do an extremely poor job, and thus in order to "balance the scales" it should be entitled to the requested documents. Lane or any other case or theory relative to the union's liability should it have backed out or faltered in its representational duties is, with all due respect, irrelevant to this case since those actions did not occur. Accordingly, it is not necessary to decide or opine in any fashion on the accuracy of the union's additional argument involving potential liability and thus the right to obtain the necessary documents.

Finally, I would proffer in addition to the previously cited statutes and case law reasoning, the compelling public policy argument as to why the lead opinion is simply wrong. A collective bargaining agreement is just that, a bargained document which collectively deals with the differences between management and represented employees. Once signed, it should be the one document utilized in resolving such differences or disputes to the maximum extent possible. Once signed, one of the most common, if not the most common, difference or dispute involves work-related discipline of employees.

It is unquestioned that the exclusive representative has the right, nay, the statutory duty if it chooses to exercise it and the employee is willing, to represent its members before tribunals/forums involving work-related discipline imposed by management. To have a lead opinion which short-sightedly, if not blindly, holds that any tribunal/forum not specifically part of the collective bargaining agreement means that the exclusive representative is not entitled to relevant documents under EERA (or any other Act under PERB's jurisdiction for that matter) in representing its union members in a work-related disciplinary hearing before that tribunal/forum means only one thing:

At every opportunity in the future, management will "take out" of every collective bargaining agreement as many forums as it can. It will seek to limit the scope of the grievance procedure, thus requiring more "extra-contractual" forums. It won't agree to retain or put in existing language on such subjects in the future, thus preventing their inclusion in the next collective bargaining agreement.

Some might say such a view is given to hyperbole. But just look at what happened in the instant case. The District suspended the affected employee for twenty days. It wouldn't give Local 99 the requested documents under EERA so that the union could defend its member, instead insisting that the clearly relevant material be obtained through the Personnel Commission. After finally getting the information and having it introduced at the hearing, the Personnel Commission ruled against the District

and reduced the suspension from twenty days to one. The District never even imposed the one-day suspension. Hyperbole? No way.

Some might say such a view misses the point of footnote 9 in the lead opinion. Again, no way. The disingenuous proposition contained therein deserves comment. The operative phrase in attempting to take focus away from extra-contractual forums in said footnote is if such requested information by the union is "relevant to its EERA-based responsibilities." However, the lead opinion has defined such "relevance" as limited to "purposes of collective bargaining or contract administration." And, if representing union members in disciplinary hearings is not in the collective bargaining agreement, then it is, by lead opinion definition, not within "contract administration." Accordingly, footnote 9 in the lead opinion does nothing to lessen or negate this portent of things to come.

Instead of a document designed to be inclusive, the lead opinion can only result in future agreements containing the bare minimum since such agreements will lessen, if not eliminate, the obligation of management to produce documents under laws within PERB's jurisdiction. Why? Because if the union's ability to represent its membership is not in the collective bargaining agreement, then that representation cannot qualify as "contract administration." Let the exclusive representative fend for itself in the other tribunal/forum. Maybe there will be a procedure to get the requested information, maybe not. Maybe the procedure will be extremely onerous and time consuming, maybe not. The lead opinion does not make these aspects a deciding

factor; nor can it, since they were not an issue in this case and thus were not litigated before the ALJ.[2]

The "parade of horribles" scenario on extra-contractual forums envisioned by the lead opinion, on the other hand, is given to hyperbole. The facts in this case do not just deal with an "extra-contractual" forum. They deal with such a forum for work related discipline. The reason why the parties are in the forum is just as critical, if not more so, than the forum itself. Similar to the reasoning utilized on pages 16-17 in California Union of Safety Employees (Coelho) (1994) PERB Decision No. 1032-S, the District initiated this forum by its suspension of an employee and should therefore be required to produce the relevant documents under EERA. After all, but for the actions of the District in imposing what turned out to be an unwarranted suspension to begin with, the parties would have never been before the Personnel Commission.

Outside of a union representing its members at the bargaining table, there is nothing more basic than the ability of the union to represent its members in work-related disciplinary hearings if that is the joint desire, regardless of what the tribunal/forum is called. Remember, this case deals only with work-related disciplinary hearings. A decision which impedes and dilutes that basic statutory right through misapplication of the facts and law and through hyperbole of consequences is wrong. It

[2]If anything, it appears from footnote 8 in the lead opinion that whether such a procedure is onerous, time consuming, or even exists would be irrelevant to whether or not EERA could be invoked.

is wrong based on PERB statutes. It is wrong based on PERB case law, and it is wrong based on sound public policy.

Fortunately, while there are two votes holding that there was no violation of EERA when the District refused to provide the magazines to Local 99, the reasoning of Member Garcia's concurring opinion clearly means that the lead opinion is in a minority of one on the issue that really counts: The employer's duty to furnish information extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement and that duty is not limited solely by the words contained in said collective bargaining agreement.

In other words, Member Garcia concluded no EERA violation because he concluded that the District had complied with EERA, not because EERA did not apply. While I do not agree with Member Garcia's "totality of circumstances" approach in analyzing whether or not a violation had occurred, what is most important is his reasoning and mine in determining that there was such an EERA based obligation on behalf of the District. Perhaps the light at the end of the tunnel for the union is not just yet the proverbial oncoming train.