

OVERRULED IN PART by Contra Costa Community College
District (2019) PERB Decision No. 2652



STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES)	
ASSOCIATION,)	
)	
Charging Party,)	Case Nos. LA-CE-3655
)	LA-CE-3682
v.)	
)	PERB Decision No. 1270
SAN BERNARDINO CITY UNIFIED SCHOOL)	
DISTRICT,)	June 22, 1998
)	
Respondent.)	
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Appearances; Alan S. Hersh and Madalyn J. Frazzini, Attorneys, for California School Employees Association; Atkinson, Andelson, Loya, Ruud & Romo by Sherry G. Gordon, Attorney, for San Bernardino City Unified School District.

Before Johnson, Dyer and Amador, Members.

DECISION

JOHNSON, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Bernardino City Unified School District (District) to a proposed decision of a PERB administrative law judge (ALJ) (attached). In his decision, the ALJ held that the District violated section 3543.5(a), (b), (c) and (d) of the Educational Employment Relations Act (EERA)¹ in various ways.

¹EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

It shall be unlawful for a public school employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights

The Board has reviewed the entire record in this case, including the proposed decision, the District's exceptions and the California School Employees Association's response.² The Board concurs that it is in the best interests of the parties and consistent with the purposes of the EERA to grant withdrawal, with prejudice, of those portions of the unfair practice charge and complaint in Case No. LA-CE-3682 that relate to the commuter policy allegations. The Board finds the remaining portions of the proposed decision to be free of prejudicial error and hereby adopts them as the decision of the Board itself.

ORDER

Based upon the foregoing findings of fact and conclusions of law, and upon the entire record in this matter, it is found the

guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

²The parties have jointly informed the Board that they have satisfactorily resolved their dispute concerning the District's commuter policy, and request that the Board issue an order allowing the withdrawal, with prejudice, of all allegations in Case No. LA-CE-3682 which concern the District's commuter policy, as well as the simultaneous withdrawal of all District exceptions to the proposed decision based upon the commuter policy allegations.

San Bernardino City Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b), (c) and (d), by: (1) unilaterally implementing sick leave review policies; (2) refusing to provide the California School Employees Association (CSEA) with commuter agreement information; (3) threatening CSEA; (4) refusing to provide CSEA with employee addresses; and (5) engaging in bad faith surface bargaining with CSEA.

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. Unilaterally implementing sick leave review policies within the scope of representation in the absence of a waiver of CSEA's right to negotiate.

2. Refusing, without legal justification, to provide CSEA with relevant and necessary information, including but not limited to employee addresses, upon a proper request by CSEA.

3. Threatening CSEA for protected activity.

4. Engaging in bad faith bargaining with CSEA.

5. Encouraging employees in any way to join any other employee organization in preference to CSEA.

6. By the same conduct, denying CSEA its rights.

7. By the same conduct, interfering with the rights of employees to be represented by CSEA.

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

1. If requested by CSEA, meet and negotiate in good faith with CSEA concerning sick leave review policies.

2. If requested by CSEA, reinstate the prior leave policies and practices.

3. Make whole those unit members adversely affected by the sick leave review policies, as follows:

a. All documents placed in unit members' personnel files pursuant to the policies, including but not limited to step 2, step 3 and step 4 notices, shall be removed. Step 3 and step 4 notices may be replaced by the documents previously in use that dealt with verification of absences but did not refer to discipline. Disciplinary warnings and reprimands may be reimposed only on the basis of previous policies and practices.

b. Unit members who received substandard attendance/punctuality evaluations pursuant to the policies shall be reevaluated pursuant to previous policies and practices.

c. Any docking of pay or suspension or dismissal pursuant to the policies shall be rescinded. Any such docking, suspension or dismissal may be reimposed only on the basis of previous policies and practices. Unless the actions are thus reimposed, the affected employees shall receive back pay with interest at the rate of 7 percent per annum, and the dismissed employees shall be reinstated.

4. Within ten (10) days following the date this

Decision is no longer subject to appeal, post at all work locations where notices to classified 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 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 the Notice is not reduced in size, altered, defaced or covered with any other material.

5. Make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board, in accord with the regional director's instructions.

It is further ORDERED that the portions of the unfair practice charge and complaint in Case No. LA-CE-3682 that relate to the District's commuter policy allegations and the exceptions to the proposed decision regarding those allegations are WITHDRAWN WITH PREJUDICE. Accordingly, all the portions of the proposed decision which concern the District's commuter policy are VACATED.

Members Dyer and Amador joined in this Decision.



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 Nos. LA-CE-3655 and LA-CE-3682, California School Employees Association v. San Bernardino City Unified School District, in which all parties had the right to participate, it has been found that the San Bernardino City Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b), (c) and (d), by: (1) unilaterally implementing sick leave review policies; (2) refusing to provide the California School Employees Association (CSEA) with commuter agreement information; (3) threatening CSEA; (4) refusing to provide CSEA with employee addresses; and (5) engaging in bad faith surface bargaining with CSEA.

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing sick leave review policies within the scope of representation in the absence of a waiver of CSEA's right to negotiate.
2. Refusing, without legal justification, to provide CSEA with relevant and necessary information, including but not limited to employee addresses, upon a proper request by CSEA.
3. Threatening CSEA for protected activity.
4. Engaging in bad faith bargaining with CSEA.
5. Encouraging employees in any way to join any other employee organization in preference to CSEA.
6. By the same conduct, denying CSEA its rights.
7. By the same conduct, interfering with the rights of employees to be represented by CSEA.

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

1. If requested by CSEA, meet and negotiate in good faith with CSEA concerning sick leave review policies.
2. If requested by CSEA, reinstate the prior leave policies and practices.

3. Make whole those unit members adversely affected by the sick leave review policies, as follows;

a. All documents placed in unit members' personnel files pursuant to the policies, including but not limited to step 2, step 3 and step 4 notices, shall be removed. Step 3 and step 4 notices may be replaced by the documents previously in use that dealt with verification of absences but did not refer to discipline. Disciplinary warnings and reprimands may be reimposed only on the basis of previous policies and practices.

b. Unit members who received substandard attendance/punctuality evaluations pursuant to the policies shall be reevaluated pursuant to previous policies and practices.

c. Any docking of pay or suspension or dismissal pursuant to the policies shall be rescinded. Any such docking, suspension or dismissal may be reimposed only on the basis of previous policies and practices. Unless the actions are thus reimposed, the affected employees shall receive back pay with interest at the rate of 7 percent per annum, and the dismissed employees shall be reinstated.

DATED: _____ SAN BERNARDINO CITY UNIFIED
SCHOOL DISTRICT

BY: _____
Authorized Agent

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



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION,)	
)	
Charging Party,)	Unfair Practice
)	Case Nos. LA-CE-3655
v.)	LA-CE-3682
)	
SAN BERNARDINO CITY UNIFIED SCHOOL DISTRICT,)	PROPOSED DECISION
)	(1/14/98)
)	
Respondent.)	
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Appearances: Madalyn J. Frazzini and Alan S. Herish, Staff Attorneys, for California School Employees Association; Atkinson, Andelson, Loya, Ruud & Romo, by Sherry G. Gordon, Attorney, for San Bernardino City Unified School District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union of classified employees alleges a school district unilaterally changed sick leave policy and committed other unfair practices. The school district denies it committed any unfair practices.

The California School Employees Association (CSEA) filed an unfair practice charge (LA-CE-3655) against the San Bernardino City Unified School District (District) on March 26, 1996, alleging the District unilaterally changed policy by implementing a building services sick leave review policy. CSEA filed a second charge (LA-CE-3682) against the District on May 30, 1996, alleging the District committed other unfair practices. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued complaints against the District on July 10

and October 4, 1996. The District filed answers to the complaints on July 19 and October 23, 1996, denying it had committed any unfair practices. PERB held informal settlement conferences with CSEA and the District on August 28 and October 30, 1996.

PERB consolidated the two cases on November 14, 1996, and held a formal hearing on the consolidated cases on December 18-19, 1996, and January 6-9, February 3-7, and March 10-12, 1997. During and after hearing, some allegations were withdrawn or dismissed. After the filing of post-hearing briefs, the remaining allegations were submitted for decision on August 12, 1997.

FINDINGS OF FACT

The District is a public school employer under the Educational Employment Relations Act (EERA).¹ CSEA is an employee organization under EERA and is the exclusive representative of the District's classified employee bargaining unit. The District is the tenth largest school district in California and has some 2000 classified employees. Of those, some 200 work in the building services department and some 300 work in the nutrition services department.

CSEA and the District were parties to a collective bargaining agreement executed on November 17, 1992 (Agreement). According to Article XXIV (Term of Agreement), Section 1

¹EERA is codified at Government Code section 3540 and following. Unless otherwise indicated, all statutory references are to the Government Code.

(Duration), the Agreement was in effect "through September 30, 1995, and from year to year thereafter, unless modified or amended." Article XVIII (Grievance Procedure) provided CSEA could be a grievant and could submit grievances to binding arbitration.

From 1977 on, Joseph Woodford (Woodford) was the District's employee relations director. On November 13, 1995, Julie Kossick (Kossick) became the CSEA representative with responsibility for the District. For the three months before Kossick's employment, CSEA representative Don Evans (Evans) had that responsibility.

On March 12, 1996, CSEA informed Woodford a decertification effort was being mounted against CSEA by San Bernardino Educational Support Personnel (ESP), an affiliate of the National Education Association. On June 28, 1996, ESP filed a decertification petition. On November 7, 1996, a PERB agent determined ESP's petition was timely and valid but the election should be stayed (at CSEA's request) until CSEA's unfair practice charges could be heard. On April 14, 1997, after the unfair practice hearing was over, CSEA withdrew its request to stay the election.² Ballots were mailed on May 30, 1997, and counted on June 24, 1997. CSEA succeeded in remaining the exclusive representative by receiving 880 votes, while ESP received 307 votes.

²Because of the stay, I had allowed ESP to participate in the hearing as a joined party. After CSEA withdrew its request for the stay, ESP withdrew as a party to this case.

Building services sick leave review policy

Article III of the Agreement (District Rights) stated in part as follows:

Section 1--District Powers, Rights, and Authority. It is understood and agreed that, except as limited by the terms of this Agreement, the District retains all of its powers and authority to direct, manage, and control to the extent allowed by the law. Included in, but not limited to, those duties and powers are the right to: Determine its organization; direct the work of its employees; determine the times and hours of operation; determine the kinds and levels of services to be provided and the methods and means of providing them; establish its educational policies, goals, and objectives; insure the rights and educational opportunities of students; determine staffing patterns; determine the number and kinds of personnel required; maintain the efficiency of District operations; determine District curriculum; design, build, move or modify facilities; establish budget procedures and determine budgetary allocations; determine the methods of raising revenue; contract out work, except where specifically prohibited by the Education Code; and take any action on any matter in the event of an emergency, as provided in Section 3 herein. In addition, the District retains the right to hire, classify, assign, evaluate, promote, demote, terminate, and discipline employees. This recital in no way limits other District powers as granted by law.

Section 2--Limitation. The exercise of the foregoing powers, rights, authority, duties, and responsibilities by the District, the adoption of policies, rules, regulations, and practices in furtherance thereof, and the use of judgment and discretion in connection therewith, shall be limited only by the specific and express terms of this Agreement, and then only to the extent such specific and express terms are in conformance with law.
[Emphasis added.]

Article XIV of the Agreement (Leaves), Section 1 (Sick Leave), Subsection A(1), stated:

Full-time unit members shall accrue eight (8) hours of sick leave for each calendar month of service.

This currently accrued sick leave was known as "earned" sick leave in the District. Subsection B(5) stated in part:

Sick leave of no more than the amount entitled to per year may be granted in advance of being earned.

This was known as "advance" sick leave.

Article IV, Section 3 (Verification), stated in part:

The District shall have the right to require verification for any leave taken under this Article XIV as a condition for granting the leave. An attending physician's verification of sick leave may be required for good cause after prior notification to the unit member.

The Rules and Regulations for the Classified Service adopted by the District's Personnel Commission also addressed sick leave, but Article XXII of the Agreement (Effect of Agreement), Section 2 (Classified Personnel Rules and Regulations), stated Personnel Commission rules and regulations "shall not be applicable to unit members covered by this Agreement."

The District's Operating Rules for Building Services set forth the following Personnel Policy on Frequent Absences:

The Classified Contract has established that the District has the right to require verification of any leave, including sick leave. Good cause exists for requiring a physician's verification if the employee has:

- (1) set a pattern of absences which occurs on certain days of the week;

- (2) set a pattern of absences which occurs on days preceding or following holidays; or
- (3) set a pattern of excessive absences on an annual basis.

If one of these conditions exists, or other good cause, the employee will be counselled by his/her supervisor, a record of the conference will be made, and the requirement of a doctor's verification of illness will be enforced.

The Operating Rules otherwise noted sick leave was governed by the Agreement.

The Operating Rules stated as follows with regard to reporting absences:

All employees must notify Building Services that they are going to be absent from work, for any reason, and when they are ready to return to work.

- a. Maintenance employees are to call in prior to their normal reporting time.
- b. Day custodians must call in before 6:45 a.m.
- c. Night custodians must call in before 12:00 noon.

With regard to vacation leave, the Operating Rules required five days prior approval.

In June 1995, Ed Norton (Norton) became the District's building services director. In his first few weeks in the department, he became concerned about what he saw as "chronic sick leave abuse" and "non-standard application of discipline." Norton directed the department's managers and supervisors to develop a uniform sick leave review policy. He appointed operations supervisor William Clayton (Clayton) as facilitator,

in part because Clayton already had some guidelines and forms for dealing with sick leave.

By sometime in August 1995, the department had a draft policy, and Norton asked employee relations director Woodford to meet with department management. The draft policy was reviewed with Woodford item by item, to determine if there were conflicts with the Agreement, Personnel Commission rules, or Board of Education policies and procedures. Woodford suggested some changes, and Clayton revised the draft. Thereafter, the policy was explained to all the department's supervisors and ultimately disseminated to all the department's employees. Norton testified he thought the policy was disseminated as early as August 1995, but he seems to have been mistaken; all the other testimony and evidence indicates it was disseminated in late October 1995.

The policy as disseminated bore a date of October 26, 1995, which was apparently its effective date. It stated in part as follows:

All attendance will be monitored by supervisors to identify potential abuse of sick leave. Conferences and progressive discipline will be based on the following six steps and the "Sick Leave Review Policy Guidelines." We will begin with the first step, listed below, and proceed to each successive step if there is no improvement in the attendance. The six steps are as follows:

1. Identify potential abuse of sick leave.
2. Conference with employee to determine if there is a verifiable reason for the pattern and/or use of sick leave.

** Give employee the "Building Services Sick Leave Review Policy" packet.

3. Conference with employee and issue printed form "Dr.'s Verification Warning Notice."
** On Evaluation, indicate "Improvement Needed" under item 16 [Attendance/Punctuality].
4. Conference with employee and issue printed form "Dr.'s Verification Required."
** On Evaluation, indicate "Unsatisfactory" under item 16.
5. Recommend Suspension.
6. Recommend Dismissal.

The policy then stated it was "based, in part" on Article XIV, Section 3, of the Agreement, which it quoted.

The policy went on to set forth the following guidelines:

- A. Sick leave use of 50% or more OR six instances of use of sick leave (in a 12 month period) will be used as indicators to initiate a "Use of Sick Leave" conference with an employee.
- B. We will look for established patterns of sick leave use, such as before or after weekends and holidays and on or directly following payday.
- C. A "compassion adjustment" will be made to give credit for justifiable sick leave. The percentages mentioned in guideline "A," above, will only show those occurrences that weren't documented or credited.
- D. A Doctor's verification will be required for chronic health conditions.

- E. Only "earned" sick leave will be granted for an employee who has received a "Warning Notice" (step 3) or greater.
- F. An employee with a positive sick leave balance and not in some phase of conferences under the Sick Leave Review Policy, may use sick leave as appropriate.
- G. Vacation will not be granted for sick leave use.
- H. We will uniformly enforce the "5 days advance notice" for vacation.
- I. Dates placed on forms must correspond with dates actually absent.
- J. We will "dock" an employee's pay when justified.
- K. Each employee must call "in person" to report any absence for sick leave. The procedure for this is as follows:
 - 1. Maintenance employees on the day shift will call 388-6100 between 6:00 a.m. and 6:30 a.m. to report their absence.
 - 2. Operations employees on the day shift will continue to call 388-6104 between 6:00 a.m. and 6:30 a.m. to report their absence.
- L. NO CALL FOR REPORTING AN ABSENCE WILL BE ALLOWED TO THE ANSWERING MACHINE. [All capital letters in the original.]
- M. All documentation will be sent to the Classified Personnel Department to be placed in employee's personnel record commencing with step #3, above (we will include the

"Conference Summary--Use of Sick Leave" IOC [inter-office communication] with that documentation).

There followed a series of forms related to the policy.

The first form was the step 2 notice. It took the form of an inter-office communication (IOC) on the subject "Conference Summary--Use of Sick Leave" and stated in part:

This IOC confirms our conference held on _____ to discuss your use of sick leave. During that conference, I provided you with a copy of the Building Services Sick Leave Review Policy and explained the progressive steps, including discipline, used to implement this policy. In addition, I reminded you that sick leave is a conditional paid leave that ensures the continuance of your wages when you are ill or injured and are unable to work. It is important that you only use sick leave when you are prevented from performing the duties of your job, as a result of illness or injury.

The form then quoted Article XIV, Section 3, of the Agreement.

The second form was the step 3 notice, headed "Absenteeism and Doctors' Verification Warning Notice." It took the form of a memo on the subject "Disciplinary Warning - Use of Sick Leave" and stated as follows:

On _____ a conference was held regarding your use of sick leave. At that time you were informed that:

_____ As of _____, your sick leave balance was _____.

_____ You have used _____ days since _____, which is sufficiently excessive to justify this "Warning Notice."

_____ Of these days, _____ have been used on _____.

_____ Of these days, _____ have been used
before or after weekends or
holidays.

If this pattern of absence continues, you will be required to furnish a verification from your doctor or dentist each time you are absent for illness. You may also be required to furnish a doctor's verification when using Personal Necessity [leave] for an immediate family member.

Improvement in your attendance is required and expected. Failure to improve your attendance may result in further disciplinary action.

A copy of the form was directed to "Personnel."

The third form was the step 4 notice, headed "Doctors' Verification Required." It took the form of a memo on the subject "Reprimand - Use of Sick Leave" and stated:

This notice verifies that on _____ a conference was held at _____ regarding your use of sick leave. At that time you were notified, in accordance with Article XIV, section 3 of the Collective Bargaining agreement between the District and the California School Employees Association, that you will be required to furnish written verification by a physician on absences reported as illness until further notice. This action has been taken because of:

_____ A pattern of absence which occurs
on certain days of the week.

_____ A pattern of absence which occurs
on days before or after weekends or
holidays.

_____ A pattern of absence on an annual
basis which is inconsistent for
classified employees.

* You must provide the doctor's verification immediately upon your return to work.

- * Failure to provide the Doctor's Verification will result in loss of pay and will be recorded as AWOL.
- * The cost of the physician's services is borne by you.

Failure to comply with this directive and requirement may result in further disciplinary action, up to and including dismissal from your classified position.

Again, a copy of the form was directed to "Personnel."

The final form was headed "Building Services Sick Leave Review Policy Certification of Receipt" and stated:

I certify that I have received a copy of the Building Services Sick Leave Review Policy.

This form was signed and dated by individual employees when the policy was disseminated to them.

CSEA became aware of the policy after it was disseminated. An employee faxed a copy to CSEA representative Evans, who discussed it with the chapter president and agreed to send the District a demand to meet and negotiate. On November 6, 1995, Evans sent Woodford a letter stating in part as follows:

I am writing you regarding some concerns I have regarding a published "Building Services Sick Leave Review Policy". (See Attached) My concerns are as follows:

- I. Items A and C on the policy refer to some numerical guidelines for discipline instead of validity of absence as well as some sort of subjective "Compassion Adjustment". These items are changes that exceed or alter the current contract, Commission Rules and past practice regarding sick leave usage and/or discipline and are subject to negotiations.

- II. Item E violates the employees Education Code right. Education Code, Section 45191 reads in part "credit for leave of absence need not be accrued prior to taking such leave by the employee and such leave of absence may be taken at anytime during the year."
- III. Item F seems to infer that employees who have used all available regular illness leave will be singled out. There are established and agreed upon guidelines for usage of illness leave, extended illness leave, as well as other leaves. Changes are subject to negotiations.
- IV. Item G references an instance when vacation may not be used. In fact if an employee has followed the contractual guidelines, he/she may use vacation for whatever reason they deem appropriate.
- V. Item J refers to "docking" someone's pay without due process. Except for a couple of education provisions relating to serious offenses the discipline and due process guideline in both the Education Code and Personnel Commission Rules and Regulations must be followed.

The proposed policy and attached forms clearly are a change in working conditions, as well as in more than one case a violation of the contract and statutory provisions. CSEA #183 respectfully demands to meet and negotiate the changes in working conditions outlined in the attached sick leave review policy. Additionally, CSEA #183 respectfully demands that the district cease and desist from unilaterally implementing said policy until a negotiated agreement is reached or the negotiating process is concluded up to and including impasse and factfinding.

In response to this letter, Woodford's secretary called Evans and set up a negotiating session for November 16, 1995. The District did not put the policy on hold, however.

On November 16, 1995, Evans and the rest of CSEA's usual negotiating team met with Woodford and other district managers, including building services director Norton. Kossick, who had just started her employment with CSEA, was not present. The parties spent two hours going over the building services policy, clarifying the District's intentions and airing CSEA's concerns. Although Evans testified the parties did not reach any agreement that day, it appears the parties did agree at least two aspects of the policy should be revised to conform to the Agreement and the District's past practice. The parties apparently agreed step 3 and step 4 notices should include language informing employees the notices would be placed in their personnel files and the employees had the rights to make responses and to have them also placed in the files. The parties apparently also agreed Guideline "F" was too restrictive in stating, "Vacation will not be granted for sick leave use." Norton testified that based on CSEA's input the guideline was to be changed by adding "after-the-fact."

It is clear the parties did not agree on at least one issue, however: whether the policy's restriction on the use of advance sick leave violated Education Code section 45191. It was agreed Evans would obtain and share a legal opinion on this issue.

It is otherwise unclear exactly to what extent the parties did and did not agree about the policy at the November 16 meeting. Evans and one of his team members testified negotiations on the policy were not concluded that day and were

to continue later. They testified that when those in attendance put their names on a sign-in sheet it was made clear they were not agreeing to anything. The minutes of CSEA's executive board meeting of December 4, 1995, reported as follows:

The Negotiations Team met with the District on 11/16/95 regarding the implementation of the new "Building Services Sick Leave Review Policy." Items A, C, E, F, G, and J of the policy were discussed. No formal agreement was made on the policy. The District and CSEA agreed to meet again in sixty to ninety days for further discussions.

Presumably this report was made by the chapter president and/or the chapter secretary, who attended both the November 16 negotiations meeting and the December 4 executive board meeting.

Woodford testified, however, there was no agreement to continue negotiations on the policy other than to "get together after the first of the year and see if there were . . . problems." Woodford testified that apart from "a continuing dispute over Education Code section 45191 . . . basically we had an agreement at the end of the meeting, and that Don Evans would confirm that agreement in writing to the District." Norton similarly testified he left the meeting "thinking that everything was acceptable with the exception of the one pending item." Woodford testified he normally took notes at a negotiating session, but he had no notes of the November 16 meeting; no one's notes of that meeting were offered in evidence.

On December 1, 1995, Evans sent Woodford the following letter:

I am writing you this letter as a follow-up/confirmation of the understanding/clarifications reached between CSEA Chapter 183 and the district on November 16, 1995, regarding the "Building Services Sick Leave Review Policy".

The understanding/clarifications are:

- I. Personal necessity days taken by employees will not be used in the formula to trigger a "use of sick leave" conference.
- II. Approved vacation requests may be used in a manner that the employee(s) deems appropriate.
- III. That under certain conditions/emergencies, employees may not be able to call in themselves or during the 30-minute call in window when they are ill or injured.
- IV. Any documentation that will go into an employee's personnel file will clearly state so, as well as state the employee's right to respond in writing, and have the response placed in their personnel file.
- V. That the intent of the policy is to reduce abuses of sick leave but not to restrict the employee's right to use sick leave when ill or injured.
- VI. That valid exceptions will be reviewed and considered on a case-by-case basis.
- VII. That this policy will be uniformly and fairly applied to all employees in Building Services.

I will address the issue of restricting the use of sick leave in advance separately. CSEA believes the meeting held on November 16, 1995, was both constructive and helpful in clarifying concerns of both CSEA Chapter 183 and the district.

Feel free to contact me if you have any questions or concerns.

This letter did not mention further negotiations; Evans testified Kossick became responsible for such negotiations from the moment the letter went out. The letter also did not repeat the demand in Evans's November 6 letter that the District cease and desist from implementing the building services policy.

Meanwhile, on November 30, 1995, Woodford had received a rather mysterious two-page fax, sent to the District from the CSEA office. The cover page, in Evans's handwriting, indicated the fax was both from Evans and to Evans, and it bore the comment, "As discussed." The second page had no heading but began with the following paragraph:

On Thursday, November 16, 1995 CSEA Chapter 183 and District administrators met regarding the Building Services' "sick leave review policy". A number of clarifying understandings and agreements were reached regarding this policy. The specifics will be published and made available to all bargaining unit employees.

The second page ended with the name "CSEA Chapter 183" and the slogan "Working Together, Working for You." Woodford testified he had been expecting Evans to send him "confirmation of our agreement and understanding" on the building services policy. Evans testified he did fax Woodford an advance copy of the December 1 letter, but he did not recognize the second page of the November 30 fax, which also does not appear to be what Woodford would have expected to receive from Evans.

The District apparently did not respond to the November 30 fax or the December 1 letter. The District did take some action on the basis of the November 16 meeting, however. Under

Clayton's direction, some 3000 preprinted step 3 and step 4 notices were stamped with the additional personnel file information. Building services supervisors were informed of that change and also of the change in Guideline F (on granting vacation for sick leave use).

There was apparently no further communication between the District and CSEA on the building services policy until January 31, 1996. On that date, Evans sent Woodford a letter that began as follows:

During a meeting held in November of 1995, CSEA noticed the district that it was violating employees' Education Code rights (Section 45191) by restricting their advance use of sick leave.

Education Code section 45191, regarding leave of absence for illness or injury, states in part:

"Pay for any day of such absence shall be the same as the pay which would have been received had the employee served during the day. Credit for leave of absence need not be accrued prior to taking such leave by the employee and such leave of absence may be taken at any time during the year."

The Education Code is clear that it is the employee who decides when to take the leave.

The collective bargaining agreement also requires the district to grant advance sick leave. The district's belief that it has discretion to grant the advance sick leave is incorrect under the contract, however, it is immaterial that the district thinks it has such discretion under the collective bargaining agreement.

The letter concluded as follows:

Pursuant to Education Code section 45191, employees have the right to take advance sick leave and the district does not have the authority nor discretion to deny such leave. While the district has the right under the limits specified in the Education Code and collective bargaining agreement to request verification of illness, it is a separate issue and result.

In closing, CSEA Chapter 183 respectfully demands that the district comply with Education Code section 45191, and cease and desist from restricting the advance use of sick leave by classified employees.

Please notify me in writing of the district's requested compliance, and the notification of the appropriate manager/supervisors.

Like the December 1 letter, this letter did not mention further negotiations, nor did it demand the District cease and desist from implementing the building services policy generally. Again, the District apparently did not respond.

A meeting between the District and CSEA was set for February 27, 1996, to discuss the wearing of shorts by warehouse employees. Kossick testified she initially requested the meeting to discuss the building services policy as well; Woodford testified Kossick added that topic after the meeting was already set. On February 27, 1996, Kossick and part of CSEA's negotiating team met with Woodford and the warehouse manager; Evans was also present, as an observer. According to Kossick and Evans, Woodford stated the building services policy was not legally negotiable, while Kossick insisted it was. Eventually, Woodford asked Kossick to outline her concerns, for discussion at a separate meeting. According to Kossick, Woodford also stated

the District intended to apply the building services policy district-wide eventually.

On March 1, 1996, Kossick sent Woodford a letter confirming a March 8 appointment for a meeting to discuss the building services policy. The letter stated in relevant part:

The purpose of this meeting is to address concerns of the sick leave policy such as:

Sick leave formula/adjustments

Morale

Inequitable application

According to Kossick, when the March 8 meeting occurred Woodford stated he had no intention of negotiating the building services policy, which he said was not negotiable, and CSEA should contact Norton if it wanted to do anything further.

On March 13, 1996, Evans sent Woodford the following letter:

As of today's date, I have not received from you a response to my letter of January 31, 1996 requesting the district's compliance with Education Code Section 45191 and cease restricting classified employees' use of advance sick leave.

Unfortunately, if I don't receive your written response by March 22, 1996 CSEA will have to assume the district is not going to comply with Education Code Section 45191. CSEA Chapter #183 will have no choice but to seek other formal remedies to this issue.

I am looking forward to your response.

Two days later, on March 15, 1996, Kossick sent Woodford the following letter:

As a result of the district and CSEA Chapter #183 being unable to reach a negotiated agreement regarding the "Building Services Sick Leave Review Policy", as well as your response to me on March 8, 1996, that the

district now considered the policy non-negotiable, CSEA respectfully demands the following:

- A. The district cease and desist from unilaterally implementing said policy until a negotiated agreement is reached on [sic] the negotiating process is concluded up to and including impasse and fact finding.
- B. To meet and negotiate the changes in working conditions outlined in the above referenced and attached policy.
- C. The district respond in writing within five (5) business days, complying with our legal demands.

If the above referenced demands and requests are not complied with, CSEA Chapter #183 will have no alternative but to seek any and all available legal remedies.

Feel free to call me if you have any questions or concerns.

The District apparently did not respond to either letter.

In May 1996, the District printed a revised version of the building services policy. Step 1 was revised by adding language indicating how potential sick leave abuse would be identified: "through review of employee attendance records." Steps 3 and 4 were revised to refer to item 9 on a new evaluation form, which was the renumbered "Attendance/Punctuality" item. Guideline C was revised to state as follows:

A "compassion adjustment" may be made to give credit for long-term, (usually a minimum of two weeks of illness or injury) justifiable use of sick leave as part of the employee conference.

Guideline E was rephrased to state, "Unearned sick leave will not be granted" (rather than, "Only 'earned' sick leave will be

granted") for an employee at step 3 or higher. Guideline F was dropped altogether; Guideline G became the new Guideline F and was revised with the addition of "after-the-fact." Finally, the step 3 and step 4 notices were printed with the following language:

A Copy of this Document Will Be Placed in
Your Personnel File at the End of Five (5)
Days. You Have the Right to Respond to this
Document and Have Your Response, If Any,
Placed in Your Personnel File.

This language and the "after-the-fact" language in the new Guideline F appear to have come out of the negotiations on November 16, 1995, but the other changes apparently did not.

Prior to the dissemination of the building services policy in October 1995, there was no formal six-step process for dealing with excessive use of sick leave, and there was no form like the step 2 notice. There was a form comparable to the step 3 notice, warning employees they would be required to furnish verification if their pattern of absence continued, but unlike the step 3 notice it was not labeled a "disciplinary warning" and did not state failure to improve might result in "further disciplinary action." There was also a form comparable to the step 4 notice, requiring verification, but unlike the step 4 notice it was not labeled a "reprimand" and did not state failure to provide verification would "result in a loss of pay and will be recorded as AWOL" and failure to comply might result in "further disciplinary action, up to and including dismissal."

The attendance of employees had previously been monitored, and employees had been counseled, evaluated and disciplined (up to and including dismissal) for excessive absenteeism. There was no policy, however, dictating when these actions would be taken. There was, for example, no policy dictating an employee being required to furnish verification would at the same time receive a reprimand and an "unsatisfactory" attendance evaluation and would be recommended for suspension if there was no improvement in attendance. An employee who was required to furnish verification in 1981 testified he was not told he could also be disciplined.

Prior to dissemination of the building services policy, there was also no generally established definition of excessive use of sick leave. Operations supervisor Clayton testified he employed 50 percent usage of earned sick leave as an indication an employee should be counseled, but he also testified there were only "two or three of us that had pretty rigorously applied" such a policy. Retired carpentry supervisor Bill Stevenson (Stevenson) was apparently one of the less rigorous supervisors in this regard: he testified he counseled employees only when they had "pretty much used up" earned sick leave.³ Stevenson was not unique: a building services employee not supervised by Stevenson testified that in 1993 he completely used up his sick

³The District argues Stevenson's testimony should not be credited, because Stevenson was upset about being written up under the building services policy himself, and because (according to Norton) Stevenson initially had problems explaining the policy to employees. I nonetheless found Stevenson to be a credible witness, especially as to his own past practices as a supervisor.

leave without being counseled or written up. Stevenson acknowledged some other supervisors were "a little more strict," but there was evidently no established policy stating their approach was right and Stevenson's approach was wrong.

Even Clayton, the stricter supervisor, did not testify he employed six instances of sick leave use as an alternative indication an employee should be counseled.

There was also no previous District policy forbidding any employee from using unearned (advance) sick leave. In 1993, Clayton issued the following criteria for approving the use of unearned sick leave by employees he supervised:

Option A:

1. A minimum of 5 consecutive years of full-time service with the district.
2. A minimum of 3 of the most recent years of full-time consecutive service must be free of the abusive use of sick-leave.

Option B:

1. The employee may submit a Dr.'s "Off-Work" notice for the time requested.

Option B appears to indicate even an employee with a history of sick leave abuse could use unearned sick leave by submitting an "Off-Work" notice from a physician, while Guideline E of the building services policy offers no such option. Furthermore, there is no evidence other supervisors were even as strict as Clayton in this regard.

There were also no policies prohibiting the granting of vacation for sick leave use (Guideline G), requiring employees to call "in person" between 6:00 and 6:30 a.m. to report absences (Guideline K), or prohibiting the use of the answering machine

for that purpose (Guideline L) . Stevenson testified the building services policy changed prior practice in these areas. One employee testified he used vacation for sick leave purposes in 1993, when he had used up all his sick leave. Another employee testified he had been able to have his wife call in for him, to call in himself before 6:00 a.m., or to call in to the answering machine, until the building services policy went into effect.

Nutrition services sick leave review policy

In 1996, the management of the District's nutrition services department also became concerned about attendance. The department director talked to Woodford, who recommended discussing the issue with building services management. Ultimately, Nutrition Program Manager Jill Ross (Ross) and the nutrition services supervisors developed their own sick leave review policy based on the building services policy. Ross did not notify CSEA of the nutrition services policy before it was implemented, although she understood building services management had worked with CSEA. There is no evidence Woodford was involved in developing or implementing the nutrition services policy.

The nutrition services policy was implemented effective July 1, 1996. This policy included some parts of the original building services policy of October 1996, some parts of the revised policy of May 1996, and some parts that were unique. Step 1 was the same as in the October policy; steps 3 and 4 were like those in the May policy in referring to item 9 of the new evaluation form. The related forms were substantively the same

as those in the May policy, except that a copy of the step 2, 3 and 4 forms was directed to the "Nutrition Program Manager" (Ross) instead of to "Personnel." Guidelines C, E, F and G were the same as in the October policy, and thus were different from those in the May policy.

Guideline H in the nutrition services policy stated:

We will uniformly enforce the "10-day advance notice" for vacation.

The corresponding building services guidelines had required "5 days advance notice."

Guideline K of the nutrition services policy stated in full:

Each employee must call "in person" to report any absence for sick leave. The procedure for this is as follows:

1. Nutrition Services employees will call 881-8000 between 6:00 a.m. and 6:30 a.m. to report their absence.
 - a. Nutrition Services employees assigned to secondary sites will also call their site Manager between 6:00 a.m. and 7:00 a.m. to report their absence.
 - b. If your arrival time at your secondary site coincides with your Manager's arrival time, you must call your Manager at his/her home between 5:00 a.m. and 6:00 a.m.
2. Food Production Workers reporting to work prior to 6:00 a.m. will call 872-7455 between 5:00 a.m. and 5:30 a.m. to report their absence.

The corresponding building services guidelines had required employees to call "in person" between 6:00 a.m. and 6:30 a.m. but not to call their managers.

Guideline L of the nutrition services policy stated:

NO CALL FOR REPORTING AN ABSENCE WILL BE
ALLOWED TO THE ANSWERING MACHINE.

This guideline was identical to the corresponding building services guideline in both content and capitalization.

In late June 1996, Ross explained the nutrition services policy to 12-month employees, at a meeting of several dozen such employees. In late August 1996, Ross also explained the policy to 9-month employees, at a meeting of several dozen such employees. Copies of the policy were distributed at both meetings.

A nutrition services employee testified that in past years she had exhausted all her earned sick leave and carry over sick leave; she testified she was not counseled or written up but continued to received "wonderful" evaluations and even an exemplary employee award. She further testified Guidelines K and L of the nutrition services policy were changes in District practice, in that her husband had previously called in for her, she had not been told to call at a certain time, and she had been able to leave messages on the answering machine. On September 17, 1996, this employee received an inter-office communication from her supervisor, with a copy sent to Ross, for reporting her absence at 6:45 that morning instead of between 6:00 and 6:30. She had called at 5:55, 6:30 and 6:40, but was unable to reach the right person until 6:45.

Ross acknowledged the "6 to 6:30 timeframe" was new; apparently so was the prohibition on using the answering machine.

The most recent version of the Nutrition Services Employee Handbook stated in part:

If you are ill or cannot make your assigned work hours, call in as soon as possible. Employees scheduled to work before 7:00 a.m. can call the Senior Food Production Worker on her/his pager. To contact this person: dial 872-7455, listen for tone, then dial your phone number, followed by "#", leave the appropriate message. If you are scheduled to work after 7:00 a.m., you may leave a message on the answering machine (881-8000). Give your name, date absent, hours you work, and reason for absence.

An old Cafeteria Handbook, apparently from the 1980's, had stated in part:

Absences - You must do your own calling for any absence giving your name, phone number, date, why you will be absent and when you will return. Also state your school location, job and hours.

The more recent Nutrition Services Employee Handbook did not specifically require employees to do their own calling, however. A nutrition services supervisor testified the practice of someone else calling did occur before the nutrition services policy, but "wasn't supposed to," and was supposed to stop with the policy.

The Nutrition Services Employee Handbook did not otherwise address sick leave. With regard to vacation leave, it required ten days prior request.

In the latter part of 1996, many nutrition services employees received one or more inter-office communications for not calling in between 6:00 and 6:30 a.m., for using the answering machine, or for not calling "in person." Copies of these communications were generally sent to Ross, but they were

not step 2 notices. One employee did receive a step 2 notice for exhausting all her sick leave for the 1996-97 school year, but the notice stated "a compassion [sic] adjustment will be made because it was one instance due to broken arm."

Another employee received both a step 2 notice and a step 4 notice for a "pattern of absence on an annual basis." Both notices gave a conference date of July 26, 1996.⁴ The employee had already been required to obtain verification of absences due to illness by an inter-office communication dated October 12, 1994. He had also been reprimanded for excessive absences, mostly just before or after a weekend, on October 20, 1993. An evaluation from June 1995 stated his "attendance/punctuality" needed improvement, citing in part his complete exhaustion of his allowed sick time. In October 1995, he was recommended for a three-day suspension, due in part to a history of absences. A May 1996 evaluation stated his "attendance/punctuality" still needed improvement.

A nutrition services supervisor testified that prior to the nutrition services policy she had monitored employee attendance, counseled employees about their use of sick leave, and recommended the suspension or termination of employees for excessive absenteeism. She also testified to "using compassion adjustments long before I ever heard the word," by sometimes

⁴For some unexplained reason, the step 2 notice was dated August 8, 1996, and the step 4 notice was dated August 6, 1996. There was apparently no step 3 notice.

adjusting documentation for employees with personal, family or chronic problems.

Alleged denial of representation

On January 31, 1996, building services employee Ron Wilson (Wilson) was called into a conference with his supervisor, Stevenson, concerning Wilson's use of sick leave. Wilson testified Stevenson told him he was a sick leave abuser according to the building services policy. Stevenson asked Wilson to sign a copy of the step 2 notice, but Wilson, who had heard from the CSEA chapter president the policy was on hold, refused to sign. Wilson and Stevenson arranged to meet the next day with Stevenson's supervisor, operations manager Jim Lewis (Lewis).

On the next day, February 1, 1996, Wilson and Stevenson arrived outside Lewis's office. Wilson was accompanied by Kossick and the CSEA chapter president. Lewis came out of his office and was introduced to Kossick. He questioned why Kossick was there; she explained she would be representing Wilson at the meeting because of the potential for discipline.

Kossick and the chapter president testified this conversation was courteous and in "normal voices." Operations supervisor Clayton, whose office was nearby, testified he heard the loud voice of Wilson, who he said normally had a loud voice. Clayton was concerned about possible disruption and started to come out of his office. Building services director Norton, whose office was also nearby, testified he heard "commotion and noise" and came out of his office to find out what was going on. Under

the circumstances, it seems likely the conversation, which involved five people, was in fact fairly noisy, and it was evidently loud enough to attract the attention and concern of Clayton and Norton.

Norton approached the group. He testified he questioned whether they had an appointment; Clayton confirmed he heard Norton ask that question. Norton further testified he understood the group thought they had an appointment with him, and he told them he had no notice of such an appointment. Norton went on to testify he asked who Kossick was, told her he did not think she had a right to represent Wilson at "just an interview," said he would schedule a formal appointment if she did have that right, and told everyone he needed to have them leave.

The testimony of other witnesses, although consistent with Norton's testimony as to the general content of what he said, gives a much different sense of how Norton said it. Wilson, Kossick, and the chapter president all testified Norton shouted at Kossick while she tried to explain her presence, and Wilson and the chapter president testified Norton ultimately shouted at Kossick to "get the hell out." Norton did not directly contradict this testimony, which I credit.⁵ There was no testimony Norton said anything against Kossick personally or CSEA generally; Wilson and Kossick testified Norton said he did not

⁵The chapter president testified Norton and Kossick were "maybe two inches apart, nose to nose" when he shouted at her, but no one else testified to his particular detail, and I do not credit it.

care who Kossick was. Norton shouted at Kossick in the presence of unit members, including not only Wilson and the chapter president but also the clerical employees working in the area. Wilson told several other unit members about the incident, which he testified left him with "mixed feelings" about Kossick (how she would be able to stand up to Norton) and CSEA (whether it would give him a "fair shake").

Norton later contacted Woodford and was told CSEA did have a right to represent Wilson. A meeting was then scheduled for February 7, 1996. On that day, Norton, Lewis and Stevenson met with Wilson and Kossick. They discussed Wilson's use of sick leave and the building services policy; when Wilson seemed not to understand the policy, Norton said Wilson's "toggle switch was not in the on position." Wilson ultimately signed a copy of the step 2 notice, which stated in part Norton had "explained the progressive steps, including discipline, used to implement this policy." Norton had added to the form the note, "Ron [Wilson] stated he strained his back and needed to see a chiropractor over a 3 day period on 9/13/95 to 9/15/95."

On March 27, 1996, Wilson filed an unfair practice charge against CSEA, alleging a violation of the duty of fair representation. In the charge, Wilson mentioned Kossick was "thrown out" by Norton on February 1, 1996, but his complaints were (1) CSEA had allowed the building services policy to take effect and (2) Kossick had allowed Wilson to be "verbally abused" by Norton at the meeting of February 7, 1996. A known ESP

supporter offered to help Wilson file the charge, but Wilson declined the offer. PERB dismissed the charge on July 24, 1996.

Alleged cancellation of commuter agreement

CSEA and the District entered into a commuter agreement on September 21, 1993.⁶ The introduction to the commuter agreement stated:

WHEREAS, Regulation XV of the South Coast Air Quality Management District (SCAQMD) requires the District to prepare and submit a Commuter Program Trip-Reduction Plan (Plan);

WHEREAS, the South Coast Air Quality Management District approved the District's Plan on September 19, 1990;

WHEREAS, the District's Plan has an impact upon wages, hours, and other negotiable terms and conditions of employment; and

WHEREAS, the District and the Association have met and negotiated and have reached agreement on the implementation of the Plan;

The stated purpose of the commuter agreement was as follows:

The sole purpose of this Agreement is to encourage unit members to participate in the Plan by using an alternate mode of transportation to and from their work location. The goal is to increase average vehicle ridership.

The commuter agreement went on to provide certain incentives (including cafeteria discounts and extra vacation days) to employees using alternative modes of transportation (such as buses and car pools). The incentives were subject to the following limitation:

⁶This was the successor to a commuter agreement dated October 15, 1990.

The Plan incentives set forth in this Agreement shall apply only to those unit members who regularly report to work at a site governed by a Plan and have filed a Clean Air Corps initial entry and have maintained participation by filing a monthly Clean Air Corps update entry.

In addition to the incentives, the commuter agreement provided the District would "encourage" flexible work hours and alternative work schedules, and CSEA would have one position on the District Clean Air Corps Advisory Committee.

The commuter agreement included the following provision on grievances:

Unit members who have been adversely affected by misapplication or incorrect interpretation of a specific provision of this Agreement may file a grievance as provided for in Article XVIII of the Collective Bargaining Agreement.

The commuter agreement stated it could be amended by mutual agreement and would "remain in full force and effect . . . through the duration of the Collective Bargaining Agreement between the District and the Association."

In connection with the dispute over the commuter agreement, there was a dispute in the testimony at hearing over the duration of the Agreement. Article XXIV of the Agreement (Term of Agreement), Section 1 (Duration), stated:

Except as otherwise provided herein and in Section 2 below, this Agreement shall remain in full force and effect from November 17, 1992, through September 30, 1995, and from year to year thereafter, unless modified or amended pursuant to the following provisions.

Section 2 (Renegotiation of Wages) provided for reopeners after July 1, 1993, and July 1, 1994. Section 3 (Renegotiations)

provided for negotiation of a successor agreement, if CSEA made an initial proposal between May 1 and June 1 preceding expiration of the Agreement. Section 4 provided the Agreement could also be reopened "by specific written mutual consent of the Parties."

CSEA failed to make an initial proposal between May 1 and June 1, 1996, and as a result the Agreement was to be extended "in full force and effect . . . from year to year" beyond September 30, 1995, pursuant to Article XXIV, Section 1. The District nonetheless offered to negotiate with CSEA solely on the issue of wages. On October 17, 1995, the District and CSEA entered into what they called an "Amendment to the Agreement" providing a 4 percent salary increase.

At hearing Woodford testified the final phrase of Article XXIV, Section 1 ("unless modified or amended pursuant to the following provisions") meant any modification or amendment that did not extend the term of the Agreement automatically terminated the Agreement. Thus in Woodford's view the 1995 "Amendment to the Agreement," which did not mention the term of the Agreement, terminated the Agreement, and with it the commuter agreement, which was to have the same duration as the Agreement.

Woodford's reading of Article XXIV, Section 1, although not necessarily contrary to the literal language, is not a plausible interpretation of the parties' intent. Under his reading of the language, the parties could not negotiate any modification or amendment to the Agreement without also negotiating an extension of the Agreement, or else the entire Agreement would terminate.

There is no apparent reason why the parties would want to bind themselves in this peculiar way. The more plausible reading of Article XXIV, Section 1, is that the Agreement would remain "in full force and effect" through September 30, 1995, and year to year thereafter, except to the extent it was actually "modified or amended" by the parties.

Woodford's implausible reading of Article XXIV, Section 1, was not supported by any evidence of past practice or bargaining history. The CSEA spokesperson at the negotiations on the 1995 "Amendment to the Agreement" testified there was no discussion about the Agreement expiring, as one might expect if CSEA was in fact giving up all its other rights under the Agreement in exchange for the salary increase.

Prior to the hearing in this matter, Woodford apparently never told CSEA of his view the Agreement had terminated in 1995. On the contrary, on May 7, 1996, Woodford sent a letter to CSEA acknowledging receipt of "your initial contract proposal for modifications to the current bargaining agreement which expires on September 30, 1996," apparently acknowledging a one-year extension of the Agreement beyond September 30, 1995, despite the intervening "Amendment to the Agreement." Furthermore, on July 12, 1996, Woodford sent PERB a letter in connection with the decertification petition stating in part, "The District's records indicate . . . [t]he current collective bargaining agreement will expire on September 30, 1996."

Woodford also did not tell CSEA the commuter agreement had terminated in 1995. On March 13, 1996, he sent CSEA a letter on the subject "Cancellation of Commuter Program Trip-Reduction Plan Agreement," stating as follows:

Prior to the conclusion of the 1995-96 school year, the District will become exempt from all of the elements of the South Coast Air Quality Management District trip reduction program. This means that the District will no longer be required to participate in car pooling and other related programs included in the Commuter Program Trip-Reduction Plan. Therefore, effective July 1, 1996, the agreement between the District and the CSEA implementing the Commuter Program Trip-Reduction Plan will be cancelled.

If you have any questions or wish additional information, please do not hesitate to contact me.

Kossick testified she then discussed the cancellation with Woodford, who told her it was a District decision that had already been made and implemented. On May 7, 1996, it was formally resolved that "the Board of Education abolishes the Commuter Program Trip Reduction Policy, Policy No. 4145 a-b." There was no evidence the Board of Education took any separate formal action on the commuter agreement with CSEA.

Woodford testified he had anticipated CSEA would ask to negotiate the effects of the cancellation of the commuter agreement. CSEA did not request any negotiations, however, nor did it file a grievance.

Alleged denial of information and threat to retaliate

On March 12, 1996, Kossick sent the District the following "Discovery Request for Identity of Witnesses and Documents" in connection with a unit member's dismissal hearing:

In preparation for the Commission Hearing on Respondent's recommended dismissal, the California School Employees Association is hereby requesting disclosure of the name, residence, and telephone number of the witnesses you intend to call at the scheduled Board Hearing of March 28, 1996 and March 29, 1996, as well as copies of all documents the district plans on using in the scheduled appeal hearing.

Kossick testified she thought there was a due process right to receive the witness list, and she had heard the District had a past practice of providing such a list. Woodford testified there was no such right or practice, although CSEA had once before requested such a list.

Around the same time, Kossick asked the District for a copy of the commuter agreements between CSEA and the District. CSEA's copies of the commuter agreements were in its archives rather than in the appropriate master file.

On March 15, 1996, Woodford and Kossick had a grievance meeting, after which Kossick followed Woodford to his office for a separate meeting. Kossick testified as follows about the conversation that ensued: Woodford told Kossick he had been going to give her everything, including the witness list and the commuter agreements, but now he was going to give her nothing. Woodford threw a document at her and said "since I got this, I'm not going to give you anything and I'm going to make it hard on

you." The document was Evans's letter of March 13, 1996, stating in part:

Unfortunately, if I don't receive your written response by March 22, 1996, CSEA will have to assume the district is not going to comply with Education Code Section 45191. CSEA Chapter #183 will have no choice but to seek other formal remedies to this issue.

Woodford testified he had understood this letter to be an indication CSEA would file an unfair practice charge.

According to Kossick's testimony, Woodford then said he hoped ESP would come in (through its decertification efforts) and Kossick would be gone. When Kossick told him CSEA would need to go to arbitration on the grievance they had discussed, Woodford told her to "do whatever you're going to do because I'll just take it out on you in contract negotiations." When Kossick also told him it looked like she would have to file an unfair practice charge about the building services policy, Woodford told her to "do whatever you want to do, I'll just take it out on . . . CSEA in contract negotiations." Shortly after the meeting, Kossick made notes of the conversation; these notes generally corroborate her testimony.

Woodford testified about the same meeting. He acknowledged there was discussion of the requests for information but did not say what that discussion was. He also acknowledged saying something to the effect "it might be better if the other organization [ESP] prevailed" in its decertification attempt. He remembered telling Kossick about the grievance, "Do what you got to do," but he testified, "I'm not sure I recall any discussion

specifically about bargaining." He acknowledged he was upset, partly by Evans's March 13 letter, and he remembered expressing irritation about receiving it when he "thought we'd had an agreement" on the building services policy. He did not make notes of the conversation, and he acknowledged that his anger and the passage of time may have decreased his ability to remember what occurred.

I credit Kossick's testimony that Woodford said (1) he would not provide the witness list and the commuter agreements because of Evans's March 13 letter, (2) he hoped ESP would prevail in its decertification attempt and (3) he would "take it out on" CSEA in contract negotiations if CSEA sought arbitration or filed an unfair practice charge. Kossick's testimony was generally corroborated by her notes. She had good reason to remember the conversation, while Woodford, who had evidently lost his temper, had good reason to forget it. Woodford confirmed some of Kossick's version of events and did not really deny the rest other than to say, "I'm not sure I recall any discussion specifically about bargaining." This was not a persuasive denial.

Woodford never provided the requested witness list. He testified he did mail CSEA the commuter agreements "sometime later," probably after his secretary returned to work after an illness. Kossick did not deny receiving the commuter agreements.

Kossick discussed Woodford's statements with various unit members. CSEA went ahead and pursued the grievance and filed the unfair practice charge.

Alleged refusal to provide employee addresses

On or about April 14, 1996, CSEA representative Liz Stephens (Stephens) called Woodford and requested the home addresses of CSEA bargaining unit employees. On April 24, 1996, she followed up with a written request for "mailing labels (with home addresses) for the entire bargaining unit," saying these were "urgently needed." When Woodford received the written request he marked it "approved" and took it to Carol Haley (Haley) in Personnel Services. Haley marked it "OK to run" and gave it to a clerk, who used the District's computer system to produce labels for Stephens.

On April 29, 1996, Stephens again wrote Woodford, thanking him for the labels that had been produced but stating they were "incomplete" and requesting additional labels. Stephens and Woodford then had a telephone conversation, in which Woodford stated he had furnished what he thought CSEA was entitled to. Woodford further stated he had cards from employees requesting their addresses not be given out. On April 30, 1996, Stephens requested in writing "the addresses for those employees you do not have a formal written request from not to release their address to this union." On the same day, Woodford sent Stephens the following fax message:

The CSEA has received mailing labels for all classified bargaining unit members except

those who have indicated not to release the information to the employee organization or to give their home addresses to no one. The form below is the one used by employees to restrict release of their home addresses and telephone numbers.

The form referred to was District form BU-224, as revised in August 1994.

Form BU-224 was completed by employees when they were hired and, apparently, when they changed their names, addresses or telephone numbers. The form, as it had existed since at least 1989, offered employees the following options to mark regarding their addresses and telephone numbers:

RESTRICTIONS: MAY RELEASE TO

- * EMPLOYEE ORGANIZATIONS ONLY
- * DISTRICT DIRECTORY
- * GIVE TO NO ONE

- * NO RESTRICTIONS

An older version of the form, however, did not offer these options to mark, nor did it say anything about restricting the release of addresses to others.

The District kept the completed forms on file in the payroll office, although not in particularly good order. They were the only written documents maintained by the District restricting the release of employee addresses. The District entered other requests to restrict the release of addresses into its computer system, but it did not maintain any documentation to verify those requests.

In producing labels for CSEA in April 1996, Woodford and Haley relied on the District's computer system, and they did not check whether the restrictions in the computer system were

supported by written documentation. They testified this was how they normally produced addresses for CSEA, which the Agreement required be done annually, and CSEA had not previously complained. Woodford testified he did not knowingly deny CSEA addresses to which it was entitled, but he acknowledged the District's system needed to be revised.

CSEA filed its unfair practice charge on this issue on May 30, 1996. After the informal conference on October 30, 1996, CSEA was allowed to review the forms on file in the District's payroll office. CSEA identified over 400 employees whose addresses had been withheld even though the forms on file did not restrict the release of their addresses to CSEA. The forms on file for these employees had no options marked; or they were marked "employee organizations only," "district directory" or "no restrictions;" or they were old forms on which no options were offered. For some employees there were no forms on file at all. The District ultimately provided CSEA the employees' addresses.

Alleged refusal to bargain

Article XXIV of the Agreement (Term of Agreement), Section 3 (Renegotiations), stated in part:

No sooner than May 1 and no later than June 1, preceding expiration of this Agreement, the Association shall present its initial proposals. No later than June 1, the Parties shall commence meeting and negotiating for a successor Agreement.

On May 3, 1996, CSEA sent the District its initial proposal. In a letter dated May 7, 1996, Woodford responded as follows:

I have received your initial contract proposal for modifications to the current bargaining agreement which expires on September 30, 1996. At this time, the District has a good faith doubt as to the CSEA's majority support among classified employees in the bargaining unit. This good faith doubt is based upon the current decertification campaign and the substantial decline in CSEA membership within the bargaining unit. At the present time, less than 20% of eligible bargaining unit members are CSEA members.

The District will maintain existing wages, hours, and other legally negotiable terms and conditions of employment until the issue of majority status is resolved. In addition, the District will continue to recognize the CSEA as the exclusive representation [sic] of classified unit members for purposes of grievance processing and contract administration.

As soon as the issue of majority support is resolved, the District will be prepared to meet and negotiate with the prevailing employee organization, if any.

On May 20, 1996, CSEA filed a grievance, alleging the District violated Article XXIV, Section 3, "when it refused to meet and negotiate a successor agreement prior to June 1, 1996." On May 24, 1996, Woodford responded to the grievance as follows:

The CSEA's initial contract proposal will be presented to the Board of Education at its regular meeting on June 4, 1996. The Board of Education will adopt its initial proposal for a successor agreement at its regular meeting on June 25, 1996.

Woodford explained that after he received the grievance he "went back and researched the issue and came to the conclusion that my initial position was incorrect."

CSEA's proposal was in fact presented to the Board of Education on June 4, 1996, although it could have been presented at meetings on May 14 and May 21, 1996. On June 7, 1996, Kossick took the grievance to Level II "to keep the grievance alive until we were actually at the table with the District." On June 14, 1996, the District sent CSEA the District's own initial proposal, which the Board of Education adopted on June 25, 1996. Negotiations actually began on July 3, 1996. CSEA apparently did not pursue its grievance any further; Woodford had responded at Level II, "Grievance was granted at level one along with all remedies sought at level."

Alleged surface bargaining

CSEA's initial proposal of May 3, 1996, proposed amendments to 21 of the 24 articles of the Agreement. CSEA proposed some 85 sections or subsections be amended, some 10 be added, and some 10 be deleted. Among other things, CSEA proposed Article V (Association Security) be replaced with "Full agency shop." CSEA also proposed a salary increase "to be determined through the negotiations process."

The District's initial proposal of June 14, 1996, proposed amendments to 9 articles, with some 13 sections to be amended and some 13 to be deleted. Among other things, the District proposed deleting Article V (Association Security) in its entirety. It also proposed deleting three parts of Article IX (Hours): Section 14 (Changes in Assigned Time), Section 15 (Calendar Adjustment), and Subsection B of Section 12 (Compressed

Workweek), which allowed a "9/80" work schedule. The District also proposed "a salary increase that will recruit and retain qualified bargaining unit members."

An Association Security article had been part of the parties' collective bargaining agreement since 1979, with a limited service fee provision in effect since 1990. A section on Changes in Assigned Time had also been part of the parties' agreement since 1979, and a section on Calendar Adjustment had been part of their agreement since 1982. The subsection allowing a "9/80" work schedule apparently dated from 1992.

The section on Changes in Assigned Time was at issue in the grievance Woodford and Kossick discussed on March 15, 1997. It was this grievance Kossick said CSEA would take to arbitration, causing Woodford to tell her to "do whatever you're going to do because I'll just take it out on you in contract negotiations." The section on Calendar Adjustment was at issue in a grievance CSEA filed on June 10, 1996. An alleged repudiation of a settlement of that grievance was added by amendment to CSEA's second unfair practice charge on July 15, 1996.⁷ The subsection allowing a "9/80" work schedule was related to the commuter agreement, the alleged cancellation of which was part of CSEA's second unfair practice charge when it was originally filed on May 30, 1996.

⁷The repudiation allegations were ultimately dismissed during the hearing, for CSEA's failure to make a prima facie showing of an EERA violation.

When CSEA's negotiating team reviewed the District's initial proposal, they were upset and thought it was "a bunch of nonsense." They were particularly upset by the proposed deletion of the Association Security article, the sections on Changes in Assigned Time and Calendar Adjustment, and the subsection allowing a "9/80" work schedule.

Negotiations began on July 3, 1996, with Kossick speaking for CSEA and Woodford speaking for the District. At the first session, Woodford stated CSEA would have to accept the District's proposal on Association Security (deleting the entire article) or there would be no way the parties would reach an agreement. Woodford also stated CSEA would have to agree to the District's proposed deletions from the Hours article or there would be no contract. Woodford made similar statements at the second session on July 11, 1996.⁸

At the sixth session on August 14, 1996, the District's position on the Hours article apparently softened somewhat. Woodford had offered a 4 percent salary increase and told CSEA "if you want more you'll find that the grievable portions of your contract will drop out of that contract." Kossick understood Woodford was referring to the proposed deletions from the Hours article. Woodford was apparently indicating he would insist on those deletions only if CSEA wanted more than a 4 percent salary increase.

⁸Kossick's testimony with regard to these statements was not contradicted by Woodford and, as to July 3, 1996, was corroborated by Kossick's bargaining notes.

The District remained adamant on Association Security, however. At the conclusion of the August 14 session, CSEA stated it was unwilling to accept the deletion of the Association Security article. Kossick described Woodford's response as follows:

Mr. Woodford said that basically if you, if that's what you're going, if that's going to be CSEA's position that then we wouldn't reach an agreement and that, but that's okay because no one ever said we had to reach an agreement but we tried and that's all that the law required us to do was try.

At that point, Woodford closed his notebook and left the room, followed by the rest of the District's negotiating team. The District team left without scheduling the next session, as the parties had normally done at the conclusion of each session. Kossick ultimately called the District to schedule the next session.

The seventh, eighth, and ninth sessions took place in September and October 1996. A tenth session scheduled for October 21, 1996, was cancelled and rescheduled for November 7, 1996, at Kossick's request. At the beginning of the November 7 session, Kossick outlined CSEA's position, which then included accepting the deletion of the subsection allowing a "9/80" work schedule. After some discussion, the parties found themselves in agreement on all issues except salary, Association Security, Changes in Assigned Time, and Calendar Adjustment. The parties had reached tentative agreements on the dozens of other issues, through a process of give and take that began in the summer.

At the end of the November 7 session, Woodford made to CSEA the following trial proposal (which he later confirmed in writing):

1. 6% salary increase, effective January 1, 1997.
2. Allow CSEA a mailed ballot agency shop election conducted by PERB during the term of the agreement.
3. Deletion of Article IX, Section 14, Changes in Assigned Time.
4. Deletion of Article IX, Calendar Adjustment.

The District apparently was no longer insisting on the deletion of the entire Association Security article and was willing to give CSEA a chance to get the agency shop CSEA had sought. The District was, however, still seeking the deletion of the sections on Changes in Assigned Time and Calendar Adjustment, if there was to be a 6 percent salary increase.

Kossick said she needed time to consider Woodford's trial proposal and requested another session on December 4, 1996; Woodford said the District was available to meet earlier, but Kossick said her calendar was jammed. At the December 4 session (the eleventh and final session), Kossick stated CSEA would not agree to deleting the provisions on Association Security, Changes in Assigned Time, and Calendar Adjustment, but would agree to maintaining the status quo on those issues. Woodford's initial response was that the parties had no agreement and were at impasse; Kossick then agreed the parties were at impasse. Later, however, Woodford asked Kossick if she could commit to an agreement with a 6 percent salary increase and the status quo on

Association Security, Changes in Assigned Time, and Calendar Adjustment. Kossick said she thought she could if she talked to the rest of the CSEA negotiating team. Ultimately, CSEA and the District reached a verbal tentative agreement that day on the basis outlined by Woodford, and the tentative agreement was later ratified by both parties.

Woodford had drafted the District's initial proposal. He testified as follows about which issues in the initial proposal were most important to the District:

I would say the three, if I could pick three issues, the most important would be, one, the agreement within the economic parameters given to me by the Board of Education and the budget they gave me for negotiations; secondly would be a term of three years with as few reopeners as possible; and then finally, we were under some pressure to implement a settlement agreement reached with the Department of Fair Employment and Housing, known as the Ruderman Case [involving health and welfare benefits].

Woodford did not testify how deletion of the provisions on Association Security, Changes in Assigned Time, and Calendar Adjustment related to these or any other concerns of the District.

Kossick testified she thought Woodford had made good his threat to "take it out on" CSEA in contract negotiations if CSEA sought arbitration or filed an unfair practice charge, both of which CSEA did. Woodford never admitted making those specific threats. Woodford admitted telling Kossick it might be better if ESP prevailed in its decertification attempt, but he denied doing anything to put that idea in motion.

ISSUES

1. Did the District unilaterally change policy by implementing the sick leave review policies?
2. Did the District deny CSEA's right to represent employee Ron Wilson?
3. Did the District unilaterally change policy by cancelling the commuter agreement with CSEA?
4. Did the District unlawfully refuse to provide information requested by CSEA?
5. Did the District threaten to retaliate against CSEA?
6. Did the District unlawfully refuse to provide employee addresses requested by CSEA?
7. Did the District unlawfully refuse to negotiate with CSEA?
8. Did the District engage in surface bargaining with CSEA?

CONCLUSIONS OF LAW

1. Alleged unilateral implementation of sick leave review policies

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

To prevail on a complaint of unilateral change, a charging party must establish by a preponderance of the evidence (1) the employer breached or altered the parties' written agreement or

its own established past practice; (2) such action was taken without giving the exclusive representative notice and opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract but amounted to a change of policy (that is, had a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment); and (4) the change in policy concerned a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196; Pajaro Valley Unified School District, supra, PERB Decision No. 51; Davis Unified School District (1980) PERB Decision No. 116.)

In the present case, there appears to be no dispute the sick leave review policies concerned matters within the scope of representation. EERA section 3543.2(a) specifically lists both "leave" and "procedures to be used for the evaluation of employees" as terms and conditions of employment within scope. Furthermore, PERB has held "rules of conduct which subject employees to disciplinary action are subject to negotiation [that is, are within scope] both as to criteria for discipline and as to procedure to be followed." (San Bernardino City Unified School District (1982) PERB Decision No. 255.)

There is some dispute in the briefs about whether the sick leave review policies had a generalized effect on the members of the bargaining unit. The District asserts they did not have such an effect, but this assertion is contrary to the evidence. The District itself used the word "policy" in the documents

themselves, indicating they were to have a generalized rather than isolated effect. In the building services department at least, the policy was explained to all supervisors and disseminated to all employees. In the nutrition services department, a similar effort was made, and the policy was disseminated to at least several dozen 12-month employees and several dozen 9-month employees. Although only one nutrition services employee testified at hearing, several other employees also received inter-office communications for not following the policy on reporting absences.

There appears to be no real dispute CSEA did not receive prior notice and opportunity to negotiate the sick leave review policies. Without prior notice and opportunity to negotiate, a change in policy tips the balance of negotiations, undermining the exclusive representative and forcing it to try to talk the employer back into the previously established policy. (San Mateo County Community College District (1979) PERB Decision No. 94.) That is the position in which CSEA found itself. CSEA became aware of the building services policy only after it was already disseminated to the building services employees and apparently in effect. In Evans's letter of November 6, 1995, CSEA demanded the District cease and desist from implementing the policy pending negotiations, but the District did not do so.

Similarly, CSEA was not given prior notice and opportunity to negotiate with regard to the nutrition services policy. CSEA had been told (at the meeting of February 27, 1996) the District

intended to apply the building services policy district-wide eventually, but CSEA was also told (at the same meeting and also at the meeting of March 1, 1996) the District regarded the policy as non-negotiable. In Kossick's letter of March 15, 1996, CSEA again demanded the District cease and desist from implementing the building services policy pending negotiations, but again the District did not do so. Instead, the District went ahead and adapted the building services policy into the nutrition services policy, without giving CSEA prior notice and opportunity to negotiate.

There is significant dispute in this case about whether the sick leave review policies altered the parties' Agreement or the District's established past practice. I conclude one aspect of the policies was fully consistent with and supported by the Agreement. Article XIV, Section 3, gave the District "the right to require verification" for sick leave "for good cause after prior notification to the unit member." To the extent the sick leave review policies required such verification, and to the extent the step 3 and step 4 notices gave notification of that requirement, they were specifically authorized by the Agreement. It would not matter if the District had not previously required verification on a consistent basis, because a party's choice not to enforce a specific right in the past does not preclude it from doing so in the future. (Marysville Joint Unified School District (1983) PERB Decision No. 314.)

One other aspect of the policies was supported by a combination of the Agreement and formal District policies. Article XIV, Section 16, Subsection C, required vacation leave to be "arranged in advance." In the building services department, the operating rules had required vacation be approved at least five days in advance. In the nutrition services department, the employee handbook had required vacation requests be submitted at least ten days in advance. The District thus did not change established policy merely by stating in the sick leave review policies that it would "uniformly enforce" these established advance notice requirements.

The District generally argues that in fashioning the sick leave review policies it merely "pulled together practices, policies, rules and regulations that had been in existence both informally and formally." The District made a similar argument in San Bernardino City Unified School District, supra, PERB Decision No. 255. In that case, PERB acknowledged the District had a legitimate interest in having its policies and rules set forth clearly in written form. PERB nonetheless found an unlawful unilateral change, because the evidence showed there had been no uniform past practice but rather one that varied from supervisor to supervisor. In the present case, the evidence again shows variety rather than uniformity of past practice. It is clear the past sick leave review practices of supervisors like Stevenson were quite different from those of supervisors like Clayton. Furthermore, the new sick leave review policies varied

at least in significant detail even from the practices of Clayton, who led the development of the building services policy.

The burden was on CSEA to establish the sick leave review policies altered the District's previous policy or practice. Based on the findings of fact and the entire record in this matter, I conclude CSEA has met its burden with respect to the following significant aspects of the policies:

1. The six-step process.
2. The 50%-or-six-instances formula (Guideline A).
3. The restriction on using advance sick leave (Guideline E).
4. The restriction on using vacation leave (Guideline G).
5. The restrictions on exactly when, how and by whom absences are to be reported (Guidelines K and L).
6. The step 2 notice.
7. The step 3 notice, to the extent it is a disciplinary warning.
8. The step 4 notice, to the extent it is a disciplinary reprimand.

Although I have thus found all the elements of a unilateral change, there remains a question whether CSEA waived its right to negotiate with regard to the sick leave review policies. One way such a waiver may be established is by clear and unmistakable contractual language. (Amador Valley Joint Union High School District (1978) PERB Decision No. 74.)

In the present case, the District points to Article III of the Agreement (District Rights). Section 1 of that article states the District retains the rights to "maintain the efficiency of District operations" and to "evaluate, . . . terminate, and discipline employees," among other rights. Section 2 states in part "the adoption of policies, rules, regulations, and practices in furtherance" of the exercise of those rights "shall be limited only by the specific and express terms of this Agreement."

A clear and explicit management rights clause may constitute a clear and unmistakable waiver. (Barstow Unified School District (1996) PERB Decision No. 1138.) A generally-worded management rights clause, however, will not be construed as such a waiver. (Norris School District (1995) PERB Decision No. 1090, citing Dubuaue Packing Co. (1991) 303 NLRB No. 66 [137 LRRM 1185] .)

I find the District Rights article in the Agreement to be generally worded rather than clear and explicit. It does not mention sick leave review policies specifically (or leave policies generally), and the language on the right to "maintain the efficiency of District operations" is too general to indicate a specific waiver. Furthermore, even as to the subjects the article does more specifically mention (such as discipline), it does not indicate the District is to have "exclusive" (that is, non-negotiable) rights. (Compare Barstow Unified School District, supra, PERB Decision No. 1138.) The article is thus

not a clear and unmistakable waiver of CSEA's right to negotiate with regard to the sick leave review policies.

In San Bernardino City Unified School District, supra. PERB Decision No. 255, the District argued it could unilaterally adopt rules of conduct pursuant to the then-existing contractual language in which it retained the right to terminate and discipline employees. PERB nonetheless found an unlawful unilateral change. The District has not produced evidence the contractual language has changed in such a way as to lead to a different result in the present case.

Waiver may also be established by demonstrative behavior, waiving a reasonable opportunity to negotiate over a decision not already firmly made by the employer. (Los Angeles Community College District (1982) PERB Decision No. 252.) Such a waiver must be an intentional relinquishment of statutory rights.

(Ibid.) An employee organization does not waive its rights to negotiate by failing to request negotiations after a firm decision has already been made by the employer. (Morgan Hill Unified School District (1986) PERB Decision No. 554a).

Because (as I have already concluded) CSEA did not receive prior notice and opportunity to negotiate with regard to the building services policy, it cannot be said CSEA waived its rights to negotiate before the policy was disseminated and made effective. Once CSEA was aware of the policy, CSEA promptly demanded to negotiate about it, by Evans's letter of November 6, 1995. The only real question is whether CSEA's conduct at and

after the negotiating session of November 16, 1995, waived CSEA's rights to further negotiations on the issue. Such a waiver would not excuse the District's initial unilateral action, but it might at least limit CSEA's remedy.

The evidence as to what happened at the November 16 meeting is divided. Woodford and Norton testified they thought the parties reached agreement on the policy, except as to the one Education Code question. Evans and one of his negotiating team members testified negotiations were not concluded but were to continue, and this is what was reported to CSEA's executive board.

The overall evidence shows both sides acted inconsistently with regard to negotiating the building services policy. The District initially disseminated the policy (and preprinted some 3000 forms) without any notice to CSEA, as if the policy were entirely non-negotiable. In response to CSEA's demand, however, the District promptly set up the November 16 negotiating session. Still, the District did not put the policy on hold, and Woodford did not even keep notes of the November 16 meeting, as he would normally do in negotiations.

After the November 16 meeting, someone at the CSEA office faxed Woodford a document referring to "clarifying understandings and agreements" concerning the policy, but Evans's more formal letter to Woodford (dated December 1, 1995) referred only to "understanding/clarifications," avoiding any use of the word "agreement." Woodford did not question this ambiguity in the

letter, nor did he seek written confirmation of an actual agreement. On the other hand, Evans's December 1 letter did not refer to any further negotiations, nor did it repeat Evans's earlier demand the District "cease and desist."

In some ways the District acted as if it had reached an actual agreement with CSEA: it added the agreed language on personnel files to the step 3 and step 4 notices, and it informed supervisors of the agreed change on granting vacation for sick leave use. When the District formally revised the building services policy in May 1996, these changes were included, but then so were other changes that apparently had not been negotiated with CSEA. Furthermore, when the District adapted the building services policy for use in the nutrition services department, it did not include the change on granting vacation for sick leave use, as if there had been no agreement with CSEA even on this issue.

On January 31, 1996, when Evans wrote Woodford about the Education Code issue, he addressed it as a legal issue, not as a negotiating issue. Evans again did not mention further negotiations or ask the District to cease and desist. According to Evans, Kossick was by then responsible for further negotiations, but Kossick does not appear to have been giving that responsibility much attention. Kossick did not attempt further negotiations until February 27, 1996, and the outline of "concerns" in her letter of March 1, 1996, was skimpy and vague (especially in comparison with Evans's initial demand letter of

November 6, 1995). Woodford's response to Kossick, at the meeting of March 8, 1996, was that he had no intention of negotiating the policy in any case, because in his view it was not negotiable.

How to explain the apparent inconsistencies in the parties' behavior? Were they both uncertain as to what extent the policy was negotiable? Were they both hoping to avoid what seemed likely to be difficult negotiations on the policy as a whole? Did CSEA enter the negotiating session on November 16, 1995, knowing the policy as a whole was firmly decided (and might require the filing of an unfair practice charge) but hoping some of the details could still be ameliorated by negotiation?⁹ Did the District open up the policy for full negotiation and then later change its mind about negotiability? Did CSEA consciously acquiesce in the policy as a whole and later change its mind?

Given the record in this case, any of these explanations is speculation. Speculation will not support the finding of a waiver. Given the ambiguities in the evidence, I cannot find CSEA intentionally relinquished its statutory rights. I conclude CSEA did not waive its rights to negotiate the sick leave review policies.

For the foregoing reasons, I conclude the District's implementation of the sick leave review policies was an unlawful

⁹If so, this case would be comparable to Morgan Hill Unified School District, supra, PERB Decision No. 554a, in which the union negotiated the timing of an employee's bid after the employer had already made a firm decision about the employee's seniority.

unilateral change that violated its duty to bargain in good faith with CSEA, in violation of EERA section 3543.5(c). This conduct also denied CSEA its right to represent unit members, in violation of EERA section 3543.5(b). This conduct also interfered with the right of unit members to be represented by CSEA, in violation of EERA section 3543.5(a).

2. Alleged denial of representation

In NLRB v. J. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689] (Weingarten), the court held an employee has a right to union representation at an investigatory interview the employee reasonably believes may result in disciplinary action. In Redwoods Community College Dist. v. Public Employment Relations Bd. (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523], the court extended the Weingarten right of representation under EERA to an interview with "highly unusual circumstances" even if the element of discipline is absent.

CSEA argues the District violated the Weingarten right to representation on February 1, 1996, when employee Wilson was scheduled to have a step 2 sick leave interview, and building services director Norton ordered Wilson's CSEA representative to "get the hell out." The problem with CSEA's argument is the interview did not take place at all that day (with Norton ordering Wilson out too), and when the interview finally did take place (on February 7, 1996) CSEA was allowed to represent Wilson. One element of a Weingarten violation is the employer's persistence in conducting an interview without representation.

(California State University, Long Beach (1991) PERB Decision No. 893-H.) Faced with an assertion of the Weingarten right, the employer may (as one option) dispense with or discontinue the interview. (Ibid.) The Weingarten rule requiring representation is inapplicable if no meeting or interview takes place. (Placer Hills Union School District (1984) PERB Decision No. 377.) There appears to be no reason to find a Weingarten violation in the present case, where the District merely (though rudely) cancelled one interview with representation and then scheduled another.¹⁰

CSEA also argues Norton's conduct on February 1, 1996, "encouraged employees to support one employee organization over another, in violation of [EERA] section 3543.5(d)." In Santa Monica Community College District (1979) PERB Decision No. 103, PERB stated, "The simple threshold test of [EERA] section 3543.5(d) is whether the employer's conduct tends to influence that choice [between employee organizations] or provide stimulus in one direction or the other." This threshold test is objective; it does not depend on what the employer subjectively intended or how employees actually responded. (Ibid.)

I find in the present case this threshold test has not been met. Although he publicly and rudely told the CSEA representative to "get the hell out," Norton did not say anything against her personally or against CSEA generally; in fact, he

¹⁰Under the circumstances, there appears to be no need to conclude whether or not Wilson actually had a right to representation at a step 2 sick leave interview. The District does not dispute he had such a right, however.

said he did not care who she was. Norton also did not say anything about CSEA's rival, ESP, and there is no apparent reason to believe he would have treated an ESP representative differently. Furthermore, there is nothing about the context of Norton's conduct to demonstrate a stimulus or tendency to influence the choice between CSEA and ESP; there is no evidence ESP's decertification campaign, about which CSEA first informed the District on March 12, 1996, was even under way on February 1, 1996.

I do not believe every act of public rudeness to a union representative is a threshold violation of EERA section 3543.5(d). By an objective standard, Norton's public rudeness to the CSEA representative did not become something more merely by virtue of Wilson's resulting "mixed feelings" about CSEA and his later charge against CSEA, with which an ESP supporter offered to help. I conclude Norton's conduct of February 1, 1996, did not violate EERA section 3543.5(d).

3. Alleged cancellation of commuter agreement

In its post-hearing brief, the District argues the commuter agreement "contained an arbitration clause" but CSEA did not file a grievance over its cancellation. Although the District does not press the issue, this argument raises a question about PERB's jurisdiction.

EERA section 3541.5(a) states, in part, PERB shall not:

Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and

covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646, PERB held this section established a non-waivable jurisdictional rule requiring a charge be dismissed and deferred if (1) the grievance machinery of the agreement covered the matter at issue and culminated in binding arbitration and (2) the conduct complained of in the unfair practice charge was prohibited by the provisions of the agreement.

In Inglewood Unified School District (1991) PERB Order No. Ad-222, PERB held the grievance machinery of an agreement covered a matter for deferral purposes only if the agreement itself gave the charging party the right to grieve the matter. In the present case, Article XVIII of the Agreement (Grievance Procedure), Section 1 (Definitions), gave "any unit member or the Association" the right to grieve concerning "a specific provision of this Agreement." The grievance provision of the commuter agreement, in contrast, gave the right to grieve concerning the commuter agreement only to "[u]nit members who have been adversely affected." Because CSEA itself was not given a contractual right to grieve with regard to the commuter agreement, the grievance machinery did not cover CSEA's dispute with the District about the commuter agreement. Deferral is therefore inappropriate, and PERB has jurisdiction.

As stated above (in connection with the sick leave review policies), an employer's unilateral change in terms and

conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate, in violation of EERA section 3543.5(c). A charging party must establish by a preponderance of the evidence (1) the employer breached or altered the parties' written agreement or its own established past practice, (2) such action was taken without giving the exclusive representative notice and opportunity to bargain over the change, (3) the change was not merely an isolated breach of contract but amounted to a change in policy (that is, had a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment), and (4) the change in policy concerned a matter within the scope of representation.

In the present case, the District does not dispute the commuter agreement was a policy within scope. The District does not argue the commuter agreement terminated in 1995, as Woodford testified; such an argument would not be plausible, for the reasons indicated in the findings of fact. I conclude the commuter agreement was by its terms in effect through September 30, 1996, and was thus in effect both on March 13, 1996, when the District told CSEA it would be cancelled, and on July 1, 1996, when the cancellation was effective.

The District argues, "Despite having three and one-half months advance notice, the Association did not make a request to negotiate the effects of the termination of the agreement." This argument raises the question of whether CSEA's inaction in this

regard waived its right to negotiate. Such a waiver must be an intentional relinquishment of an employee organization's rights under EERA. (Los Angeles Community College District, supra, PERB Decision No. 252.) An employee organization does not waive its rights to negotiate by failing to request negotiations after a firm decision has already been made by the employer. (Morgan Hill Unified School District, supra, PERB Decision No. 554a). An employee organization does not waive its rights to negotiate the effects of a decision within scope where it has not had notice and an opportunity to negotiate prior to the decision. (Arcohe Union School District (1983) PERB Decision No. 360.)

In the present case, the District's letter of March 13, 1996, presented the cancellation of the commuter agreement as a firm decision of the District. The letter stated without qualification that "effective July 1, 1996, the agreement . . . will be cancelled," and it invited contact from CSEA only for "questions" or "information," not negotiations. According to Kossick's uncontradicted testimony, when she discussed the cancellation with Woodford he told her it was a District decision that had already been made and implemented. Woodford testified he anticipated CSEA would ask to negotiate the effects of the cancellation, but there is no evidence he communicated to CSEA any willingness to negotiate. Since the ultimate question is whether CSEA intentionally relinquished its rights to negotiate, the District's unexpressed willingness to negotiate would not negate its express indications the decision was already firmly

made. I conclude CSEA did not waive its right to negotiate the decision and effects of the cancellation of the commuter agreement.

The District also argues:

Clearly the agreement was put in place only to satisfy SCAQMD requirements. . . . Even in the absence of notice, at the point that the SCAQMD Plan was no longer in place, bargaining unit employees no longer had an expectation that the incentives would continue.

It is true the stated purpose of the commuter agreement was "to encourage unit members to participate in the Plan," and the incentives were limited to "those unit members who regularly report to work at a site governed by a Plan." There is no allegation the District did not have the right to abolish the plan itself, thus making the incentives inoperative. The commuter agreement did more than provide the incentives, however; it also provided the District would "encourage" flexible work hours and alternative work schedules and CSEA would have one position on the District Clean Air Corps Advisory Committee. There is no evidence that abolishing the plan would necessarily make these other provisions inoperative.¹¹ Furthermore, the commuter agreement did not state it would automatically change or end if the plan changed or ended. Instead, it only said it could be amended by mutual agreement and would remain in full force and effect for the duration of the Agreement (which I have concluded was through September 30, 1996). I conclude the District's right

¹¹The plan itself is not in evidence.

to abolish the plan did not automatically give it the right to cancel the entire commuter agreement unilaterally, and the stated purpose of the commuter agreement, in context, was not a clear and unmistakable waiver of CSEA's right to negotiate concerning cancellation of the agreement.

For the foregoing reasons, I conclude the District's cancellation of the commuter agreement was an unlawful unilateral change that violated its duty to bargain in good faith with CSEA, in violation of EERA section 3543.5 (c) . This conduct also denied CSEA its right to represent unit members, in violation of EERA section 3543.5(b). This conduct also interfered with the right of unit members to be represented by CSEA, in violation of EERA section 3543.5(a) .

4. Alleged denial of information

It has long been held by the National Labor Relations Board (NLRB) and by PERB that the duty to bargain in good faith requires an employer to provide information requested by a union that is necessary and relevant to the union's duty as exclusive representative to represent unit members. (NLRB v. Acme Industrial Company (1967) 385 U.S. 432 [64 LRRM 2069]; Procter & Gamble Manufacturing Company v. NLRB (8th Cir. 1979) 603 F.2d 1310 [102 LRRM 2128]; Stockton Unified School District (1980) PERB Decision No. 143 (Stockton).) Certain information is presumed to be relevant, but if the employer questions the relevance the union must give the employer an explanation. (Modesto City Schools and High School District (1985) PERB

Decision No. 479.) Once relevant information is requested, the employer must provide it or adequately set forth the reasons why it is unable to comply. (The Kroger Company (1976) 226 NLRB 512 [93 LRRM 1315]; Stockton.) The employer may be excused if compliance would be burdensome, but the burden of proving this defense is on the employer. (NLRB v. Borden, Inc. (1st Cir. 1979) 600 F.2d 313 [101 LRRM 2727]; Stockton.)

Information immediately pertaining to mandatory subjects of bargaining is presumptively relevant. (State of California (Departments of Personnel Administration and Transportation) (1997) PERB Decision No. 1227-S.) Other information is not presumed relevant, and the requestor must show the information is relevant and necessary to its representational duties. (Ibid.)

The duty of fair representation under EERA extends to grievance handling (Fremont Teachers Association (King) (1980) PERB Decision No. 125), and information relating to grievance processing is deemed to be relevant (Modesto City Schools and High School District, supra, PERB Decision No. 479). The duty of fair representation does not extend, however, to an extra-contractual forum. (San Francisco Classroom Teachers Association. CTA/NEA (Chestanqué) (1985) PERB Decision No. 544.)

In the present case, the requested witness list apparently did not immediately pertain to a mandatory subject of bargaining, nor did it relate to grievance processing. On the contrary, it related to an extra-contractual forum, outside CSEA's representational duty under EERA. The burden was therefore on

CSEA to show the witness list was nonetheless relevant and necessary to its representational duties. CSEA did nothing to meet this burden.

The requested commuter agreements, in contrast, did immediately pertain to mandatory subjects of bargaining; the commuter agreements stated as much on their face.¹² It is true CSEA had the commuter agreements in its archives, but this in itself does not establish a recognized justification for the District to refuse to provide them, nor does the District argue it should.

It is apparently also true the District did provide the commuter agreements "sometime later," as Woodford testified. The District asserts in its post-hearing brief, "The slight delay was due to the absence of Woodford's secretary." The evidence does not support this assertion, however; Woodford did not testify the delay was "slight" or due solely to his secretary's absence. I have credited Kossick's testimony that Woodford said on March 15, 1996, he would not provide the commuter agreements. This was a refusal on its face. It may have been a short-lived refusal, but it was nonetheless a refusal when it occurred.

I therefore conclude CSEA requested relevant information (the commuter agreements), the District refused to provide that information, and the District established no justification for its refusal. Under PERB precedent, the District's refusal

¹²The commuter agreements specifically referred to "an impact upon wages, hours, and other negotiable terms and conditions of employment."

violated its duty to bargain in good faith with CSEA, in violation of EERA section 3543.5(c). This conduct also denied CSEA its right to represent unit members, in violation of EERA section 3543.5(b). This conduct also interfered with the right of unit members to be represented by CSEA, in violation of EERA section 3543.5(a).

5. Alleged threat to retaliate

A threat to retaliate against an employee organization for protected activity interferes with the organization's statutory rights. (State of California (California Department of Forestry and Fire Prevention) (1989) PERB Decision No. 734-S.) Filing an unfair practice charge or a grievance is protected activity.

(California State Employees Association (1993) PERB Decision No. 1014-S; North Sacramento School District (1982) PERB Decision No. 264.) Employee organizations as well as employees have statutory rights to file unfair practice charges and grievances. (EERA Sec. 3541.5(a); South Bay Union School Dist. v. Public Employment Relations Bd. (1991) 228 Cal.App.3d 502 [279 Cal.Rptr. 135].)

In the present case, I have credited Kossick's testimony that Woodford told her he would "take it out on" CSEA in contract negotiations if CSEA sought arbitration of a grievance or filed an unfair practice charge. I conclude this threat interfered with CSEA's rights, in violation of EERA section 3543.5(b). This conduct also interfered with the right of unit members to be represented by CSEA, in violation of EERA section 3543.5 (a).

CSEA argues Woodford's statements to Kossick, and in particular his statement he hoped ESP would prevail in its decertification attempt, also violated EERA section 3543.5(d), which makes it unlawful for an employer to "in any way encourage employees to join any organization in preference to another." The test is "whether the employer's conduct tends to influence that choice [between employee organizations] or provide stimulus in one direction or the other." (Santa Monica Community College District, supra, PERB Decision No. 103.)

Given Woodford's position of authority in the District, and the retaliatory content of his statements as a whole, I would have little difficulty in finding his statements violated EERA section 3543.5(d) if he had made them within the hearing of unit members who could have been influenced by them. The difficulty is Woodford made his statements only to Kossick, and there is no evidence any unit member heard them. Woodford's statements thus could have a tendency to influence unit members only to the extent Kossick, an agent of the charging party, repeated them.

CSEA cites El Torito-La Fiesta Restaurants v. NLRB (9th Cir. 1991) 136 LRRM 2908, 2912 [929 F.2d 490], for the proposition "a statement made to an agent of the employees' representative should be considered as having been made to the employees." The case is not on point, however, because it addressed whether laid-off employees had a reasonable expectation of recall based in part on what the employer told a union business agent. The case did not address whether the employer's statements had an unlawful

tendency to influence employees where that influence could be felt only if the charging party repeated the statements.

CSEA also cites Manton Joint Union Elementary School District (1992) PERB Decision No. 960, but I do not find the case analogous. In that case, the employer made statements of support to the leader of an employee organization; the leader was herself a unit member, and her employee organization was the rival of the charging party. The charging party thus could not control the influence the employer's statements might have on unit members.

CSEA argues it was "appropriate" and, by implication, predictable for Kossick to repeat Woodford's statements to at least some of the unit members she represented. I do not disagree. There was apparently nothing personal or confidential about the meeting between Kossick and Woodford; they apparently discussed various issues between CSEA and the District solely in their representative capacities. Nonetheless, it seems inappropriate to hold Woodford's statements had an unlawful tendency to influence unit members when that influence depended entirely on whether or not Kossick, an agent of the charging party, repeated the statements. Kossick had complete control over whether the statements would be communicated to unit members at all and, if so, how. If she was concerned about the statements' influence on unit members, she did not have to file an unfair practice charge about them; she only had to refrain from repeating them.

I conclude that although Woodford's statement violated EERA section 3543.5(a) and (b), as previously discussed, they did not in themselves violate EERA section 3543.5(d). I shall, however, consider those statements, and the possibility of a 3543.5(d) violation, in connection with the District's alleged surface bargaining with CSEA.

6. Alleged refusal to provide employee addresses

As stated above, it has long been held by the NLRB and PERB that the duty to bargain in good faith requires an employer to provide information requested by a union that is necessary and relevant to the union's duty as exclusive representative to represent unit members. Certain information is presumed to be relevant, but if the employer questions the relevance the union must give the employer an explanation. Once relevant information is requested, the employer must provide it or adequately set forth the reasons why it is unable to comply. The employer may be excused if compliance would be burdensome, but the burden of proving this defense is on the employer.

The NLRB has held unit members' home addresses are presumptively relevant. (See, e.g., Harco Laboratories, Inc. (1984) 271 NLRB No. 220 [117 LRRM 1232].) In Prudential Insurance Co. v. NLRB (2d Cir. 1969) 412 F.2d 77, 84 [71 LRRM 2254] (Prudential), the Court of Appeals stated the following about a union's request for the addresses of unit members:

The kind of information requested by the Union in this case has an even more fundamental relevance than that considered presumptively relevant. The latter is needed

by the union in order to bargain intelligently on specific issues of concern to the employees. But data without which a union cannot even communicate with employees whom it represents is, by its very nature, fundamental to the entire expanse of a union's relationship with the employees. In this instance it is urgent so that the exclusive bargaining representative of the employees may perform its broad range of statutory duties in a truly representative fashion and in harmony with the employees' desires and interests. Because this information is therefore so basically related to the proper performance of the union's statutory duties, we believe any special showing of specific relevance would be superfluous.

With regard to requests for addresses (as well as with regard to other requests for information), PERB has generally followed NLRB precedent. (See, e.g., Mt. San Antonio Community College District (1982) PERB Decision No. 224, citing Prudential.)

In 1992, the California State Legislature amended section 6254.3 of the California Public Records Act (PRA).¹³ This section previously applied to the home addresses of state employees only. As amended, the section states in relevant part as follows (with the new language underlined):

(a) The home addresses and home telephone numbers of state employees and employees of a school district or county office of education shall not be deemed to be public records and shall not be open to public inspection, except that disclosure of that information may be made as follows:

(3) To an employee organization pursuant to regulations and decisions of the Public Employment Relations Board, except that the home addresses and home telephone numbers of

¹³The PRA is codified at section 6250 and following.

employees performing law enforcement-related functions shall not be disclosed.

(b) Upon written request of any employee, a state agency, school district, or county office of education shall not disclose the employee's home address or home telephone number pursuant to paragraph (3) of subdivision (a) and an agency shall remove the employee's home address and home telephone number from any mailing list maintained by the agency, except if the list is used exclusively by the agency to contact the employee.

In 1986, prior to the 1992 PRA amendment, PERB issued specific regulations with regard to the provision of the home addresses of employees under the Ralph C. Dills Act (Dills Act) and the Higher Education Employer-Employee Relations Act (HEERA).¹⁴ The Dills Act regulation is PERB Regulation 40165¹⁵ and states in relevant part as follows:

(a) Except as prohibited by law, the state employer shall release to an exclusive representative a mailing list of home addresses of state employees it represents pursuant to a written request by the exclusive representative.

(c) As provided by Government Code Section 6254.3, and upon written request of a state employee, the state employer shall remove the state employee's home address from the mailing lists referenced in subsection (a) and (b) prior to the release of such lists.

The HEERA regulation is PERB Regulation 51027 and is parallel to the Dills Act regulation.

¹⁴The Dills Act is codified at section 3512 and following, HEERA is codified at section 3560 and following.

¹⁵PERB regulations are codified at California Code of Regulations, title 8, section 31001 and following.

When the Dills Act and HEERA regulations were issued in 1986, PRA section 6254.3 applied to the home addresses of state employees only. Now that the 1992 amendment to the Public Records Act has made section 6254.3 applicable to the addresses of public school employees as well, there appears to be no reason why the principles embodied in these regulations should not also apply under EERA, which in all relevant respects is parallel to the Dills Act and HEERA.

I conclude that under EERA unit members' addresses are presumptively relevant information. The burden thus shifts to the District to justify its refusal to provide over 400 such addresses in April 1996, when CSEA requested them. The District has not rebutted the presumption those addresses were relevant information, nor has the District argued or proved it would have been burdensome to provide them. Furthermore, the District has not argued or proved those addresses were withheld pursuant to written requests by the employees under PRA section 6254.3.

The District instead argues CSEA is "estopped" from claiming the withholding of the addresses was wrongful because the District followed the same procedure it had always followed in producing addresses for CSEA. There is, however, no evidence CSEA was previously aware of the inadequacies of that procedure. Furthermore, a party does not lose a legal right (in this case, the right under EERA to receive relevant information) merely by not enforcing that right on prior occasions. (Cf. Marysville Joint Unified School District, supra, PERB Decision No. 314.)

The District also argues its withholding of the addresses "was based upon an honestly held legal position regarding employees' rights." This argument is not supported by the evidence. Woodford did not testify he held any particular legal position; it appears from the evidence he simply and mistakenly believed the District had written requests on file for all the employees whose addresses were withheld. This mistaken belief could have been corrected (and ultimately was corrected) by a review of the District's own files. There is no apparent reason why such a mistaken belief should justify the District's refusal to provide information that CSEA had a right to receive.

I therefore conclude the employee addresses CSEA requested in April 1996 were relevant information and the District established no defense for its refusal to provide over 400 of the requested addresses. Under PERB precedent, the District's refusal violated its duty to bargain in good faith with CSEA, in violation of EERA section 3543.5(c). This conduct also denied CSEA its right to represent unit members, in violation of EERA section 3543.5(b). This conduct also interfered with the right of unit members to be represented by CSEA, in violation of EERA section 3543.5(a).

7. Alleged refusal to bargain

As noted above (in connection with the commuter agreement), EERA section 3541.5(a) states, in part, PERB shall not:

Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and

covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District, supra, PERB Decision No. 646, PERB held this section established a non-waivable jurisdictional rule requiring a charge be dismissed and deferred if (1) the grievance machinery of the agreement covered the matter at issue and culminated in binding arbitration and (2) the conduct complained of in the unfair practice charge was prohibited by the provisions of the agreement.

These standards are met in this case with respect to the allegation that the District refused to negotiate with CSEA in May 1996. First, the grievance machinery of the Agreement covered the dispute raised by this allegation and culminated in binding arbitration. Second, the conduct complained of in this allegation was arguably prohibited by Article XXIV, Section 3, which required the parties to commence meeting and negotiating no later than June 1. This allegation, to the extent it alleges an independent EERA violation, must therefore be dismissed. The evidence will be considered, however, in connection with the District's alleged surface bargaining with CSEA.

8. Alleged surface bargaining

EERA section 3543.5(c) makes it unlawful for a public school employer to refuse or fail to meet and negotiate "in good faith" with an exclusive representative. An employer must negotiate with a good faith intent to reach agreement. (Pajaro Valley Unified School District, supra. PERB Decision No. 51.)

Negotiating without such an intent is called "surface bargaining" because of its superficiality. A surface bargaining violation is determined by a "totality of conduct" test that "looks to the entire course of negotiations to determine whether the employer has negotiated with the requisite intention of reaching agreement." (Ibid.)

Surface bargaining is indicated by a course of conduct that delays or thwarts the bargaining process and for which there is no reasonable explanation or rationale. (See, e.g., Stockton Unified School District, supra, PERB Decision No. 143.) The duty to negotiate in good faith does not, however, require parties to reach agreement, make concessions on every proposal, or yield positions fairly maintained. (Oakland Unified School District (1982) PERB Decision No. 275.)

In the present case, the course of the negotiations between CSEA and the District was in some ways unremarkable. The parties met eleven times on a fairly regular basis for a little over five months. They started with dozens of issues and eventually worked their way through them, apparently resolving easier issues first and harder issues last. Ultimately, they reached agreement without resorting to the statutory procedures for resolving an impasse (under EERA section 3548 and following).

Some remarkable things occurred before the parties began negotiating, however. First, ESP launched its decertification effort against CSEA; CSEA informed Woodford of this effort on March 12, 1996. Then, on March 15, 1996, Woodford told Kossick

he hoped ESP would prevail, and he threatened to "take it out on" CSEA in contract negotiations if CSEA sought to arbitrate a grievance or filed an unfair practice charge, both of which CSEA did. Then, on May 7, 1996, Woodford responded to CSEA's initial proposal by refusing to bargain on the basis of an asserted "good faith doubt as to the CSEA's majority support." Woodford testified he researched this matter only after CSEA filed a grievance on May 20, 1996; Woodford then concluded his initial position was incorrect, and he granted the grievance on May 24, 1996.¹⁶ Negotiations therefore did not begin until July 4, 1996, although the Agreement had stated CSEA and the District "shall commence meeting and negotiating" no later than June 1.

Woodford testified he never did anything to put in motion his expressed hope ESP would prevail over CSEA. Under the circumstances, I do not credit this testimony.¹⁷ CSEA's initial proposal gave Woodford his first opportunity to "take it out on" CSEA in contract negotiations, as he had threatened to do. It also gave him an opportunity to assist ESP's decertification efforts, since a delay in negotiations would tend to undermine

¹⁶Woodford did not explain why he ever thought his initial position was correct.

¹⁷Woodford's self-serving testimony on this point was elicited by a leading question and was thus less credible than it otherwise might have been. Also, Woodford undermined his own credibility generally by testifying the Agreement (and the commuter agreements) terminated in 1995, an implausible position that was also inconsistent with letters Woodford sent to CSEA and PERB. Furthermore, although surface bargaining is a question of subjective intent, it is generally to be determined by objective evidence.

CSEA and encourage support for its rival. Woodford took the opportunity.

As the District's employee relations director, Woodford presumably knew the Agreement required negotiations to begin no later than June 1. As an experienced labor relations professional, he presumably also knew a refusal to bargain is a serious matter. Woodford nonetheless responded to CSEA's initial proposal by refusing to bargain, apparently without researching the matter beforehand. When CSEA challenged Woodford by filing a grievance, it did not take Woodford long to change his position, but his refusal still had its effect, and negotiations were delayed until July 4, 1996.

I conclude Woodford's statements of March 15, 1996, and his refusal of May 7, 1996, are strong evidence Woodford intended to and did retaliate against CSEA and support ESP by delaying the bargaining process. The next question is whether such an intent and such conduct continued in the course of the negotiations with CSEA.

One indication of surface bargaining is the making of predictably unacceptable proposals. (Redwood City School District (1980) PERB Decision No. 115; Oakland Unified School District (1983) PERB Decision No. 326.) Woodford drafted the District's initial proposal of June 14, 1996, which CSEA's negotiating team found an unacceptable "bunch of nonsense." Was this reaction predictable? As to the Association Security article, I conclude it was. An Association Security article had

been part of the parties' collective bargaining agreement since 1979. By its nature, the article helped secure the viability of the CSEA chapter. Woodford did not testify the District had any problems with the article, and yet he proposed to delete it entirely. This was a predictably unacceptable proposal, and was presumably intended to be.

As to the deletions from the Hours article, the question is closer. Sections on Changes in Assigned Time and Calendar Adjustment had been part of the Hours article since 1979 and 1982 respectively; they had also been at issue in recent grievances. The existence of the grievances would tend to indicate these two sections were of some importance to CSEA; this is especially true of the grievance on Changes in Assigned Time, which CSEA decided to take to arbitration. On the other hand, the grievances would also indicate these sections were a source of some disagreement, which the District could reasonably seek to resolve in negotiations. If there was a problem with the language of these sections, however, one might expect the District to propose some clarifying changes in that language. The District never did so, but only proposed the sections be deleted entirely. Especially in the light of Woodford's threat to "take it out on" CSEA if it sought arbitration of the grievance on Changes in Assigned Time, I conclude the District's proposal to delete the two sections was intended to be and actually was predictably unacceptable.¹⁸

¹⁸I do not conclude, however, the District's proposal to delete the subsection allowing a "9/80" work schedule was predictably unacceptable. That subsection apparently dated from

Another indication of surface bargaining is taking an inflexible position. (Fremont Unified School District (1980) PERB Decision No. 136.) The District took an inflexible position on Association Security for over four months. At the first and second negotiating sessions, Woodford stated there would be no agreement unless the entire article was deleted. At the sixth session, Woodford made a similar statement, then emphasized the point by walking out, without scheduling the next session as normal. Walking out is itself evidence of surface bargaining. (San Ysidro School District (1980) PERB Decision No. 134.) The District apparently remained inflexible on the Association Security issue until the tenth session, when it offered CSEA a mailed agency shop election.

In its post-hearing brief, the District argues it was simply engaging in lawful "hard bargaining." The essence of lawful hard bargaining, however, is insistence on positions fairly maintained. (Oakland Unified School District, supra, PERB Decision No. 275.) Woodford never testified to any legitimate reason for deleting the entire Association Security article. For the same reasons I have concluded the District's initial proposal on this issue was intentionally predictably unacceptable, I also conclude the District's position was not fairly maintained.

The District also took an inflexible position on the Hours article. At the first two sessions, Woodford stated there would be no agreement unless the sections on Changes in Assigned Time

only 1992, and CSEA ultimately accepted its deletion.

and Calendar Adjustment were deleted. At the sixth session, Woodford softened his position somewhat and indicated he would insist on those deletions only if CSEA wanted more than a 4 percent salary increase. Conditioning agreement on economic matters upon agreement on non-economic matters, however, is also an indication of surface bargaining. (Fremont Unified School District, supra, PERB Decision No. 136.) Woodford never proposed any change in the two Hours sections short of total deletion, and he continued to propose their deletion until the parties appeared to reach impasse at the eleventh session, after over five months of negotiations. Woodford never testified as to any legitimate reason for deleting the two sections. For the same reasons I have concluded the District's initial proposal on these issues was intentionally predictably unacceptable, I also conclude the District's position was not fairly maintained.¹⁹

For all the foregoing reasons, I conclude that in the course of negotiations the District continued its intent and conduct to delay the bargaining process, as initially evidenced by Woodford's statements of March 15, 1996, and his refusal to bargain on May 7, 1996. I therefore conclude the District engaged in bad faith surface bargaining, in violation of EERA section 3543.5(c). This conduct also tended to undermine CSEA and support ESP in the pending decertification election, in violation of EERA section 3543.5(d). This conduct also denied

¹⁹I do not conclude, however, the District's position on deleting the subsection allowing a "9/80" work schedule was not fairly maintained.

CSEA's rights, in violation of EERA section 3543.5(b). This conduct also interfered with the right of employees to be represented by CSEA, in violation of EERA section 3543.5(a).

REMEDY

EERA section 3541.5 (c) gives PERB:

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

In the present case, the District has been found to have violated EERA section 3543.5(a), (b), (c) and (d), by (1) unilaterally implementing sick leave review policies, (2) unilaterally cancelling a commuter agreement, (3) refusing to provide CSEA with commuter agreement information, (4) threatening CSEA, (5) refusing to provide CSEA with employee addresses and (6) engaging in bad faith surface bargaining with CSEA. It is therefore appropriate to direct the District to cease and desist from such conduct. In connection with some violations, it is also appropriate to direct the District to take certain affirmative actions, as discussed below.

Sick leave review policies

I have concluded the District violated its duty to negotiate with CSEA by unilaterally implementing sick leave review policies. It is therefore appropriate to direct the District to meet and negotiate about sick leave review policies, if CSEA so requests.

In California State Employees' Association v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923, 946

[59 Cal.Rptr.2d 488], the court stated in part:

Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an opportunity to meet and confer over the decision and its effects. (See, e.g., Oakland Unified School Dist. v. Public Employment Relations Bd. (1981) 120 Cal.App.3d 1007, 1014-1015 [175 Cal.Rptr. 105].) This is usually accomplished by requiring the employer to rescind the unilateral change and to make employees "whole" from losses suffered as a result of the unlawful unilateral change.

It is therefore appropriate to direct the District to rescind the sick leave review policies and reinstate the District's previous policies and practices, if CSEA so requests. It is also appropriate to direct the District to make whole those employees who have been adversely affected by the sick leave review policies, due to documents placed in their personnel files, substandard evaluations, dockings of pay, suspensions and dismissals pursuant to those policies. The District will therefore be directed to rescind such adverse actions, although it may reimpose them on the basis of the previous policies and practices. To the extent employees have lost pay due to actions that are rescinded and not reimposed, the employees shall receive back pay with interest at the rate of 7 percent per annum. (See Regents of the University of California (1997) PERB Decision No. 1188-H.)

I recognize it may be difficult, at least in some instances, for the District to determine whether actions taken under the sick leave review policies, which therefore must be rescinded, would also have been taken under the previous policies and

practices, and therefore may be reimposed. Part of the difficulty arises from the variety of past practices that existed, at least in the building services department. This difficulty does not justify denying the affected employees a remedy, however. On the other hand, it would not be appropriate to prevent the District from reimposing actions it would have taken even if it had not implemented the new sick leave review policies.

Commuter agreement

I have concluded the District violated its duty to negotiate with CSEA by unilaterally cancelling a commuter agreement. It is therefore appropriate to direct the District to meet and negotiate about commuter policies, if CSEA so requests.

As noted above, the normal remedy for a unilateral change is restoration of the status quo. In the present case, there are two obvious objections to restoring the status quo by reinstating the policies in the commuter agreement: (1) the stated duration of the commuter agreement, which I have concluded was through September 30, 1996, has passed, and (2) the stated purpose of the commuter agreement, "to encourage unit members to participate in the Plan," can no longer be carried out, because the plan itself has been abolished. In California State Employees' Association v. Public Employment Relations Bd., supra, 51 Cal.App.4th 923, however, the court held duration language in an agreement did not authorize unilateral termination of the agreement and did not make restoration of the status quo inappropriate. In the present

case, I have concluded the stated purpose of the commuter agreement also did not authorize unilateral termination, and I further conclude the stated purpose and the duration language do not make restoration of the status quo inappropriate. The District will therefore be directed to reinstate the policies in the commuter agreement, if CSEA so requests.

CSEA also asks the District be required to credit "employees who use alternative methods of commuting . . . with additional vacation time and meal vouchers which they would have received but for the employer's illegal conduct." In the present case, however, this make-whole remedy is inappropriate. The commuter agreement specifically limited its incentives to "unit members who regularly report to work at a site governed by a Plan." There is no allegation the District did not have the right to abolish the plan itself, making the incentive provisions of the commuter agreement inoperative. There is thus no evidence any employees lost incentives due to the District's unlawful conduct (cancelling the commuter agreement) that they would not have already lost due to the District's lawful conduct (abolishing the plan).

Posting

It is also appropriate the District be directed to post a notice incorporating the terms of the order in this case. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice the District has acted in an unlawful manner, is being required to cease and

desist from this activity and take affirmative remedial actions, and will comply with the order. It effectuates the purposes of EERA that employees be informed both of the resolution of this controversy and of the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and upon the entire record in this matter, it is found the San Bernardino City Unified School District (District) violated the Educational Employment Relations Act (EERA or Act), Government Code section 3543.5(a), (b), (c) and (d), by

- (1) unilaterally implementing sick leave review policies,
- (2) unilaterally cancelling a commuter agreement, (3) refusing to provide the California School Employees Association (CSEA) with commuter agreement information, (4) threatening CSEA,
- (5) refusing to provide CSEA with employee addresses and
- (6) engaging in bad faith surface bargaining with CSEA.

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. Unilaterally implementing sick leave review policies within the scope of representation, in the absence of a waiver of CSEA's right to negotiate.
2. Unilaterally cancelling commuter agreements.

3. Refusing without legal justification to provide CSEA with relevant and necessary information, including but not limited to commuter agreement information and employee addresses, upon a proper request by CSEA.

4. Threatening CSEA for protected activity.

5. Engaging in bad faith bargaining with CSEA.

6. Encouraging employees in any way to join any other employee organization in preference to CSEA.

7. By the same conduct, denying CSEA its rights.

8. By the same conduct, interfering with the rights of employees to be represented by CSEA.

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

1. If requested by CSEA within 10 days of this proposed decision becoming final, meet and negotiate in good faith with CSEA concerning sick leave review policies and commuter policies.

2. If requested by CSEA, reinstate the prior leave policies and practices and prior commuter policies.

3. Make whole those unit members adversely affected by the sick leave review policies, as follows:

a. All documents placed in unit members' personnel files pursuant to the policies, including but not limited to step 2, step 3 and step 4 notices, shall be removed. Step 3 and step 4 notices may be replaced by the documents previously in use that dealt with verification of absences but did not refer to discipline. Disciplinary warnings and

reprimands may be reimposed only on the basis of previous policies and practices.

b. Unit members who received substandard attendance/punctuality evaluations pursuant to the policies shall be reevaluated pursuant to previous policies and practices.

c. Any docking of pay or suspension or dismissal pursuant to the policies shall be rescinded. Any such docking, suspension or dismissal may be reimposed only on the basis of previous policies and practices. Unless the actions are thus reimposed, the affected employees shall receive back pay with interest at the rate of 7 percent per annum, and the dismissed employees shall be reinstated.

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to classified 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 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 the Notice is not reduced in size, altered, defaced or covered with any other material.

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

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing" (See Cal. Code of Regs., tit. 8, sec. 32135; Code of Civ. Pro. sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

THOMAS J. ALLEN
Administrative Law Judge