STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EAST SIDE TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. EAST SIDE UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2298-E PERB Decision No. 1713 November 23, 2004

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for East Side Teachers Association, CTA/NEA; Burke, Williams & Sorensen by Darren C. Kameya, Attorney, for East Side Union High School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the East Side Union High School District (District) to the proposed decision (attached) of an administrative law judge (ALJ). The ALJ found that the District violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing its policy of using a particular form for the submission of public complaints against employees, a violation of EERA section 3543.5(a), (b) and (c).[2]

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

[2]EERA section 3543.5 states, in pertinent part:

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

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, the District's exceptions, and the response of the East Side Teachers Association, CTA/NEA. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

DISCUSSION

Deferral to Arbitration

In its exceptions, the District asserts for the first time that this matter should be deferred to arbitration. (See EERA sec. 3541.5(a).) Significantly, the District failed to raise deferral as a defense in its initial response to the charge, in its answer to the complaint, and in its brief submitted after the evidentiary hearing. Indeed, it was only after the ALJ ruled against the District in the proposed decision that the District first asserted deferral. As such, the Board is now confronted with an issue that has lingered for some time: whether deferral to arbitration is still a jurisdictional defense in light of State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S (Food & Agriculture).

> (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. Knowingly providing an exclusive representative with inaccurate information, whether or not in response to a request for information, regarding the financial resources of the public school employer constitutes a refusal or failure to meet and negotiate in good faith.

Prior to Food & Agriculture, the Board had held in Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), that EERA section 3541.5(a)(2) established a jurisdictional rule requiring that a charge be dismissed and deferred if certain requirements were met. In Food & Agriculture, the Board held that Lake Elsinore was erroneously decided to the extent it required deferral even in instances where the employer was not willing to waive procedural defenses, such as timeliness. In a footnote, the Board in Food & Agriculture stated:

> At the time Dry Creek [Joint Elementary School District (1980) PERB Order No. Ad-81a] was decided, the Board treated deferral as an affirmative defense which could be waived. This issue is not squarely before the Board and the Board therefore does not overrule the portion of Lake Elsinore which discusses the jurisdictional nature of Section 3541.5. [Fn. 7.]

Not long after Food & Agriculture, the Board issued Long Beach Community College District (2003) PERB Decision No. 1564 (Long Beach) in which it held that the statute of limitations under EERA was not jurisdictional, but rather an affirmative defense. In reaching this holding, the Board discussed the public policy principles governing EERA. The Board also carefully examined the language of EERA section 3541.5(a) and private sector precedent under the National Labor Relations Act (NLRA)[3].

Based on the discussion and analysis contained in Food & Agriculture and Long Beach, the Board now rejects that portion of Lake Elsinore holding that deferral to arbitration is jurisdictional. Instead, as with the statute of limitations, the Board finds that deferral under EERA must be raised as an affirmative defense. Given the extensive discussion of the language of EERA section 3541.1(a) in Long Beach, this holding should not be surprising.

As with the holding in Long Beach, the Board finds that its holding here regarding deferral is consistent with public policy. Specifically, treatment of deferral as an affirmative

[3]The NLRA is codified at 29 U.S.C. section 141, et seq.

defense is necessary to preserve the scarce resources of PERB and the parties. The case at bar is a prime example. Were the Board to allow the District to assert deferral for the first time in its exceptions, both parties and PERB would have wasted an enormous amount of time and money litigating the underlying charge. Instead, by requiring the District to assert deferral as an affirmative defense such waste can be avoided while retaining all the rights provided by EERA section 3541.5(a). Accordingly, the Board holds that deferral to arbitration under EERA section 3541.5(a)(2) is not jurisdictional, but rather must be asserted as an affirmative defense or waived. As the District failed to raise deferral in its answer, its deferral exception is rejected.

Remedial Order

The District also asserts in its exceptions that the ALJ erred in ordering that the disciplinary actions against employees D.R. and L.G. be rescinded. According to the District, the ALJ's order fails to recognize that discipline may have been imposed even had the required forms been used. This exception must also be rejected. The ALJ found that the use of the public complaint form was required by established practice, and moreover, provided employees with important information regarding the complaints against them. The District's failure to provide these forms to D.R. and L.G. requires rescinding the disciplinary-actions taken against them. However, nothing in the ALJ's order prevents the District from re-filing the disciplinary actions once use of the public complaint forms has been reinstated.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the East Side Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c), when it

unilaterally ceased utilizing the "Formal Public Complaint" form in cases involving allegations of sexual and racial harassment/discrimination and ceased providing a copy of the complaint to the bargaining unit member named in the public complaint. This conduct also violated EERA section 3543.5(a), by interfering with the rights of bargaining unit members to participate in employee organizations of their own choosing, and EERA section 3543.5(b), by denying East Side Teachers Association, CTA/NEA (Association) its right to represent employees in their employment relations with the District.

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

A. CEASE AND DESIST FROM:

1. Unilaterally ceasing to utilize the "Formal Public Complaint" form in cases involving allegations of sexual and racial harassment/discrimination and ceasing to provide a copy of the complaint to the bargaining unit member named in such cases.

2. Interfering with bargaining unit employees' rights to participate in the activities of an employee organization of their own choosing.

3. Denying the Association its right to represent employees in their employment relations with the District.

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

1. Upon request, meet and negotiate with the Association over any future decision and the effects thereof of ceasing to utilize the "Formal Public Complaint" form in cases involving allegations of sexual and racial harassment/discrimination and ceasing to provide a copy of the complaint to the bargaining unit member named in the public complaint.

2. Rescind the disciplinary action imposed on employees identified in these proceedings as "D. R." and "L. G." and destroy all documentation of those actions; with respect to D. R., reimburse him for lost wages as a result of his suspension, with interest at the legal rate of seven percent per annum.

3. Post at all locations where notices to employees are customarily posted, copies of the Notice attached hereto as an appendix. The Notice must be signed by an authorized agent for 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 calendar days. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by an other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

Chairman Duncan and Member Whitehead 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. SF-CE-2298-E, East Side Teachers Association, CTA/NEA v. East Side Union High School District, in which the parties had the right to participate, it has been found that the East Side Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c), when it unilaterally ceased utilizing the "Formal Public Complaint" form in cases involving allegations of sexual and racial harassment/discrimination and ceased providing a copy of the complaint to the bargaining unit member named in the public complaint. This conduct also violated EERA section 3543.5(a), by interfering with the rights of bargaining unit members to participate in employee organizations of their own choosing, and EERA section 3543.5(b), by denying East Side Teachers Association, CTA/NEA (Association) its right to represent employees in their employment relations with the District.

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

A. CEASE AND DESIST FROM:

1. Unilaterally ceasing to utilize the "Formal Public Complaint" form in cases involving allegations of sexual and racial harassment/discrimination and ceasing to provide a copy of the complaint to the bargaining unit member named in such cases.

2. Interfering with bargaining unit employees' rights to participate in the activities of an employee organization of their own choosing.

3. Denying the Association its right to represent employees in their employment relations with the District.

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

1. Upon request, meet and negotiate with the Association over any future decision and the effects thereof of ceasing to utilize the "Formal Public Complaint" form in cases involving allegations of sexual and racial harassment/discrimination and ceasing to provide a copy of the complaint to the bargaining unit member named in the public complaint.

2. Rescind the disciplinary action imposed on employees identified in these proceedings as "D. R." and "L. G." and destroy all documentation of those actions; with respect to D. R., reimburse him for lost wages as a result of his suspension, with interest at the legal rate of seven percent per annum.

Dated: _____ EAST SIDE UNION HIGH 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

EAST SIDE TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. EAST SIDE UNION HIGH SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-2298-E PROPOSED DECISION (7/21/03)

Appearances: California Teachers Association, by Ramon E. Romero, Staff Attorney, for East Side Teachers Association, CTA/NEA; Doug Emerson, Director of Employer/Employee Relations, for East Side Union High School District.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

East Side Teachers Association, CTA/NEA (Association) initiated this action by filing an unfair practice charge against the East Side Union High School District (District) on October 31, 2002. Following its investigation of the charge, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on November 20, 2002. The complaint alleges that the District unilaterally changed a policy of using a particular form for the submission of public complaints against employees by substituting a new form for public complaints involving harassment/discrimination. This conduct is alleged to violate Educational Employment Relations Act (EERA or Act) section 3543.5(a), (b) and (c).[1]

[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:

The District answered the complaint on December 11, 2002, denying all material allegations.

The parties participated in an informal settlement conference on January 16, 2003, but the matter was not resolved.

The undersigned conducted a formal hearing in Oakland on April, 11, 2003.[2] With the receipt of post-hearing briefs on June 16, 2003, the matter was submitted for decision.

FINDINGS OF FACT

The District is a public school employer within the meaning of section 3540.1(k) of the Act. The Association is an employee organization within the meaning of section 3540.1(d) and an exclusive representative within the meaning of section 3540.1(e). There are approximately 1,200 employees in the bargaining unit.

The parties have had a collective bargaining agreement in effect at all times relevant to this dispute. Article 28 of the agreement, entitled "Public Complaint," sets forth a procedure to

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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.

[2] At the commencement of the formal hearing, the Association asserted that it had not been served a copy of the answer and that the allegations of the complaint should therefore be deemed admitted. This motion was denied. The Association also moved to amend the complaint to delete the allegation that the form for public complaints was produced as a result of negotiations and to add the allegation that it first discovered the change in practice in May 2002 (rather than the practice necessarily changing on that date). Both the motions to amend the complaint were granted.

be followed before the District imposes any disciplinary action or issues any negative and/or unsatisfactory evaluation as a result of information received through a complaint from a member of the public or an employee of the District. The first step requires that the bargaining unit member be "advised of the existence and substance of the complaint" within the period of time specified. Thereafter, either party (the employee or administrator acting on the complaint) has the right to schedule a meeting to discuss the complaint, at which the employee may be represented by the Association. In addition, the accused has the right to respond to the complaint orally or in writing after notification of the complaint.

Section 28.1.4 of Article 28 provides:

> Complaints which are withdrawn or shown to be false shall neither be placed in the unit member's personnel file nor utilized in any evaluation or disciplinary action against the unit member. Should the administrator determine that the substance of the complaint is true, following this procedure, it may be placed in the unit member's personnel file. Any complaint which is neither determined to be true or [sic] false will be put in a "complaint file" for a period of three years. Such a complaint will be discarded after three years from the date of the complaint, unless a similar complaint regarding the same unit member is filed; in that case, the first complaint will become part of the new complaint file and will be dealt with consistent with this procedure as a part of the second complaint.

Section 28.1.4 also requires that the administrator prepare a written report if he/she determines the complaint is either "true" or "neither true nor false." The report is to summarize all information considered as well as the reasoning for the administrator's finding. The administrator has discretion whether to issue any report if the complaint is found to be false. Further, Article 28 provides for a right of appeal of the administrator's finding to the District's governing board.

Beginning in 1980 and continuing through 2002, Bill Mustanich has served the Association as either a grievance representative, representing employees at a particular school

site, or as a grievance chair (or co-chair), representing employees district-wide. Over this period of time, he has been called upon for representation in an average of between two and ten times per year, district-wide, involving public complaints against unit members. In all cases in which Mustanich was involved, the principal was the "administrator" who presided over the complaint process. Warren Smith served as the grievance chair and co-chair beginning in 1985 until his retirement in 2002. He, too, personally dealt with approximately two to ten public complaints each year. In 1997, a third co-chair was added, and the position was filled by Larry Scharsch. Scharsch provided representation in public complaints cases as well.

The Association witnesses testified that in cases where a parent, student, member of the public, or employee wishes to file a complaint against a bargaining unit member, the District utilizes a form entitled "Formal Public Complaint Against a District Employee" for processing complaints against unit members. The form contains blanks for the following information: (1) date, (2) identity of principal/immediate supervisor with whom the complaint is lodged, (3) name, address and telephone number of the complainant, (4) identity of the person against whom the complaint is being filed, (5) a description of the nature of the complaint, and (6) a signature line for the complainant, immediately following a statement certifying that the information provided is true and accurate to the best of the complainant's knowledge. The form is in triplicate; the original goes to the administrator, one copy to the person against whom the complaint is lodged, and another to the complainant.

If a sustained complaint is appealed to the governing board, the administrator's decision upheld, and the complaint form entered in the employee's personnel file, the Association usually files a grievance, claiming lack of just cause under Article 27 ("Discipline") of the agreement. Once, a principal rejected the complaint, but the complainant's parent persuaded

the governing board to have the complaint placed in the employee's personnel file. The Association prevailed in a grievance claiming a violation of the Article 28 procedure.

Although the public complaint form did not result from negotiations between the parties, the Association never objected to its use. The Association approved of the form's use because it served as a tool for eliciting details of the complaint from the complainant and required that the complainant sign the form with an acknowledgement of the certification. Early on, a public complaint was likely to be documented on a paper other than the form. But within the past "five to seven" years, Mustanich has seen the public complaint form used "quite regularly." During this period of time, Mustanich has made it his regular practice to request a copy of the form, and the District has always complied.

There was no direct evidence that the District has an explicit rule or guidance regarding when it requires a complainant to complete the formal complaint form. Association witnesses admitted that in some cases only a verbal complaint is made against the unit member. In these cases however, no disciplinary action has ever resulted. The complaint was either dropped or informally resolved (e.g., the employee might agree to undergo counseling).

When a complainant has come forward with a written complaint but it was not prepared on the public complaint form, the District administrator has attached the writing to the public complaint form and provided both documents to the Association. The complainant's signature will appear on the public complaint form. Scharsch testified that the Association interprets Article 28 as requiring notification of the charges, and that whenever the complainant has reduced his or her complaint to writing, the documents must be produced.

In 2000, approximately, Mustanich became aware of a form entitled "Title IX Harassment/Discrimination Complaint." A District attorney produced it for the Association when a unit member expressed a desire to file a complaint of sexual harassment against an

administrator. During the same period in which the public complaint form has been in use, the Association has been aware of at least ten of the public complaints involving allegations of sexual harassment against unit members. Mustanich represented employees in most or all of these cases. Smith has also represented employees charged with sexual harassment. Neither Mustanich nor Smith ever witnessed the Title IX form being utilized in such cases involving a unit member.

Scharsch represented two unit members against whom complaints had been lodged in May 2002. In both cases, Scharsch requested a copy of the complaint and in each case he was denied it by Doug Emerson, the District's director of employer/employee relations. Emerson advised Scharsch that copies would not be provided because the cases involved Title IX harassment/discrimination. Emerson confirmed at the hearing that copies of the Title IX complaints are not provided to the employee or the Association, citing reasons of confidentiality.

The first of these two cases involved a teacher (identified here as "D. R."), and the complaint involved racial discrimination. Emerson announced as a result of his investigation that the employee would receive discipline in the form of a nine-day suspension without pay. In the second case involving sexual harassment, Emerson indicated that the employee (identified as "L. G.") would be disciplined by having a letter placed in his personnel file. In both cases, Emerson communicated the substance of the complaint to Scharsch verbally. However, in the second case, Emerson refused to reveal the name of the complainant, disclosing only that the person was a classified employee. In both cases, Emerson testified, the employees admitted the substance of the complaints.

According to Emerson, the District produced the Title IX complaint form in 1994. It was developed to ensure compliance with federal civil rights law. Emerson believed the

Association provided input as to the development of the form, but he provided no specifics. A copy of the Title IX form appeared in a 1998-1999 District parent/student handbook. However, there was no affirmative evidence that the Association was provided a copy of the handbook or that an officer with appropriate negotiating authority viewed the contents of the handbook.

In September 2000, the Title IX form was used in a complaint against the same D. R. identified above where the claim was sexual harassment.[3] Although Smith was aware of the case and believes he referred the employee directly to legal counsel for representation because it was a serious case, he denied seeing any documentation in the case.

Under the District's practice, every Title IX complaint triggers an investigation. After the investigation is completed the form may be retained in the investigative file or destroyed. Even if discipline results from such a sexual or racial harassment/discrimination complaint, the Title IX complaint form is not placed in the employee's personnel file. Emerson agreed that regardless of whether the complaint involves sexual or racial harassment/discrimination, Article 28 prescribes the procedure for the investigation of all complaints.

According to Emerson, the District interprets Article 28 as requiring production of a copy of the complaint only if it seeks to enter a public complaint form in the employee's personnel file. This rule does not prevent the District from utilizing another form so long as it does not seek to enter it in the file. Emerson testified that the District continues to use and produce the public complaint form for cases not involving sexual or racial harassment/discrimination.

[3] A copy of that complaint indicates that the form was last revised in March 1995.

ISSUE

Did the District unilaterally change its policy regarding the processing of public complaints?

CONCLUSIONS OF LAW

A public school employer is required to meet and negotiate in good faith with the exclusive representative of a bargaining unit of its employees concerning matters within the scope of representation. (Sec. 3540.1(h); 3543.5(c).) An employer's unilateral implementation of a change as to a negotiable subject, absent a valid defense, constitutes a per se violation of its duty to meet and negotiate in good faith. (Pajaro Valley Unified School District (1978) PERB Decision No. 51.) No finding of over-all subjective bad faith is required because such conduct, just like a flat refusal, necessarily obstructs bargaining and frustrates the objectives of the Act. (California State Employees' Assn. v. Public Employment Relations Bd. (1996) 51 Cal.App.4th 923, 934-935, citing NLRB v. Katz (1962) 369 U.S. 736 [50 LRRM 2177].)

The elements of a unilateral change violation are: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated departure from the policy, but amounts to a change of policy, i.e., the change has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment; 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.)

The Association contends that all of the required elements for a unilateral change case have been met: (1) the District had established a past practice of using the public complaint

form in virtually all situations where a complaint arose against an employee; (2) it reversed its policy when it began using the Title IX form, without prior notice or opportunity to bargain having been provided; (3) the change had a generalized effect or continuing impact on bargaining unit members; and (4) the matter is a negotiable subject because the public complaint process described in the contract is a procedure for the imposition of discipline, and discipline of the type imposed here (i.e., suspensions without pay and documentation in the personnel file) is within EERA's scope of representation definition.

The District contends that there can be no violation because the form was not negotiated and because the Association failed to establish a consistent practice regarding its use. To the extent the contract addresses the imposition of discipline as a result of public complaints, the District argues that it complied with the terms of Article 28 with respect to D. R. and L.G. In addition, the District contends that the form is not a matter within the scope of representation.

In this case, the Association predicates its case on an alteration of the District's "own established past practice." PERB has stated that a binding past practice is one that is "regular and consistent" or "historic and accepted." (Pajaro Valley Unified School District, supra, PERB Decision No. 51.) In Temple City Unified School District (1989) PERB Decision No. 782, PERB held that the exclusive representative had acquiesced in a policy of individual negotiations to "buy out" employees in order to obtain their early retirement. The evidence demonstrated a total of 12 buy-outs over a 17-year period. The union became involved in the negotiations in five of the cases after they were initiated by the employer and had knowledge of the practice for more than four years. PERB concluded that the practice itself had existed for at least six years before the union filed its charge.

I find that the District had a "historic and accepted practice" of utilizing the formal public complaint form in cases of public complaints (i.e., those lodged against a unit member by a student, parent, employee, or other member of the public) and that when such a public complaint form was completed the District administrator provided the employee with a copy of it. Mustanich competently testified that use of the form had become "quite regular" during the past five to seven years and that whenever he has requested a copy of it the administrator has obliged.

The fact the public complaint form was not negotiated is irrelevant. The Association was aware of its use and acquiesced in its use. I reject the District's argument that the failure of the Association to negotiate the complaint prevents it from claiming a past practice on which to base its case of unilateral change. It is well-settled that unwritten past practices may support a charge of unilateral change. (See Pajaro Valley Unified School District, supra, PERB Decision No. 51.)

I further find that this practice applied to cases involving sexual or racial harassment/discrimination complaints. Mustanich and Smith recalled at least ten cases of this kind during the period of time the District was regularly utilizing the public complaint form, and neither representative ever saw the Title IX form during this time. Mustanich was always provided a copy of a public complaint form upon request when he represented an employee. That he made no exception as to any particular type of cases implies that District administrators provided him with a copy of the public complaint form in the harassment/discrimination cases as well.

The District claimed that the Title IX form was used instead in these cases prior to 2002 (presumably as early as 1994, when it was developed) but failed to carry its burden that it had established such a contrary practice. Although the District suggested that the policy had

always been to use the Title IX form for harassment/discrimination cases by making an offer of proof at the outset of the hearing that the Association was aware of this form prior to its use in these cases, no such proof was ever adduced. It appeared that the District intended to establish that Smith was aware of the use of the Title IX form in the previous case against D. R. occurring in 2000. However, Smith credibly testified that he saw no documentation in that case. Emerson admitted that Article 28 applies to all cases of public complaints whether or not they involve harassment/discrimination.

The language of Article 28 also supports a finding that District administrators had a "regular and consistent" practice of utilizing the form. (Pajaro Valley Unified School District, supra, PERB Decision No. 51, citing, inter alia, NLRB v. Allied Products Corp. (6th Cir. 1977) 548 F.2d 644 [94 LRRM 2433], modifying (1975) 218 NLRB 1246 [89 LRRM 1441].) The form was one prepared by the District and distributed to all schools. It is entitled "Formal Public Complaint Against District Employee"; the title of Article 28 is "Public Complaint." The correspondence of the language is direct; hence it can be inferred that administrators were notified in some manner by the District as to the form's intended use when it was distributed. Moreover, the wording of section 28.1.4 implies that the public complaints are typically committed to writing, since it speaks of the complaint being retained and placed in the personnel and investigative files. A verbal complaint cannot be "placed" in a file unless it is first reduced to writing. Any administrator reading Article 28 would naturally assume the best practice for complying with the procedure would be to have the complainant complete the form. Thus, the evidence that an administrator occasionally acted upon a complaint despite the fact that it was only verbal does not prevent a finding of the existence of a "regular and

consistent" practice of completing the form.[4] Even assuming the administrator's capacity for discretion in directing the complainant to complete the public complaint form, the evidence clearly establishes that whenever the form was completed it was provided to the Association upon request. The Association predicates its case both on the fact that the District had a practice of requiring the public complaint form and providing it whenever documentation was available.

Next, I find that the Association has established that the District altered its policy when it began using the Title IX form in harassment/discrimination cases without having provided the Association prior notice of the change in policy. I have found that the District used the public complaint form in all cases prior to May 2002. In the cases of D. R. and L. G., the District utilized the Title IX form instead of the public complaint form. Because the District suggests that no change in policy occurred in May 2002, it naturally makes no claim that it provided notice of a change in policy. To the extent it may be arguing that notice of the change was imputed to the Association based on the representation provided to D. R. in the earlier case, resulting in a waiver by inaction of the right to bargain, I reject this claim based on my finding above of no notice. (See Victor Valley Union High School District (1986) PERB Decision No. 565.)

I further find that the change in policy has a generalized effect and continuing impact on the terms and conditions of employment for bargaining unit members. Emerson asserted that use of the Title IX form was the proper procedure for cases involving harassment/discrimination complaints. Emerson's position as director of employer/employee

[4] The Association witnesses' testimony that no verbal complaint ever resulted in formal discipline of any kind could be read as suggesting that verbal complaints were intended by the victim to be informal but that the District would nevertheless become involved. While the District could not force an employee to fill out a form, an administrator might or might not have conditioned his/her involvement in the matter on completion of the form.

relations places him in the responsible authority position to establish District policy. Therefore, the evidence demonstrates that the District intends to follow this practice in the future and that its conduct in these two cases is not a mere isolated deviation from prior policy.

Lastly, I find that the matter of the utilization of a form for documenting public complaints is a matter within the scope of representation. A subject is negotiable if it is specifically enumerated in the Act's scope of representation definition. (Sec. 3543.2.) Section 3543.2(b) identifies "causes and procedures for disciplinary action, other than dismissal, including a suspension of pay for up to 15 days, affecting certificated employees." The public complaint procedure whereby formal complaints involving harassment/discrimination were documented in the public complaint form and provided to the Association must be considered a procedure for disciplinary action, because Emerson admitted that the public complaint procedure applied to the cases of D. R. and L. G. and because his investigation in both cases resulted in the imposition of discipline short of dismissal. (See Arvin Union School District (1983) PERB Decision No. 300.) Also, because Article 28 provides that the public complaint form may be placed in the employee's personnel file, it is a procedure for the evaluation of certificated employees, another enumerated subject under section 3543.2(a). (Compton Community College District (1990) PERB Decision No. 798.) The fact that the District claims its policy is never to include the Title IX form does not affect this conclusion. Emerson included his own letter summarizing his findings in the L. G. case in the employee's personnel file. Also section 28.1.4, by its express terms, applies when a public complaint will be used to impose discipline or will result in a negative evaluation pursuant to

Article 28.[5] As I have found, the public complaint form appears to have been developed by the District to assist administrators in fulfilling these provisions of the contract.

Accordingly, I conclude that the District unilaterally changed its policy regarding the process of public complaints in violation of EERA section 3543.5(c). This conduct also denied the Association its right to represent bargaining unit members, specifically D. R. and L. G., in violation of EERA section 3543.5(b). It further interfered with the rights of these bargaining unit members to participate in the activities of an employee organization of their own choosing, in violation of EERA section 3543.5(a).

REMEDY

Section 3541.5(c) grants PERB

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

In this case it has been determined that the District violated its obligation to negotiate in good faith by unilaterally ceasing to use the public complaint form in cases of sexual and racial harassment/discrimination and ceasing to provide a copy of the complaint to the bargaining unit member named in such cases, in violation of section 3543.5(c). The District will be ordered to return to the status quo ante which existed prior to the implementation of the change in policy. In the event the District chooses to cease using the form in the future, it must give the Association reasonable notice and an opportunity to negotiate about that decision.

[5] The core values embodied in the public complaint form vis-a-vis the unit member are due process (i.e., notice) and the right of confrontation (i.e., identity of the complainant and the certification requirement that bears on credibility). (See Cal. Const., arts. 7 and 15; U. S. Const., 6th and 14th Amds.)

In addition, it is appropriate to order that the disciplinary action imposed on D. R. and L. G. be rescinded and all documentation of those actions be destroyed. Since D. R. lost wages as a result of his suspension, the District should also be required to reimburse him for these lost wages, with interest at the legal rate of 7 percent per annum. This affirmative action is necessary to effectuate the purposes of the Act, which imposes a duty on the public school employer to meet and negotiate in good faith and refrain from taking unilateral action on matters within the scope of representation. The concern is less with the veracity of the complainant's charges against the employees (the District claims the employees admitted the allegations) than with the denial of the Association's ability to represent the employees in a meaningful way. In L. G.'s case, Emerson refused even to inform Scharsch of the identity of the complainant.

It is also appropriate that the District be required to post a notice incorporating the terms of this order. The Notice should be signed by an authorized agent of the District indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting of such notice will provide employees with notice that the District has acted in an unlawful manner and 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 the controversy and the District's readiness to comply with the ordered remedy. (Davis Unified School District (1980) PERB Decision No. 116; see also 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 the case, and pursuant to section 3541.5(b), it is hereby ordered that the East Side Union High School District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the East Side Teachers Association, CTA/NEA as the exclusive representative of its certificated employees by unilaterally ceasing to use the "Formal Public Complaint" form in cases involving allegations of sexual and racial harassment/discrimination and ceasing to provide a copy of the complaint to the bargaining unit member named in such cases.

2. By the same conduct, interfering with bargaining unit employees' right to participate in the activities of an employee organization of their choosing.

3. By the same conduct, denying to the East Side Teachers Association, CTA/NEA rights guaranteed by the Educational Employment Relations Act, including the right to represent its members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Upon request, meet and negotiate with the East Side Teachers Association, CTA/NEA over any future decision and the effects thereof of ceasing use of the "Formal Public Complaint" form.

2. Within thirty (30) workdays of service of a final decision in this matter, rescind the disciplinary action imposed on D. R. and L. G. and destroy all documentation of those actions; with respect to D. R., reimburse him for lost wages as a result of his suspension, with interest at the legal rate of 7 percent per annum.

3. Within seven (7) workdays of service of a final decision in this matter, post at all locations where notices to employees are customarily posted, copies of the Notice attached hereto as an appendix. The Notice must be signed by an authorized agent for 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 calendar days. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by an other material.

4. Within thirty (30) workdays of service of a final decision in this matter, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

Pursuant to PERB Regulation 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the PERB 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. (PERB Regulation 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. (PERB Regulations 32135(a) and 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 PERB Regulation 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. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 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 PERB Regulations 32300, 32305, 32140, and 32135(c).)

Donn Ginoza
Administrative Law Judge

PROOF OF SERVICE BY MAIL
C.C.P. 1013a

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, CA 95814-4174. I am readily familiar with the ordinary practice of the business of collecting, processing and depositing correspondence in the United States Postal Service and that the correspondence will be deposited the same day with postage thereon fully prepaid.

On November 23, 2004, I served the attached PERB Decision No. 1713, East Side Union High School District, Case No. SF-CE-2298-E on the parties listed below by placing a true copy thereof enclosed in a sealed envelope for collection and mailing in the United States Postal Service following ordinary business practices at Sacramento, California addressed as follows:

Doug Emerson, Director of Employer/Employee Relations
East Side Union High School District
830 N. Capitol Avenue
San Jose, CA 95133

Darren C. Kameya, Attorney
E. Luis Saenz, Attorney
Burke, Williams & Sorensen
450 Sansome Street, Suite 1200
San Francisco, CA 94111-3320

Ramon E. Romero, Staff Attorney
California Teachers Association
P.O. Box 921
Burlingame, CA 94011-0921

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on November 23, 2004, at Sacramento, California.

Teresa M. Stewart
(Type or print name)

Teresa M. Stewart
(Signature)