STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

KING CITY HIGH SCHOOL TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. KING CITY JOINT UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2272-E PERB Decision No. 1777 September 14, 2005

Appearances: California Teachers, Association by Ramon E. Romero, Attorney, for King City High School Teachers Association, CTA/NEA; Breon, Shaeffer & Bryant by Guy A. Bryant, Attorney, for King City Joint Union High School District.

Before Duncan, Chairman; Whitehead and Shek, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by King City Joint Union High School District (District) of an administrative law judge's (ALJ) proposed decision (attached). The complaint alleged that the District violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing the policy related to the calculation of salary increases based on a revenue sharing formula established in the collective bargaining agreement (CBA). The complaint also alleged that the District failed and refused to provide information requested by the King City High School Teachers Association, CTA/NEA (Association) relating to the calculation of salary increases.

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

The Board has reviewed the entire record in this matter, including but not limited to the complaint and answer, the hearing transcript and exhibits, the parties' post-hearing briefs, the ALJ's proposed decision, the District's exceptions, and the Association's response to the District's exceptions. In light of the Board's review, the Board adopts the ALJ's proposed decision as a decision of the Board itself. As the District has raised pertinent issues in its exceptions, these issues are addressed below.

DISCUSSION

1. Request for Oral Argument

PERB Regulation[2] 32315 provides:

> A party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response to the statement of exceptions a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument.

With its exceptions, the District requests oral argument. It reasons:

> Due to the extensive documentary record and the nuances of the salary formula at issue, the District wishes to be available to the Board to answer relevant questions that may arise.

The Board has previously denied requests for oral argument in cases containing a voluminous record. (Mt. Diablo Unified School District (1983) PERB Decision No. 373; State of California (Department of Youth Authority) (1984) PERB Decision No. 432-S.) The Board has also denied such requests where the Board had conducted a full and fair hearing, the parties had an extensive opportunity to present briefs, and have availed themselves of that

[2]PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

opportunity. (Arvin Union School District (1983) PERB Decision No. 300.) We find that the voluminous record, extensive documentary evidence, the opportunity for the parties to brief their positions, and the comprehensiveness of the briefs render oral argument unnecessary. The Board therefore denies the District's request for oral argument.

2. Unilateral Change Allegations

a. Inclusion of Non-unit Teacher Salaries in CBA Line 1100, Article 17, Paragraph 17

The Association alleges that salaries of non-unit teachers were improperly included as part of total teacher compensation for Line 1100, in CBA Article 17, section 9 portion of the computation for percentage salary increase. These include substitute teachers, some summer school and independent study teachers, and "walk-on" coaches who solely coach athletic teams or supervise extracurricular activities. As support, the Association refers to Article 17, section 7, which states that "members of the teachers' bargaining unit shall be allocated 65% of the total district revenue sources as itemized below." According to the Association, any other interpretation would render this provision internally inconsistent. Association witnesses testified that it only negotiates on behalf of unit members. (See, e.g., RT, Vol. III, 115: 11-18.)

The Association further points to spread sheets prepared by District negotiator Jeanne Howland (Howland) for August 2000 negotiations in which the "Expenditures" category includes a subcategory entitled "Unit Members Salaries" comprised of teachers', counselors', and "other certificated" salaries, and also line items for "Total Unit Compensation," in determining the percentage allocation to unit members. (See Exh. 3, pp. 9, 10, emphasis added.)

The District argues that Line 1100 in the CBA is based upon Line 1100 in the required annual J-200 report prepared by the District for submission to the California Department of Education (CDE). Line 1100 in the J-200 report consists of all teacher compensation, including compensation for non-unit teachers. According to the District, discussions on the composition of the CBA Line 1100 focused on funding sources, not on breaking out unit members from all certificated employees included in that line item on the J-200. District witnesses do not recall any discussion regarding whether the CBA Line 1100 excludes non-unit employees. Alternatively, the District counters that, under the CBA, these individuals are part of the bargaining unit.

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

When interpreting collective bargaining agreements, the Board has applied traditional rules of contract law. (Grossmont Union High School District (1983) PERB Decision No. 313 (Grossmont); Barstow Unified School District (1996) PERB Decision No. 1138 (Barstow); Antelope Valley Union High School District (1998) PERB Decision No. 1287, pp. 5-6 (Antelope Valley).) In Barstow, the Board relied upon the California Civil Code for guidance. Quoting Civil Code sections 1638 and 1641, in pertinent part:

> The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.
> . . . . . .
> The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.
> (Barstow, p. 13.)

The Board follows this guidance in unilateral change cases that evaluate whether the employer has breached the CBA or whether the employer is able to take the action underlying the charge. (Antelope Valley, p. 6) However, where the contract language is silent or ambiguous, the policy may be ascertained by examining past practice or bargaining history. (Marysville Joint Unified School District (1983) PERB Decision No. 314, p. 9, citing, Rio Hondo Community College District (1982) PERB Decision No. 279 and Pajaro Valley Unified School District (1978) PERB Decision No. 51; see also, Barstow, p. 13.)

The ALJ relied upon the Board's general articulation of the rules of contract interpretation in Grossmont:

> Every contract requires mutual assent or consent. There must be an agreement on definite terms. [Citation omitted.] But ordinarily (in the absence of fraud, mistake, et cetera) the outward manifestation or expression of assent is controlling. Mutual assent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding. "By the modern law of contract, the mere state of mind of the parties - with reference to the 'meeting of the minds' - is not the essential object of inquiry, the terms of the promise-act being determinable by an external and not by an internal standard . .. ." [citation omitted; emphasis in the original.]
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> (Grossmont, pp. 15-16, citing B.E. Witkin, Summary of California Law, Eighth Ed., 1973, p. 92.)

Article 17, paragraph 7, clearly provides that 65 percent of the appropriate revenues will be allocated to "members of the bargaining unit." However, Paragraph 9's reference to Line 1100 is ambiguous as to the scope of its coverage. The District argues that paragraph 9,

Line 1100 includes expenditures for non-unit teachers comparable to Line 1100 in the J-200 annual report to the CDE. Yet, this construction would result in the formula set forth in paragraph 10, in which total teacher compensation (paragraph 9) is divided by total District revenue (paragraph 8), computing to less than the 65 percent required by paragraph 7.

Looking at the surrounding provisions under the principle of "noscitur a sociis," the introductory phrase of paragraph 10 is worded, "[t]o determine the 'percentage' allocation, as stipulated in Paragraph 7," the paragraph 10 formula clearly substantiates the principle delineated in paragraph 7. Further, as the ALJ correctly noted, since the first paragraph in Article 17 defines the salary formula, paragraph 7 states the central principle of Article 17. The limitation on full-time equivalents (FTE) in Article 17, section 14 and the negotiations surrounding that provision support this interpretation. The parties took great pains to count the 84 2/6 FTE, accounting for each individual member of the unit. (See, e.g., Exhs. 3, 11, 13, 16 and 19.) The District's contention that this limitation is unrelated to salary formula in Article 17 and specifically, the 65 percent requirement in section 7, is not persuasive. That restriction merely provides reimbursement to the Association if the District hires more teachers in relation to the State revenue it receives in order to prevent dilution of the 65 percent allocation to the bargaining unit.

The Board's interpretation harmonizes the potential conflict between paragraphs 9 and 7. In accordance with Civil Code section 1641, "[a]n interpretation which gives a reasonable, lawful and effective meaning to all the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect." (Barstow, p. 15, citing 1 Witkin, Summary of California Law (9th ed. 1987) Contracts, sec. 690, p. 623.) Thus, this interpretation fulfills this requirement of giving effect to all provisions of Article 17, namely paragraphs 7, 8, 9, and 10, which involve computation of the salary increase formula.

On the other hand, the District argues that "Line 1100" is a "technical term" under Cal. Civil Code section 1645. We disagree. The operative phrase in Civil Code section 1645 in this regard is "as usually understood by persons in the profession or business to which they relate." While "Line 1100" may be a technical term to those school district budget officers that prepare J-200 budget reports such as Howland,[3] there was no evidence presented that it is a term of art for the Association negotiators, such as Tim Swoverland, the Association's chief negotiator, who is a physical education teacher, or Dean Athos (Athos), another Association negotiator, who teaches mathematics. On the contrary, the Association testified to the same understanding of "Line 1100" for the CBA as we have found above.

In addition, the parties' outward expressions regarding Article 17 supports this interpretation. The Association made clear from the outset that only expenditures incurred for bargaining unit members would be included in the 65 percent computation. The District never contradicted this notion and in fact Howland's spreadsheet denoted the Line 1100 expenditures as "Unit Member Salaries." If the Association misunderstood the District's intent, the District not only failed to correct the misunderstanding but reinforced it through the headings on the District's spreadsheet. The District asserts that it did not change the formula with respect to Line 1100 initially proposed by the Association, which referred to the J-200. However, the Line 1100 in the CBA contains other different elements from the Line 1100 in the J-200. For example, the CBA Line 1100 includes tax sheltered annuities, which are not salaries, and thus not a permitted component of the J-200 Line 1100. CBA Line 1100 also covers academic chairs who are excluded from Code 1100 in the J-200 report pursuant to the state accounting

[3]According to Howland's testimony, her official title for the District is Chief Business Officer for the King City Joint Union High School District and the King City Union School District.

manual requirements. Moreover, spreadsheets prepared by both parties (see Exhs. 11 [Howland] and 13 [Athos]) listing certificated staff payments for purposes of negotiations exclude substitute and hourly teachers.[4]

Alternatively, the District argues that the substitute teachers, walk-on coaches, and some summer school and independent study teachers are part of the bargaining unit. The District points to various CBA provisions as support for this contention. Article 2 defines the unit as all "full- and part-time certificated employees of the District - excluding management, confidential, and supervisory employees ... ."[5] Article 3 defines "teacher," part-time employment," and "half-time employment."[6] Appendix C provides for hourly payment for unit members. These provisions do not mention substitute teachers, walk-on coaches, or independent study and summer school teachers.[7] There was no District testimony as to whether these individuals are part of

[4]The Association acknowledges that unit employees who also perform hourly, summer school, or substitute duty are charged under the Line 1100.

[5]CBA Article Two RECOGNITION provides, in pertinent part:

> 1. The District recognizes the Association as the exclusive representative of all full-and part-time certificated employees of the District - excluding management, confidential, and supervisory employees, as defined in the 'act' - for the purpose of meeting and negotiating.

[6]CBA Article Three DEFINITIONS provides, in pertinent part:

> 1. 'Teacher' refers to any full-time or part-time certificated employee who is included in the appropriate unit as defined in Article Two and therefore covered by the terms and provisions of this Agreement.

[7]The District cites Education Code sections 44852 and 44913-44919 as support for the position that these teachers are "part-time employees," and so included within the unit. However, these statutes address temporary, substitute, probationary and summer school employees; there is no reference to part-time employees, or to any legal relationship between these employees and "part-time" employees. There is no definition of "part-time employee."

the unit. On the contrary, Leslie Wayne Brown (Brown), District superintendent, testified that he did not recall specific discussions on this issue. (R.T., Vol. II: p. 211, lines 1-17.)

According to the Association, during the initial negotiations over the composition of the unit, the Association had sought to represent those classifications but the District refused to voluntarily recognize them. (See testimony of Nicholas Munoz, Jr. (Munoz), R.T., Vol. II, p. 109, line 7 through p. 110, line 28.) As a compromise, the parties agreed to Article 2, paragraph 2 RECOGNITION of the July 1987 CBA, which provided:

> 2. The Board and Association agree to jointly request of the Public Employment Relations Board a clarification of the unit to exclude by specific definition substitute teachers, hourly teachers and summer school teachers.[8]

For reasons that are unclear, the parties never sought clarification from the Board. Since that earlier agreement, according to Association witnesses, the parties had presumed that these individuals were excluded from the unit. (See testimony of Munoz, R.T., Vol. II: pp. 107-112.) Munoz testified that in his 27 years as Association president and negotiator, the Association has never negotiated on behalf of substitute teachers, walk-on coaches, and summer school and independent study teachers who are not in the unit, except for the original unsuccessful attempt to have them included in the unit.

The District does not dispute the Association's testimony on this point but instead points primarily to the RECOGNITION and DEFINITION sections in the CBA. In fact,

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It is therefore unclear whether these classifications are considered "part-time" certificated employees as intended by the parties in the CBA.

[8]This provision was removed from the latest CBA.

District witnesses testified that the Line 1100 in the J-200 includes compensation for individuals who are not in the unit. (See e.g., testimony of Brown, district superintendent, R.T.; Vol. II, p. 206, lines 15-19.) There was also District testimony that individuals who are not members of the unit should not be considered in the calculation of the salary formula. (See testimony of William Wagener, District negotiator, Vol. II: p. 167, lines 17-23.) The District cannot have it both ways. As a result, the District's argument does not persuade us that substitute teachers, hourly teachers, walk-on coaches, and summer school teachers are members of the bargaining unit.

The District's other exceptions were thoroughly and adequately addressed by the ALJ. The Board therefore affirms this portion of the ALJ's proposed decision, finding that the District violated the provisions of CBA Article 17 by improperly calculating Line 1100 expenditures charged to the Association under paragraph 9, Line 1100.

b. Exclusion of Non-Restricted Salaries in Revenue Calculations

Article 17, paragraph 8 identifies the District revenue sources to be included in the revenue calculation portion of the formula in order to determine the percentage allocation under paragraphs 10 and 7. Included among those items are "Staff Development," "Mentor Teacher," and "Lottery." The Association contends, and the District does not dispute, that these items were segregated from the unrestricted revenue column and placed in the restricted revenue column. (See Exhs. 5, 8, 9 and 10.) As found by the ALJ, the District failed to include the site block and advanced placement grants, new general fund revenue, in the revenue calculation. (Id.) These errors constitute a departure from the policy expressed in the salary formula and thus violates EERA.

In its exceptions, the District states that it provided evidence that it properly segregated the revenue sources. However, the only evidence noted is the District's auditor's testimony

that the District acknowledged its failure to include the PERS reduction from the revenue calculation and that application of the formula would require reductions in other expenditures in order to preserve the mandatory three percent reserve. These facts do not contradict the District's failure to include the required revenue sources in the paragraph 8 revenue computation.

The District further asserts that as a result of properly segregating the revenues, it does not owe the Association the additional $164,774. Again, the District has not provided support for this argument or specifically that this amount is inaccurate.[9]

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the King City Joint Union High School District violated the Education Employment Relations Act (EERA), Government Code section 3540, et seq.

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

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and negotiate in good faith with the King City High School Teachers Association, CTA/NEA (Association) as the exclusive representative of its certificated employees by unilaterally repudiating the policy of excluding wages paid to non-bargaining unit employees when calculating expenditures for the purposes of determining the percentage increase to be applied to the 2000-2001 salary schedule.

[9] In fact, in the proposed decision, the ALJ noted that $164,774, the Association's computation of the disputed amounts, was lower than his own calculation of the amount owed to the Association.

2. Failing and refusing to meet and negotiate in good faith with the Association as the exclusive representative of its certificated employees by unilaterally repudiating the policy of including all defined revenues for the purposes of determining the percentage increase to be applied to the 2000-2001 salary schedule.

3. By the same conduct described in paragraphs 1 and 2, interfering with bargaining unit employees' right to participate in the activities of an employee organization of their choosing.

4. By the same conduct described in paragraphs 1 and 2, denying to the Association rights guaranteed by EERA, including the right to represent, including the right to represent its members.

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

1. Upon request, meet and negotiate with the Association over any future decision and the effects thereof of changing the policies contained in Article 17 as they pertain to the "salary formula."

2. Within thirty (30) days of service of this decision, rescind the decision implemented in January 2002, recalculate the percentage increase to be allocated to the 2000-2001 salary schedule in accordance within the meaning of the terms of the collective bargaining agreement as found herein, and award bargaining unit employees retroactive increases (i.e., the difference between the increase previously calculated and the increase calculated pursuant to the remedial order), with interest at the legal rate of 7 percent per annum.

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

notice attached hereto as an Appendix, signed by an authorized agent of the employer. Such positing shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that this notice is not reduced in size, defaced, altered or covered by any other materials.

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. Respondent 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.

It is further Ordered that all other allegations in Case No. SF-CE-2272-E are hereby dismissed.

Chairman Duncan and Member Shek 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-2272-E, King City High School Teachers Association, CTA/NEA v. King City Joint Union High School District in which all parties had the right to participate, it has been found that the King City Joint Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(c), when it unilaterally repudiated (1) the policy of excluding wages paid to non-bargaining unit employees when calculating expenditures for the purposes of determining the percentage increase to be applied to the 2000-2001 salary schedule and (2) the policy of including all defined revenues for the purposes of determining the percentage increase to be applied to the 2000-2001 salary schedule. This conduct also violated EERA section 3543.5(a), by interfering with the right of bargaining unit members to participate in employee organizations of their own choosing, and EERA section 3543.5(b), by denying King City High School 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. Failing and refusing to meet and negotiate in good faith with the King City High School Teachers Association, CTA/NEA (Association) as the exclusive representative of its certificated employees by unilaterally repudiating the policy of excluding wages paid to non-bargaining unit employees when calculating expenditures for the purposes of determining the percentage increase to be applied to the 2000-2001 salary schedule.

2. Failing and refusing to meet and negotiate in good faith with the Association as the exclusive representative of its certificated employees by unilaterally repudiating the policy of including all defined revenues for the purposes of determining the percentage increase to be applied to the 2000-2001 salary schedule.

3. By the same conduct described in paragraphs 1 and 2, interfering with bargaining unit employees' right to participate in the activities of an employee organization of their choosing.

4. By the same conduct described in paragraphs 1 and 2, denying to the Association rights guaranteed by EERA, including the right to represent, including the right to represent its members.

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

1. Upon request, meet and negotiate with the Association over any future decision and the effects thereof of changing the policies contained in Article 17 as they pertain to the "salary formula."

2. Within thirty (30) days of service of this decision, rescind the decision implemented in January 2002, recalculate the percentage increase to be allocated to the 2000-2001 salary schedule in accordance within the meaning of the terms of the collective bargaining agreement as found herein, and award bargaining unit employees retroactive increases (i.e., the difference between the increase previously calculated and the increase calculated pursuant to the remedial order), with interest at the legal rate of 7 percent per annum.

Dated:_____ King City Joint 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

KING CITY HIGH SCHOOL TEACHERS ASSOCIATION, CTA/NEA, Charging Party, v. KING CITY JOINT UNION HIGH SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-2272-E PROPOSED DECISION (2/6/04)

Appearances: California Teachers Association, by Ramon E. Romero, Staff Attorney, for King City High School Teachers Association, CTA/NEA; Breon and Shaeffer, by Guy A. Bryant, Attorney, for King City Joint Union High School District.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

King City High School Teachers Association, CTA/NEA (Association) initiated this action by filing an unfair practice charge against King City Joint Union High School District (District) on June 28, 2002. On November 19, 2002 the Association filed an amended charge. On February 28, 2003, following its investigation of the charge, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the District unilaterally changed policies established in the collective bargaining agreement relating to the calculation of salary increases based on a revenue-sharing formula. The complaint also alleged that the District failed and refused to provide information requested by the Association related to the calculation of the salary increases. This conduct was 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:

The District answered the complaint on March 24, 2003, denying all material allegations and asserting a number of affirmative defenses.

The parties participated in an informal settlement conference on March 24, 2003, but the matter was not resolved.

The undersigned conducted a formal hearing in Burlingame on September 10, 11, and 12, 2003. With the receipt of post-hearing briefs on December 22, 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. l(e).

The District operates two general high schools and two continuation high schools, employing approximately 90 bargaining unit members at those sites. The parties have had a number of collective agreements over the past two decades. However, prior to the agreement at issue herein, the last comprehensive working document between the parties was the one for the period of July 1, 1987 through June 30, 1990.

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

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

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

The 1987-1990 agreement contained a formula for the determination of salary increases on a year-to-year basis during the term of that agreement. For reasons not fully explored in the hearing, the parties dispensed with the formula calculation and negotiated salary increases on a yearly basis during the period from 1988 or 1989 through 2000.

Over these years, the Association has represented a bargaining unit consisting of full- and part-time teachers, librarians, and counselors. Substitute teachers are not included in the unit. The District also hires teachers who are not necessarily bargaining unit members to fill positions in summer school and independent study. "Walk-on" coaches are employees who may, or may not, be certificated. They are hired to coach District athletic teams and supervise other extra-curricular activities. The hourly pay for these positions is not a matter negotiated between the parties. Employees serving solely in these other capacities are not considered bargaining unit employees.[2]

In the summer of 2000, the parties commenced negotiations for a new, comprehensive, three-year agreement. These negotiations resulted in a successor agreement with a term of January 1, 2000 through June 30, 2003. This agreement revives a salary formula similar to the one in the 1987-1990 agreement. The disputes in this case arise out of meaning of the language employed in the new salary formula.

As was true for many school districts, the state's cost-of-living-adjustments (COLAs), which were the key to revenue growth, were low in the 1990's. Tim Swoverland, a 24-year

[2] The 1987-1990 agreement and the parties' current agreement employ the same unit definition in the recognition article ("full and part-time certificated employees [with certain exclusions]"). The 1987-1990 agreement contained a provision whereby the parties contemplated submitting to PERB the issue of the appropriateness of expanding the unit to include substitute teachers, hourly teachers and summer school teachers. That never occurred and this additional language was deleted from the latest agreement.

District employee and the Association's chief negotiator for the agreement at issue herein,[3] recalled that the District's salary increases in the 1990's were low and that no increases were received in a couple of those years. However, by 2000 the state's fiscal situation had improved dramatically and the Legislature in that year approved a significant increase in the revenue limit tied to average-daily-attendance.[4] The school districts were also informed that additional new state and federal revenue sources would be available. The Association and the District were expecting significant funding to be available for teacher raises.

The parties exchanged initial proposals on salary in June 2000. The parties met for their first face-to-face bargaining session on July 7. In attendance for the Association were Swoverland, Dean Athos, Nick Munoz and Paul Cavanaugh, among others. The District was represented by, among others, Superintendent Wayne Brown, District attorney Guy Bryant, and Chief Business Officer Jeanne Howland. Howland made a presentation on the budget. Both parties' initial salary proposals were non-specific. The District's proposal was simply that it would attempt to reach an agreement on a "fair" salary increase. The District acknowledged the increased revenues and agreed in principle to allow the Association to receive a fair share of them.

One of the reasons Swoverland returned to the bargaining team after a three-year absence was the Association's desire to reduce the level of animosity between the parties. Prior bargaining of the yearly salary increases had been contentious, and the negotiating principals perceived that this had not reflected well on the parties, particularly situated as they were in a small, rural community. Immediately after the first negotiating session, Swoverland

[3] Swoverland was also a bargaining team member from 1987 through 1997.

[4] The legislation resulted in the elimination of the "revenue limit deficit factor." The total budget increase from the state for the 2000-2001 year was approximately 23 percent.

proposed a ground rule that would maintain confidentiality in the negotiations. These same considerations led the Association to believe that use of some kind of a salary formula, perhaps one that avoided the pitfalls of the prior formula, might be viable because it would avoid yearly negotiations, guarantee fair increases on a yearly basis, and be based on objective financial factors.

On July 13, the Association presented a multi-page request for financial information to assist it in negotiations. The District responded fully in writing on July 20.

At the August 8 session, the Association proposed a formula based on a seven-year historical average of the percentage of salaries allocated to teachers in relation to total District revenue. This average percentage would establish a baseline or floor the District would be required to maintain over the term of the agreement. Yearly increases would then be calculated based on the amount of revenue exceeding the historical percentage. This was simpler than the old compensation formula which based salary increases on a full accounting and categorization of allowable District revenues and compensation costs "charged" to the Association. Swoverland expressed that the prior formula was too complicated, which was apparently one reason for its abandonment.

Swoverland calculated the seven-year historical average utilizing numbers from the Department of Education website which posts financial figures reported to the state by the school districts. "Teacher salaries" were provided from the figures reported by school districts on Line 1100 of the standardized J-200, budget-reporting document. Line 1100 from the J-200 is designated by the term: "Teacher salaries." The historical average was determined to be 43.34 percent of District revenues. District revenues were obtained from Lines 8010 through 8799 of the J-200 report for the previous seven years. Swoverland also prepared a chart of the

same numbers for similarly situated school districts in the region for purposes of showing comparability.

The District showed interest in the concept but expressed its desire that restricted revenues be kept out of the formula, since growth in that sector would not be available to fund salary increases for teachers.

At the third negotiating session on August 18, the District proposed to offer a "total compensation package equivalent to 64.2 percent of the District's unrestricted revenue for the 2000/2001 school year." That figure dropped to 63.5 percent for the 2001-2002 and 2002-2003 years. The significant alteration of the formula was the inclusion of all District employee costs for the bargaining unit, including health and welfare premiums and other costs described as "trailers." Trailers include the District's contributions for the state teachers retirement system, workers compensation, state disability insurance, and Medicare. Howland prepared a spreadsheet listing the included revenues and expenditures resulting in the District's "total compensation" figure, broken out for the past seven years.[5] Under the heading of "Unit Members Salaries," the figure for "Teachers salaries" was identified as coming from Line 1100. Also included were "Counselors Salaries" (Line 1500) and "Other Certificated" (Line 1900). Howland calculated that the 63.5 percent figure equated with the seven-year average of total compensation to teachers as a percentage of the District's unrestricted revenue.[6]

The fourth negotiating session occurred on August 21. The Association sensed the ability to reach agreement, and the session lasted from 10:00 a.m. until 8:30 p.m. After the

[5] The spreadsheet showed "trailers" calculated at 11 percent of total salaries.

[6] Howland also costed out a one percent increase to the salary schedule based on the total budget for teachers salaries. This would form the basis for determining the percentages to be added to the salary schedule.

morning session, the Association returned with a proposal containing language for inclusion in Article 17. The proposal captured the unrestricted revenue line items from Howland's spreadsheet, as well as the figures listed under "Total Unit Compensation." It also proposed that the unit's revenue share be 64.92 percent, reflecting inclusion of the unit's two librarians and one counselor. The Association incorporated an agreement to exclude salaries paid through grant-funded programs, driver training (a fee generating program), and staff development buy-back revenue from the calculation of the percentage to be allocated to the salary schedule as an increase year-to-year. The rationale for exclusion of these revenues and expenditures was presumably their non-recurring nature. The Association also proposed that a control be placed on hiring of new unit members so as not to dilute the pool eligible to participate in the revenue stream. Hirings driven by increased enrollment would be allowed. This proposal called for 2000-2001 establishing the baselines for student enrollment and unit size. If the District hired where less than a one full-time equivalent (FTE) increase was justified, the portion not justified would be added as a pro-rated percentage increase to the salary schedule. The District brought Bill Wagener, a principal, into the negotiations to present the District's position on the baseline staffing control. The parties calculated the baseline staffing level to be 84 2/6 positions.[7] This concept brought the parties very close to agreement.

The District and Association each presented an additional revision of the language before they arrived at a tentative agreement on salary. The major revisions included a provision providing that any new general revenue source would be included in total revenues, as well as the Association's right to negotiate over any new restricted general fund revenue that might be available for salaries. The figure for District contributions to tax-sheltered annuities

[7] Partial FTEs were calculated based on the six-period schedule.

(TSA) was moved from the trailers section to the Line 1100 figure of the formula. At the close of the session, the parties executed the tentative agreement with the following language:

> 7. For the duration of this three-year contract (2000-01, 2001-02, and 2002-03), members of the teachers' bargaining unit shall be allocated 65.00% of the total district revenue sources as itemized below.
>
> 8. District Revenue sources shall be:
>
> A. Total Revenue Limit
> B. PL 94-142
> C. ROP
> D. Special Education
> E. Staff Development
> F. Mentor Teacher
> G. Class Size Reduction
> H. Lottery
> I. Interest
> J. Any new General Fund Revenue source. The parties will agree to meet and negotiate any new Restricted General Fund Revenue source that may be used for salary.
>
> 9. Total Compensation for the teachers shall include the following:
>
> A. Salaries, categories:
> 1. 1100 (includes TSA) GAB[8]
> 2. 1400
> 3. 1500
> B. Those items known as "trailers:"
> 1. District STRS contribution
> 2. Workers compensation
> 3. SDI
> 4. Medicare
> [5. TSA ~ stricken] GAB
> C. Medical, dental and vision benefits.
>
> 10. To determine the "percentage" allocation, as stipulated in Paragraph 7, total Teacher Compensation (Paragraph 9) shall be divided by total District Revenue (Paragraph 8).
>
> 11. The initial salary schedule increase for 2000-01 shall be 6.17 percent. The initial salary schedule increase for the

[8] "GAB" are the initials of the District's attorney, Guy Bryant.

2001-02 and 2002-03 years shall be 50% of the COLA allowed by the state for the given year.

12. On August 15 following the close of the fiscal year, the District shall prepare its estimated unaudited actuals and adjust the salary schedules as follows in compliance with Paragraph 7 above.
    A. As per current contract language.
    B. Drop from contract
    C. Drop from contract

13. Items excluded from the percentage calculations for the teachers' salaries shall be:
    A. Grant revenues and expenditures.
    B. Driver Training revenues and expenditures.
    C. Staff Development Buyback Revenue and Expenses.

14. The District may increase the number of regular staff members by one full-time equivalent with each enrollment increase of thirty (30) students as determined by the previous year's CBEDS. The 2000-01 CBEDS will establish the base year data. The District may increase the number of CSR (class size reduction) staff members by one full time equivalent with each enrollment increase of twenty (20) students as determined by 2000-01 CBEDS. If the additional staff member has both regular and CSR sections, the enrollment increase shall be proportionate to the teacher's assignment.
    Example: New staff member assigned to two CSR sections and four regular sections requires an enrollment increase of 26.67 students; i.e., 2x20+4x30=160; 160/6=26.67.

    If the enrollment increase falls short of the required number to justify the additional FTE, then the shortfall shall be prorated by the number of students short and that amount shall be multiplied by 1.0 percentage points and placed on the teachers' salary schedule.
    Example: 1 new regular staff FTE was added; however, as determined by CBEDS there was only an increase of 22 students (8 short); therefore, 0.267% (8/30x1.0%=0.267%) will be added to the teachers' salary schedule.

    If the enrollment exceeds the number of students required to justify the staffing increase, then that number in excess shall be carried over to be used in the calculation for subsequent additional staffing.

> Example: There were thirty-four new students for one additional FTE. The number in excess, four will be carried over to the next year to be used for justification for additional FTE in subsequent years.
>
> Baseline staffing levels will be [the staffing level on August 28, 2000 - stricken] 84.2/6 [sic] on 8/28/00. GAB

[Tim Swoverland/signature] [Guy A. Bryant/signature 8/21 /00]
For the Association Date For the District Date

This language, in substantial part, was adopted in the successor agreement later ratified by the parties.[9]

The District has always included wages paid to substitutes, summer school teachers, independent study teachers, and walk-on coaches in its Line 1100 calculations. This practice existed prior to adoption of the new salary formula and was carried forward thereafter.

Swoverland testified that there was discussion about Line 1100 and what was to be considered included in that item. He testified that the Association team stated its belief that substitutes were "excluded." At one point Swoverland asked Howland if substitutes were included in the "charging." Howland answered, "No, I don't think so." Swoverland further testified that the Association informed the District that if a bargaining unit teacher were teaching independent study, wages for that activity could be "charged" to the Association. He recalled specific discussions regarding a grant-funded, transportation academy teacher, a part-time administrator/part-time teacher, a non-certificated librarian, and an interim counselor. Swoverland asserted that he received assurances that the wages of these employees would be

[9] Paragraph 12.A., with the following language, was substituted:

> If the revisions reveal additional funds available upon recomputing the percentage allocation, the salary schedule shall be increased retroactively for the year. Salaries shall be paid in accordance with the schedule improvement and a retroactive lump sum warrant shall be issued prior to the end of the fiscal year.

"charged" to the Association only to the extent that they were in the bargaining unit. He agreed that the interim counselor's salary could be charged once he became certificated. Swoverland also testified that the Association agreed that the aggregate of the allowable salaries could then be charged to the Association regardless of position or salary level, so long as the 84 2/6 FTE figure was not exceeded.

Athos recalled discussions about grant-driven programs and agreement that since these funds would be excluded from the revenue side they should also be excluded from the expenditure side (i.e., wages earned not "charged" in calculating the 65 percent figure).

The District witnesses testified that they understood the Association to be proposing that the Line 1100 figure be used exactly as it was reported in the J-200, without modification. Howland noted that Swoverland's presentation of the Association's first proposal, based on the J-200 figures he drew from the website, introduced the notion of the parties relying on a number that was simple, objectively verifiable, and not subject to dispute. Howland verified the website numbers for accuracy. Then, using these numbers, she calculated the 64.92 percent number for the District's proposal that incorporated non-salary compensation. As to specific discussions between the parties about Line 1100, Howland testified that the parties discussed what was included in that category. However, she was hesitant to claim that the District explicitly stated that the portion paid to non-bargaining unit employees would be included in the calculation.[10]

Howland was questioned about a reference in the District's bargaining notes to substitute pay in a District caucus on August 21. There, Howland is cited as stating that she had a problem with "redefining the formula now." Expanding on these bargaining notes, she

[10] During cross-examination she stated that she believed the District stated it intended to use "all" of Line 1100. She did not elaborate.

explained that the Association had presented the entire Line 1100 figure, and the District had responded in kind. Therefore, Howland anticipated problems if there were an attempt to disaggregate the Line 1100 figure after such exchanges.

Wagener, Brown and Howland agreed there were discussions to clarify the bargaining unit status of the various problematic positions identified by the Association. However, they understood the apportioning of positions to deal solely with the 84 2/6 FTE figure in paragraph 14.[11] The parties were simply discussing positions so as to arrive at a total for the baseline figure.

As to the credibility dispute between Swoverland and Howland concerning the parties' understanding of Line 1100, I believe both witnesses were credible and that both attempted to answer honestly from their best recollection. I find that Swoverland's testimony was more direct and specific than that of Howland's, and therefore credit his testimony to the extent there are conflicts about whether, for example, substitute pay was acknowledged to be a component of Line 1100.

By memorandum dated August 28, 2000, Brown advised the Association that the District was preparing an accounting of FTEs going into the new school year. He expressed hope that the Association would acknowledge the District's concerns about underestimating CBEDs growth and a "lag" factor in adjustments to the baseline. The Association responded, providing a list of bargaining unit members and seeking confirmation of all employees whose salaries were being "charged to the Association" pursuant to the tentative agreement. The

[11] Because salary increases are dependent upon the percentage paid to teacher salaries that falls short of the 65 percent total compensation baseline, additional employees whose salaries are charged to that allocation share can eliminate the possibility for raises. In other words, per capita salaries will necessarily be diluted by the addition of more unit members.

Association expressed alarm that the District would quickly seek to resume negotiations on a matter it thought had been so recently resolved.

According to the agreement, the contract required an initial 6.17 percent increase to the salary schedule in the fall of 2000. This resulted strictly from a pre-determined amount agreed upon between the parties rather than the formula. The first formula-driven increase was to occur after release of the District's 2000-2001 unaudited actuals in August of 2001, and applied retroactively to the 2000-2001 salary schedule.

During the 2000-2001 school year, Athos developed a spreadsheet to track District financial data. His chief responsibility was to monitor the expenditures side of the formula, or the "numerator side" of the formula as defined in paragraph 9. The Association made a number of information requests in the fall of 2000, including requests for the number of bargaining unit positions "charged" to the Association. Athos's spreadsheet identified each bargaining unit member's salary, extra-duty stipends (such as for coaching), other hourly wages (such as for summer school), health insurance premiums (based on dependent coverage selected), and tax-sheltered annuity payments. Athos excluded wages associated with grants (e.g., the 21st Century program), because the revenue was likewise excluded from the revenue total. The expenditures were totaled to arrive at the figure the Association used for the paragraph 9 expenditures made by the District on behalf of the bargaining unit.[12]

In March 2001, after release of a preliminary budget report for the 2000-2001 year, the Association first discovered that there might be a difference of opinion as to whether

[12] Swoverland asserted that the District's responses to information requests were evidence the District shared the same understanding as to what was to be charged to the bargaining unit. However, I decline to adopt that inference because it is equally possible that the District was simply responding to the information sought and deemed relevant by the Association.

calculation of formula's numerator (paragraph 9) would include payments to all certificated teachers, as opposed to only those in the bargaining unit.

At a May 15, 2001, meeting, it became clear there was indeed a dispute about whose salaries were to be included in the 1100 line. Swoverland was quoted in the District's bargaining notes as saying:

> We have a 3-year contract and I've been nervous about it. It shows an extremely high percentage so I know there was a mistake, or really two. #1 = my mistake (1100s) and #2 = Jeanne used all union numbers. If you say, hey, we've made a mistake. Then we'll work on it. As far as FTE, we feel we had an understanding.

After the 2000-2001 financials were complete, the District calculated the increase owed on the salary schedule. It implemented a 4.12 percent increase as an adjustment to the 2000-2001 salary schedule based on its calculations. In addition, the District acknowledged the need to add 1.935 percent as its one-half, up-front contribution of the state COLA for the 2001-2002 year.

The Association protested that the percentage resulting from the 2000-2001 financials was inadequate, and there began a series of meetings held in an attempt to resolve differences in the amount the parties believed the formula should have yielded. These differences related not just to paragraph 9 expenditures, but to paragraph 8 revenues as well.

In January 2002, after the Association pointed out that Public Employees Retirement System (PERS) "reduction revenue" had been improperly omitted from the revenue side, the District agreed to add that amount ($213,209) to the formula. The District also agreed to exclude the 21st Century grant funds and staff development buy-back revenues from both sides of the equation.

The District affirmed that it was including payments to all certificated employees, including substitutes, summer school teachers, independent study teachers, and walk-on

coaches in the Line 1100 amount and would not accept the Association's position that only payments to bargaining unit members should be used.

The January 2002 meeting also left differences as to the revenue calculation as defined by paragraph 8. Paragraph 8.E. lists "Staff Development" revenues as being included in the revenue stream to be shared by the bargaining unit. The J-200, unaudited actuals for 2000-2001 list $37,782 under Line 8419 (Other State Revenues/Special Instructional Allowances/Staff Development [emphasis added]). The District placed this figure in the column for "restricted" revenue, thereby excluding that amount from the revenue total. Paragraph 8.H. lists "Lottery" revenue. Under Line 8560 (Other State Revenues/Other State Revenue/State Lottery Revenue [emphasis added]), the District apportioned $36,960 of a total of $288,838 of state lottery revenue as "restricted" revenue. Paragraph 8.F. lists "Mentor Teacher" revenue. At the bargaining table, the District informed the Association that the amount for this category was $24,073. Line 8422 is designated as "Other State Revenues/Special Instructional Allowances/Mentor Teacher (emphasis added)," but that amount was not included there. The District told the Association that it had been included under Line 9540 ("Liabilities/Deferred Revenue"), which contained only "restricted" funds.[13] Lastly, paragraph 8 J. includes "Any new General Fund Revenue." The District advised the Association, again at the bargaining table, that the District had received a site block grant of $65,644 and an advanced placement grant of $3,315, but excluded those from revenue. The total of these two amounts is $68,959. The sum of all disputed amounts was $167,774. At the

[13] The Association's documentation indicates that this money was received for peer assistance activities.

hearing, the Association presented an updated summary of the revenue amounts which remained in dispute which closely matches this sum.[14]

Based on its change to include the PERS reduction revenue, the District informed the Association that its new calculations resulted in a determination that an additional 3.54 percent was due as an adjustment to the 2000-2001 salary schedule. At a January 30, 2002, meeting, the District stated that no more adjustments would be made. The Association interpreted this as an indication that the District was taking a firm position with respect to the calculation of the formula.

No action was taken by the District with respect to implementing the increases until April 2002. The District then made its final adjustment to the 2000-2001 salary schedule. Retroactive checks were issued in May 2002 based on the final 13.83 (6.17 + 4.12 + 3.54) percent increase to the 2000-2001 schedule. New checks from that time forward were based on the 13.83 percent figure, as well as the up-front, 1.935 percent addition to the 2001-2002 schedule.

On July 18, 2002, the Association forwarded a written information request seeking a list of bargaining unit members whom the District considered as comprising the 84.66 FTE, the adjusted baseline figure for the unit.[15] In addition, the Association noted a $2,486,758 difference between the parties' total revenue calculations. It requested "an accounting" of the difference, as well as a justification for the District's exclusion of certain revenue sources

[14] The total from that summary is $167,758. Since the Association submits in its post-hearing brief that the latter figure is correct, and the Association's figure is lower than the undersigned's calculated total, its number will be adopted for purposes of this decision. The Association will be deemed to have waived the $16 difference.

[15] The Association contended there were mid-year personnel changes and it needed to know who replaced the two slots ascribed to two departing unit members.

included by the Association. Swoverland testified that the District did respond regarding the list of bargaining unit members.[16] But he claimed the revenue information was not provided.

By letter dated August 22, 2002, the District responded in writing. As to the revenue question, the District's stated that it was again providing a copy of the J-200 information relied upon by the District and concluded:

> The District has clearly identified the line items contained in the J200 that the District deemed appropriate to include in the formula calculation pursuant to Article 17. For example, the District has listed ROP, Special Education, Class Size Reduction, Lottery, etc. The Union can review the J200 to see which line items were excluded from the District's calculation. Those line items are clear and unambiguous and a count [sic] for the $2,486,758 difference identified by the Union.

Athos testified that he encountered delays in receiving amounts of hourly wages paid to bargaining unit members after the close of the 2000-2001 year, though he noted that the District generally offered an explanation for the delays. He stated the delays could be measured in "weeks." Brown recalled that during the spring and summer 2002 negotiations, numerous requests for information were made at the table and that he attempted to ensure that responses were provided to each. He could not recall the Association articulating any complaint during that time.

Sometime after the parties understood there was a dispute concerning Line 1100, Howland consulted an accounting guidance issued by the Department of Education. She also contacted a department official by e-mail and requested an opinion as to whether the District's practice was in conformity with the guidelines. The department official agreed that the District was following the correct procedure.

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[16] Howland prepared a memorandum dated May 5, 2002, for Brown listing all of the bargaining unit members, their FTE figure, a break-out of their pay and other compensation. The memorandum was intended to respond to the question of the changes in the unit staffing from 2000-2001 to 2001-2002. The Association introduced this exhibit at the hearing.

The District provided no evidence at the hearing to substantiate its position that it had properly segregated restricted from unrestricted revenue in its accounting of paragraph 8 revenues, or properly excluded other revenue claimed by the Association to meet the definitions within paragraph 8. As evidenced by its August 22 information response, the District appears to have contended that the J-200 was a document that spoke for itself.

ISSUES

1. Did the District unilaterally repudiate the contractual policy of allocating only bargaining unit wages to the compensation formula in calculating the percentage increase due on the salary schedule?

2. Did the District unilaterally repudiate the contractual policy of including all contract-defined revenues in calculating the percentage increase due on the salary schedule?

3. Did the District fail to provide necessary and relevant information requested by the Association for the purpose of enforcing the contractual policies on salary increases?

CONCLUSIONS OF LAW

The Unilateral Changes

A public school employer is required to meet and negotiate in good faith with the exclusive representative 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 [59 Cal.Rptr.2d 488], 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.)

Here the matters related to the generation of the proper percentage to be allocated to the salary schedule are clearly ones within the scope of representation. (Sec. 3543.2(a).) An improper interpretation of the salary formula has a "generalized effect or continuing impact" on the bargaining unit because the formula is applied annually during the life of the agreement with compounding effects.[17] Further, the District's action was unilateral: it rendered an accounting, presented it as the correct calculation, and implemented the calculated salary increases over the objection of the exclusive representative as to the proper interpretation of the contract language. There appears to be no disagreement that the issues here revolve around the correct definition of the salary formula, which in turn is based on ascertaining the meaning of the parties' contractual terms. If the District's interpretation of the contractual language was correct, it did not unilaterally repudiate the agreement.

[17] I distinguish Grant Joint Union High School District, supra, PERB Decision No. 196 on grounds that the salary formula issue there involved a one-time application of the formula.

Composition of Line 1100

The parties frame their dispute around the issue whether the District is permitted under the language of Article 17 to include expenditures for all teaching and after-school activities performed by certificated employees (whether or not they held bargaining unit positions) in the salary formula calculations. The District included all such expenditures under Line 1100 in determining the increase to be applied to the salary schedule at the end of the 2000-2001 year.

In deciding issues arising under collective bargaining agreements, both PERB and the National Labor Relations Board (NLRB)[18] adhere to normal rules of "offer and acceptance" under traditional contract law, even if the more technical rules of such law do not necessarily control. (Grossmont Union High School District (1983) PERB Decision No. 313 (Grossmont); Pittsburgh-Des Moines Steel Co. (1973) 202 NLRB 880, 888 [83 LRRM 1187].)

In Grossmont, a unilateral change case, PERB recited basic rules of contract interpretation under California law used in ascertaining the meaning of disputed contract language, quoting Witkin as follows:

> Every contract requires mutual assent or consent. There must be an agreement on definite terms. [Citation omitted.] But ordinarily (in the absence of fraud, mistake, et cetera) the outward manifestation or expression of assent is controlling. Mutual assent is gathered from the reasonable meaning of the words and acts of the parties, and not from their unexpressed intentions or understanding. "By the modern law of contract, the mere state of mind of the parties - with reference to the 'meeting of the minds,' - is not the essential object of inquiry, the terms of the promise-act being determinable by an external and not by an internal standard ... ." [Citation omitted; emphasis in the original.]...

[18] When interpreting the EERA, it is appropriate to take guidance from cases interpreting the National Labor Relations Act (NLRA) and California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 615-617 [116 Cal.Rptr. 507].)

(See also Brant v. California Dairies, Inc. (1935) 4 Cal.2d 128, 133 [48 P.2d 13]; King v. Stanley (1948) 32 Cal.2d 584, 591-592 [197 P.2d 321].)

The Association begins with an argument based on the text of the agreement. The Association emphasizes the language of paragraph 7 providing that 65 percent of the appropriate revenue shall be "allocated" to "members of the bargaining unit." The District never explicitly disagrees with the meaning or effect of this language. The revenue sources are listed and therefore defined by paragraph 8. By logic then, the bargaining unit should be guaranteed 65 percent of the paragraph 8 revenues.[19] The difficulty arises from the fact that if non-bargaining unit employee wages are included in the expenditures defined in paragraph 9 (i.e., the 1100 line), the salary increase generated by the numerator of paragraph 9 (expenditures) over the denominator of paragraph 8 (revenues) will necessarily fall short of guaranteeing a 65 percent share to the bargaining unit, assuming no year-to-year change in revenues or non-salary expenditures (i.e., the zero-sum concept).

The paragraph 9/8, numerator/denominator results in a percentage which is then compared with the 65 percent figure of paragraph 7. Whatever difference is "allocated" as an increase on the salary schedule. Wagener explained it this way:

> You run the formula. You do the numerator and the denominator and then that's how you figure. Once you do your expenditures, you're really looking at, then, did you miss, did you come up short. And then that goes to the teachers' bargaining unit.

Wagener refused to accept the notion that simply because paragraph 7 guaranteed the bargaining unit 65 percent, only bargaining unit wages should be included in the numerator, asserting that the paragraph 9 numerator had its own definition. Nevertheless, he implicitly

[19] The language of paragraph 7 states that the revenues are those revenues "defined below." There is no specific reference to another paragraph. But logically the reference is to paragraph 8, since that is the only paragraph defining revenues.

acknowledged the logical dissonance of the 65 percent figure and the paragraph 9/8, numerator/denominator. Based on the language of Article 17, I find that the reference to Line 1100 suffers from latent ambiguity.

Interpretation of contract provisions is generally guided by the canon of "noscitur a sociis" ("it is known from its associates"), a point urged by the Association. (Long Beach Community College District (2003) PERB Decision No. 1568; San Marcos Unified School District (2003) PERB Decision No. 1508; Victor Valley Community College District (1986) PERB Decision No. 570.) Paragraph 10 states: "To determine the 'percentage' allocation, as stipulated in Paragraph 7, total Teacher Compensation (Paragraph 9) shall be divided by total District Revenue (Paragraph 8)." This could be construed as suggesting that the 65 percent is subject to the result of the numerator/denominator calculation (i.e., Wagener's contention). However, it is clear from context that the "'percentage' allocation" in paragraph 10 is only the percentage increase to be added to the salary schedule. In effect, the salary percentage increase "allocated" to the schedule is equivalent to the residual sum of money available after non-salary compensation is deducted (paragraph 9, subparagraphs B (trailers) and (C) (health benefits)). Significantly, there is nothing in the text of the formula that can be construed as altering the requirement that the bargaining unit receive 65 percent of the identified revenues. Since paragraph 7 is the first paragraph defining the salary formula, it should logically be read as stating the most general, or the primary, principle. This more limited construction of Line 1100 - that Line "1100" was a reference only, simply intended to instruct the parties where to look for bargaining unit wages rather than necessarily a prescription for the amount traditionally reported on the J-200 - does harmonize the apparent conflict between paragraph 7 and paragraphs 8 and 9.

As noted above, the meaning of contract terms must also be guided by the outward manifestations of intent by the parties. While the more formal rules of contract interpretation might suggest that any ambiguity be construed against the party drafting the language in question, the evidence supports a finding that the Association succeeded in conveying the concept of a salary formula based on an accounting principle whereby only expenditures actually incurred on behalf of bargaining unit members would be charged in arriving at the 65 percent revenue share. The Association conveyed its concern over dilution of the 65 percent by including the 84 2/6 baseline. This was one, but not the only manifestation of intent. The Association bargaining team posed hypotheticals regarding the transportation academy teacher (excluding the grant as revenue and cost), the part-time administrator/part-time teacher (pro-rating the salary), non-certificated librarian and interim counselor (delaying or excluding the charging of salaries). I conclude that this position-by-position exercise took place in the context of what wages to "charge" the bargaining unit. I also believe that the District must have understood the concept of "charging" other expenditures, such as health benefits and tax sheltered annuity payments, which apparently require reference to individual employee records.

The District's witnesses, Wagener, Brown and Howland, testified that they understood these issues arose strictly in the context of arriving at the 84 2/6 baseline total. While it is possible that the District witnesses had this understanding, they did not provide testimony demonstrating that this counter-understanding was clearly expressed to the Association bargaining team. Thus, I have no substantial evidence on which to find there was an outward manifestation of intent from the District opposing that of the Association.

The record also supports a finding that the District led the Association to believe it had assurances that Line 1100 was configured in the manner understood by the Association. I have

found that Swoverland sought assurances that substitute pay was not included in Line 1100 and that Howland did not contradict him. Howland presented a spreadsheet with the District's first counterproposal with a break-out of expenditures. That spreadsheet identified Line 1100 under the more general heading "Unit Members Salaries."

Another difficulty with the District's position is that if the paragraph 9 expenditures do include payments to non-bargaining employees, the District has the power to further dilute the 65 percent allocation. Whether or not District bargaining team members honestly believed that the discussion about apportioning the salaries of particular employees related solely to the 84 2/6 baseline, it is unlikely that the Association would have failed to more carefully define the Line 1100 reference if it had known that non-bargaining unit wages were included in that line.[20]

Very soon after the agreement, there was the exchange of memoranda concerning the District's concern about the "lag" factor in adjustments to the CBEDs-driven baseline and the Association's request for confirmation of unit members whose salaries were "charged" to the Association. Athos also began developing the spreadsheet he would use to closely monitor the expenditures charged to the bargaining unit. Athos's primary responsibility as the "numbers man" was to track on his computer the District's salary expenditures on behalf of unit members, down to the precise fraction of a day. These actions corroborate the concept of the formula conveyed by the Association during bargaining.

The District's position also rests on the argument that the Association was the first to incorporate Line 1100 in a salary proposal. The District simply adopted that concept and

[20] I do acknowledge that it is unlikely and impractical for the District to achieve significant cost-savings in this manner. However, as the Association's attorney hypothesized, it is conceivable that the District might hire highly prized athletic coaches from the outside and dilute the salary pool in that fashion.

carried through with it. Although the District's first counterproposal did not explicitly reference Line 1100, it did base its 64.92 percent revenue share calculation based on numbers from Line 1100. Howland contended that Line 1100 drove all of its calculations during the negotiations and that the percentage it ultimately agreed to would not have been put forth if the Association's definition of Line 1100 were intended. Countering this, Swoverland contended that Line 1100 as he had presented it in the original formula was "rejected" when the District presented its more complicated formula - one that necessarily involved more detailed cost-accounting.[21] On this matter, I am somewhat more sympathetic to the District's position. Even if it was never expressly stated that the District premised its 64.92 percent figure on use of the full Line 1100 figure, it would have been reasonable for the Association bargaining team to have understood this. Nevertheless, there is no evidence that the Association was aware that Line 1100 included payments to non-bargaining unit employees, and, as I have found above, it was led to believe otherwise.

Other aspects of intent on the District's part suffer from its failure to have manifested them in the negotiations. Howland believed the intent of the parties was to rely on easily obtainable, simple numbers. She claimed she would have opposed any agreement that involved the kind of detailed breakout of expenditures required by the Association's concept because it would have been too onerous for her staff. This only takes the District so far, because there were no easily identifiable numbers for health benefits or TSA payments (from the J-200 or otherwise), and as noted above these payments appear to require reference to

[21] It is true that the Association's first proposal was not based on the concept of accounting. Rather, it was based on concepts of historical average, approximation, and faith in the self-correcting nature of the baseline percentage. However, since it left out non-salary compensation, it also did not achieve complete elimination of the problem of continuing fractious bargaining. The new formula was, if anything, more like a resurrection of the prior, exacting accounting formula.

individual employee records. In addition, Howland testified that she opposed "redefining" the Association's Line 1100 proposal at the August 21 caucus when the subject of substitute pay was raised. If anything, this suggests that the District understood the logical disconnect between paragraph 7 and paragraphs 8 and 9, but failed to openly discuss it with the Association, for whatever strategic reasons it may have had.

The finding in the Association's favor is not one I make lightly however. There is a question whether the Association should have exercised greater "due diligence" in bargaining. For example, it could have specifically requested a break-out of the Line 1100, but did not. It could have consulted the Department of Education, or the department's accounting manual, independently.[23] In the negotiating sessions following the discovery of the discrepancy, Swoverland was also quoted as possibly suggesting that the Association made a mistake in failing to appreciate the District's practice with respect to Line 1100. Nevertheless, the District's business office was in a far better position to appreciate the nuances of District financial reporting.[24] I do not believe it a reasonable rule to require that teacher bargaining teams have the level of expertise necessary to anticipate this kind of discrepancy. Furthermore, if there was a "mistake" on the Association's part, the District failed to disabuse the Association of its erroneous understanding, and in fact reinforced it with the spreadsheet suggesting that Line 1100 contained only "Unit Members Salaries." As I have found above, the District knew or should have known that the Association was proceeding on the concept of

[22] It even appears that the parties' previous formula listed Line 1100, and despite its use on one or more occasions the Association apparently failed to discover the discrepancy.

[23] Although the Association disputes that the accounting guidance mandates inclusion of coaches pay, it does not appear to dispute that substitute pay would be included.

[24] As is typical in bargaining, the Association was required to forward a detailed information request at the outset to ferret out financial information pertinent to bargaining.

the accounting principle whereby it would only be "charged" for salaries, stipends and hourly pay to bargaining unit members from Line 1100.[25]

Accordingly, I find that the District unilaterally repudiated the language of Article 17 in violation of EERA section 3543.5(c) by failing to properly calculate expenditures charged to the Association under Line 1100 in determining the amount available as an increase to the salary schedule for the 2000-2001 year. This conduct also denied the Association its right to represent bargaining unit members, in violation of EERA section 3543.5(b), and interfered with the right of such bargaining unit members to participate in the activities of an employee organization of their own choosing, in violation of EERA section 3543.5(a).

The Revenue Calculations

The Association presented evidence that there was a dispute as to the proper inclusion of all allowable revenues.[26] The District offered no evidence or argument to controvert this showing. Paragraph 8 includes revenue for "Staff Development," "Mentor Teacher," and "Lottery." These funds claimed by the Association in these categories as reflected in the 2000-2001, J-200 satisfy the putative definitions contained in the contract. The J-200 confirms that the District segregated these revenues, or portions thereof, from the "unrestricted" revenue

[25] The Association relies on a rule of construction in section 20 of the Restatement (2nd) of Contracts (1981) which provides that despite a mistaken understanding as to the meaning of a particular contract term (i.e., a lack of a "meeting of the minds"), the manifestation of intent required to uphold a contract will be found if the party against whom the contract is sought to be enforced knew or should have known of the mistake by the first party. Conversely, the same canon has been interpreted as resulting in no contract being formed "if neither party is at fault or both parties are equally at fault." (Merced County Sheriffs Employees Assn. v. County of Merced (1987) 188 Cal.App.3d 662, 676 [233 Cal.Rptr. 519].) The result herein is consistent with the application of this rule.

[26] The Association's motion to amend the complaint to delete the allegation that the District failed to include the PERS reduction revenue was granted. The Association made no argument in its post-hearing brief that the use, as alleged in the complaint, of an 11 percent "rule of thumb" for trailers or expenditures from grants and the driver-training program constituted unilateral repudiations of the agreement. I therefore deem them waived.

column and placed them in the "restricted" column. There was no evidence to dispute the Association's claim that the District identified the site block grant and advanced placement grant as new general fund revenue.[27] The District's failure to include these revenues in its calculations constitutes a departure from the policy as expressed in the salary formula.

Accordingly, I find that the District unilaterally repudiated the language of Article 17 in violation of EERA section 3543.5(c) by failing to include these revenues in calculating the amount available for an increase to the salary schedule for the 2000-2001 year. This conduct also denied the Association its right to represent bargaining unit members, in violation of EERA section 3543.5(b), and interfered with the right of such bargaining unit members to participate in the activities of an employee organization of their own choosing, in violation of EERA section 3543.5(a).

Any other remaining unilateral change allegations not addressed above are dismissed.

The Information Requests

The exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty of representation. (Stockton Unified School District, supra, PERB Decision No. 143). PERB uses a liberal standard, similar to a discovery-type standard, to determine the relevance of the requested information. (California State University (1987) PERB Decision No. 613-H.) Failure to provide such information is a per se violation of the duty to bargain in good faith.

An exclusive representative's right to information is not absolute and PERB has recognized employer defenses for refusing to provide relevant information based on

[27] I note that some or all of the Association's evidence on this point is hearsay. However it may independently support a finding because of the party-admission hearsay exception, and the fact that the District witnesses who could have contradicted the matter were available to testify.

"justifiable circumstances." (State of California (Departments of Personnel Administration and Transportation) (1997) PERB Decision No. 1227-S.) For example, an employer need not furnish information in a more organized form than its own records, nor information that is unavailable. (Ibid.) Also, where an employer partially complies with a request and the exclusive representative fails to communicate its dissatisfaction, or reassert or clarify its request, there is no violation. (Ibid.; see also Oakland Unified School District (1983) PERB Decision No. 367.) PERB analyzes each case on the particular facts related to the request. (State of California (Departments of Personnel and Transportation), supra, PERB Decision No. 1227-S.)

The complaint alleges that the Association made requests for information in the "spring", "summer" and "October 2002." These requests sought the data underlying "the District's full-time equivalent calculations" and the "percentage allocation" pursuant to Article 17, as well as the District's unaudited actual expenditures.[28]

The Association's post-hearing brief gives only cursory treatment to these already, non-specific allegations. For example, it states that "the information requested by the Association was produced only after repeated requests, produced after long delays, produced in a piecemeal manner, or not produced at all." The brief also implies that the District withheld information concerning the amounts of revenue actually available and the precise amounts of compensation paid to bargaining unit members.

Swoverland testified that the year-end, close-out information for the 2000-2001 school year was expected on August 15, 2001, but the District delayed producing it until "either

[28] The allegations in the complaint relate only to information requests beginning in the spring of 2002. Unalleged violations prior to this time would be time-barred, and in any event, no motion to amend the complaint was made by the Association during the hearing.

September or October." He later testified that the year-end close-outs were delayed in each of the three years:

> It was, a lot of times, never met in September. So we were behind on all that. Then there was also issues when - I asked several times verbally, as far as even to go to the counsel for explanation of the difference between the restricted and unrestricted numbers in a breakout of that amount. And we've never received that to this day.

The Association introduced the July 18, 2002, information request regarding the two-part request for information related to the FTE changes for the 2001-2002 year and an explanation of the discrepancy between the parties' revenue figures.

The record does not support a finding that the District failed to provide information in such a way as to demonstrate an unlawful refusal. The District did respond to the July 18 written request, although explaining that much of the information had already been provided. Its claim that the discrepancy in revenues could be reconstructed by the Association based on the J-200 and previous hand-outs is supported in the record. The District's spreadsheets provided to the Association identify the J-200 line numbers for each of the listed revenue sources. It is unclear why a more detailed explanation, or legal justification by the District, for why particular revenue sources were excluded would be necessary and relevant. The Association has also not demonstrated that it clearly communicated the basis for the parties' differences regarding revenue sources so as to require such a response. (State of California (Departments of Personnel Administration and Transportation), supra, PERB Decision No. 1227-S.)

Further, Swoverland acknowledged that at some point the Association received the staffing information in response to the July 18 request. No specific claim was raised in the post-hearing brief setting forth a basis for a violation involving this request. Therefore the Association has failed to carry its burden as to this issue.

Athos complained of delays in receiving hourly pay information but could not pinpoint when these delays occurred or demonstrate why the District's explanations were implausible.

The claim that the 2001-2002 unaudited actuals were delayed is only vaguely supported. These financials may have been available in September, or possibly October 2002, which would not necessarily have constituted an unreasonable delay. (See Azusa Unified School District (1983) PERB Decision No. 374.) The burden by the Association to demonstrate unreasonable delay has not been met.

Accordingly, the information request allegations are hereby dismissed.

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 repudiating the policies contained in Article 17 as they relate to the calculation of the percentage increase to be added to the 2000-2001 salary schedule, both on the revenue side (paragraph 8) and the expenditure side (paragraph 9). It is therefore appropriate to order that the District's decision in January 2002 to change the salary policy be rescinded, and that the District cease making unilateral changes in wages from that point forward.

In addition, it is appropriate to order that District be ordered to recalculate the percentage increase to be allocated to the 2000-2001 salary schedule in accordance with the meaning of terms of the collective bargaining agreement as found herein, and award bargaining unit employees retroactive increases (i.e., the difference between the increase previously

calculated and the increase calculated pursuant to this remedial order), with interest at the legal rate of 7 percent per annum. (Calexico Unified School District (1983) PERB Decision No. 357.) 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. (California State Employees' Assn. v. Public Employment Relations Bd., supra. 51 Cal.App.4th 923, 946 [59 Cal.Rptr.2d488].)

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 King City Joint 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 King City High School Teachers Association, CTA/NEA as the exclusive representative of its

certificated employees by unilaterally repudiating the policy of excluding wages paid to non-bargaining unit employees when calculating expenditures for the purposes of determining the percentage increase to be applied to the 2000-2001 salary schedule.

2. Failing and refusing to meet and negotiate in good faith with the King City High School Teachers Association, CTA/NEA as the exclusive representative of its certificated employees by unilaterally repudiating the policy of including all defined revenues for the purposes of determining the percentage increase to be applied to the 2000-2001 salary schedule.

3. By the same conduct described in paragraphs 1 and 2, interfering with bargaining unit employees' right to participate in the activities of an employee organization of their choosing.

4. By the same conduct described in paragraphs 1 and 2, denying to the King City High School 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 King City High School Teachers Association, CTA/NEA over any future decision and the effects thereof of changing the policies contained in Article 17 as they pertain to the "salary formula."

2. Within thirty (30) workdays of service of a final decision in this matter, rescind the decision implemented in January 2002, recalculate the percentage increase to be allocated to the 2000-2001 salary schedule in accordance with the meaning of terms of the collective bargaining agreement as found herein, and award bargaining unit employees retroactive increases (i.e., the difference between the increase previously calculated and the

increase calculated pursuant to this remedial order), with interest at the legal rate of 7 percent per annum.

3. Within ten (10) 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. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accord with the director's instructions.

All other allegations against the District in the complaint are hereby dismissed.

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. (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 together 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 PERB Regulations 32300, 32305, 32140, and 32135(c).)

Donn Ginoza
Administrative Law Judge