STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOS ANGELES SCHOOL PEACE OFFICERS ASSOCIATION, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4181-E PERB Decision No. 1501 October 31, 2002

Appearances: Lackie & Dammeier by Dieter C. Dammeier, Attorney, for Los Angeles School Peace Officers Association; Paul, Hastings, Janofsky & Walker by Cara D. Miller, Attorney, for Los Angeles Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Los Angeles Unified School District (District) to an administrative law judge's (ALJ) proposed decision (attached) finding that the District violated the Educational Employment Relations Act (EERA)[1] by unilaterally rescinding a past practice whereby District police detectives could commute to and from work in District-owned vehicles. The ALJ found this conduct violated EERA section 3543.5(a), (b) and (c).[2]

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

[2] Section 3543.5 provides, in pertinent part:

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

After reviewing the entire record in this case, including the proposed decision, the District's exceptions, and the Los Angeles School Peace Officers Association's (POA) response,[3] the Board adopts the decision of the ALJ as the decision of the Board itself as modified by the following discussion.[4]

DISCUSSION

The ALJ reached three basic conclusions in his proposed decision. First, he concluded that the POA did not waive its right to bargain through the parties' contract nor did it waive its right to bargain through its course of conduct. Second, he concluded that the detectives use of take home vehicles for commuting to and from home is a mandatory subject of bargaining. Finally, he concluded that the District's 1994 unilateral removal of the take home cars from detectives for 2 and a half years did not preclude a finding that the past practice was to allow the cars to be taken home.

> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of 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.

[3] The District's request for oral argument is denied. The record and briefs in this matter adequately present the issues and positions of the parties.

[4] Neither party excepted to the portion of the ALJ's proposed decision finding that the POA's method of requesting negotiations did not constitute a waiver. As this issue has not been specifically urged, it is waived and is not considered by the Board. (PERB Reg. 32300(4)(c); PERB regs. are codified at Cal. Code Regs., tit. 8, sec. 31001 et seq.) This portion of the ALJ's proposed decision is not adopted by the Board.

The District's exceptions to the proposed decision argue that: (1) it had the right to make the change under the contract as the POA waived its right to bargain either by contract or by course of conduct; (2) the change was not a unilateral change because the policy was not an unequivocal past practice nor was it within scope because requiring negotiations would abridge the District's managerial prerogative; and (3) the remedy is too broad in that it ostensibly includes reimbursement for detectives who have chosen not to utilize district vehicles and therefore have no damages.

Did the POA Waive its Right to Bargain Over the Change by Contract?

The ALJ found that the contract did not "clearly and unmistakably" waive the POA's right to bargain. The ALJ reached this conclusion by being "amenable" to the POA's interpretation that the language of section 2.0, the District Rights article, appears to be "limited to matters which are beyond the scope of negotiations under Government Code section 3543.2" or not otherwise limited by the agreement. The ALJ found by reading the two portions of the clause together the language, at best, is ambiguous and therefore does not provide a "clear and unmistakable" waiver of the POA's right to bargain. Although the Board agrees the clause is ambiguous, it reaches this result in a different manner than the ALJ.

The Board disagrees with the ALJ's basis for finding the clause in question ambiguous. Section 2.0 of the District Rights clause reads, in part:

> It is agreed that all matters which are beyond the scope of negotiations under Government Code Section 3543.2, and also all rights which are not limited by the terms of this Agreement are retained by the District. Such retained rights include, but are not limited to, the right to determine the following matters.

The Board finds this language is not ambiguous and is not amenable to the POA's interpretation. The phrase "all rights which are not limited by the terms of this Agreement" is

separate and distinct from the first set of rights retained by the District. This is plain on its face as the phrase follows a comma and the words "and also." It is distinct from the first retained District Right, which is all matters beyond the scope of negotiations. The second prong presumably covers matters within scope.

The ALJ concluded that under prevailing PERB case law, an employee's use of an employer's vehicle for commuting to and from home is a mandatory subject of bargaining. As the Board agrees with the ALJ that the use of take home vehicles is within scope, the question becomes whether the second prong of the District Rights clause, read with or without the specific subdivisions of Article 2.0, constitutes a "clear and unmistakable" waiver through its express terms or by necessary implication.

The second prong reads, "all rights which are not limited by the terms of this Agreement are retained by the District." (Emphasis added.) It is not possible to "retain" something you do not otherwise have. Without an express or implied waiver of the right to bargain, the District would have to negotiate matters within scope with the POA. The right to make a change within scope therefore cannot be "retained" by the District as it is a right that it would not have, but for the contract. It is not entirely clear what the parties meant by this language, but it is within this ambiguity that the Board finds the language of Article 2.0 does not constitute a "clear and unmistakable" waiver.

The District argues that the provisions of 2.0(c), (d) and (k) when read with the general lead into the Article at section 1.0 and the parties' Entire Agreement clause at Article VIII constitute waiver either expressly or by necessary implication. The Board does not agree.

As the ALJ correctly noted, the term "vehicle" is not used in (c), but is used in (d) and (k). The inference that 2.0(c) was not intended to include vehicles is sound, therefore 2.0(c)

cannot be the basis for a waiver. In 2.0(d), the ALJ correctly points out that the District retains the right to determine the "vehicles" to be used in rendering services to the public. The ALJ correctly concluded that it is not clear that this section pertains to take home vehicles because it is not at all clear that in their take home use such vehicles are involved in rendering services to the public. As is discussed more thoroughly below in addressing the "managerial prerogative" section of the Board's decision, the record indicates that while the reason the District provided take home cars since the 1970's was part of the emergency response plan, the plan changed in the early 1990's. There is no evidence that the emergency response plan changed again following the change in the early 1990's. The plan was the same when the take home cars were pulled in 1994 and the same when they were given back in 1997. The emergency response plan was in effect when the District gave the cars back in 1997. To argue now that the cars are necessary for the plan and therefore are "involved in rendering services to the public" is suspect. The same analysis applies to either vehicle safety or safety of the public or property under 2.0(k).

Did the POA Waive its Right to Bargain by its Course of Conduct?

The District argues that the POA waived its right to meet and confer over the utilization of District-owned vehicles because the history of negotiations after the POA was on express notice of the District's unilateral decision to remove take home vehicle privileges is sufficient to constitute waiver. The issue was not addressed by the ALJ.

The District's argument is that in 1994, after POA raised a question about the District's decision to no longer provide take home vehicles, the District's counsel notified POA in writing of the District's position that "pursuant to the current agreement between the parties, the District has retained the right to determine the utilization of District vehicles and to change,

modify or discontinue that use, in whole or in part." (District's Ex. B) Although the POA did not file an unfair practice charge at the time the vehicles were taken, it did not acquiesce either. It continued to challenge the action politically, ultimately getting the vehicles restored in 1997.

The District's argument is that POA was on notice that the District felt it had the power under the contract to take back the cars, yet POA and the District rolled over the District Rights provision in 1997 bargaining. By failing to negotiate any modification, the District argues POA waived its right to require negotiations over this issue.

As the POA points out in its brief, the POA never acquiesced, therefore the District was on notice that the POA had challenged its right to withdraw the vehicles, and in fact was successful in getting the vehicles back. The POA argues the District should have clarified its rights in bargaining.

As it appears neither party raised the issue at the table, the negotiating history is not helpful in establishing a waiver as this issue apparently could cut against either party's argument. The Board therefore concludes the POA's alleged failure to negotiate a modification does not constitute a waiver.

Was the Policy Not Within Scope Because Requiring Negotiations Would Abridge the District's Managerial Prerogative?

The ALJ concluded that under prevailing PERB case law, an employee's use of an employer's vehicle for commuting to and from home is a mandatory subject of bargaining. The ALJ noted that the Board has reached this decision every time it has reviewed this question. The detectives here enjoyed a financial benefit from the use of a District-owned take home vehicle in the form of partially subsidized transportation.

The District argues that the removal of take home cars from detectives was a non-negotiable management prerogative. The District correctly notes that the ALJ did not

specifically address whether requiring the District to negotiate over its proposed change in the use of its vehicles for the purpose articulated would significantly abridge the District's freedom to exercise its managerial prerogative. (Anaheim Union High School District (1981) PERB Decision No. 177.) The District relies on West Covina Unified School District (1993) PERB Decision No. 973 (West Covina) for further support of its argument that the ALJ should have reviewed the abridgement of the managerial prerogative argument. In West Covina the Board stated, "[A] policy governing the assignment of school district vehicles may not in all cases constitute a negotiable subject. We find it appropriate to decide the issue on a case-by-case basis. There may well be circumstances where vehicle assignment represents a clear management prerogative." Implicit in the ALJ's decision is a finding that requiring negotiations would not abridge the District's managerial prerogative.

The District argues that, to constitute a mandatory subject of bargaining, the negotiation requirement may not "significantly abridge" the District's freedom to exercise its managerial prerogatives. The District's exceptions contain the following excerpt from Seafarers, Local 777 v. NLRB, 603 F.2d 862 (D.C. Cir. 1978):

> The fact that an employer's decision affects conditions of employment does not necessarily imply, however, that it is a mandatory subject of bargaining. The law draws a distinction between those decisions 'primarily about the conditions of employment' which must be made a subject of bargaining and those which, while affecting the employees' working conditions, are entrepreneurial judgments 'fundamental to the basic direction of a corporate enterprise' or which substantially alter the way in which business is conducted. *The latter need not be submitted to bargaining.*

The District also cites the following excerpt from New Jersey v. Jersey City Police Officers Benevolent Assoc., 158 L.R.R.M. (BNA) 2788 (1998):

> To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

In its brief, the District refers to the Chief of Police's testimony that:

> [t]he District's reason for initially allowing detectives to commute using District-owned vehicles, as well as the decisions in 1994 and 2000 to change that policy with respect to most detectives, was to ensure the District's effective response to emergencies and effective utilization of equipment for purposes of public service and safety.

The District argues that:

> [t]his decision relates to the fundamental managerial prerogative of promoting safety and public service. See Corpus Christi Fire Fighters Assoc. v. Corpus Christi, 10 S.W. 3d 723, 728, 163 L.R.R.M. (BNA) 2688 (2000) (promotion of safety concerns are managerial prerogative).

While the District's managerial prerogative/safety argument appears persuasive on its face, the history of the take home cars as contained in the record undercuts the District's argument. The District Police Chief testified that detectives were first permitted to take home District automobiles as a component of the District emergency response plan. The plan was rewritten in the early 1990's. Under the new plan, designated employees are to assemble at one of three locations where the District stores vehicles and equipment. Under the new plan, it is not necessary for all detectives to have cars, therefore the cars were recalled from the detectives.

The Board is persuaded that the safety issue is not the controlling issue for two reasons. First, the cars were not taken until 1994, even though the emergency plan was rewritten in the early 1990's. Implicit in this passage of time is a disconnect between the adoption of the new

plan and the initial taking of the cars in 1994. Second, the take home cars were restored in 1997, notwithstanding the new (early 1990s) safety policy calling for the cars to be housed at a District location. The emergency response plan was purportedly the basis for the cars being recalled in 1994. If safety was really the basis for the cars being withdrawn, the cars should not have been restored unless the emergency plan reverted to where it was before the "early 1990's change." The timing of the change in the emergency plan (the basis for the change in take home vehicles) is too remote from the change in take home vehicles to support the "managerial prerogative" argument urged by the District. The Board finds the decision was not a non-negotiable managerial prerogative.

Is the Remedy Too Broad?

The District argues that in the event the Board affirms the ALJ's decision, the remedy be limited to police detectives who actively chose to commute in District owned vehicles from May 5, 2000 until the date the District again makes take home cars available to detectives. While the text of the ALJ's order says "reimburse all police detectives for losses they incurred during the period they were unable to use District owned vehicles for commuting." The very next sentence limits the order to "Detectives who lost their take home vehicles... ." The ALJ's remedy on its face is clearly limited to detectives who incurred a loss therefore the requested modification is not necessary.

The dissent argues Article XVII covers the matter in dispute. We disagree. Article XVII concerns nothing more than reasonably safe working conditions. The District's 'managerial prerogative' argument attempting to justify its unilateral change is clearly rooted in concerns about safety of the public, not safe working conditions for employees. Although it is true that if the conduct appears to be "arguably prohibited" by the contract, the matter should

be deferred (Riverside Community College District (1992) PERB Order No. Ad-229); we do not find that the District's unilateral action is even "arguably prohibited" by Article XVII. The safety measures in this case are clearly covered by Section 2.0 safety measures for the public and vehicles, not by the parties' contractual "safe working conditions" provision.

We agree that if we did find coverage by a collective bargaining agreement we normally would not allow a party to choose to pursue a claim through PERB instead of arbitration. (State of California, Department of the Youth Authority (1989) PERB Decision No. 749-S.) However, this case proceeded through a formal hearing, a proposed decision was issued and the case was appealed to the Board, all well prior to the shift in our decisional law regarding deferral. Retroactive application of our deferral policy to force the parties to put the exact same case on before an arbitrator would not likely be in the best interest of the parties or effective administration of EERA.

The dissent finds POA waived its right to bargain by both contract and conduct. For the reasons contained above (and in the adopted portion of the ALJ's proposed decision), we disagree. The POA never acquiesced to the change. Neither the parties' contract and the bargaining history nor POA's actions support a finding of a clear and unmistakable waiver.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in Case No. LA-CE-4181-E, it is found that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c). Therefore, pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing the past practice whereby District police detectives were permitted to use District-owned vehicles to commute between their personal residence and work;

2. Interfering with the right of POA to represent its members;

3. Interfering with the right of individual police detectives to participate in the activities of an employee organization.

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

1. Effective immediately upon service of this decision, reinstate the past practice of providing take-home vehicles for police detectives.

2. Within ninety days following the date this decision is no longer subject to appeal, reimburse all police detectives for losses they incurred during the period they were unable to use District-owned vehicles for commuting. Detectives who lost their take-home vehicles shall be reimbursed for the applicable period at the rate of 5.7 cents per mile, which is the amount of the subsidy provided by the District. For each detective, the 5.7 cents per mile rate shall be multiplied by the number of daily commuting miles driven and that sum shall again be multiplied by number of days actually commuted to work during the period from May 5, 2000, until the date the District again makes take-home cars available to detectives. The reimbursement amount shall be augmented by interest at the rate of 7 percent.

3. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix.

4. Written notification of the actions taken to comply with this Order shall be made to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Los Angeles School Peace Officers Association.

Member Whitehead joined in this Decision.

Member Neima's dissent begins on page 13.

NEIMA, Member, dissenting: I respectfully dissent from the Public Employment Relations Board (PERB or Board) majority decision in this case because I believe the record supports a finding that the Los Angeles School Peace Officers Association (POA), by contract and by conduct, waived its right to bargain over the withdrawal of permission for detectives to drive police vehicles between home and work.

Article III, section 2.0 of the parties' agreement sets out certain retained rights. Those rights include the right to determine the "disposition...location...and utilization of all District...equipment." (Art. III, sec 2.0(c).) A Los Angeles Unified School District (District) owned vehicle is included within the meaning of "equipment" under the common sense meaning of the term, although the word "vehicle" is not used in section 2.0(c). The word "vehicle" is used in section 2.0(d), however, wherein the District retains the right to determine the "vehicles...to be used in connection with...services [to be rendered to the public]." The word "vehicle" is again used in section 2.0(k) wherein the District retains the right to determine "[s]afety and security measures for...vehicles."

The absence of "vehicles" in section 2.0(c) does not sway me from concluding that "equipment," a general term, encompasses "vehicles," which are among the most basic types of equipment used by law enforcement agencies. Thus, by operation of Article III, section 2.0 of the parties agreement, I would find that POA waived its right to bargain over the District's decision to withdraw permission for home use of police vehicles by detectives.

POA's history of conduct indicates that it had a similar understanding. I note particularly that POA did not file an unfair practice charge when the District refused to meet and confer regarding withdrawal of permission for home use of the vehicles in 1994. In

addition, I note that POA used political, rather than legal, means to secure the reestablishment of permission for home-use of police vehicles in 1997, when they enlisted the assistance of a new superintendent of schools to reinstate the home-use policy. POA's resort to politics instead of unfair practice proceedings indicates that the decision was a matter of management right, not a subject over which POA believed it could require bargaining.

Another issue is brought into question by the language of the parties' agreement: whether the dispute at issue in this case should have been deferred to arbitration. Article III, section 1.0 provides:

> 1.0 General: In the event that there is a conflict between the rights of the District under this Article and the rights of POA or employees as set forth elsewhere in this Agreement, the provisions of the other Articles of this Agreement shall prevail. [Emphasis added.]

Article III, section 2.0 provides:

> 2.0 District Rights: It is agreed that all matters which are beyond the scope of negotiations under Government Code section 3543.2, and also all rights which are not limited by the terms of this Agreement are retained by the District. Such retained rights include, but are not limited to, the right to determine the following matters:

Article III, section 2.0(k) provides:

> Safety and security measures for employees, students, the public, properties, facilities, vehicles, materials, supplies, and equipment, including the various rules and duties for all personnel with respect to such matters, subject only to Article XVII (Safety). [Emphasis added.]

In the course of examining this case, I looked closely at Article XVII (Safety), which provides, in relevant part:

> 1.0 The responsibility for providing reasonably safe working conditions which are in conformance with applicable law and which are within fiscal constraints shall be the District's.

> Employees shall be responsible for complying with safety procedures and practices and for reporting to the immediate supervisor as soon as possible any unsafe condition, facility, or equipment. There shall be no reprisal against an employee for reporting any unsafe condition, facility, or equipment.
>
> 4.0 In view of the nature of the duties performed by bargaining unit personnel, the District, upon request by POA, will meet with POA's representative and two of its members to consult on matters related to safety and equipment provided by the Department. Such meetings shall be arranged by mutual agreement. [Emphasis added.]

The District repeatedly raised safety as one of the primary reasons for the withdrawal of permission for home use of the vehicles. The majority asserts that the District was concerned with public safety, not employee safety, so Article XVII's meet and confer requirement was inapplicable. However, the District argued in its statement of exceptions, "Having those vehicles out of commission and less available to others (i.e., allowing certain detectives to take them home) directly affects the 'safety and security measures for employees, students and the public.'" [Emphasis added.]

It is undisputed that the parties did not meet and confer regarding withdrawal of permission for home-use of the police vehicles. Both in 1994 and 2000, POA requested to meet with the District and the District took the position that it did not have a duty to bargain with POA over the decision. However, correspondence in the record indicates the District did agree to "meet and consult" with POA over the 1994 change. That offer was not in compliance with Article XVII, however, which requires that the meeting take place between the District and a POA representative and two POA members. The police chief met with a POA representative on March 22, 2000, to discuss the District's plan to withdraw permission for home-use of the vehicles. One plausible inference is that the District's offer to "meet and

consult" in 1994 and the meeting in 2000 reveal recognition by the District of a duty to "meet and consult" under Article XVII.

However, neither party cited Article XVII or argued at any stage of these proceedings that the matter should have been deferred to arbitration. I note that the events giving rise to the charge at issue in this case occurred before the Board issued its decision in State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S, overruling the Board's "deferral to the wall" standard from Lake Elsinore School District (1987) PERB Decision No. 646. Due to the lack of argument or evidence related to Article XVII, one can only speculate regarding the parties' understanding of Article XVII or their reasons for declining to invoke it in this case. For that reason, I believe it would not advance the purposes of EERA to consider retroactive application of our current deferral standard in this case.

In the absence of a basis for deferral of this case to arbitration, I would conclude, based on the contract language and conduct discussed above, that the POA waived its right to bargain over the withdrawal of permission for home use of police vehicles by detectives.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-4181, Los Angeles School Peace Officers Association v. Los Angeles Unified School District, in which all parties had the right to participate, it has been found that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c). The District violated EERA when during or about the month of March 2000, it unilaterally rescinded the past practice whereby District police detectives could commute to and from work in District-owned vehicles. By this conduct the District violated EERA section 3543.5(c). Because the action also had the effect of reducing the compensation of individual employees, the District's conduct also violated section 3543.5(a). Because the District refused to meet and negotiate with the Los Angeles School Peace Officers Association (POA) about its decision to remove take-home automobiles, the District's action also violated Section 3543.5(b).

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing the past practice whereby District police detectives were permitted to use District-owned vehicles to commute between their personal residence and work;

2. Interfering with the right of POA to represent its members;

3. Interfering with the right of individual police detectives to participate in the activities of an employee organization.

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

1. Effective immediately upon service of this decision, reinstate the past practice of providing take-home vehicles for police detectives.

2. Within ninety days of the service of this decision, reimburse all police detectives for losses they incurred during the period they were unable to use District-owned vehicles for commuting. Detectives who lost their take-home vehicles shall be reimbursed for the applicable period at the rate of 5.7 cents per mile, which is the amount of the subsidy

provided by the District. For each detective, the 5.7 cents per mile rate shall be multiplied by the number of daily commuting miles driven and that sum shall again be multiplied by number of days actually commuted to work during the period from May 5, 2000, until the date the District again makes take-home cars available to detectives. The reimbursement amount shall be augmented by interest at the rate of 7 percent.

Dated: _____ LOS ANGELES 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 WITH ANY OTHER MATERIAL

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LOS ANGELES SCHOOL PEACE OFFICERS ASSOCIATION, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-4181 PROPOSED DECISION (11/28/00)

Appearances: Lackie & Dammeier by Dieter C. Dammeier, Attorney, for Los Angeles School Peace Officers Association; Belinda D. Stith, Staff Counsel, for Los Angeles Unified School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A union here challenges a school district's unilateral withdrawal of permission for school police detectives to use district automobiles for transportation to and from home. The union contends that because the district's action affected wages, it constituted a failure to negotiate in good faith. The school employer replies that because its action was authorized by the contract, it had no obligation to bargain. Moreover, the district asserts, the right to control the use of district property is a nonnegotiable management prerogative.

This action was commenced on May 1, 2000, when the Los Angeles School Peace Officers Association (POA) filed an unfair practice charge against the Los Angeles Unified School District (District). The Office of the General Counsel of the Public

Employment Relations Board (PERB or Board) followed on May 31, 2000, by issuing a complaint against the District.

The complaint alleges that before March 22, 2000, it was the District's policy that police detectives were allowed to use employer-provided take-home vehicles. On or about March 22, 2000, the complaint continues, the District changed this policy by refusing to allow police detectives to use employer-provided take-home vehicles. The District took this action, the complaint alleges, without affording POA an opportunity to negotiate the decision to implement the change in policy and/or its effects. By making this change, the complaint alleges, the District violated Educational Employment Relations Act (EERA) section 3543.5(c) and, derivatively, (a) and (b).[1]

The District filed an answer to the complaint on June 20, 2000, admitting all jurisdictional allegations. In the answer,

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[1]Unless otherwise indicated, all statutory references are to the Government Code. The EERA is codified at section 3540 et seq. In relevant part, section 3543.5 provides as follows:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of 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.

the District also admitted "that prior to March 22, 2000, Respondent issued District property (vehicles) to detectives and that they were allowed to take the vehicles home." The District denied all other allegations and advanced a series of affirmative defenses including an assertion that its actions were "within the express language of the Collective Bargaining Agreement."

A hearing was conducted in Los Angeles on September 27, 2000. With the filing of briefs, the matter was submitted for decision on November 16, 2000.

FINDINGS OF FACT

The District is a public school employer as defined in section 3540.1(k) of the EERA. POA is an employee organization as defined in section 3540.1(d). At all times relevant, POA has been the exclusive representative, as defined in section 3540.1(e), of Unit A, an appropriate unit of the District's School Police Officers. Unit A contains approximately 225 school police officers, 15 detectives and 120 to 130 school safety officers and plant security aides.

POA became exclusive representative of Unit A during or about 1982. The District and POA were parties to a collective bargaining agreement, effective from December 19, 1997, through June 30, 2000, a time span that includes the relevant period. The agreement provides for binding grievance arbitration. However, the dispute at issue is not deferable because no provision of the agreement arguably prohibits the conduct at issue.

Prior to May of 2000, it was the practice of the District to permit all police detectives to use a District vehicle to commute to and from home. Except for a three-year period in the mid-1990s, this practice was in existence for more than 20 years. During the period between July of 1994 and October of 1997, only detectives assigned to the Officer-Involved Shooting Team were permitted to have take-home cars. Since May of 2000, permission to take a District car home has been restricted, once more, to detectives assigned to the Officer-Involved Shooting Team.

Several police detectives testified that the opportunity for use of a District-provided take-home car was a principal motivation for their decisions to seek positions as detectives. They testified that a District-provided automobile permitted them to save money on gasoline and insurance and reduce wear-and-tear on their personal automobiles. This was particularly important to detectives who drove long distances to work.[2] Several detectives testified that use of a District-provided automobile enabled their families to own fewer personal automobiles.

Employees who used District-provided take-home cars did not commute totally at District expense. During the relevant period, the District assessed a fee of 14.3 cents per mile to detectives who commuted in a District-provided automobile. The charge to employees was collected as a payroll deduction based on the monthly mileage to and from each detective's home. During the

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[2]Detective Jerry Timms drives to and from Temecula, 140 miles round-trip, each workday. Detective Daniel Fricke drives to and from Quartz Hill, 90 miles round-trip, each workday.

same period, the District reimbursed employees who used their personal automobiles on District business at the rate of 20 cents per mile.[3]

District Police Chief Wesley Mitchell testified that detectives first were permitted to take District automobiles home as a component of the District emergency response plan. He said the plan then in effect listed detectives among those key employees who would need District vehicles in order to pass through police lines after an earthquake or other emergency. He said a District automobile also would provide them with immediate access to District radio dispatch. In an emergency, he said, employees with District automobiles were expected to assemble at pre-determined locations to assist as needed.

In the early 1990's, the District wrote a new emergency response plan. Under that plan, Chief Mitchell testified, designated employees are to assemble at one of three locations where the District stores vehicles and equipment. He said under the revised plan, it no longer is necessary for all detectives to have District automobiles. Chief Mitchell recommended that the cars be removed and then Superintendent Sidney Thompson agreed. Effective July 1, 1994, the District called in the take-home cars from all detectives except those assigned to the special unit that investigates officer-involved shootings.

POA protested the removal of cars and demanded to meet and negotiate about the decision. However, by letter of April 21,

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[3]See Joint Exhibit 1 at p. 82, appendix B, section 9.0.

1994, an attorney representing the District rejected the demand to bargain. Citing the District Rights Article of the agreement then in effect, the attorney asserted that the District had:

> . . . retained [the] right to determine the utilization of all District properties and equipment, as well as how and when that equipment is used to service the public and District personnel. . . .

The attorney said the District was willing "to meet and consult" with POA but not to bargain.

There was no bargaining between POA and the District regarding the removal of the cars in 1994. POA did not file an unfair practice charge. Raymond Boulden, POA president in 1994, testified that the union did not undertake litigation because the attorney then representing POA predicted it would not be successful.

Although the District would not bargain with POA, the union did not drop the matter. Mr. Boulden testified that he met with Chief Mitchell, then with the chief's boss, then with the assistant superintendent and, finally, with members of the school board. He said this "political" route ultimately proved successful after Reuben Zacarias became District superintendent.

On September 30, 1997, Chief Mitchell sent a memo to all lieutenants, sergeants and detectives informing them that the:

> . . . superintendent has directed that all sworn School Police personnel above the rank of senior officer be assigned vehicles for the purpose of home-to-work transportation. . . .

The cars were restored to detectives who wanted them during or about the month of October.

However, Superintendent Zacarias was not in office long and he was followed by an interim superintendent, Ramon Cortines. Chief Mitchell testified that in December of 1999 or January of 2000 he was invited to meet with Mr. Cortines for a review of the operation of the police department. During that meeting, the chief testified, he was asked about existing practices and the use of equipment. Either during that meeting, or shortly thereafter, the chief recommended that the District reclaim the take-home automobiles from detectives. Mr. Cortines agreed.

At a meeting on or about March 22, 2000, Chief Mitchell advised POA President Pablo Quezada Jr. that the District was going to reclaim most take-home vehicles from detectives. Mr. Quezada recalled the chief stating that only detectives in specialized units could keep the cars. He said the chief identified Internal Affairs as a unit where detectives might retain their take-home cars. Mr. Quezada testified that he protested the decision "in a very nice way" and did not challenge the authority of the chief to take the action. Mr. Quezada testified that he also "may have said something to the effect of, you know, thank God it only affects 14 people."

Chief Mitchell quoted Mr. Quezada stating that "it was not a major issue for him because it did not affect that many of the members of his bargaining unit." The chief said he was pleased to hear that comment and he hoped that the transition would go

smoothly. The chief said he inferred from Mr. Quezada's comments "that there was no issue." Nevertheless, the chief testified, it was:

> . . . pretty clear from our conversation that he and I both understood that there would be some members of the bargaining unit that would not be happy about it, but these would be the members that were affected, and not necessarily the total bargaining unit.

Still, despite the chief's interpretation of Mr. Quezada's comments, POA did consider removal of the take-home cars an "issue." Dieter C. Dammeier, attorney for the union, wrote to the chief on March 28, 2000, and demanded to meet and confer over the removal of take home vehicles for police detectives. Mr. Dammeier wrote:

> . . . The take home vehicles are a valued employee benefit. As such, in the [sic] alteration to such benefit requires the District to meet and confer with the association prior to making a change.

Chief Mitchell replied by letter of April 5, 2000, asserting that the agreement between the parties contains no provision obligating the District to provide take-home vehicles. Furthermore, he continued, the retained rights provision of the agreement grants the District the right to determine the use of all property and equipment and thus permits removal of the cars. The chief noted that he had met with Mr. Quezada on March 22, 2000, and that Mr. Quezada:

> . . . stated he understood that we intended to recall vehicles from employees who either did not have an emergency call back responsibility or routinely began and concluded their work day at a School Police

> Department office. He went on to say there were only a small number of Association members affected and he took no issue with the decision. Based upon all of the foregoing, I conclude there is no cause for further discussion and thus, I have issued the order that affected employee will return their vehicles to District garaging by May 5, 2000.

By memo of April 6, 2000, Assistant Chief Richard Page advised all employees affected by the change about the chief's decision. The memo identified only the occupants of the following jobs as entitled to retain a take-home vehicle: administrators, operations' lieutenants, sergeants assigned to day operations and the Officer-Involved Shooting Team.

There were 15 detectives on the date the take-home cars were removed. Three of these were members of the Officer-Involved Shooting Team and they retained their cars. The other 12 lost the right to use take-home vehicles.

The letter to Chief Mitchell was the only demand to bargain POA made regarding the removal of take-home cars from police detectives. The union made no demand to bargain to the District's Office of Staff Relations or to the private law firm that represents the District in labor relations matters. The contract between the parties does not specify where demands to bargain should be made, although in the past such demands usually have been made to the Office of Staff Relations.

The District Rights provision of the contract is set out in Article III. The provision generally seeks to retain all rights not specifically limited by law or by other provisions of the

contract. Section 2.0 of Article III commences with the following introduction:

> District Rights: It is agreed that all matters which are beyond the scope of negotiations under Government Code Section 3543.2, and also all rights which are not limited by the terms of this Agreement are retained by the District. Such retained rights include, but are lot limited to, the right to determine the following matters:

The section then continues with 13 paragraphs setting out specific retained rights. Relevant here are the right to determine:

> c. The acquisition, disposition, number, location, types and utilization of all District properties and equipment, whether owned, leased, or otherwise controlled, including all facilities, grounds, parking areas and other improvements, and the type of personnel, work, service, and activity functions assigned to such properties;
>
> d. All services to be rendered to the public and to District personnel in support of the services rendered to the public; the nature, methods, quality, quantity, frequency and standards of service; and the personnel, facilities, vendors, supplies, materials, vehicles, equipment and tools to be used in connection with such services; the subcontracting of services to be rendered and functions to be performed, including educational, support, construction, maintenance and repair services, subject only to Code restrictions upon same;
>
> . . . . . .
>
> k. Safety and security measures for employees, students, the public, properties, facilities, vehicles, materials, supplies, and equipment, including the various rules and duties for all personnel with respect to such matters, subject only to Article XVII (Safety);

LEGAL ISSUES

1. Did POA waive by contract language its right to negotiate about removal of take-home automobiles from police detectives?

2. If not, did the District make a unilateral change in a negotiable subject and thereby fail to meet and negotiate in good faith when it removed take-home cars from police detectives?

CONCLUSIONS OF LAW

Waiver

It is long established in PERB precedent that any waiver of an exclusive representative's right to bargain must be "clear and unmistakable." (Amador Valley Joint Union High School District (1978) PERB Decision No. 74). A waiver will not be lightly inferred. (Oakland Unified School District (1982) PERB Decision No. 236.) For an employer to show that an exclusive representative has waived its right to negotiate, the employer must produce evidence of either "clear and unmistakable" contract language or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. (San Mateo County Community College District (1979) PERB Decision No. 94.)

A waiver can be shown by contractual terms, by negotiating history or by inaction on the part of the exclusive representative. (Los Angeles Community College District (1982) PERB Decision No. 252.) By whichever method, however, the evidence must indicate an intentional relinquishment of the

union's right to bargain. (San Francisco Community College District (1979) PERB Decision No. 105.) "Contract terms will not justify a unilateral management act on a mandatory subject unless the contract expressly or by necessary implication confers such a right." (Los Angeles Community College District, supra, PERB Decision No. 252.)

The District argues that POA has waived its right to bargain about take-home automobiles through specific contractual language set forth in the District Rights Article. The collective bargaining agreement, the District observes, clearly sets forth as retained rights "the acquisition, disposition, location, and utilization . . . of all District properties and equipment. . . ." Further, the District continues, the agreement provides as additional retained rights, "safety and security measures for employees, students, the public, properties, vehicles and equipment. . . ."

POA rejects these contentions, arguing that the District Rights provision of the contract preserves District authority only over matters outside the scope of representation. The District Rights clause must be read in its entirety, the union continues, in order for its meaning to be apparent. When the section is read in its entirety, POA argues, it is clear that it does not reserve to the District the right to make a unilateral change in any negotiable matter.

Article III, section 2.0, of the agreement between the parties sets out certain retained rights. These

include, in subsection 2.0(c), "the right to determine the . . . disposition, . . . location, . . . and utilization of all District . . . equipment." Arguably a District-owned vehicle would be included within the meaning of "equipment" although the word "vehicle" is not used in subsection 2.0(c). The word "vehicle" is used in subsection 2.0(d) wherein the District also retains the right to determine the "vehicles . . . to be used in connection with . . . services [to be rendered to the public]." The word "vehicle" is again used in subsection 2.0(k) wherein the District retains the right to determine "[s]afety and security measures for . . . vehicles."

I would note, however, that the use of the word "vehicle" in subsection 2.0(d) and 2.0(k) but not in 2.0(c) creates an inference that the language in subsection 2.0(c) was not intended to include "vehicles." In subsection 2.0(d) the District does retain the right to determine the "vehicles" to be used in rendering "services to the public." But it is not clear that this section pertains to take-home "vehicles" because it is not at all clear that in their take-home use such vehicles are involved in rendering services to the public. Neither is there any obvious connection between take-home vehicles and the District's control over vehicle safety set out in subsection 2.0(k).

Significantly, as POA argues, the language of section 2.0, the District Rights article appears limited to "matters which are beyond the scope of negotiations under Government Code section

3543.2" or not otherwise limited by the agreement. POA argues that the obvious purpose of section 2.0 is to specifically identify some of the rights that fall outside the statutory scope of representation.[4] The District Rights article is certainly amenable to the interpretation advanced by POA. At best, the language is ambiguous.

Plainly, contract language that lends itself to such a discussion does not provide a "clear and unmistakable" waiver of the union's right to bargain. "Clear and unmistakable" language would explicitly state in the contract that the District retains the right, without bargaining with POA, to recall all take-home automobiles from use by District employees.

The contractual language relied upon by the District is not of recent origin. It was in existence at least since 1979[5] and has been inserted into successor agreements over the period that District police detectives had take-home automobiles. Obviously, the parties were aware of the practice at the time the language was readopted. Had the parties intended the contract to grant unfettered authority to remove take-home cars they easily could have stated as much.

In sum, it cannot be said that the contract language cited by the District indicates an intentional relinquishment of the union's right to bargain. (San Francisco Community College

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[4]As will be seen, infra, the right of employees to commute in employer-owned vehicles is a matter PERB has explicitly held to be a negotiable subject within the scope of representation.

[5]See Respondent's Exhibit A at p. 12.

District, supra, PERB Decision No. 105.) No cited provision of Article III expressly or by necessary implication confers on the District the right to unilaterally remove take-home cars from District police detectives. Accordingly, I reject the District's argument that POA waived its right to negotiate about the subject.

I also find no waiver by POA's failure to make its request to negotiate to the Office of Staff Relations or to the District's labor relations counsel. While it is the practice that demands to bargain normally are made to the Office of Staff Relations, there is no evidence that this is the only way a union can initiate bargaining. The contract is silent on the question of where demands to bargain are to be made. Under the circumstances here, it was reasonable that the demand would be made to Chief Mitchell because it was Chief Mitchell who informed the union of the impending change. The Office of Staff Relations had no role in the matter.

Moreover, regardless of where POA made its demand to bargain, it is clear that the union's failure to address its demand to the Office of Staff Relations did not constitute a waiver. As the evidence makes obvious, the District did not give POA notice of its intended action prior to reaching a firm decision to remove the take-home cars from detectives. Chief Mitchell advised POA President Quezada about a course of action that already was firm. It was not a proposal.

An employee organization does not waive its right to bargain by failing to request negotiations after a firm employer decision already has been made. (Arcohe Union School District (1983) PERB Decision No. 360 (Arcohe).) Waiver is an affirmative defense and any doubts must be resolved against the party asserting it. (Placentia Unified School District (1986) PERB Decision No. 595.) Thus, POA would not have waived its right to bargain even if it had made no request at all.

Unilateral Change

If an employer makes a pre-impasse unilateral change in an established, negotiable practice that employer violates its duty to meet and negotiate in good faith. (NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].) Such unilateral changes are inherently destructive of employee rights and are a failure per se of the duty to negotiate in good faith. (Davis Unified School District, et al. (1980) PERB Decision No. 116; State of California (Department of Transportation) (1983) PERB Decision No. 361-S.)

To prevail on a complaint of unilateral change, the exclusive representative must establish by a preponderance of the evidence that (1) the employer breached or altered the parties' written agreement or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change of policy (i.e., has a generalized effect or continuing impact upon the terms and conditions of employment of

bargaining unit members); and (4) the change in policy concerns a matter within the scope of representation. (Grant Joint Union High School District (1982) PERB Decision No. 196 (Grant); State of California (Department of Forestry and Fire Protection) (1993) PERB Decision No. 999-S.)

POA argues that the District's recall of take-home automobiles from police detectives meets all elements of a unilateral change. POA notes that, except for a three-year period from 1994 to 1997, the practice had been in existence for 20 years. The District took the action without negotiating, POA continues, and the removal has a generalized effect and continuing impact on the terms and conditions of unit members. Finally, POA asserts, it is clear that the change involved a negotiable matter because of its obvious financial impact on the affected police detectives.

The District bases its defense on a contention that the removal of the vehicles did not affect a negotiable matter. Citing West Covina Unified School District (1993) PERB Decision No. 973 (West Covina), the District asserts that the removal of take-home cars from detectives was a non-negotiable management prerogative.[6] Unlike the employees in West Covina, the District

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[6]In West Covina the Board found the employer's removal of take-home vehicles from certain employees to be a mandatory subject of bargaining. Nevertheless, in language relied upon by the District, the Board also observed:

> The Board emphasizes in this decision, however, that a policy governing the assignment of school district vehicles may not in all cases constitute a negotiable

argues, police detectives did not have 24-hour responsibilities. Moreover, the District continues, there was no showing of economic benefit to the employees because some detectives chose not to use take-home cars, considering them to be too expensive. Therefore, the District concludes, the removal of take-home cars was not negotiable.

I conclude that under prevailing PERB case law, an employee's use of an employer's vehicle for commuting to and from home is a mandatory subject of bargaining. The Board has reached this conclusion every time it has considered the matter. (See Office of Santa Clara County Superintendent of Schools (1982) PERB Decision No. 233 [vacated on other grounds, PERB Decision No. 233a]; State of California (Department of Transportation) (1983) PERB Decision No. 333-S; and West Covina.) In West Covina, the Board observed that:

> . . . the use of District vehicles. . . is reasonably related to wages and compensation. The authorization to use the vehicles to commute to and from work had a tangible dollar value to . . . employees, saving them the maintenance and commuting costs for their own vehicles. By specifically providing . . . a vehicle . . . , the District included the value of the use of the vehicle as part of [the affected employees'] compensation.

> subject. We find it appropriate to decide the issue on a case-by-case basis. There may well be circumstances where vehicle assignment represents a clear management prerogative. However, no evidence is presented in the case before the Board on which to base such a finding.

I find nothing in that portion of the West Covina decision relied upon by the District that would justify a conclusion that the District's action was non-negotiable. The District's strongest argument was that of contractual waiver which I have found not persuasive. Plainly, as in West Covina, the employees here enjoyed a financial benefit from the use of a District-owned take-home vehicle.

Although the District did not provide a completely free take-home car to police detectives, the detectives did enjoy partially subsidized transportation. Detectives using take-home cars had to reimburse the District at the rate of 14.3 cents per mile. At the same time, the contract between the parties provided for the District to reimburse employees using their own automobiles on District business at the rate of 20 cents per mile. Thus the District was subsidizing the cost of commuting for police detectives at the rate of 5.7 cents per mile above what the parties had agreed to be the cost of operating an automobile. Clearly, this subsidized commuting was of a financial benefit to the detectives and was therefore related to wages.

The significant question presented by these facts is what weight to accord the District's 1994 removal of the take-home cars from detectives. The District views this event as proof of its unfettered authority to grant or remove take-home cars as it sees fit. Because POA filed no unfair practice charge, the

District reasons, the union acquiesced in the District's assertion of authority over the use of District-owned vehicles.

But it is apparent that POA never acquiesced in the District's 1994 decision to remove automobiles from police detectives. Although the union did not file an unfair practice charge, neither did it accept the decision. POA attacked the removal of the take-home cars politically at various levels of the District's hierarchy. Ultimately, the political challenge succeeded and take-home automobiles were restored to District police detectives in the fall of 1997. Detectives then were able to commute in District-owned vehicles for two-and-a-half more years, until May of 2000.

Under the standard the Board has adopted, to be binding a past practice:

> . . . must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. [Citations.] The Board has . . . described a valid past practice as one that is "regular and consistent" or "historic and accepted. . . ."[7]

For at least 14 years, it was unequivocally accepted that District police detectives could have District-owned take-home automobiles. In 1994, this practice was unilaterally rescinded in an action never concurred in by POA. The union challenged

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[7]Hacienda La Puente Unified School District (1997) PERB Decision No. 1186 adopting the administrative law judge decision at p. 13.

removal of the cars at all political levels within the District until it succeeded finally in securing a restoration of the right to commute in District automobiles. The practice then continued on for two-and-a-half more years, unequivocally accepted by both the District and POA.

I can find no PERB case that identifies how long a practice must be in effect in order to constitute an enforceable past practice. But even if the practice were dated only from when take-home cars were returned to detectives in the fall of 1997, two-and-a-half years is not a fleeting period. During those two-and-a-half years, the practice of police detectives using take-home cars was unequivocal, clearly enunciated and acted upon and readily ascertainable for a reasonable period of time. It was accepted that police detectives would enjoy the benefit as part of their job.

For these reasons, I conclude that POA has established a unilateral change. By removing the take-home cars, the District altered the past practice. The action was taken without affording the union with an opportunity to bargain prior to when a firm decision already was made. The change was not isolated but was a new rule of general application to all detectives. The change involved a negotiable subject, i.e., wages.

Accordingly, I conclude that the District failed to meet and negotiate in good faith when during or about March of 2000, the District removed take-home vehicles from District police

detectives. By this conduct the District violated EERA section 3543.5(c). Because the action also had the effect of reducing the compensation of individual employees, the District's conduct also violated section 3543.5(a). Because the District refused to meet and negotiate with the Union about its decision to remove take-home automobiles, the District's action also violated section 3543.5(b).

REMEDY

The PERB in section 3541.5(c) is given:

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

The District has been found in violation of its duty to meet and negotiate in good faith by unilaterally rescinding the past practice whereby District police detectives could commute to and from work in District-owned vehicles.

It is appropriate therefore that the District be directed to cease and desist from making unilateral changes and to reinstate the past practice of providing take-home vehicles for police detectives. The District shall continue to provide take-home automobiles for detectives until such time as the parties have modified the procedure as a result of collective bargaining or until the District is permitted to implement its last-best offer to the POA upon the completion of the statutory impasse resolution procedures.

It also is appropriate that the District be directed to make whole all police detectives for losses they incurred during the period they were unable to use District-owned vehicles for commuting. Detectives who lost their take-home vehicles shall be reimbursed for the applicable period at the rate of 5.7 cents per mile, which is the amount of the subsidy provided by the District. For each detective, the 5.7 cents per mile rate shall be multiplied by the number of daily commuting miles driven and that sum shall again be multiplied by number of days actually commuted to work during the period from May 5, 2000, until the date the District again makes take-home cars available to detectives. The amount determined shall be augmented by interest at the rate of 7 percent per year.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the Los

Angeles Unified School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(c), (b) and (a). The District violated the Act when during or about the month of March 2000, it unilaterally rescinded the past practice whereby District police detectives could commute to and from work in District-owned vehicles. By this conduct the District violated EERA section 3543.5(c). Because the action also had the effect of reducing the compensation of individual employees, the District's conduct also violated section 3543.5(a). Because the District refused to meet and negotiate with the Union about its decision to remove take-home automobiles, the District's action also violated section 3543.5(b).

Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing the past practice whereby District police detectives were permitted to use District-owned vehicles to commute between their personal residence and work;

2. Interfering with the right of POA to represent its members;

3. Interfering with the right of individual police detectives to participate in the activities of an employee organization.

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

1. Effective immediately upon service of a final decision in this matter, reinstate the past practice of providing take-home vehicles for police detectives.

2. Within ninety (90) days of the service of a final decision in this matter, reimburse all police detectives for losses they incurred during the period they were unable to use District-owned vehicles for commuting. Detectives who lost their take-home vehicles shall be reimbursed for the applicable period at the rate of 5.7 cents per mile, which is the amount of the subsidy provided by the District. For each detective, the 5.7 cents per mile rate shall be multiplied by the number of daily commuting miles driven and that sum shall again be multiplied by number of days actually commuted to work during the period from May 5, 2000, until the date the District again makes take-home cars available to detectives. The reimbursement amount shall be augmented by interest at the rate of 7 percent.

3. Within ten (10) workdays of service of a final decision in this matter, post at all work locations where notices to members of the school police officer bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps

shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

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

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code 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 mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit.8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ronald E. Blubaugh
Administrative Law Judge