STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STANDARD SCHOOL DISTRICT, Charging Party, v. STANDARD TEACHERS ASSOCIATION, CTA/NEA, Respondent.	Case No. LA-CO-1081-E PERB Decision No. 1775 August 26, 2005

Appearances: Miller, Brown & Dannis by David G. Miller, Attorney, for Standard School District; California Teachers Association by Robert E. Lindquist, Attorney, for Standard Teachers Association, CTA/NEA.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Standard Teachers Association (Association) to the proposed decision (attached) of an administrative law judge (ALJ). The ALJ concluded that the Association violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing policy when it refused to participate in the local peer assistance and review (PAR) program.

The Board has reviewed the entire record in this matter, including the unfair practice charge, complaint, stipulated record, the Association's statement of exceptions and the

[1]EERA is codified at Government Code section 3540, et seq.

Standard School District's response thereto.[2] The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts the proposed decision as the decision of the Board itself.

DISCUSSION

The Association attaches to its appeal, the decision of a Commission on Professional Competence (Commission) dated February 4, 2002, in a matter involving a certificated employee of the Stockton Unified School District. The Association asserts that this new evidence may be admitted and considered by the Board pursuant to paragraph 19 of the stipulation of the parties, which states, in relevant part:

> The Administrative Law Judge shall take judicial notice of the California Peer Assistance and Review Program for Teachers enabling legislation [citation] and any relevant legislative history pertaining thereto submitted by the parties.[3]

Pursuant to the stipulation of the parties, the ALJ shall take judicial notice of only the enabling legislation and any relevant legislative history pertaining to the PAR. The new evidence consists of an administrative decision issued by the Commission of an entirely different school district, regarding a certificated employee. It does not pertain to any relevant legislative history. According to the stipulation of the parties, it falls outside the purview of the ALJ.

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[2]The District's request for attorneys' fees is denied.

[3]In a cover letter to the ALJ accompanying the stipulation, the Association's attorney states, in part:

> Upon your approval, this Stipulation will comprise the majority of the factual record of the case. The remainder of the record would consist of any relevant 'legislative facts,' lodged by the parties, regarding the legislative history of the California Peer Assistance and Review Program for Teachers enabling legislation.

Assuming for the purpose of argument that the decision of the Commission is related to the legislative history of the PAR, which it is not, it was issued on February 4, 2002 and should have been available to the Association well before the ALJ closed the record on December 1, 2003. The Association does not state any reason as to why the new evidence could not have been presented to the ALJ for his review and consideration before the case was submitted for decision. There is no allegation that this decision constitutes newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. (Yolo County Superintendent of Schools (1990) PERB Decision No. 838; San Mateo Community College District (1985) PERB Decision No. 543.) Thus, the new evidence is rejected and will not be considered by the Board.

ORDER

Based on the findings of fact, conclusions of law and the entire record in this case, the Public Employment Relations Board (PERB) concludes that the Standard Teachers Association, CTA/NEA (Association) violated the Educational Employment Relations Act (EERA), Government Code section 3543.6(c), by unilaterally changing a negotiated policy on peer assistance and review (PAR).

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

A. CEASE AND DESIST FROM:

Unilaterally changing PAR policy.

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

1. Rescind its repudiation of the negotiated PAR policy.

2. Within ten (10) work days following the date this decision is no longer subject to appeal, post at all work locations where notices to bargaining unit employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the Association, indicating that the Association will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive work days. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The Association 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 Standard School District.

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. LA-CO-1081-E, Standard School District v. Standard Teachers Association, CTA/NEA in which all parties had the right to participate, it has been found that the Standard Teachers Association, CTA/NEA, violated the Educational Employment Relations Act (EERA), Government Code section 3543.6(c), by unilaterally changing a negotiated policy on peer assistance and review (PAR).

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing PAR policy.

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

1. Rescind the repudiation of the negotiated PAR policy.

Dated:_____ STANDARD TEACHERS ASSOCIATION, CTA/NEA

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

STANDARD SCHOOL DISTRICT, Charging Party, v. STANDARD TEACHERS ASSOCIATION, CTA/NEA, Respondent.	UNFAIR PRACTICE CASE NO. LA-CO-1081-E PROPOSED DECISION (3/29/04)

Appearances: Miller Brown & Dannis by David G. Miller, Attorney, for Standard School District; California Teachers Association by Robert E. Lindquist, Attorney, for Standard Teachers Association, CTA/NEA.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a school district alleges that a teachers association unilaterally and unlawfully changed a negotiated policy on peer assistance and review. The association denies any unlawful conduct.

The Standard School District (District) filed an unfair practice charge against the Standard Teachers Association, CTA/NEA (Association) on November 19, 2001. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint on July 16, 2002, to which the Association filed an answer on August 8, 2002.

The parties chose not to participate in an informal settlement conference, and PERB scheduled a formal hearing for November 7, 2002. The hearing was postponed, however, due to illness. Ultimately, the parties agreed to a stipulated record, which they filed with PERB on October 14, 2003. With the receipt of the parties' briefs on December 1, 2003, the case was submitted for decision.

FINDINGS OF FACT

As stated above, the parties agreed to a stipulated record. The following findings of fact are based entirely on the parties' stipulation. These findings are intended to summarize and highlight the most relevant stipulated facts, and not to delete, alter or interpret any part of the parties' stipulation.

The District is a public school employer under the Educational Employment Relations Act (EERA).[1] The Association is an employee organization under EERA and is the exclusive representative of an appropriate unit of the District's certificated employees, including all classroom teachers.

The District and the Association were parties to a collectively negotiated agreement (Agreement) for the period 1998-2001. Pursuant to contractual reopeners for the 2000-2001 school year, the parties agreed on or about January 31, 2001, to a peer assistance and review (PAR) program, which was described in a new Article XV of the Agreement. Paragraph A of the article stated as follows:

> The California Peer Assistance and Review Program (PAR) for Teachers provides a mechanism by which exemplary classroom teachers assist other classroom teachers in the areas of subject matter knowledge, teaching methods, and teaching strategies. Peer assistance activities are provided by "Consulting Teachers" to "Participating Teachers." Consulting Teachers are selected and designated by the Joint Teacher-Administrator Peer Assistance and Review Panel ("Joint Panel"). A Participating Teacher is a classroom teacher who is referred to and required to participate in the PAR program as a result of an unsatisfactory rating of the employee's performance in any one or more of the following areas: 1) teaching methods, 2) teaching instruction. A classroom teacher may request assistance through the PAR process as a "Voluntary Participant" subject to the provisions of the law and the agreement of the Joint Panel.

[1] EERA is codified at Government Code section 3540 and following.

Under Paragraph B of the article, oversight and guidance of the PAR program was to be provided by the Joint Panel of teachers and administrators.

Paragraph B of the article stated in part that the majority of the Joint Panel "shall be certificated classroom teachers who have been chosen by other certificated classroom teachers" and that classroom teacher membership on the Joint Panel "shall be determined by the Executive Board of the Association." Paragraph B also stated:

> The Joint Panel shall be composed of five members, three current classroom teachers and two administrators. The term of a Joint Panel member who is a classroom teacher shall be three years, except that the first terms of the teacher members shall be one one-year term, one two-year, and one three-year term.

Paragraph B also provided that the Joint Panel "shall elect a member as chair who shall serve for a two-year term." Among the duties of the Joint Panel were to adopt rules and procedures and distribute them "at the beginning of each school year" and to make an annual program impact evaluation and present it "not later than June 1 of each school year."

Under Paragraph C of the article, Consulting Teachers were to be assigned to assist Participating Teachers in need of development in teaching methods or instruction. Paragraph C stated in part that a Consulting Teacher "is a current classroom teacher who applies for that designation and is selected by the Joint Panel." Paragraph E of the article stated in part, "Referral [of a Participating Teacher] to participate in the PAR program is mandatory."

Under Paragraph C of the article, the duties of a Consulting Teacher included preparing a "Plan of Consultative Assistance" and timeline for a Participating Teacher. The projected completion date for the timeline was to be "at the close of the next school year." A Consulting

Teacher was to submit a written peer review report at least every four weeks and a final report for the school year "not later than March 1."

Article XV concluded with the following paragraphs:

> J. Continuing Discussion Regarding Voluntary Participants. The District and the Association agree to continue discussions on the subject of providing PAR services to permanent teachers who volunteer.
>
> K. Reopening This Article. The parties agree that this Article shall be reopened if either Education Code section 44500 et seq. or the State's implementation guidelines or regulations are modified in any manner that adversely impacts a term of the Article. The parties further agree that this Article may be reopened at any time by mutual agreement. Finally, the parties agree that reopening the Article does not necessarily reopen the Collective Bargaining Agreement.
>
> L. Termination of This Article. If State funding for the PAR program is eliminated, this Article shall expire and have no force or effect without the need for further action by either the District or the Association. The District shall notify the Association in writing that the PAR program funding has been eliminated.

Article XV itself did not otherwise address continuing discussion, reopening or termination of the article.

The 1998-2001 Agreement of which Article XV became a part also included an Article XVII (Conclusion). That article's Paragraph D (Duration of Agreement) stated in part:

> This agreement shall be in full force and effect from the date of ratification by the Board of Trustees through midnight on June 30, 2001, at which time it shall expire and become null and void.

Article XVII's Paragraph C, however, stated as follows:

> Continuation of Economic Benefits. Upon expiration of this Agreement or of any interim salary schedule or health and welfare benefit contribution, teachers who are reemployed for the following school year shall be paid the same salary as for the final (or interim) year of the Agreement, including columns and

steps where eligible, until such time as a new Agreement is ratified by the parties or the duty to bargain has been completed.

1. Dollar amounts specified herein for the payment of health and welfare benefits shall be the same pursuant to this paragraph.

Article XVII did not otherwise address the termination or continuation of any term of the agreement.

In the spring of 2001, the parties began negotiations for a successor to the 1998-2001 Agreement. On July 26, 2001, when negotiations were still ongoing, the Association sent the District a memo stating in part:

> This memo is to remind you that the Collective Bargaining Agreement in the Standard School District expired on June 30, 2001.
>
> One of the legal implications of this fact is that the District may no longer lawfully operate a local Peer Assistance and Review Program (local "PAR" program), may no longer expend public funds on Peer Assistance and Review, and may no longer accept state appropriations to fund a local PAR program.

The memo demanded that the District "cease and desist from further operation of its local PAR program." The parties' stipulation does not state if or how the District responded to the memo.

On September 5, 2001, the Association sent the District a letter stating in part:

> This is to officially inform you that because we have not settle[d] our 2001-2002 contract the Standard Teachers Association (STA) will not be participating in Peer Assistance and Review (PAR). As you [k]now the PAR issue is contractual and lawyers for the California Teachers Association have advised STA that without a settlement of the contract we have no PAR agreement and STA should not be participating.

The parties' stipulation states that the District did not respond to the letter, other than by filing its unfair practice charge on November 19, 2001.

ISSUE

Did the Association unilaterally and unlawfully change a negotiated policy on peer assistance and review?

CONCLUSIONS OF LAW

Relevant Statutory Provisions

EERA section 3543.6(c) makes it unlawful for an employee organization to:

> Refuse or fail to meet and negotiate in good faith with a public school employer of any of the employees of which it is the exclusive representative.

EERA section 3543.5(c) similarly makes it unlawful for a public school employer to "[r]efuse or fail to meet and negotiate in good faith with an exclusive representative."

EERA section 3543.2(a) states in part:

> 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,...

EERA section 3543.2(b) states:

> Notwithstanding Section 44944 of the Education Code, the public school employer and the exclusive representative shall, upon request of either party, meet and negotiate regarding causes and procedures for disciplinary action, other than dismissal, including a suspension of pay for up to 15 days, affecting certificated employees. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of Section 44944 of the Education Code shall apply.

EERA section 3543.2(c), (d), and (e) similarly states that the provisions of Education Code sections 44955 and 45028 shall apply in the absence of mutual agreement. EERA section 3540 otherwise provides that EERA "shall not supersede other provisions of the Education Code."

Generally, the evaluation and assessment of the performance of certificated employees has been governed by Education Code sections 44660 through 44665, also known as the Stull Act. Section 44660 calls on school districts to develop and adopt objective evaluation and assessment guidelines. Section 44662 requires that school districts evaluate and assess employee competency as it relates to pupil progress, instructional techniques, and other specified matters. Section 44663 requires that evaluation and assessment be reduced to writing and discussed with the employee before the end of the school year. Section 44664 requires that evaluation and assessment be done at least every other year and provides that any evaluation containing an unsatisfactory rating in teaching methods or instruction "may include" the requirement of participation in an improvement program.

In 1999, the Legislature established the California Peer Assistance and Review Program for Teachers (CPARPT), in Education Code sections 44500 through 44508. The Legislature's declared intent was to establish "a critical feedback mechanism that allows exemplary teachers to assist veteran teachers in need of development in subject matter knowledge, or teaching strategies, or both." (Stats. 1st Ex. Sess. 1999-2000, ch. 4, §1.) Any participating school district was expected to "coordinate its employment policies and procedures for that program with ... the biennial evaluations of certificated employees required pursuant to Section 44664 [of the Stull Act]." (Ibid.)

Education Code section 44500(a) formally establishes the CPARPT and states:

> .. . The governing board of a school district and the exclusive representative of the certificated employees in the school district may develop and implement a program authorized by this article that meets local conditions and conforms with the principles set forth in subdivision (b).

Section 44500(b)(l) states in part that a teacher participant shall:

> volunteer to participate in the program or be referred for participation in the program as a result of an evaluation performed pursuant to subdivision (c) of Section 44664 [of the Stull Act]. In addition, teachers receiving assistance may be referred pursuant to a collectively bargained agreement.

Section 44500(b)(2) requires in part that performance goals for a teacher be "consistent with Section 44662 [of the Stull Act]."

Education Code section 44501 states that a consulting teacher "shall meet locally determined criteria" as well as certain specified qualifications. Section 44502 requires that the governance structure of a local program include a joint teacher administrator peer review panel. The majority of the panel is to be "composed of certificated classroom teachers chosen to serve on the panel by other certificated classroom teachers." Among the panel's duties are to select consulting teachers and to "annually evaluate" the impact of the local program.

Education Code section 44503(a) states in relevant part:

> The governing board of a school district that accepts state funds for purposes of this article agrees to negotiate the development and implementation of the program with the exclusive representative of the certificated employees in the school district, if the certificated employees in the district are represented by an exclusive representative.

Education Code section 44504(a) states in part that a school district that elects to participate in CPARPT shall certify to the California Superintendent of Public Instruction that it "has implemented" a local program. Section 44504(b) and (c) provides that a district that does not elect to participate is not eligible for funding pursuant to a variety of other programs, and that it must report annually at a regularly scheduled meeting of its governing board on the rationale for not participating.

Under Education Code section 44505(b) and (d), the California Superintendent of Public Instruction "may request a copy of the signature page of the collective bargaining

agreement implementing the program required pursuant to subdivision (a) of Section 44503," in addition to certification by the school district that it "has implemented" a local program by August 1, 2000, or July 1, 2001. Under Education Code section 44506(c)(2) and (3), the California Superintendent of Public Instruction shall apportion funding "annually thereafter" to each school district that certificated the implementation of a local program by August 1, 2000, or July 1, 2001. The CPARPT legislation does not address decertification or recertification of a local program.

The legislation that established the CPARPT also amended sections of the Stull Act. Education Code section 44662 was amended to include the following subdivision (d):

> Results of an employee's participation in the Peer Assistance and Review Program for Teachers established by Article 4.5 (commencing with Section 44500) shall be made available as part of the evaluation conducted pursuant to this section.

Meanwhile, the following language was added to Section 44664(c):

> If a district participates in the Peer Assistance and Review Program for Teachers established pursuant to Article 4.5 (commencing with Section 44500), any certificated employee who receives an unsatisfactory rating on an evaluation performed pursuant to this section shall participate in the Peer Assistance and Review Program for Teachers.

As noted above, this section had previously provided only that an unsatisfactory evaluation "may include" the requirement of participation in an improvement program.

Unilateral Change

In determining whether a party has violated its duty to meet and negotiate in good faith, 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. The usual 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 negotiations. (Walnut Valley Unified School District (1981) PERB Decision No. 160; Grant Joint Union High School District (1982) PERB Decision No. 196.)

Although this test is written as if the employer committed a unilateral change, the standard is also applicable to a unilateral change by an exclusive representative. (SEIU Local 998 (2004) PERB Decision No. 1580-M; University Council-American Federation of Teachers (1992) PERB Decision No. 922-H.)[2] Under EERA sections 3543.5(c) and 3543.6(c), employers and exclusive representatives have the same duty to meet and negotiate in good faith, and their conduct should be subject to the same test.

In its brief, however, the Association argues that a local PAR program is not a term or condition of employment and therefore not a matter within EERA's scope of representation subject to unlawful unilateral change. The Association first points out that the CPARPT legislation does not state that a local program is a "term and condition of employment." It is true that the legislation does not use those words. It is also true, however, that the legislation specifically requires a school district to "negotiate the development and implementation" of a local program (Ed. Code, §44603(a)) and authorizes the California Superintendent of Public Instruction to "request a copy of the signature page of the collective bargaining agreement implementing the program" (Ed. Code, §44505). The legislation also provides that participating teachers "may be referred pursuant to a collectively bargained agreement" (Ed. Code, §44500 (b) (1)). For such matters to be negotiated as part of a collective bargaining

[2] In its brief, the Association cites El Dorado County Teachers Association, CTA/NEA (1989) PERB Decision No. 759, for the proposition that PERB does not recognize unilateral changes by exclusive representatives. What PERB actually said (in footnote 1) was that it had "not yet addressed that issue." PERB has since addressed the issue.

agreement, they would necessarily seem to be terms or conditions of employment within the scope of representation.

One may compare the legislation establishing the CPARPT with the legislation that established the earlier California Mentor Teacher Program (CMTP) in former Education Code section 44490 through 44497. (Stats. 1983, ch. 498.) Before those Education Code sections were repealed by the terms of Education Code section 44504 of the CPARPT legislation, Education Code section 44495(d) specifically stated:

> The subject of participation by a school district or an individual certificated classroom teacher in a mentor teacher program shall not be included within the scope of representation in collective bargaining among a public school employer and eligible employee organizations.

If the Legislature had intended for a local PAR program to be similarly outside the scope of representation, it presumably would have said so in the CPARPT legislation.

The Association also argues that, whatever the CPARPT legislation may or may not say, EERA itself does not include a local PAR program within EERA's scope of representation. It is true that EERA section 3543.2, which governs the scope of representation, does not specifically mention PAR programs or Education Code sections 44500 through 44508 of the CPARPT legislation. For that matter, EERA section 3543.2 also does not mention Education Code sections 446600 through 44665 of the Stull Act. EERA section 3543.2(a) does state in part, however, that the scope of representation shall be limited to "matters relating to ... terms and conditions of employment" and that terms and conditions of employment include "procedures to be used for the evaluation of employees."

PERB's test for determining whether a subject, not specifically enumerated, is within the scope of representation under EERA was set forth in Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim). Under that test, a non-enumerated subject is

negotiable if (1) it is logically and reasonably related to wages, hours, or an enumerated term and condition of employment, (2) the subject is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives essential to the achievement of the district's mission. This test was approved by the California Supreme Court in San Mateo City School District v. Public Employment Relations Bd. (1983) 33 Cal.3d 850 [191 Cal.Rptr. 800].

Like the test for a unilateral change, the Anaheim test is written as if the employer's conduct is at issue. PERB, however, has recently approved an adaptation of the third prong of the test for cases like the present one in which a union's conduct is at issue. In such a case, the third prong of the test is whether the union's obligation to negotiate would not significantly abridge the union's freedom to exercise those managerial prerogatives essential to the achievement of the union's mission. (California State Employees Association, SEIU Local 1000 (2004) PERB Decision No. 1601-S.)

It should be noted that under EERA section 3543.2(a) and the Anaheim test a matter within scope need not itself be a "term and condition of employment;" it need only be related (logically and reasonably) to such a term and condition. Thus, in order to be within scope, a PAR program need not itself be an evaluation procedure; it need only be related (logically and reasonably) to evaluation procedures (and meet the rest of the Anaheim test).

I conclude that a local PAR program is logically and reasonably related to evaluation procedures. In establishing the CPARPT, the Legislature's explicit intention was to create a "critical feedback mechanism" that school districts should "coordinate" with the biennial Stull evaluations. (Stats. 1st Ex. Sess. 1999-2000, ch. 4, §1.) Teachers are to be referred for

participation based on Stull evaluations, and their performance goals are to be consistent with the Stull Act. (Ed. Code, §44500 (b) (1) and (2).) In establishing the CPARPT, the Legislature amended the Stull Act itself, in part to require that the results of a teacher's participation in a local PAR program be "made available" as part of a Stull evaluation. (Ed. Code, §44662(d).) While the Stull Act had previously provided that an unsatisfactory evaluation "may include" the requirement of participation in an improvement program, the amended Stull Act provides that a teacher who receives an unsatisfactory evaluation "shall participate" in a local PAR program. Such a program is thus related to and intertwined with evaluation procedures.

With regard to the second prong of the Anaheim test (the necessity and appropriateness of negotiations), I conclude that the Legislature has already answered the question in the affirmative. As noted above, the CPARPT legislation requires a school district to "negotiate the development and implementation" of a local PAR program (Ed. Code, §44603(a)), and also authorizes the California Superintendent of Public Instruction to "request a copy of the signature page of the collective bargaining agreement implementing the program" (Ed. Code, §44505). Presumably the Legislature would not have required such negotiations if they were not necessary and appropriate.

With regard to the third prong of the Anaheim test, I conclude that negotiating a local PAR program would not significantly intrude upon a union's managerial prerogatives. In its brief, the Association cites EERA section 3543.5(d) in arguing that:

> a proposal to assign evaluation functions to unit members who are the officers and officials of an employee organization would create the kind of conflict of interest EERA's "domination, support, or interference" prohibition was intended to prevent.

I find this argument unpersuasive on all points. Although the Legislature has required that the results of a teacher's participation in a local PAR program be "made available" as part of a Stull evaluation (Ed. Code, §44662(d)), I do not find that this necessarily assigns "evaluation functions" to the consulting teacher.[3] Nor do I find anything in the CPARPT, or in the nature of a local PAR program, that requires consulting teachers (or joint teacher administrator peer review panel members) to be "officers and officials of an employee organization." In short, I find no inherent "conflict of interest" or "domination, support, or interference." I conclude that a local PAR program meets all three prongs of the Anaheim test and is therefore within the scope of representation under EERA.

PERB has long held that a party is precluded from making unilateral changes in the status quo both during the term of a negotiated agreement and after that agreement expires, until such time as the parties negotiate a successor agreement or they negotiate through completion of the statutory impasse procedure. (Pittsburg Unified School District (1982) PERB Decision No. 199; Modesto City Schools (1983) PERB Decision No. 291.) In its brief, the Association nonetheless argues that the local PAR program in this case was a "creature of contract" that expires with the parties' collective bargaining agreement. The Association would analogize the PAR program to an arbitration clause, which PERB has held does not generally continue in effect after expiration of a collective bargaining agreement. (State of California, Department of Youth Authority (1992) PERB Decision No. 962-S (Youth Authority).)

[3] Indeed, the Agreement of the parties in this case provided (in Article XV, paragraph C, section 4) that the "assistance provided by a Consulting Teacher shall not involve the participation in nor the conducting of a Stull evaluation.

The Association's argument and analogy are unpersuasive. PERB's decision in Youth Authority was based on "established contract principles that a party may not be compelled to arbitrate a matter it did not agree to arbitrate." There are no such established principles limiting the operation of a PAR program. On the contrary, the public policy established by the CPARPT legislation strongly favors the operation of PAR programs, denying other funding to non-participating school districts (Ed. Code, §44505(b)) and requiring them to report annually on their rationale for not participating (Ed. Code, §44504(c)). The legislation provides funding "annually thereafter" to districts that certify implementation of a local PAR program by August 1, 2000, or July 1, 2001 (Ed. Code, §44506(c)(2) & (3)), and does not provide for decertification of a local program.

It is true, of course, that the CPARPT legislation requires a school district "to negotiate the development and implementation" of a local PAR program, in Education Code section 44503(a). It does not, however, require a district to negotiate the ongoing operation of a program already implemented. Language elsewhere in the legislation indicates that implementation is a distinct event, not a continuous process: a school district must certify to the California Superintendent of Public Instruction that it "has implemented" a local program (Ed. Code, §44505(a)).

There is nothing in the parties' Agreement to indicate that the parties intended the PAR program to expire with the Agreement. Such an intention would be rather extraordinary, given that the parties agreed to the PAR program on or about January 31, 2001, just five months before their Agreement was to expire. Many of the features of the agreed PAR program could barely be started, let alone completed, in those five months. Joint panel members would not be able to complete even a one-year term, let alone a two-year or three-year term. If the Joint Panel was dissolved, it could not distribute rules and procedures at the beginning of the 2001-

2002 school year, let alone make an annual program impact evaluation by June 1 of that school year. Consulting Teachers and Participating Teachers would not be able to complete their established timelines at the close of the 2001-2002 school year, and there would be no continuing discussion of voluntary participation. While the agreed PAR program thus had several features that clearly appeared to be part of a continuing program, the parties' Agreement specifically addressed only one circumstance in which the PAR program would automatically expire: if State funding were eliminated.

Finally, the Association argues (1) that its repudiation of the negotiated PAR program was not a change in policy and (2) that the District waived any right to challenge that repudiation by failing to demand bargaining. Both of these arguments are without merit.

The repudiation of an agreement (explicit or implied) is virtually the definition of an unlawful unilateral change. (See Grant Joint Union High School District, supra, PERB Decision No. 196.) The Association's repudiation of the PAR program was total and unambiguous. The Association asserted that "we have no PAR agreement," that the Association would not participate in the PAR program, and that the District "may no longer lawfully operate" the PAR program. Given this repudiation, the District was not obliged to await further damage to the PAR program, or to try to pursue negotiations from this changed position. (San Francisco Community College District (1979) PERB Decision No. 105.) The District properly sought to vindicate its rights through PERB's unfair practice process. (Ibid.)

I conclude that the Association did indeed unilaterally and unlawfully change the negotiated PAR policy, in violation of EERA section 3543.6(c).

REMEDY

EERA section 3541.5(c) gives PERB:

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

In the present case, the Association has been found to have violated EERA section 3543.6(c) by unilaterally changing the negotiated PAR policy. It is therefore appropriate to direct the Association to cease and desist from such conduct, and to rescind its repudiation of the negotiated policy.

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

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Standard Teachers Association, CTA/NEA (Association) violated the Educational Employment Relations Act (EERA or Act), Government Code section 3543.6(c), by unilaterally changing a negotiated policy on peer assistance and review (PAR).

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

A. CEASE AND DESIST FROM:

Unilaterally changing PAR policy.

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

1. Rescind its repudiation of the negotiated PAR policy.

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

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

RIGHT TO APPEAL

Pursuant to California code of Regulations, title 8, section 32305, this Proposed Decision shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document shall be considered "filed" when the originals, and the required number of copies, if any, are actually received by the appropriate PERB office before the close of business on the last date set for filing. (Cal. Code Regs., tit. 8, secs. 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 with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs, tit. 8, secs 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

THOMAS J. ALIEN
Administrative Law Judge