STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION-CHAPTER 250, Charging Party, v. CLOVIS UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SA-CE-2000-E PERB Decision No. 1504 December 18, 2002

Appearances: California School Employees Association by Maureen C. Whelan, Staff Attorney, for California School Employees Association-Chapter 250; Lozano Smith by Richard B. Galtman, Attorney, for Clovis Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Clovis Unified School District (District) of an administrative law judge's (ALJ) proposed decision. The charge alleged that the District violated the Educational Employment Relations Act (EERA)[1] by: (1) conducting an election for unit employees to "opt out" of Social Security and make changes in unit employees' California Public Employment Retirement System (PERS) benefits; (2) unilaterally changing the paycheck issuer; (3) denying the California School Employees Association (CSEA) and its Clovis Chapter 250 (Chapter 250) of their rights as the exclusive representative by, inter alia, communicating directly with unit employees; (4) failing to meet and negotiate with CSEA

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

regarding Social Security participation, paycheck issuer and the unit employees' contract arrangement with PERS; (5) informing unit employees directly that they can opt out of Social Security, which CSEA alleges is an illegal act; and, (6) circumventing CSEA concerning an agreement to conduct an election for unit employees to opt out of Social Security and PERS. By letter dated January 4, 2001, CSEA withdrew the charges regarding the paycheck issuer. In its amended charge, CSEA alleged that this conduct constituted violations of EERA section 3543.5 (a), (b) and (c).[2]

In its charge, as amended, CSEA alleges that the District conducted meetings in June 2000, to explain to unit employees the benefits of opting out of the Social Security system, and conducted an election on October 9, 2000 for employees to vote on the status of retirement benefits for all unit members. Before the June 2000 meetings, the District issued mailers to unit employees for their signatures containing an estimate of their Social Security retirement benefits. The election, which took place from October 9 to October 11, 2000, allowed unit employees to determine by majority vote whether to continue their participation in Social

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[2]Section 3543.5 provides, in pertinent part:

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

Security and PERS through the Central Valley Support Services Joint Power Agency (JPA). The charge further alleges that after October 11, 2000, when the votes were counted, the District removed bargaining unit members from the Social Security system and changed their PERS benefits without prior notice to CSEA or without providing CSEA with an opportunity to negotiate this change in benefits. As derivative violations, CSEA further alleges that the above conduct interfered with unit members' rights to be represented by their exclusive representative and denied CSEA its right to represent unit employees. The ALJ dismissed the charge regarding the June 2000 meetings but found the District's actions involving the October 2000 election violated EERA. The District filed exceptions to the ALJ's finding of a violation.

After reviewing the entire record in this matter, including the charge and amended charge, the complaint, the parties' post-hearing briefs, the proposed decision, the District's statement of exceptions and CSEA's response to the District's exceptions, the Board affirms the ALJ's proposed decision in line with the following discussion.

BACKGROUND

CSEA and its Chapter 250 is an employee organization under EERA section 3540.1(d) and is the exclusive representative for a blue collar unit of classified employees under EERA section 3540.1(e). The District is a public school employer within the meaning of section 3540.1(k).

At some time before February 1999, the District contracted to participate with other school districts in the JPA, for the purpose of providing support services to the member districts.[3] The District believed that it would receive a financial benefit from its participation

[3]The JPA's bylaws, as revised February 5, 2000, state in pertinent part:

in the JPA in that it would not have to reimburse the State of California's (State) contributions to PERS for unit employees.[4] The JPA is not subject to State recapture of the funds but instead, pays its PERS contribution directly under contract with PERS for a different categorical grouping than school districts. Therefore, the District believes that by using the JPA's services, the State would not reduce the District's revenue limits and the District would thereby receive a revenue gain.[5]

> 8.1 The administration of the program and facilities of the CVSS shall be vested in with each participating agency which shall be charged with the responsibility of conducting the programs according to the rules and regulations adopted by the CVSS and the member educational agencies.
>
> 8.5 Each employee of CVSS must be sponsored by a member agency. The CVSS employee's employment/working practices, salary and benefit schedules will be that of the sponsoring educational agency.

[4]Annually, the State recaptures its PERS contribution on behalf of the District by a prescribed amount through a reduction in State aid to the District based on the number of students, otherwise known as "revenue limits." Computation of "revenue limits" is based upon a formula accounting for the number of classified employees in a school district, i.e., the "payroll subject to PERS." (See Ed. Code sec. 42238.12.)

[5]Sometime in 1999, CSEA apparently sought a legal opinion from the Legislative Counsel's Office regarding the legality of the JPA. In its request, CSEA explained that the stated purpose of the JPA was to allow its member districts to avoid a decrease in the revenue limit. Although the Legislative Counsel believed that the formation of the JPA was legal, it also concluded that, under section 8.5 of the JPA bylaws, each sponsoring school district retains full control over all aspects of employment of its sponsored employees. The JPA would merely perform payroll functions. The Legislative Counsel further stated that if the District retains essentially all employer functions, as stated in the bylaws, then the relationship between the JPA and the sponsored employees did not appear to be that of an employer/employee relationship. Under these circumstances, the Legislative Counsel opined that the District's retention of funds, which the State would otherwise recapture, would contravene the Legislature's intent with regard to Education Code section 42238.12, that school districts neither be enriched by the revenue limit calculations nor bear the increased costs in years when the PERS contribution rate exceeds 13.020 percent.

In April 1999, in its proposed reopener under the existing collective bargaining agreement (CBA), the District sought to change the management rights provision of the CBA to reflect its participation in the JPA and the impact on unit employees. The District intended that unit members become employees of the JPA. CSEA's position was that unit members remain employees of the District. The parties reached impasse over this issue and proceeded to mediation. Unable to reach agreement, CSEA filed an unfair practice charge with PERB (Case No. SA-CE-1945-E), for which a complaint was issued and the District filed a declaratory relief action in Fresno County Superior Court. The parties ultimately settled the dispute via a settlement agreement, signed on March 2, 2000. The agreement contains the following pertinent provisions:

> 1. The parties agree that the current collective bargaining agreement between them, and more particularly Article VIII (Management Rights), shall be modified to allow CUSD to sponsor the unit employees into the Central Valley Support Services Joint Powers Agency (CVSS JPA).[6]
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> 2. The unit employees shall be sponsored into the CVSS JPA effective after July 1, 2000.
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> 3. All unit employees sponsored into the CVSS JPA shall maintain all rights and benefits derived from the collective bargaining agreement between CUSD and CSEA including but not limited to wages, hours, and working conditions. All unit employees sponsored into the CVSS JPA shall have their wages, hours and working conditions controlled by the collective bargaining agreement between CUSD and CSEA, and shall retain all rights and benefits they have as CUSD employees under the law. Collective bargaining of the wages, hours and terms and conditions of employment for all unit employees sponsored into the CVSS JPA shall be by and between CUSD and CSEA. The term "Collective bargaining" as used here, includes but is not limited to, negotiations, contract administration, grievance processing, PERB matters, and resolution of employment disputes.

[6]The settlement agreement does not provide a definition of the word "sponsor."

4. CUSD understands and agrees that CUSD is the employer of the sponsored unit employees for the purposes of compliance with the rights and duties under the collective bargaining agreement and the EERA and for PERB jurisdiction. CUSD agrees that it will not raise any objection to PERB's jurisdiction on the basis of its relationship to the CVSS JPA. CUSD agrees to be bound by EERA, PERB precedent and PERB rules.

5. If this agreement and/or the agreement between CUSD and CVSS JPA are ultimately found by a court of competent jurisdiction to be illegal, the unit employees sponsored into the CVSS JPA by CUSD shall no longer be sponsored into the CVSS JPA and shall be deemed to be employed by CUSD for all intents and purposes. At that time, the unit employees shall have the same rights and benefits and be employed on the same terms and conditions as negotiated by CUSD and CSEA, as if the agreement between CUSD and CVSS JPA never existed.

6. If CUSD ever withdraws from the CVSS JPA, the unit employees sponsored into the CVSS JPA by CUSD shall no longer be sponsored into the CVSS JPA and shall be deemed to be employed by CUSD for all intents and purposes. At that time, the unit employees shall have the same rights and benefits and be employed on the same terms and conditions as negotiated by CUSD and CSEA, as if the agreement between CUSD and CVSS JPA never existed.

On April 26, 2000, the parties signed a new CBA for the period of July 1, 2000 to June 30, 2003. In Article VIII, Management Rights, section C, the CBA states that "the District shall have the right and authority to sponsor the CUSD operations unit employees into the Central Valley Support Services Joint Powers Agency (CVSS JPA)." Article VIII, Section C, 1 - 3 of the CBA essentially reiterate sections 3 - 6 of the settlement agreement, above. There is no further mention of the JPA or definition of the term "sponsorship" in the CBA.

In early June 2000, the District conducted meetings at which Bill McGuire (McGuire), the District's associate superintendent for business, made a PowerPoint presentation to unit employees covering impact of the District's participation in the JPA, including the effect on

PERS and Social Security benefits. Ricardo Ornelas (Ornelas), CSEA's labor relations representative in the Fresno field office, attended one of these meetings. Roger Krueger (Krueger), the Chapter 250 president, helped McGuire to develop the presentation and Bill Pedersen (Pedersen), Chapter 250's vice-president, assisted McGuire as a co-presenter.

Following the presentations, there was a flurry of correspondence between Ornelas and various District representatives regarding, among other matters, CSEA's objection to the District identifying the JPA as the employer for all legal purposes. Of significance, by letter dated August 7, 2000, Ornelas wrote District Superintendent Walter Buster (Buster) demanding that the District cease and desist from unilaterally changing CSEA unit members' contract arrangement with PERS without negotiating with CSEA and informing the District that "opting out" of Social Security was not only negotiable but also possibly illegal. Ornelas threatened to file an unfair practice charge against the District in the absence of an affirmative response by August 18, 2000.

On June 30, 2000, the District issued letters to each unit employee regarding Social Security benefits to be used in a meeting with the District's retirement consultant, American Fidelity. By letter dated July 26, 2000, each employee was then scheduled to meet with American Fidelity to discuss personal retirement and investment options. These meetings occurred in late July for employees who wished to attend.

District Counsel, Richard Galtman (Galtman), by two letters dated August 15, 2000, responded to Ornelas objections. In one letter, citing section 8.5 of the JPA bylaws, Galtman stated that the employees sponsored into the JPA are required to be JPA employees for all purposes not delineated by the March 2, 2000 agreement. As PERS and Social Security were not part of the March 2 agreement and these are employer functions, Galtman asserted that the

District need not negotiate issues pertaining to PERS and Social Security. Galtman further explained that as a newly created entity, the JPA may opt out of the Social Security system and that opting out of Social Security benefits both the employer and employees. He stated that the decision to opt out of Social Security was to be made by the employees, not CSEA. He further declared that the District had not implemented anything yet. In the other August 15 letter, Galtman invited CSEA to provide legal support for its position that opting out of Social Security was illegal.

By letter dated September 20, 2000, CSEA staff attorney Maureen Whelan (Whelan) provided a legal analysis supporting CSEA's view that opting out of Social Security was illegal. Whelan asserts that the District is the employer for this purpose, citing Article VIII of the CBA. It is therefore apparent from the correspondence between the parties that the underlying dispute on this issue involves the identity of the employer for these purposes; and the legality of opting out rests on whether the employer is the District or the JPA.

On September 26, 2000, the parties commenced negotiations on reopeners. There were no proposals from either side regarding the JPA, Social Security or PERS benefits. On September 28, 2000, Ornelas mailed to each District board member a packet of materials sent to unit members regarding the illegality of opting out of Social Security and the disadvantages to employees of opting out of Social Security.

By letter dated October 9, 2000, the District mailed ballots to unit employees designed to implement JPA retirement benefits programs. Attachments included a ballot to join PERS as "miscellaneous" employees of the JPA, a summary of PERS benefits for "local miscellaneous members," a ballot for coverage under PERS 1959 survivor benefits (an option affecting Social Security coverage), and a ballot for coverage under Social Security. Both

McGuire and Krueger signed the October 9 letter. Also by letter dated October 9, Krueger resigned his position as Chapter 250 president effective immediately.

Additionally, on October 9, Ornelas faxed a letter to District Superintendent Buster protesting the election. Ornelas also wrote that Krueger had resigned his position and had no authority to represent the bargaining unit. He contends that the October 9 ballot cover letter from the District was not a proper contractual agreement, and was not ratified in compliance with the CBA and CSEA internal policies. He also asserts that negotiation of the JPA sponsorship was neither proposed as a reopener nor "sunshined" by the District to the public, which is required by law. Ornelas finally claims that CSEA had already formally notified the District that dropping out of Social Security was illegal. Ornelas concludes by asking the District to cease and desist taking unilateral action, to formally disregard the ballots to unit employees, and that absence of an affirmative response by October 13, 2000 would result in filing an unfair practice charge with PERB.

At the hearing before the ALJ, Ornelas testified that he was surprised that Krueger signed the October 9 District ballot letter. He also reiterated his view that Krueger lacked the authority to sign the letter on behalf of CSEA. Besides the fact that Krueger resigned his position as Chapter 250 president on that date, Ornelas referred to CSEA Policy 610. Policy 610 requires that a tentative agreement be submitted to the labor relations representative assigned to the chapter, who with his/her field director, reviews the agreement and issues a recommendation to the chapter president stating approval or disapproval, before the unit members may convene to ratify or reject the agreement.[7] At the hearing, Krueger testified to

[7]Policy 610 states, in pertinent part:

.3 Negotiated Agreement

.02 Every contract shall be executed by both the State Association and its chapter, except as herein provided.

.03 No chapter shall enter into a collective bargaining agreement or approve any subsequent modification thereof until a formal ratification vote has been taken in accordance with procedures set forth herein.

.4 Ratification Meeting

.01 When the negotiating committee (by whatever name) has negotiated a contract or modifications to an existing contract it shall, prior to submitting the Tentative Agreement to the bargaining unit members for ratification or rejection, submit one copy to the Labor Relations Representative assigned to the chapter.

.02 Upon receipt of the Tentative Agreement the Labor Relations Representative shall immediately review the same with his/her Field Director.

.03 The Field Director shall forward to the Chapter President, without delay, a recommendation stating approval or disapproval by the State Association. If the recommendation is for disapproval, the Field Director shall include the specific reasons as to why such a recommendation is being made. In cases where a verbal recommendation is necessary, the Field Director shall immediately follow up such verbal recommendation in writing to the Chapter President. All recommendations shall be provided in writing to the Chapter President prior to the ratification meeting.

.04 Upon receipt of the aforementioned recommendation (either verbal or written) from the Field Director, the Chapter President, in accordance with Article XII, Section 3 of the State Bylaws, shall call a meeting of all members of the bargaining unit(s) at which the leadership shall outline all the provisions of the Tentative Agreement and provide adequate opportunity for discussion, debate, and answering of questions, prior to the ratification vote.

.06 In addition to the meeting notice, the chapter shall provide each CSEA member of the bargaining unit(s): (1) a copy of the Tentative Agreement, or a summary of the Tentative Agreement; and (2) a statement as to whether or not the Negotiating Committee recommends ratification or rejection of the

knowledge of CSEA ratification procedures. Krueger discussed his familiarity with the CSEA Chapter 250 Constitution and Bylaws, approved by the State CSEA office with his knowledge in 1991. The Chapter 250 Constitution and Bylaws, Article XI, Collective Bargaining, reiterates the Policy 610 protocol for ratifying tentative agreements and even refers to Policy 610.[8] The District's Deputy Superintendent for Administrative Services, Terry Bradley, acknowledged that he and Krueger would contact the CSEA labor relations representative upon reaching a tentative agreement and admitted that Parks, CSEA field office director, once warned him not to speak with the chapter leadership when Field Director Parks was not present.

During the hearing, Krueger testified that he had agreed to the election after the unit employees had been informed of their options. He had wanted unit employees to have as much information as possible. He also stated that he did not believe that the issues involving Social Security and PERS had been resolved by the settlement agreement, but that these issues would be settled in the court system.

The election closed on October 11, 2000, and Pedersen assisted District officials in counting the ballots. Of 634 ballots distributed, 497 employees, or 78.39 percent voted; 94.37

> Agreement, and the State Association's recommendation if for rejection.
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> .8 Failure to Adhere to Policy. Should chapter officers fail to adhere to this policy, it shall be grounds for their expulsion from membership or removal from office under Section 7, Article II of the Constitution upon charges being brought and sustained by the Board of Directors that they have willingly and knowingly violated the provisions of Policy 610.

[8]CSEA submitted three examples showing the operation of this protocol by letters from Michael Parks (Parks) to Krueger and Pedersen dated May 5, 1997, October 23, 2000, and November 27, 2000.

percent voted to remain in PERS and 52.32 percent voted to opt out of Social Security. The District's election results handout indicated that the results would be sent to the JPA board and PERS.

On October 19, 2000, the parties reached a tentative agreement to amend the CBA. This agreement made no reference to the JPA.

The District acknowledges that the unit employees have not yet been sponsored into the JPA and so are still employees of the District.[9] Both parties, therefore, agree that the District, at this time, is the employer of the unit employees.

ALJ'S Proposed Decision

The ALJ found that wages and future benefits of those still employed are within the scope of representation. (See Sec. 3543.2[10]; Jefferson School District (1980) PERB Decision

[9]However, following the publication of the October 11 election results, the District, with CSEA's knowledge, sponsored non-unit employees into the JPA. (R.T., vol. I, p. 78 – 80; p. 155.)

[10]Section 3543.2 provides, in pertinent part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22316 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue Code. . . . All matters not specifically enumerated are reserved to the

No. 133; Mt. Diablo Unified School District (1983) PERB Decision No. 373.) He further determined that, since the unit employees had not been sponsored into the JPA and therefore remained employees of the District, a public school employer, the dispute is within PERB's jurisdiction. (See North Orange County Regional Occupational Program (1990) PERB Decision No. 857.)

With regard to the June 2000 meetings, the ALJ found that there was no bypass of the exclusive representative. (Muroc Unified School District (1978) PERB Decision No. 80; Walnut Valley Unified School District (1981) PERB Decision No. 160.) He reasoned that Ornelas attended one of the meetings and neither he nor others at the field office objected to the District meeting with the employees. Krueger assisted in organizing the meetings and in creating the design of the presentations. Pedersen acted as a co-presenter at these meetings. As both the CSEA field office and Chapter 250 officials in some way participated in the meetings and did not object to the meetings, the District did not bypass CSEA, or derogate or undermine CSEA's authority. These meetings also did not result in the creation of a new policy or modification of an existing policy.

With respect to the election, however, the ALJ found that the District bypassed CSEA. Social Security and PERS benefits are within the scope of representation and the District cannot conduct the election in the face of CSEA's objections. The fact that the CBA does not clearly refer to these benefits does not detract from the fact that their existence represents the status quo. The employer cannot change the status quo on items within scope without first

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public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

complying with EERA requirements. The ALJ found that the District both created a new policy and modified an existing policy by deleting Social Security and changing the employees' status in PERS.

The ALJ also disagreed with the District's contention that the approval by Chapter 250 officers of the election was sufficient to prevent bypass. The certification for the classified employees at the District is for CSEA and the local Chapter 250. (See Fairfield-Suisun Unified School District (1980) PERB Decision No. 121.) Once CSEA had notified the District of its objections, even if contrary to the position of the local chapter, by conducting the election, the District violated its obligation to the exclusive representative. In fact, CSEA repeatedly informed the District of its belief that opting out of Social Security was illegal and had done so as early as the negotiations leading up to the March 2, 2000 settlement agreement. The ALJ thus concluded that the District's actions violated CSEA's rights to represent unit members in violation of Section 3543.5(b) and thereby violated the unit employees' right to be represented under Section 3543.5(a).

The ALJ also determined that the District's actions constituted a unilateral change in violation of Section 3543.5(c). The ALJ utilized a "per se" test to find a unilateral change. (Stockton Unified School District (1980) PERB Decision No. 143.) He determined that the District implemented a change in policy within the scope of representation and the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

Although the District had not yet sponsored unit employees into the JPA, it announced its intent to sponsor the employees into the JPA, depending upon the outcome of this case. In

fact, the District had already sponsored other District employees into the JPA. The District also expressed a clear intent to change the policies regarding Social Security and PERS by conducting the election. The ALJ also disagreed with the District's contentions that its agreement with Chapter 250 to conduct the election was consistent with past practice or that the consent of the CSEA field office was not required in order to hold the election. The ALJ concluded that the District was clearly aware of CSEA's opposition to any unilateral changes to the unit's benefits.

The District excepted to the ALJ's findings that the October 9 election constituted an illegal bypass of CSEA, that the election and intended changes in Social Security and PERS benefits comprised a unilateral change in items within the scope of representation, and that the District's conduct also interfered with unit employees' rights to representation.

DISCUSSION

The District is a "public school employer" under EERA section 3540.1(k). Although originally at issue, it is undisputed that, as of the dates of the charge and hearing before the ALJ, the District, not the JPA, was the employer of the unit employees. Therefore, it is not necessary to address whether the unit employees would become employees of the JPA once the District sponsored them into the JPA.[11] The Board thus retains jurisdiction over this matter

[11]Both parties and the ALJ cite North Orange County Regional Occupational Program (1990) PERB Decision No. 857 (North Orange County) for the proposition that joint powers agencies are not subject to PERB jurisdiction. It is troubling that a group of school districts may legally join together in a way that evades EERA and results in the loss of employees' statutory rights. (See also, the Board's analysis in Joint Powers Board of Directors, Tulare County Organization for Vocational Education, Regional Occupational Center and Program (1978) PERB Decision No. 57 overturned by North Orange County.) The dissent in North Orange County opined that a proper statutory interpretation should promote, rather than defeat, "the legislative purpose and policy underlying a statutory scheme." (citations omitted.) The JPA bylaws, as confirmed by District witness testimony, provide that JPA member districts retain control over all employment matters. This fact would become particularly significant in

and does not at this time need to address the issue of Board jurisdiction over sponsored employees.

The key issues on appeal before the Board involve the events surrounding the October 9, 2000 election held by the District and the District's stated intent to use the election results to modify unit employees' Social Security and PERS benefits. The ALJ agreed with CSEA's allegations that the District, by conducting this election, unilaterally changed items within the scope of representation without notifying CSEA or providing CSEA the opportunity to bargain, bypassed CSEA by dealing directly with unit employees, and interfered with unit employees' right to be represented by its exclusive representative, CSEA, in violation of EERA section 3543.5(c), (b) and (a), respectively. In its exceptions, the District disagrees with the ALJ's finding that those actions violated EERA. The issues excepted to by the District are discussed individually below.

Unilateral Change

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (Stockton Unified School District (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request

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any Board review of the above jurisdictional issue. Interestingly, the Legislative Counsel's Opinion reached a similar conclusion regarding the stated purpose and operative effect of the Central Valley Support Services Joint Powers Agreement and bylaws on the statutory requirements of Education Code section 42238.12.

negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

1. Scope of representation

There is as of yet no PERB decision pertaining to whether Social Security and PERS benefits are within the EERA scope of representation,[12] but the question is easily handled under well-established precedent. The first federal case to hold that retirement benefits are a mandatory subject of bargaining was Inland Steel Company (1948) 77 NLRB 1, enforced (7th Cir. 1948) 170 F.2d 247, cert. denied, (1949) 336 U.S. 960 (Inland Steel Co.). In Inland Steel Company, the National Labor Relations Board held that pension benefits are "wages" under a broad interpretation of section 9(a) of the National Labor Relations Act because such benefits also accrue to employees due to their employment relationship; i.e., they simply comprise another form of compensation for employees' personal services. Social Security and PERS benefits both require employer and employee contributions to the applicable funds and so

[12]EERA section 3543.2 defines scope of representation and provides, in pertinent part:

> (a) The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 . . . .All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

embody both deferred wages and a reduction of employees' wages. Therefore, the election for retention of Social Security benefits and change in status of PERS benefits is a mandatory subject of bargaining. This conclusion is consistent with the Board's decisions in Jefferson School District (1980) PERB Decision No. 133 (at pp. 13-14[13] and pp. 47-48) (Jefferson) and Temple City Unified School District (1989) PERB Decision No. 782, regarding the mandatory status of retirement benefits in general.

2. Change in Policy

The District asserts that the October 9 election and subsequent announcement to carry out its results were merely an implementation of the settlement agreement. The District's argument essentially alleges that, through the provisions in the settlement agreement, CSEA has waived its right to negotiate changes in Social Security and PERS benefits. (See e.g., Grossmont Union High School District (1983) PERB Decision No. 313; Chico Unified School District (1983) PERB Decision No. 286.) However, such waiver must be clearly and unequivocally conveyed. (Oakland Unified School District (1982) PERB Decision No. 236; San Francisco Community College District (1979) PERB Decision No. 105.) CSEA, on the other hand, contends that the settlement agreement and reiterative CBA provisions should be

[13]Quoting liberally from Inland Steel Company, the Board in Jefferson opined that the term "wages" in EERA section 3543.2:

> . . . must be construed to include other forms of economic benefit arising out of the employment relationship. There is an inseparable nexus between an employee's current compensation and his future economic welfare and security. Where deductions from wages are applied to annuities, savings bonds, or other programs designed to enhance the employee's current or future economic status, they become an integral part of the compensation structure and are no less a matter of employee-employer concern than is the basic wage rate. (Fn. omitted; emphasis added, p. 13.)

interpreted according to their labor law meaning. (Brant v. California Dairies, Inc. (1935) 4 Cal. 2d 128, 133; Mission Valley East, Inc. v. County of Kern (1981) 120 Cal. App. 3d 89, 97 [174 Cal.Rptr. 300]; Witkin, Summary of California Law 9th ed. section 684; Civ. Code section 1645.)

Under PERB precedent, PERB must interpret collective bargaining agreements according to their plain meaning if the language is clear. (Trustees of the California State University (1996) PERB Decision No. 1174-H; Marysville Joint Unified School District (1983) PERB Decision No. 314.) If the language is ambiguous, then the Board may consider extrinsic evidence, such as bargaining history. (Los Angeles Unified School District (1984) PERB Decision No. 407.) In this case, the settlement agreement and parallel CBA provisions clearly require the parties to negotiate wages, hours and working conditions. Social Security and PERS are not specifically mentioned either in the JPA bylaws or in the CBA; however, unit employees' participation in the Social Security system and in PERS is the undisputed status quo. Therefore, the election and the District's stated intent to implement the results of the election constitute evidence of the District's plan to change those retirement benefits.

The District further asserts that no action has yet been taken, i.e., that it has not sponsored employees into the JPA or eliminated or changed unit employees' Social Security or PERS benefits. In other words, the District argues, the issue of unilateral change in this case is not ripe for Board resolution. The Board stated in Milpitas Unified School District (1997) PERB Decision No. 1234 that in a unilateral change case, the statute of limitations commences on the date the charging party has actual or constructive notice of the respondent's clear intent to implement the change in policy and no subsequent wavering of respondent's intent, citing Cloverdale Unified School District (1991) PERB Decision No. 911. The Board further opined

that the charging party need not await actual implementation of the change in policy to file a charge and should not rest on its rights, citing Mt. Diablo Unified School District (1994) PERB Decision No. 1034. When the District conducted the election, published its intent to send the results to the JPA board of directors and to PERS without negotiating first with CSEA, and proceeded to sponsor non-unit employees into the JPA, CSEA had actual notice of the District's intent to make the change.

3. Prior notification of exclusive representative

The District argues that the chapter officers participated in and approved of the District conducting the election and therefore, it not only provided advance notice to Chapter 250, as the exclusive representative, but Chapter 250 was cooperating with the District throughout the election process. The District further claims that it was unaware that the CSEA field office needed to ratify Chapter 250's agreement to the election. CSEA asserts that the Chapter 250 leadership and District representatives were aware of CSEA Policy 610 and the Chapter 250 Constitution, which incorporates the ratification provisions of Policy 610. CSEA notes that the certification for the bargaining unit is CSEA and its Chapter 250, so that CSEA and the chapter are really one and the same. (Fairfield-Suisun Unified School District (1980) PERB Decision No. 121.)

We conclude that the District did not provide prior notice to CSEA before it held the election and announced its intention to implement the election results. The CSEA field office represents unit members in negotiations for the CBA and is an essential component of the ratification process under Policy 610 and Chapter 250's constitution. CSEA Policy 610 requires that local chapters submit tentative agreements for review. The CSEA field office reviews and issues its recommendation to the chapter to either vote to ratify or reject the

tentative agreement. At the ratification meeting, a CSEA field representative attends to explain and discuss CSEA's position with the unit members before they vote. Moreover, Deputy Superintendent Bradley, a District negotiator, testified to his awareness of the need to communicate tentative agreements to the CSEA field representative, including proposed agreements on wage reopeners. Chapter 250 President Krueger testified to his knowledge of Policy 610. Bradley also acknowledged that CSEA Field Director Parks had advised him not to speak with Chapter leadership when Parks was not present. CSEA further provided correspondence showing the parties' past practice of submitting tentative agreements to CSEA for ratification under Policy 610.

In the CBA, the exclusive representative is listed as CSEA and its Chapter 250. Therefore, under Fairfield-Suisun Unified School District (1980) PERB Decision No. 121, the District must provide advance notice of its actions to both entities. In this case, the District and Chapter 250 did not invoke the ratification process by forwarding the proposed agreement to conduct the election and implement the election results to CSEA. The District thereby did not provide the required advance notice to CSEA.

4. Opportunity to request negotiations

Again, the District contends that the Chapter 250 officials agreed to the election and that there is no past practice regarding the need for CSEA field office consent. As stated above, we conclude that there is such a practice and policy requiring CSEA field office review.

The District also asserts that CSEA did not object to the election until the ballots were issued, citing various cases for the principle that the District had no obligation to bargain unless CSEA made a demand to bargain. However, the CSEA field office did not learn of the election until October 9, with the receipt of the October 9 letter signed by McGuire and

Krueger and enclosed ballots.[14] Upon receipt of the October 9 letter, CSEA immediately faxed its opposition and demand to bargain to the District. In addition, previous correspondence between CSEA and District negotiators addressed CSEA's opposition to the District's elimination of Social Security benefits of unit employees on the basis that such action is illegal. Clearly CSEA had historically opposed the District's actions to alter unit members' retirement benefits. CSEA also had no advance notice of the election but immediately objected and demanded the right to negotiate upon learning of its happening. In addition, we disagree with the District's contention that CSEA opposed the elimination of Social Security benefits but not the election process itself and so did not effectively request negotiations. This contention entails a "distinction without a difference."

By conducting the election and announcing its intent to implement the results, the District thereby violated EERA section 3543.5(c).

Bypass

The District incorrectly maintains that a bypass violation only involves employer denial of union access to unit members. Rather, under PERB precedent, an employer may not communicate directly with employees to undermine or derogate the representative's exclusive authority to represent unit members. (Muroc Unified School District (1978) PERB Decision No. 80.) Similarly, the employer violates the duty to bargain in good faith when it bypasses the exclusive representative to negotiate directly with employees over matters within the scope of representation. (Walnut Valley Unified School District (1981) PERB Decision No. 160.) However, once a policy has been established by lawful means, an employer has the right to

[14]Under this analysis, Krueger's resignation on October 9 and the resulting impact on his authority to represent CSEA become irrelevant.

take necessary actions, including consulting with employees, to implement the policy. (Id.) To establish that an employer has unlawfully bypassed the union, the charging party must demonstrate that the employer dealt directly with its employees: (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (Id.)

The District's reliance on State of California (Franchise Tax Board) (1992) PERB Decision No. 954-S (Franchise Tax Board) is inappropriate. In Franchise Tax Board, the Board held that the Association did not provide sufficient evidence to show that adverse actions against an Association steward, which were adjudicated before the employer, interfered with the Association's right to represent its members. The Board has found interference with union rights in cases where the employer has circumvented the exclusive representative and dealt directly with unit members, as in the case here. (Muroc Unified School District (1978) PERB Decision No. 80, pp. 19-21; Modesto City Schools (1983) PERB Decision No. 291, pp. 48–51.) Refusal to bargain in good faith has also resulted in derivative violations of EERA section 3543.5(a) and (b) for interfering with the rights of unit employees to be represented by the exclusive representative and for denying the exclusive representative the right to represent its members, respectively. (State of California (Department of Youth Authority) (2000) PERB Decision No. 1374-S; State of California (Department of Corrections) (2000) PERB Decision No. 1381-S.) As discussed above, the District was aware of its obligation to notify the CSEA field office in advance of its decision to conduct the October 9 election and implement the results, and to provide CSEA with the opportunity to negotiate. The October 9 cover letter to unit members and the concurrence of Chapter 250 officials was insufficient notice to CSEA in light of CSEA Policy 610, the Chapter 250 Constitution, and the parties' past practice of

communicating tentative agreements to the CSEA field office. In the face of CSEA's expressed opposition to the elimination of Social Security benefits, the District's failure to notify CSEA of the election and the decision to implement the results constitute interference with CSEA's right to represent unit employees in violation of EERA section 3543.5(b).

Denial of Employees' Right to be Represented by Union

The District argues that CSEA did not establish interference under EERA section 3543.5(a) because it did not prove all elements of a violation. However, the cases cited by the District involve the elements for a showing of retaliation or discrimination, not interference.[15] The test for whether a respondent has interfered with the rights of employees under EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. [State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, citing Carlsbad Unified School District (1979) PERB Decision No. 89; Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106.]

In this matter, the District did not notify CSEA of the October 9 election or of its plan to implement the election results in advance of taking these actions. The District further did not provide CSEA the ability to negotiate with the District regarding its actions.

[15]The District incorrectly cited Novato Unified School District (1982) PERB Decision No. 210 (Novato), which actually distinguishes the standard required for "interference" under section 3543.5(a) from that for "discrimination." (Novato, p. 5, fn. 7.)

Consequently, the District interfered with unit members rights to representation under EERA section 3543.5(a).[16]

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Clovis Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), by its conduct in bypassing the exclusive representative in dealing with unit employees and by unilaterally altering retirement benefits.

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

A. CEASE AND DESIST FROM:

1. Bypassing the California School Employees Association-Chapter 250 (CSEA) and dealing directly with unit employees on terms and conditions of employment or unilaterally changing terms and conditions of employment without affording CSEA an opportunity to negotiate or until completion of the statutory impasse procedures.

2. Denying unit employees their rights to be represented by CSEA.

3. Denying CSEA its right to represent unit members.

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

1. Rescind the determination to remove employees from Social Security benefits or altering their status with the California Public Employees Retirement System.

[16]As stated above, the District's failure to bargain in good faith creates derivative violations of section 3543.5(a) for interference with employees' right to representation. (State of California (Department of Youth Authority) (2000) PERB Decision No. 1374-S; State of California (Department of Corrections) (2000) PERB Decision No. 1381-S.)

2. Within ten (10) workdays of the service of the decision in this matter, post at all work locations where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Upon issuance of the decision in this matter, 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 director's instructions.

Members Baker and Neima 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 No. SA-CE-2000-E, California School Employees Association – Chapter 250 v. Clovis Unified School District, in which all parties had the right to participate, it has been found that the Clovis Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c).

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

A. CEASE AND DESIST FROM:

1. Bypassing the California School Employees Association – Chapter 250 (CSEA) and dealing directly with unit employees on terms and conditions of employment or unilaterally changing terms and conditions of employment without affording CSEA an opportunity to negotiate or until completion of the statutory impasse procedures.

2. Denying unit employees their rights to be represented by CSEA.

3. Denying CSEA its right to represent unit members.

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

Rescind the determination to remove employees from Social Security benefits or altering their status with the California Public Employees Retirement System.

Dated: _____ CLOVIS 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.