STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTEE TEACHERS ASSOCIATION, Charging Party, v. SANTEE ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4268-E PERB Decision No. 1822 February 22, 2006

Appearances: California Teachers Association by Rosalind D. Wolf, Attorney, for Santee Teachers Association; Parham & Rajcic by Mark R. Bresee, Attorney, for Santee Elementary 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 both the Santee Teachers Association (STA) and the Santee Elementary School District (District) to an administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge alleged that the District violated the Educational Employment Relations Act (EERA)[1] by unilaterally changing a policy pertaining to concerted activities and adopting regulations to implement the policy without giving the STA prior notice or opportunity to bargain.

The Board has reviewed the entire record in this matter, including, but not limited to, the unfair practice charge, the District's position statement, the complaint, the amended unfair practice charge and first amended complaint, the answers to the complaint and first amended complaint, the parties' post-hearing briefs, the transcripts and exhibits, the proposed decision,

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

the parties' exceptions and responses to exceptions. In light of its review, the Board affirms the ALJ's proposed decision, subject to the discussion below.

DISCUSSION

1. Timeliness of Amended Charge

The ALJ determined that the amended charge was timely filed because it related back to the original charge. We find this determination to be unnecessary.

In the original complaint issued on June 5, 2001, the Board agent identified the District's conduct which constituted an unfair practice, including the District's adoption of a new board policy without providing the STA an opportunity to negotiate the effects of the change in policy. The impact or effects of the board policy (BP) are spelled out in the administrative regulation (AR), which the District or Superintendent Marcia Johnson approved and implemented without first providing STA notice and an opportunity to bargain. Because the AR defines the impact of the BP on unit employees, STA's demand to bargain the impact of the BP on January 10, 2001, was a demand to bargain the AR.

It was therefore unnecessary to amend the complaint to add an allegation regarding the unilateral adoption of the AR because all the fundamental elements of a prima facie case for the District's failure to engage in effects bargaining upon demand already existed in the original complaint. Since the original complaint is sufficient on its face, the issue relating to timeliness of the amended complaint is moot and requires no further discussion.

2. Waiver of Right to Negotiate the Decision to Adopt the BP

The ALJ found that STA waived the right to negotiate the BP. We agree. The Board has long held that a union may waive the right to bargain a contractual matter within the scope of representation, (San Mateo County Community College District (1979) PERB Decision

No. 94 (San Mateo).) But a waiver of the right to bargain must demonstrate clear and unmistakable language (Amador Valley Joint Union High School District (1978) PERB Decision No. 74) or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer (San Mateo). Such a waiver will never be lightly inferred. (Oakland Unified School District (1982) PERB Decision No. 236.) A waiver might be shown by inaction on the part of the exclusive representative (Los Angeles Community College District (1982) PERB Decision No. 252), but the evidence must demonstrate an intentional relinquishment of the union's right to bargain. (San Francisco Community College District (1979) PERB Decision No. 105.)

STA states that the parties' practice had been that the District would not adopt a new proposal before bringing the proposal for discussion to the joint Employer-Employee Relations Committee (EERC). For several years, the parties had engaged in interest-based bargaining through the EERC, at which the parties presented their interests. Some of those "interests" eventually evolved into proposals, which were not adopted as policies until full discussion with the exclusive representative. However, the last round of negotiations for a successor agreement had become more adversarial, leading to the "work to rule" action by STA and the development of the BP.

The District states that it gave STA sufficient notice but that STA waived its right to bargain the BP by failing to make a demand. Notice of the BP was provided before its first reading at the December 5 board meeting and before its second reading and adoption at the December 19 meeting. Association President Lynne Beerle (Beerle) raised her concerns about the proposal at the December 5 meeting but did not demand to bargain the BP. Again, at the December 19 board meeting, Beerle expressed her concerns that the BP would cause damage to the relationship between the teachers and the District, but did not demand to

bargain. Neither Beerle nor other STA representatives otherwise demanded to negotiate the BP. The BP was adopted by the board at the December 19 meeting after its second reading.

After the BP was raised at the December 5 board meeting, Beerle asked CTA staff member Marilyn Sanderson (Sanderson) for advice as to what action to take on the BP. Sanderson testified as to her response:

> Q. And after you received a copy of the policy, do you recall what advise you gave Ms. Beerle, or what your conversation was with Ms. Beerle at that point?
>
> A. ... Generally, we talked about the contents of the policy, and Lynne asked me what should we do, should we do something about this. And after I read the policy, I said, I don't think there's any action to take at this point. If the board passes it, it clearly deals with some areas that we're going to be concerned about, but if you -- and speaking to Lynne, if you choose to speak at a board meeting about it, as you do on many other things, I certainly think that that's appropriate.
>
> Q. And why did you not think there was any action to take at this point?
>
> A. Well, a couple of reasons. The board policy, as I read it, appeared to be dealing with a situation that didn't exist at that time. There was no strike, there was no prohibition against concerted activities because the negotiated agreement was expired. It seemed to me, in reading that proposed board policy, that it was to deal with an emergency situation, and I took that to mean a strike. Also, that policy clearly stated, in one of the paragraphs, that any action by the board that would impact the negotiated agreement sufficient notice ~ these aren't the exact words, but that notice would be given and the association would have the opportunity to bargain those impacted areas. So it was my understanding, from reading this board policy, that the district was preparing for future or potential actions that weren't in current existence, and that if they took some action that dealt with the contract, we would go through the negotiations process to deal with those.
>
> .....
>
> Q. Did you think about the possibility of demanding to bargain that policy?

> A. At that time I didn't see a need to file a demand to bargain. The board policy hadn't passed. It's been my advice to chapters that if a policy is passed that requires some need to bargain, that we file a demand to bargain the impact and the effect of a policy, or an action, resolution, whatever the board might pass. So at that point in time, no, I did not. [R.T., Vol. II, pp. 79 - 82.]

In her testimony, Beerle acknowledged that she did not demand to bargain the policy. She testified that the policy stated that she would be given an opportunity to bargain the policy and so was waiting for that opportunity. This was based on the past practice of raising these issues with the EERC before they became District policies. At the December 5 and 19 board meetings, Beerle instead expressed concern that the adoption of the BP would damage the relationship between the teachers and the District. (R.T., Vol. I, pp. 79-82.)

A valid request to negotiate will be found if it adequately indicates a desire to negotiate on a subject within scope. (Newman-Crows Landing Unified School District (1982) PERB Decision No. 223.) The determination as to whether a communication constitutes a proper request to negotiate will be determined on a case-by-case basis. (Delano Joint Union High School District (1983) PERB Decision No. 307.) Protests over an employer's contemplated unilateral action is not the same as a demand to bargain. (Id.)

We conclude that STA had adequate notice of the proposed BP and that, after serious discussion as to the consequences of such a demand, Beerle and Sanderson decided not to demand bargaining. Although Beerle expressed concern that adoption of the BP could damage the relationship between the teachers and the District, she did not demand to bargain the BP during the December 5 and 19 board meetings at which it was discussed and did not demand to negotiate the BP thereafter. The testimony of Sanderson and Beerle clearly confirm the ALJ's finding that STA made a reasoned decision not to demand bargaining of the BP itself. STA's later demand to negotiate impacts of the BP does not comprise a demand to negotiate the BP itself. We therefore find that STA waived its right to bargain the BP.

STA argues that the adoption of the BP was unlawful since the District had not raised it at the bargaining table. According to STA, there can be no waiver during negotiations for a successor to an expired agreement during impasse, citing various National Labor Relations Board (NLRB) decisions to support this contention. The District counters that STA misconstrues the cited cases, and that this theory flies in the face of Board precedent. According to the District, this policy was not being negotiated and so not subject to the Board's impasse procedures; waiver is a possible defense during pre-impasse negotiations.

We agree with the District. In California State Employees' Assn. v. Public Employment Relations Bd. (1996) 51 Cal. App. 4th 923, 937 [59 Cal. Rptr. 2d 488], the court of appeals stated:

> A unilateral change at expiration of a contract may be lawful if the employees' exclusive representative expressly waived its right to negotiate the subject of the change.

In conclusion, we find that STA clearly and unmistakably waived its right to negotiate the BP. STA received notice of the proposed BP before the December 5 board meeting. STA witnesses testified to its deliberate decision not to demand to bargain the BP. Although protesting the proposed BP at the December 5 and December 19 board meetings, STA did not demand to bargain the proposed BP.

3. Waiver of the Right to Negotiate the AR

The ALJ found the District unilaterally adopted the AR without giving STA notice and the opportunity to bargain. Because we would not amend the complaint to add a unilateral change allegation as to the AR, this discussion is moot. Consistent with our findings above, we vacate the findings of the ALJ as to this allegation.

4. Waiver of the Right to Negotiate the Impacts of BP

The ALJ found that the District unlawfully refused STA's demand to bargain the impact of the BP. We agree. "An employer is obligated to provide the exclusive representative with notice and an opportunity to negotiate over the effects of its decision that have an impact upon matters within scope." (Oakland Unified School District (1985) PERB Decision No. 540 (Oakland), citing Newark Unified School District, Board of Education (1982) PERB Decision No. 225 and Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District (1984) PERB Decision No. 375.) In this case, STA received a copy of the proposed BP shortly before the December 5 board meeting. The BP was adopted on December 19. STA expressed concerns about the BP but did not request to bargain the BP at these meetings. Rather, STA demanded to bargain the impacts of the BP on January 10, 2001 and the District expressed its refusal to negotiate on January 19, 2001.

The District argued that STA may not wait for implementation of the BP to demand bargaining on its impacts. The District's argument lacks merit. The District cites Victor Valley Union High School District (1986) PERB Decision No. 565 (Victor Valley) and several non-precedential hearing officer decisions. In Victor Valley, the Board found the evidence of formal notice to the union of a plan to change instructional minutes insufficient to demonstrate waiver. The Board stated that, "[n]otice must be given sufficiently in advance of a firm decision to make a change to allow the exclusive representative a reasonable amount of time to decide whether to make a demand to negotiate." (Victor Valley, p. 5.) However, unlike the instant matter, the issue in Victor Valley involved negotiation over a change in terms and conditions of employment, not over the impacts of the change.

In contrast with Victor Valley are cases involving negotiations over layoffs and the impacts of the decision to layoff employees. For example, in Oakland, the employer's decision to lay off employees took place two months before its implementation. The Board held that this timeframe "provided ample opportunity for good faith negotiations to take place prior to implementation of the resolution.. . ." (Oakland, p. 17; emphasis added.) In this case, the BP was approved on December 19. However, there was no effective date stated on the BP, only an approval date; there was no strike or threat of strike; and thus, there was never opportunity for implementation of the BP.

Even if the BP had become effective upon its approval, the BP provides for the superintendent to develop a written plan to "delineate actions to be taken in the event of a strike or threatened strike." That plan is the AR. Contrary to the District's contention, the BP says nothing about bargaining the effects of the BP, particularly impacts as detailed as those found in the AR. Instead, the BP merely provides that to the extent the policy modifies existing contractual provisions with employee organizations, employee organizations shall be provided an opportunity to demand to bargain the modifications prior to their effective date. The BP itself does not indicate what provisions of the expired collective bargaining agreement (CBA) would be modified.

In light of these facts, we find that STA has not waived its right to negotiate the impacts of the BP. The Board therefore finds the District to be obligated to bargain the impact of the BP as set forth in the AR and concludes that the District violated EERA when it refused STA's demand to bargain the impacts.

5. Interference - Unalleged Violation

The ALJ found that the District interfered with unit employees' protected rights through some provisions of the BP and AR. We agree. PERB has held that an Unalleged

violation may be found by the trial judge provided it is intimately related to the subject matter of the complaint, part of the respondent's same course of conduct, and was fully litigated at the hearing, with respondent having the opportunity to examine and cross-examine witnesses. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668 (Tahoe-Truckee).) Therefore a trial judge must carefully evaluate Unalleged violations on a case-by-case basis to protect against violations of due process.

The proposed decision characterized interference as an Unalleged violation, commenting that the issue was not raised in "the charge or complaint; however, STA raised this issue in its opening statement at the hearing and in its post-hearing briefs. The District made no response, either in its opening statement, its original brief, or its reply brief." On appeal, the District does not dispute the propriety of the Unalleged violations; rather, the District argues that it did not engage in interference with employees' protected rights. The District apparently believes the interference allegations were fully and fairly litigated at hearing and has now waived the ability to argue otherwise. Given the District's concession, we will evaluate whether the District interfered with employees' rights.

The District excepts to the ALJ's findings regarding interference in its opening brief: "Importantly, the regulations make it very clear that they do not attempt to, will not be, and cannot be implemented in a manner that would be contrary to law in general or the rights of STA unit members in particular" because "[t]he regulation specifies that it shall not be applied in any manner that is in conflict or inconsistent with the law." (District's opening brief, p. 12.) In support, the District cites the express language of the AR that the District may not "interfere with .. . employees for exercise of their protected rights." The District points to the testimony of Superintendent Johnson on the issue that, it asserts, mitigated the

effect of the policy.[2] Further, the District argues that it is not prevented from disavowal of any unlawful conduct. (Inglewood Unified School District (1987) PERB Decision No. 624; Long Beach Community College District (1998) PERB Decision No. 1278).[3]

EERA section 3543(a) guarantees employees the right to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." EERA section 3543.5(a) makes it unlawful for employers to "impose or threaten to impose reprisals on employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter." The test for whether a respondent has interfered with the rights of

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[2]Johnson testified on this issue as follows:

> Q. Is it your ~ was it your belief that this policy and administrative regulation would allow you to be above the law?
>
> A. No.
>
> Q. Would it allow you to violate the law in terms of implementing any emergency procedures?
>
> A. No.
>
> Q. The — was it your intent to ignore the law in the event of a strike and do whatever you wanted to?
>
> A. No.
>
> (R.T., Vol. III, p. 23.)

[3]The Board has held that: "An honestly given retraction can erase the effects of a prior coercive statement. . . . The key question in cases involving the discontinuance of illegal activity is whether the employer's retraction was made in a manner that completely nullified the coercive effects of the earlier statement." (Sacramento City Unified School District (1985) PERB Decision No. 492, ALJ's proposed dec. at p. 28, emphasis added.) The cases cited by the District involve the adequacy of attempted retractions actually made by the employer. In this case, there is no evidence that the District has attempted to retract the inappropriate portions of the BP or AR. The District however argues that the Board should consider "prospective" disavowals of unlawful conduct but has cited no authority for this argument. We thus find that the District's argument lacks merit.

employees under the EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board has described the standard as follows:

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

Under the above-described test, a violation may only be found if EERA provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

We find that the ALJ's proposed decision correctly found an independent violation of interference. First, the BP prohibits "any strike, walk-out, slowdown, or other such strike-related type activities by employees of the District. . . .The District may take disciplinary action against employees, taking into account the seriousness of the behavior and the District's efforts to rebuild relations following the withholding of services by employees." As explained by the ALJ, the phrase "or other such strike-related type activities" interferes with employee rights because of its ambiguity, the possibility of a broad interpretation in the future, and its resulting chilling effect on employees' protected rights. (Cf. Los Angeles County Federation of Labor v. County of Los Angeles (1984) 160 Cal.App.3d 905 [207 Cal.Rptr. 1] (LA. County Federation), in which the court found an ordinance that punished employees for instigating, participating in, or affording leadership to a strike to be overbroad and unduly chilling to protected rights despite the provision of a severability clause in the ordinance.) Thus, a broad interpretation of the BP may effectively restrain employees from

engaging in protected conduct, such as the "work to rule" program, rallies, leafleting, and peaceful picketing. (See, e.g., Hilmar Unified School District (2004) PERB Decision No. 1725; San Marcos Unified School District (2003) PERB Decision No. 1508; NLRB v. Servette. Inc. (1964) 377 U.S. 46 [55 LRRM 2957]; Modesto City Schools (1983) PERB Decision No. 291; Los Angeles Unified School District (1990) PERB Decision No. 803.)

The District argues that specific language in the BP prohibits interference and therefore ameliorates its prohibitions, namely:

> To the extent the policies modify current contractual provisions with employee organizations, employee organizations shall be provided an opportunity to demand to bargain the modifications prior to their effective date.

We disagree that this or any other provision of the BP prohibits interference with protected rights. We therefore reject this argument and affirm the ALJ's analysis and ruling regarding the phrase "or other such strike-related type activities" in the BP.

Second, the District excepts to the ALJ's finding that the AR would deprive employees of, among other items, their payroll deduction privileges, a right protected by EERA section 3543.1, and thus per se interference in violation of EERA. (Rio Hondo Community College District (1983) PERB Decision No. 292 (Rio Hondo).) In Rio Hondo. the employer adopted an emergency resolution, which threatened to withdraw certain employee privileges, including dues deductions, of employee organizations that encourage its members to participate in a work stoppage. Finding a violation, the Board explained the chilling effect that such deprivation of rights inflicts on employees:

> A threat to punitively suspend statutory rights tends to undermine the status of the exclusive representative and has a chilling effect on employee activity. This is so because an employer's threat is backed by the considerable power than an employer holds over an employee. Even if acting illegally, an employer can withhold employment and earnings for months or even years before a legal remedy can be effected. Faced by such

> potential hardship and dire consequences, an employee might well be persuaded to forego rights, even those provided by the Legislature and protected by the Board, rather than test the employer's authority and intent.

Further, in Rio Hondo, the Board declared that, "even without implementation, the threat to suspend statutorily protected employee organization rights in an emergency resolution constitutes a violation of section 3543.5(a)." (Rio Hondo, citing Barstow Unified School District (1982) PERB Decision No. 215.) We find that, in this case, the AR's threatened withholding of payroll deductions similarly chills employees' participation in protected conduct and violates Section 3543.5(a).

The District argues that the following language mitigates the impact of the interference by limiting the superintendent's powers to take these actions:

> The District shall not impose or threaten to impose reprisals, discriminate or threaten to discriminate, or otherwise interfere with, restrain or coerce employees for the exercise of their rights.

This statement, however, is buried within the lengthy recitation of emergency procedures and regulations in the AR and, similar to the court's finding in L.A. County Federation, "the portions that we find invalid so permeate the section that, merely to excise *them,* would leave a section unintelligible." (L.A. County Federation, at p. 910, emphasis in original.)[4] Consequently, we find that this provision does not clearly disclaim the unlawful portions of the AR.

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[4]L.A. County Federation differs in some respects from the matter before us. In L.A. County Federation, the court found large portions of an emergency ordinance prohibiting strikes to be so broad as to be unenforceable. In this case, the withholding of employee rights, including statutory rights, are unlawful in part because of the District's unilateral change in terms and conditions of employment and in part because of unlawful interference with rights specifically guaranteed to employees under EERA. However, the principle that the District's brief "disavowal" buried within the AR is insufficient to ameliorate the unlawful aspects of the AR remains the same.

Therefore, we hold that the AR's threat to eliminate employee payroll deduction privileges interfered with employees' rights under EERA, and that the adoption of the AR was unlawful and should be rescinded.

In its exceptions, STA now asks the Board to expand on the ALJ's ruling, to find a right to strike under EERA by overturning the Board's decision in Compton Unified School District (1987) PERB Order No. IR-50, and to find that the BP and AR both interfered with this protected right. STA says that it raised this allegation in the charge and amended charge in paragraph 5, which states, in pertinent part:

> On or about December 19, 2000, the District adopted a policy purporting to prohibit Association activity protected by the EERA, and threatening disciplinary action for engaging in Association activity protected by the EERA.
>
> a. Since expiration of the Agreement in June 30, 2000, the District had no policy purporting to prohibit Association activity protected by the EERA, and no policy authorizing disciplinary action for engaging in Association activity protected by the EERA.
>
> b. On or about December 19, 2000, the District Governing Board adopted New Board Policy 4141.6 ....
>
> .....
>
> c. At the meeting, Association President Lynne Beerle protested the Board action.

We do not find that the above paragraph clearly alleged a violation of interference under EERA, other than a derivative violation of the District's alleged unilateral change. If anything, STA is merely introducing its claim that the District board unilaterally changed its policy. Neither the complaint nor the amended complaint alleged interference with the right to strike as an independent violation and STA did not seek to amend the charge or complaint to include this violation. STA's mention of this issue in its opening statement merely asserts that the District had no right to insist that employees' waive their statutory rights, such as in a

no-strike clause, after the contract had expired. In its post-hearing brief, STA distinguished this case from various cases in which there was an imminent threat of strike but concluded that since there was no such emergency in this case, the District's threatened suspension of statutory rights violated EERA section 3543.5(a). This constitutes the entire extent of STA's discussion regarding alleged interference by the District before the issuance of the proposed decision. Under these circumstances, we find that STA's request does not provide adequate notice and opportunity to defend, was not fully litigated, does not show that the parties had the opportunity to examine and be cross-examined on the issue, and therefore, does not meet the requirements for an Unalleged violation. (Tahoe-Truckee: Eureka City School District (1985) PERB Decision No. 481.)

Further, as previously found, STA waived its right to negotiate the BP, and its prohibition against "any strike, walk-out, slowdown." Clearly, STA has also previously waived the right to strike as evidenced by the "no-strike clause" found in Article XXII of the expired CBA. Thus, the Board need not consider whether the District has interfered with the right to strike or whether the right to strike is protected under EERA.

Accordingly, the Board finds that the District's prohibition of "other such strike-related type activities" in the BP and the threatened "loss of payroll deduction privileges" in the AR interfere with, restrain, and coerce employees in the exercise of their statutory rights to engage in activities in support of STA and to dues deductions, in violation of EERA section 3543.5(a).

Remedy

The ALJ ordered rescission of the offending language in the BP and of the entire AR, and that the District post a notice incorporating the terms of the order. Given the above findings, the ALJ's proposed remedy is appropriate and is hereby adopted as the remedy of the Board itself.

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, those portions of the charge and complaint alleging the Santee Unified School District's (District) unilateral adoption of Board Policy 4141.6 (BP 4141.6) is dismissed.

Those portions of the charge and complaint alleging the District's unilateral adoption of Administrative Regulation 4141.6 (AR 4141.6) and its refusal to bargain the impact of BP 4141.6 in violation of the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c). In addition, Unalleged violations of EERA section 3543.5(a) are found in certain language of BP 4141.6 and AR 4141.6.

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

A. CEASE AND DESIST FROM:

1. Maintaining AR 4141.6, which we adopted unilaterally without providing the Santee Teachers Association (STA) with prior notice or an opportunity to bargain;

2. Failing and refusing to meet and negotiate in good faith with STA regarding the impact of BP 4141.6;

3. Denying to STA rights guaranteed by EERA, including the right to represent bargaining unit members;

4. Interfering with, restraining, and coercing employees in the exercise of rights guaranteed by EERA, including the right to be represented by, and engage in activities in support of, their chosen representative;

5. Interfering with, restraining, and coercing employees in the exercise of their statutory rights by prohibiting them from engaging in "strike-related type activity" in BP 4141.6, and by threatening them with "loss of payroll deduction privileges" in AR 4141.6.

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

1. Within ten (10) work days following service of a final decision in this matter, rescind AR 4141.6;

2. Upon request, meet and negotiate with STA regarding the impact of BP 4141.6, until the parties reach agreement or exhaust the statutory impasse procedures;

3. Within ten (10) work days following service of the final decision in this matter, rescind the language "other such strike-related type of activity by employees" from BP 4141.6;

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

5. 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 STA.

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. LA-CE-4268-E, Santee Teachers Association v. Santee Elementary School District, in which all parties had the right to participate, it has been found that the Santee Elementary School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c). The District violated EERA by refusing to meet and negotiate in good faith with the Santee Teachers Association (STA) regarding the adoption of Administrative Regulation 4141.6 (AR 4141.6) and the impact of Board Policy 4141.6 (BP 4141.6). The District also interfered with, restrained, and coerced employees in the exercise of their statutory rights to engage in activities in support of STA by its promulgation of overly broad language in BP 4141.6 prohibiting these activities, and by its threat in AR 4141.6 to deprive employees of payroll dues deductions.

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

A. CEASE AND DESIST FROM:

1. Maintaining AR 4141.6, which we adopted unilaterally without providing STA with prior notice or an opportunity to bargain;

2. Failing and refusing to meet and negotiate in good faith with STA regarding the impact of BP 4141.6;

3. Denying to STA rights guaranteed by EERA, including the right to represent bargaining unit members;

4. Interfering with, restraining, and coercing employees in the exercise of rights guaranteed by EERA, including the right to be represented by, and engage in activities in support of, their chosen representative;

5. Interfering with, restraining, and coercing employees in the exercise of their statutory rights by prohibiting them from engaging in "strike-related type activity" in BP 4141.6, and by threatening them with "loss of payroll deduction privileges" in AR 4141.6.

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

1. Within ten (10) working days of the service of a final decision in this matter, rescind AR 4141.6;

2. Upon request, meet and negotiate with STA regarding the impact of BP 4141.6, until the parties reach agreement or exhaust the statutory impasse procedures;

3. Within ten (10) working days of the service of the decision in this matter, rescind the language "other such strike-related type of activity by employees" from BP 4141.6.

Dated: _____ SANTEE ELEMENTARY 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

SANTEE TEACHERS ASSOCIATION, Charging Party, v. SANTEE ELEMENTARY SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-4268-E PROPOSED DECISION (10/4/02)

Appearances: California Teachers Association by Rosalind D. Wolf, Staff Counsel, for Santee Teachers Association; Parham & Rajcic by Mark R. Bresee, Attorney, for Santee Elementary School District.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

A union representing a unit of elementary school teachers claims that the school district unilaterally adopted a policy prohibiting certain concerted activities, and a set of regulations to implement that policy, without giving the union prior notice or opportunity to bargain. The union contends that the policy and regulations change several terms and conditions of employment of the teachers, and deprive them of their statutory right to engage in concerted activity. The union further contends that the district refused the union's request to negotiate the impact of the policy.

In defense, the school district contends that the union had sufficient notice prior to adoption of the policy and regulations, but failed to request negotiations, thus the district's conduct was not unlawful. The district also contends that allegations regarding the regulations are time-barred.

The Santee Teachers Association (STA or Union) filed an unfair practice charge against the Santee Elementary School District (District) on February 13, 2001, alleging the District's unilateral adoption of the new policy and its refusal to bargain the impact of the policy. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint on June 5, 2001, alleging that by its adoption of the new policy and refusal to bargain its impact, the District violated Educational Employment Relations Act (EERA) section 3543.5(a), (b), and (c).[1] An informal settlement conference was held in the PERB office in Los Angeles on December 13, 2001; however, the matter was not resolved.

On January 24, 2002, the Union filed an amended charge and a motion to amend the complaint, adding the allegation that the District unlawfully adopted an administrative regulation to implement the new policy, which changes several provisions of the parties' expired collective bargaining agreement. The Union claimed that it first learned of the adoption of the administrative regulation at the PERB informal hearing in a statement made by the District's attorney. In opposition to the motion, the District contended that the amendment is time-barred, filed more than a year after the administrative regulation was adopted. The District further contended that statements made in the context of settlement negotiations cannot form the basis of an unfair labor practice charge. The Division of Administrative Law of PERB issued a first amended complaint (Complaint) on March 13, 2002, adding the allegation that the District, by unilaterally adopting the administrative regulation and by changing its

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

policies on a wide array of terms and conditions of employment cited therein, violated EERA section 3543.5(a), (b), and (c).

The District answered the Complaint on March 25, 2002, denying any wrongdoing and again contending that allegations regarding the administrative regulation are time-barred.

A formal hearing was conducted in San Diego on June 3, 4, and 5, 2002, before Administrative Law Judge Thomas J. Allen. Thereafter, the matter was reassigned to the undersigned, who also attended the hearing. After the filing of post-hearing briefs, the matter was submitted for decision on September 13, 2002.

FINDINGS OF FACT

The facts are, with few exceptions, undisputed.

The District is a public school employer as defined in EERA section 3540.1. The STA is an employee organization as defined in section 3540.l(d) and at all times relevant has been the exclusive representative, as defined in section 3540.1(e), of an appropriate unit of the District's elementary school teachers.

STA and the District have had a history of collective bargaining since 1977. Their most recent collective bargaining agreement (Agreement) expired on June 30, 2000.[2] Article XXII of the Agreement, which had been in each of the parties' agreements since 1977 without alteration or discussion, reads in part:

PROHIBITION OF CONCERTED ACTIVITIES

> It is agreed and understood that there will be no strike, work stoppage, slowdown, picketing or refusal or failure to fully and faithfully perform job functions and responsibilities or other interference with the operations of the District by the Association or by its officers, agents, or employees during the term of this Agreement, including compliance with the request of other labor

[2] All dates refer to the year 2000, unless otherwise specified.

> organizations to engage in such activity. It is agreed and understood that any employee violating this article may be subject to discipline up to and including termination by the District. It is understood that in the event this article is violated, the District shall be entitled to withdraw any rights, privileges, or services provided for in this Agreement or in District policy from any employee and/or the Association.

From 1977 until the events at issue herein, the parties enjoyed a trusting and cooperative relationship in which many issues were resolved informally in ad-hoc meetings and joint committees, especially the Employer-Employee Relations Committee (EERC) which met monthly. Also during that time, representatives of both parties received training in "interest-based bargaining" and used this technique successfully in their negotiations. Thus, although issues were sometimes difficult and impasse was sometimes declared, the parties had always been able to resolve their differences and reach agreement. Further, STA never had to make a formal demand to bargain and the District never added or modified a policy impacting unit employees without first discussing it with STA. However, shortly after the Agreement expired, that compatible relationship started to disintegrate, for reasons no witness was able to explain.[3]

The parties met informally a few times beginning in July, but no proposals for a new agreement were exchanged. At some time in August, District Superintendent Marcia Johnson (Johnson) informed Lynn Beerle (Beerle), STA president, that she (Johnson) was instructed not to engage in any negotiations with STA without the presence of District counsel, Jack Parham

[3] The parties presented testimony and arguments placing some blame on each other for escalating the breakdown. I need not, and do not, make any finding in this regard.

(Parham). The parties held their first formal bargaining session on October 5.[4] At that time they exchanged interests, to wit: STA expressed interest in work schedules and wages. Specifically, STA said it wanted competitive wage increases in order to attract new teachers. STA also said it wanted to benefit from Governor Davis' recent announcement of a 10.95 per cent cost-of-living adjustment (COLA) in the state's education budget, which STA contended was earmarked for teacher salaries, and which teachers in neighboring school districts were receiving, at least in substantial part. The District expressed interest in fiscal responsibility and its desire, in the face of declining enrollment, to avoid having to cut programs. Thus, a conflict developed between STA's desire to save teachers and the District's desire to save programs, and strong words were exchanged. Beerle testified, uncontradicted by any respondent witness, that at this session, in response to STA's request for a District proposal, Parham, said, "If we gave our proposal now, it would piss you off."

After the session, contrary to the parties' past practice of issuing joint negotiation updates to inform unit employees, STA issued its own "Negotiation's Update," criticizing the District's position, and ending as follows: "[W]e too feel frustrated and angry." STA also issued its regular November newsletter, arguing teachers' entitlement to the state COLA and criticizing the District. The newsletter also announced an STA rally to be held on November 21 outside the District office, at which California Teachers Association President Wayne Johnson would speak, and after which Beerle would present STA's position at the board meeting scheduled for that evening.

[4] Although the record does not indicate who served on the respective parties' negotiation teams, it is apparent that Beerle had the authority to represent STA on negotiation matters.

The next bargaining session was held on October 25. The District presented a proposal which provided, inter alia, for a 4.5 per cent wage increase. STA summarily rejected the offer and issued an update on October 25 criticizing the District. On November 6, the parties each issued updates arguing their respective positions.[5] STA also distributed to unit employees a document urging their participation in a "Work to Rule" program.[6] Beerle testified that under this program, teachers were to do everything required of them, but were not to volunteer for anything extra, e.g., serving on committees. At STA's November 14 council meeting, Beerle urged teachers to wear union t-shirts every Friday and at the November 21 rally, and to

[5] STA's newsletter was formatted with tiny pictures of ticking bombs instead of computer "bullets." Beerle testified that this was not meant as a threat of strike or violence, but was just an attempt at some humor in what was then a grim situation.

[6] The Work to Rule program, entitled "STA Participation," reads as follows:

> I will support in all activities STA has planned to show the dissatisfaction our bargaining unit has with the negotiations.
>
> 1. I will work my contractual hours (Meet with all teachers in the school parking lot in the morning and enter the school together. I will then leave at my ending contractual time and meet my fellow teachers in the parking lot to go home). This is referred to as *Work to Rule* - Only.
>
> 2. I will email board members, write letters or any other form of communication to let them know how I feel.
>
> 3. I will attend the board meeting on November 21. All teachers must be present to show our solidarity! All! (More information will follow in a flyer.)
>
> 4. I will not attend district committees that I have volunteered to unless directed by my site administrator (Keep track if directed and remember listening is participation). Any committees I attend during contractual hours, I will support by listening! I will not volunteer for any committees from this point forward. [Emphasis in original.]

maintain the Work-to-Rule program, at least until the next negotiating session scheduled for November 30. In addition, STA circulated to teachers, parents, and the community, a rally flyer which contained, inter alia, a photo of Governor Davis apparently admonishing the "hear-no-evil, see-no-evil, speak-no-evil" monkeys that the state COLA was for teacher salaries.[7] The rally was held as scheduled on November 21 and was well attended; STA took exception to the unusual presence of the Sheriffs Department, which it believed the District had called in order to intimidate rally participants.[8] At the board meeting which followed, approximately 54 STA representatives, teachers, parents, and community members, an unusually high number, spoke in favor of STA's position.

During this period, and since July, the EERC had not held any meetings. STA cancelled a few sessions; then at some time in November/December, Beerle told the District that STA had no issues to bring before the EERC.

The next bargaining session, and the last one for several months, was held on November 30. STA presented its proposal calling for, inter alia, a 10.95 per cent wage increase. The District caucused for approximately 15-20 minutes, then returned to the table, called STA's offer irresponsible, and declared impasse. STA did not oppose the declaration of impasse, and the parties subsequently entered into impasse-resolution proceedings. On December 1, the District issued another update, and also a letter to unit employees from Superintendent Johnson, stating that "any salary settlement over what we have offered will result in our having to immediately cut programs, services and other [critical] resources,"

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[7] Beerle testified that STA was just "having a little fun" depicting the monkeys.

[8] Johnson testified that she had called the Sheriffs Department only because she wanted protection for everyone, not to show hostility to the rally participants.

criticizing STA's offer, and explaining why impasse was the only choice. For its part, STA distributed a flyer announcing "Negotiations Break Down! Impasse Declared" and urging "No more district 'business as usual'."

Johnson testified that by this time, she believed a strike was a "real possibility" within the next few months, because of concerns on the state of negotiations voiced to her by teachers, parents, and community members, because of threats from some teachers to "do whatever it takes" to get a favorable contract, and because of STA's mass picketing.[9] However, notwithstanding that STA acknowledged that a strike could be a "last resort," there is no evidence that STA had any strike plans, or that any STA officer or member had threatened the District with a potential strike.[10] Further, except for a few signs carried at the November 21 rally and a few signs at one school campus unauthorized by STA, regular picketing did not begin until after December. Both parties expressed hope of resolving their differences and reach a contract. In that regard, Johnson's December 1 letter to the unit closes with these words: "[W]e remain optimistic that we will be able to reach an agreement with STA in the near future." And, according to Beerle, STA was committed to using every possible means to that end. However, it was not until spring of 2001 that the parties resumed

[9] Johnson acknowledged that a strike option would be viable only after impasse-resolution proceedings were concluded.

[10] Former STA Consultant Marilyn Sanderson testified that a "strike buildup" would involve appointing and instructing picket captains, preparing picket signs, establishing a system for picketers to exchange materials, and taking a strike-authorization vote among unit members, none of which was done.

negotiations, which finally resulted in a successor agreement executed on August 17, 2001.[11] Thus, there was no contract in effect from June 30, 2000 until August 17, 2001. In the interim, STA formed a Crisis Committee on December 13 and prepared a Crisis Calendar on December 14 calling for email, newsletter and postcard campaigns, appearances at board meetings, picketing, and the continuation of the Work-to-Rule program; and the District approved the new policy and administrative regulations which inform these proceedings.

New Board Policy 4141.6

Board By-Law 9311 (BB 9311), entitled "Board Policies," regulates how District policy is established: a new policy "shall normally be given two readings by the Board" before adoption, and "[A]t its second reading, the policy may be adopted by a majority vote of all members of the Board." Drafts or suggestions for new policy may be presented to the board by the superintendent "when changes in law occur and when specific needs arise." In late 2000, Johnson drafted new Board Policy 4141.6 (BP), based on language provided by the California School Boards Association (CSBA), and presented it to the board. It reads as follows:

CONCERTED ACTION/WORK STOPPAGE

> The Governing Board recognizes the importance of maintaining positive relations with employees, employee organizations, parents/guardians and community members throughout the collective bargaining process, hi the event of an impasse in negotiations, the Board shall make a good faith effort to reach an agreement with the employee organization through participation in state mediation and fact-finding procedures.
>
> The Governing Board is responsible to provide for the education of the pupils attending the schools in the District, even in circumstances where the operation of the District is impeded by concerted action by District employees. It is the intent of the Board of Education to enact these policies to allow for the

[11] The no-strike clause of the expired Agreement was carried into the new agreement without discussion or modification.

continuous operation of District programs. To the extent the policies modify current contractual provisions with employee organizations, employee organizations shall be provided an opportunity to demand to bargain the modifications prior to their effective date.

Any strike, walk-out, slowdown, or other such strike-related type activities by employees of the District could materially disrupt the operation of the schools of the District and prevent the continuous education of the children attending District schools. Therefore, the Governing Board shall view any strike, walk-out, slowdown of mandatory or discretionary duties, or other such strike-related type of activity by employees of the school District as a prohibited act.

During any threatened or actual withholding of services, the Board shall keep parents/guardians and community informed about the status of District negotiations, the educational program and safety measures that have been taken by the District.

When feasible, the Board desires to keep schools operating during any work stoppage. The Superintendent or designee shall take steps necessary in order to help ensure the safety of students, staff and District property during a work stoppage. Such steps shall be reported to the Board as soon as possible.

The Board recognizes that preparation is necessary to reduce disruption during a work stoppage and to ensure that students receive the education to which they are entitled. The Superintendent or designee shall develop a written plan that shall delineate actions to be taken in the event of a strike or threatened strike. The plan shall include specific responsibilities of the Board and District staff, plans to maintain District operations, appropriate student instruction and supervision, as well as communication and safety issues.

The Board believes that employees shall be held accountable for their behavior during any labor dispute. The District may take disciplinary action against employees, taking into account the seriousness of the behavior and the District's efforts to rebuild relations following the withholding of services by employees. (Emphasis added.)

As was customary, at some time between December 1 and December 5, Beerle received a copy of the agenda for the board meeting scheduled for December 5. The agenda contained,

inter alia, an item calling for the first reading of the BP. Attached was a copy of the BP and a note from Assistant Superintendent Sue Yakubik (Yakubik): "Dear Lynne, Here is new policy that will be going to the Board for a first reading. I wanted to let you know that it would be presented at the December 5 Board meeting. Sue"[12] Beerle testified that this was the first time she ever received a copy of a new board policy before its adoption. Beerle attended the board meeting, where she questioned the need for the BP and expressed her concern that the BP, as well as the appearance of the Sheriffs Department at the November 21 rally and Johnson's December 1 letter to the unit employees, "may have lasting effects on the relationship between the teachers and the administration."

Some time after December 5, Beerle sought the advice of STA consultant Marilyn Sanderson (Sanderson) as to what action, if any, to take on the BP. Sanderson did not recommend any action, as she believed the BP guaranteed STA the opportunity to bargain any impact of the BP after board adoption, and after a strike declaration, neither of which had yet occurred. Sanderson also did not want to "exacerbate" an already tense situation, thereby risking the District's implementation of its contract offer, which it was privileged to do during impasse. However, Sanderson did encourage Beerle to speak against the BP at the next board meeting.

The next board meeting was scheduled for December 19. Prior to that date, Beerle received the agenda, which contained an item for the second reading, followed by the statement: "It is recommended that the Board of Education approve new Board Policy

[12] Yakubik testified that she also called Beerle prior to December 5 to inform her of the first reading of the BP. Beerle did not recall speaking with Yakubik before the Board meeting; however, she would not deny it if Yakubik so testified. Accordingly, I credit Yakubik in this regard.

4141.6." Again attached to the Agenda was a copy of the BP, as well as a copy of the new Administrative Regulation 4141.6 (AR). The Agenda made no reference to the AR; however, Yakubik sent Beerle a note stating that the AR would be discussed at the meeting. Beerle sent a copy of this package to Sanderson.

At the December 19 board meeting, Beerle spoke against the BP and the AR, calling them a "hostile action, severing lines of communication," and saying that teachers were committed to a safe environment for students and that she believed a new contract would be reached before the end of the year. Beerle testified that she did not think the board would adopt the BP or the AR before considering STA's position. Beerle did not make any request or demand to bargain the BP or the AR, believing, as did Sanderson, that STA would be able to bargain its impact.[13]

At the December 19 meeting, the board adopted the BP and held the AR for further review. An article in the San Diego Union Tribune dated December 21, reporting on the adoption, quotes Sanderson's response as follows: "Districts often put together such policies as a precaution when they reach an impasse in salary negotiations." Sanderson did not deny making that statement, but said she believed the timing of the adoption, coming so soon after the declaration of impasse, was "meant to intimidate employees."

Johnson testified regarding her interpretation of the language of the BP as follows: the phrase "employee organizations shall be provided an opportunity to demand to bargain the modifications prior to their effective date," means that prior to December 19, STA could have successfully demanded bargaining, but since December 19, STA could no longer bargain the

[13] There is no evidence that the District would have refused a demand to bargain prior to December 19. Thus, I need not make a credibility finding as to Yakubik's and Johnson's speculative testimony that, if a demand had been made, the BP would have been "pulled."

BP's adoption. Johnson was uncertain, however, as to whether STA would have the right to bargain prior to its implementation. As to "concerted activity," Johnson stated that it was not as powerful as the word "strike," thus STA would be less likely to take offense.[14] Johnson explained that the BP would prohibit only strikes, slowdowns, or other activity which would "disrupt the normal operations of the schools to be able to provide instruction." As to "discretionary duties," Johnson contended this includes only such mandatory, but excusable, non-classroom duties such as issuing report cards, and attending parent conferences and open houses. Johnson acknowledged that prior to adoption of the BP, STA had not engaged, or threatened to engage, in anything which she considered to be "concerted activity," including the November 21 rally and the Work-to-Rule program, as none of this activity had slowed down or disrupted school operations.

Administrative Regulation 4141.6

Pursuant to BB 9311, Johnson drafted Administrative Regulation 4141.6 to implement the BP. BB 9311 reads, in part:

> The application of policies is an administrative task to be performed by the Superintendent and the Superintendent's staff, who shall be held responsible for the effective administration and supervision of the entire school system.
>
> . . . . . .
>
> When policies are amended, the Superintendent or designee shall review corresponding administrative regulations to ensure that they conform to the intent of the revised policy.

Both Johnson and her executive secretary, Arietta Schaffer (Schaffer), testified that BB 9311 does not required the board to "adopt" administrative regulations; rather, the board merely "approves" what the superintendent has drafted.

[14] Johnson had replaced CSBA's use of the word "strike" with "concerted activities."

As noted above, AR 4141.6 was not approved at the December 19 board meeting, but was held for further review. Johnson testified that, while this was the first time the board had ever taken such a high interest in a proposed administrative regulation, it was only a few board members who had minor concerns, i.e., they wanted "a couple of words" changed, and wanted the board vice president rather than the superintendent given the authorization to implement the AR if the board president should be unavailable. Johnson made what she characterized as "cosmetic changes" and sent to the board members a revised AR, along with a memorandum[15] stating that she would discuss the AR with them at the next board meeting on January 9. Johnson testified that she allayed board members' concerns in telephone conversations prior to January 9, thus she saw no need to meet with them on January 9. Notwithstanding the changes she made, Johnson claimed that the AR was approved, by her, on December 19; December 19 is cited on the last page of the AR as the date of approval.

On January 26, 2001, at Johnson's instruction, Schaffer mailed copies of the BP and the revised AR to the board's distribution list, along with a cover memo instructing recipients to update their respective board Policies and Administrative Regulations notebooks. Although

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[15] The memorandum reads, in part:

> HIGH PRIORITY
>
> AR 4141.6 Concerted Action/Work Stoppage
>
> Please, please, please bring your comments on AR 4141.6 to Tuesday, January 9th. .... Remember: you are authorizing the superintendent to proceed ONLY for strike-type actions in which I cannot get to you for direction. The actions would be taken to assure the smooth operations of our schools for student safety.

Schaffer could not recall specifically whether she sent this package to STA, she assumes she did, as STA is on the board's distribution list.[16]

STA witnesses testified that in their interpretation of BB 9311, it is the board which must adopt administrative regulations, and since AR 4141.6 was not put on the agenda for action at the December 19 meeting, STA had no idea when or if it would be adopted at all. In opposition, the District argues that STA must have known that the board does not approve regulations, as a board member stated this at the December 19 meeting, which Beerle attended. However, Beerle testified that she did not recall hearing such a statement, and I have no reason to discredit her testimony. Thus, Beerle and Sanderson were both uncertain as to what was meant by the phrase, "bring the administrative regulation to the Board for review," which appears in the December 19 board meeting minutes; however, they did nothing to clarify this language. Further, Sanderson did nothing to clarify the December 21 San Diego Union Tribune article, which erroneously attributed to the newly-adopted BP some of the language of the AR.

AR 4141.6 reads:

> CONCERTED ACTION/WORK STOPPAGE
>
> The Superintendent shall be empowered, under any of the following conditions, to implement District emergency organization and operational procedures for the continuous operation of the school District should there be reason to believe that the operation of the schools may be impaired by activities of an employee organization.

[16] Beerle testified that she did not recall seeing Schaffer's mailing, thus she had no knowledge that any action had been taken on the AR. Further, neither the BP nor the AR could be located in a current search of STA's board Policies and Administrative Regulations notebooks. However, as all critical dates herein predate January 26, 2001, I therefore make no finding as to whether STA received Schaffer's mailing.

1. The condition that the activities occurred and precluded official Governing Board action in an emergency or regularly scheduled meeting of the Governing Board.

2. The receipt of official written materials indicating the employee organization's intent to commit acts which would impair the District's operations prior to the 24-hour notice required for calling a special meeting of the Governing Board

3. Obtaining a minimum of three District employee affidavits stating that the District employee organization intended to engage in activities which would occur prior to the 24-hour notice required for calling a special meeting of the Governing board.

4. The condition that none of, or an insufficient number of Governing Board members could be contacted and assembled for a special meeting within the required 24-hour notification period for such a meeting.

5. The condition that the Governing Board did not desire to meet until its next regularly scheduled meeting.

Emergency organization and operational procedures shall become effective immediately upon declaration of an emergency by the Superintendent, and shall prevail to the extent that these policies and/or regulations are not in conflict with or inconsistent with the law and shall remain in effect until further order of the Superintendent or Governing Board.

Emergency organization and operational procedures shall pertain to and supersede all District policies and/or regulations and contradictory contractual provisions after the required negotiations have been completed.

When the Superintendent declares an emergency situation to insure the continuous operation of the school District, the following emergency regulations shall be in effect:

1. No employee of the District shall be granted a leave of absence for personal business.

2. Personal necessity leave is authorized for employees only when the same is due to:

a. Death or serious illness of a member of such employee's immediate family.

b. Accident involving such employee's person or property, or the person or property of a member of such employee's immediate family.

District employees who take personal necessity leave for one of the reasons set forth above shall be required to file with the Assistant Superintendent, Human Resources satisfactory evidence of entitlement to such leave.

3. In order to be granted sick leave for absences claimed to be due to illness or injury (other than pursuant to an industrial accident or illness leave) an employee must file with the Assistant Superintendent, Human Resources, a statement signed by his or her physician or medical advisor attached to the appropriate District leave form.

Said certificate shall be submitted within one (1) day after the employee's return to work, hi the event a District employee fails or refuses to furnish said certificate, said absences shall be treated as and be deemed to be absence without leave and be subject to discipline.

4. Except as otherwise provided herein, all of the leave policies and regulations of the District shall remain in full force and effect.

5. The Superintendent, or designee, shall prepare for submission to the Governing Board a disciplinary report, setting forth the name and relevant information concerning each employee who is believed to have:

a. been absent without leave on any workday or portion thereof;

b. engaged in a walk-out, slowdown, work stoppage, or similar activity;

c. engaged in acts of vandalism directed against real or personal property of the school District or the personal property of others located on school property;

d. suggested, encouraged, intimidated, coerced, or by any other means attempted to initiate or aid in a boycott by school pupils of the District;

e. suggested, encouraged, intimidated, coerced, or by any other means attempted to persuade one or more pupils of the District not to attend school; or

f. by any means unduly intimidated, coerced substitute teachers, non-concerted action personnel, administrators, volunteers, Board members, or members of any of the families; or

g. in any manner damaged or caused to have damaged the real or personal property of the personnel outlined in (f) above; or

h. acted or failed to act in a manner which the Superintendent believes warrants disciplinary action by the Governing Board provided that a reasonable person would have known the conduct was inimical to the education of students.

Procedures with respect to said disciplinary report shall be as follows:

a. Notice shall first be given to the employee pursuant to Education Code section 44031, and he or she shall be given an opportunity to review the disciplinary report and comment thereon.

b. In the event such employee desires to enter and have attached to the disciplinary report his or her own comments, such employee shall do so within five (5) working days of receipt of notice, or he or she shall be deemed to have waived such a right.

c. Said disciplinary report, together with any written comments filed by the employee, shall then be placed in the employee's personnel file.

d. Immediately after said disciplinary report is placed in the employee's personnel file, said disciplinary report shall be submitted to the Governing Board, together with any written comments filed by the employee, for

consideration and determination on whether the Board will commence disciplinary action, including but not limited to immediate suspension and adoption of a resolution of intention to dismiss the employee.

6. No compensation shall be paid to or on behalf of any employee unless the Superintendent, whose duty it is to draw the warrants, is satisfied that the employee has faithfully performed all of his or her prescribed duties (Education Code § 45055). The term "compensation" as used herein shall include, but shall not be limited to, employer contribution, if any, toward the cost of any health, welfare, or group benefits of the employee.

. . . . . .

11. The Superintendent is authorized to reassign any and all employees, as needed, in order to keep the school open and operating.

12. The Superintendent is authorized to organize the District's personnel and its material resources in any manner necessary in order to keep the school open and operating.

13. The Superintendent is authorized to require that any District property held by District employees be immediately delivered to the designated representatives. As used herein "District Property" includes, but is not limited to, keys, computers, equipment, instructional materials, registers, grade books, lesson plan books, attendance records, seating charts, pupil scholastic data, and any other material or data important to the operation of the school District.

. . . . . .

Maintenance of District Operations

At the discretion of the Superintendent or designee, employees reporting for duty may be temporarily assigned to other duties. . . .

Days of instruction lost due to a work stoppage may be made up following the end of the normal school year.

. . . . . .

Activities of Employees

The District shall not impose or threaten to impose reprisals, discriminate or threaten to discriminate, or otherwise interfere with, restrain or coerce employees for the exercise of their rights.

Employees engaging in a work stoppage shall not prevent access to school facilities by other employees, substitutes or students; use or threaten physical violence or bodily injury; trespass; distribute malicious or defamatory leaflets or materials; or otherwise coerce or intimidate individuals in the conduct of school business.

During an actual or threatened work stoppage, an employee shall not retain in his/her possession any district property, including but not limited to student attendance and grading records, lesson plans, keys, computers, equipment and supplies.

Employees shall not use students to distribute messages that promote or explain the position of any employee organization that is contemplating or engaged in a work stoppage. In addition, employees shall not use classroom or other duty time to promote an employee organization 's position in negotiations or in a work stoppage.

When parents and/or students raise questions related to a work stoppage, employees shall approach the subject in accordance with the District's policy on controversial issues (BP 6144) and shall not allow such discussions to interfere with their regular work responsibilities.

Salary and Benefits

Employees withholding services shall not receive salary or unemployment benefits during the period of the work stoppage.

Any employee withholding services may be subject to the loss of payroll deduction privileges.

The district may not pay contributions to health care benefits if employees fail to work the minimum number of hours per month as specified in the collective bargaining agreement, Board policy or administrative regulation. However, the district shall offer employees the option of paying their own coverage under COBRA (29 USC 1161-1169)

> If the district determines that it will withhold its contributions to employees' life and disability insurance, employees shall be offered an opportunity to retain these coverages by paying the contributions themselves. (Insurance Code 10116)
>
> Employees whose vacation leave has been authorized prior to the work stoppage shall receive vacation pay for the authorized period.
>
> If an employee is on a paid sick or disability leave when the work stoppage begins, he/she shall be entitled to continued payments as long as he/she remains ill or disabled and is otherwise eligible according to Board policy and collective bargaining agreements.
>
> The Superintendent or designee may determine that credit shall not be applied toward probationary service, salary schedule advancement, permanent status, vacation earnings, retirement credit or sick leave accrual during the period of time that employees withhold services. [Emphasis in original.]

The parties stipulated, and I find, that prior to adoption of the AR, the following policies were in effect, having been established by the expired Agreement:

> - the Board had sole discretion to declare an emergency permitting modification of the Agreement where an event "threatens life, property or the essential physical operation" of the District.
>
> - Personal Necessity leave could be taken for a variety of reasons, including but not limited to those listed in [the Agreement]. [17]
>
> - a physician's statement could be required only for just cause, or after three consecutive days of leave.
>
> - employees accrued ten days of sick leave per school year,
>
> - causes for discipline were set forth in [the Agreement].[18]

[17] Article XI(B)(8)(d) of the Agreement lists several possible reasons for personal necessity leave.

[18] Article XIX(B) lists several possible reasons for discipline.

- derogatory material could not be placed in an employee's personnel file unless the employee was given an opportunity to correct the situation, and to review the materials at a conference in the presence of an Association representative.

- procedures for discipline, including an evidentiary hearing, were set forth in [the Agreement].[19]

- provisions governing employee compensation were set forth in [the Agreement].

- employees were entitled to advance on the salary schedule pursuant to [the Agreement].[20]

- provisions governing employee health and welfare benefits were set forth in [the Agreement] and did not authorize the Superintendent to withhold the employer contribution toward the cost of employee benefits for any reason.

- prior to reassignment, an employee was entitled to two days advance notice, a conference to discuss the reason for the change, and at least one working day for the purpose of move orientation and lesson planning.

- the school year was a maximum of 185 days [unless the State provided increased funding for lengthening the school year].

- the District was required to make payroll deductions as authorized in writing by an employee.

The parties also stipulated, and I find, the following:

> [I]t is the District's position that AR 4141.6 is a regulation implementing BP 4141.6 which by its title and by its terms applies only in circumstances where the Superintendent determines that the operation of the District is impeded by concerted action by District employees (BP 4141.6 [paragraph] 2).

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[19] Article XIX(C) and (D) provides for notice and an evidentiary hearing prior to an employee receiving discipline.

[20] Article XII (D) and (H) provides for employee salary "advancement", or increases, for completing outside classes.

The Demand to Bargain

Shortly after the December 19 board meeting, on December 22, the District closed for winter break and reopened on January 8, 2001. By letter to the District dated January 10, 2001, STA demanded to bargain the "impact" of BP 4141.6. By letter to STA dated January 19, 2001, the District refused the demand, stating, inter alia: "The Board has already taken formal action on this policy. Given the current climate and concerted actions of STA, we would be adversely impacted by initiating negotiations . . . STA's January 10, 2001 demand to bargain is therefore untimely."

LEGAL ISSUES

1. Are the allegations of the amended charge and complaint time-barred?

2. Did the District unilaterally adopt Board Policy 4141.6 without providing STA with notice and an opportunity to bargain?

3. Did the District unilaterally adopt Administrative Regulation 4141.6 without providing STA with notice and an opportunity to bargain?

4. Did the District unlawfully refuse STA's demand to bargain the impact of Board Policy 4141.6?

5. Did the District otherwise violate the EERA?

CONCLUSIONS OF LAW

The Amended Charge/Complaint

EERA section 3541.5(a)(l) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (Gavilan Joint Community College

District (1996) PERB Decision No. 1177.) However, a timely-filed charge may be amended to include otherwise untimely allegations, provided they are intimately related to and arise from the same course of conduct as the allegations in the original charge. (Temple City Unified School District (1989) PERB Decision No. 782.) This "relation back" doctrine has typically allowed an amendment alleging a new theory of violation, but not one alleging new facts. (Regents of the University of California (Lawrence Livermore) (1997) PERB Decision No. 1221 (UC Regents (Lawrence Livermore)).) But in Willits Unified School District (1991) PERB Decision No. 912, the original charge alleged the employer's unilateral elimination of its past practice of providing release time to attend PERB informal conferences, while the amended charge alleged a somewhat different fact, i.e., a past practice of providing release time "for problem-solving sessions relating to working conditions...." In his decision, adopted by PERB, the administrative law judge stated:

> The original charge . . . and the amended charge . . . both state the same central allegation, i.e., that the District committed an unfair practice when it denied released time .... All else is an elaboration of factual allegation and legal theory. Since both the original and amended charge are based on ... the same central fact, the amended charge is timely under the relation back doctrine.

Here, there is no dispute that the original charge regarding the BP was timely filed. The AR was written at virtually the same time as the BP, by the same author, for the same purpose, and based on the same central fact, i.e., the District's new concerted-activities policy. I find therefore that the AR is intimately related to the BP and is part of the District's same course of conduct. Further, the amended complaint was issued well in advance of the hearing, the District was fully prepared to defend against the additional allegations, and they were fully litigated. The District suffered no prejudice. Accordingly, I conclude that the allegations

regarding AR 4141.6 in the amended charge and complaint may relate back to the date of filing the original charge and are not time-barred.[21]

Adoption of Board Policy 4141.6

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: (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.)

In the instant case, it is undisputed that Article XXII of the Agreement, the no-strike clause, did not survive the Agreement's expiration nor was it discussed during negotiations thereafter. Thus, in December 2000, as there were no prohibitions or limitations on employees' concerted activities, the BP constituted a change in policy.

[21] There is nothing in the "relation-back" doctrine which requires the charging party to show it did not know, and could not have known, the facts supporting the amendment prior to its filing. Neither Burbank Unified School District (1986) PERB Decision No. 589, nor Monrovia Unified School District (1984) PERB Decision No. 460, both cited by the District, hold otherwise; the amendments sought in both cases were denied because they did not sufficiently relate to the original charge, not because the union had prior knowledge of the alleged violation. Thus, I need not reach the issues of whether STA should have known the AR was adopted at the same time as the BP, or whether STA may rely on a statement made in the context of a settlement conference as the basis for its amended charge.

The issue therefore is one of notice and opportunity to bargain. The District contends that STA had sufficient notice of the board's intention to adopt the BP, but waived its right to bargain by failing to make a demand; STA disagrees.

An employer may take unilateral action if it is demonstrated that the exclusive representative waived its right to negotiate. But any waiver of the right to bargain will not be lightly inferred. (Oakland Unified School District (1982) PERB Decision No. 236.) To show that an exclusive representative has waived its right to negotiate, there must be evidence of either "clear and unmistakable" language (Amador Valley Joint Union High School District (1978) PERB Decision No. 74) or of "demonstrable behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer." (San Mateo Community College District (1979) PERB Decision No. 94.) A waiver can be shown by inaction on the part of the exclusive representative (Los Angeles Community College District (1982) PERB Decision No. 252), but the evidence must indicate an intentional relinquishment of the union's right to bargain. (San Francisco Community College District (1979) PERB Decision No. 105.)

STA contends that: (1) two weeks is not a reasonable time in which to make a demand to bargain; (2) the BP, as well as the AR, promised the opportunity to bargain prior to implementation; (3) no bargaining demand had ever been made in the parties' 20-year history; and (4) STA's vigorous objections to the BP and the AR at the two December board meetings should be seen as a bargaining demand. However, cases cited in support of STA's position are distinguishable, to wit:

In Arvin Union School District (1983) PERB Decision No. 300, the school board adopted a new discipline policy at its meeting in August 1980. The union was not notified of

the meeting or its agenda, did not attend the meeting, and did not receive a copy of the new policy until the next school year began in September. However, the union took no action at that time beyond asking its attorney for a legal opinion and informally discussing the issue with a district representative. In early January 2001, shortly after meeting with the district regarding the first unit employee disciplined under the new policy, the union objected to the policy, demanded bargaining, and filed an unfair practice charge. PERB held that the union had not waived its right to bargain prior to January 2001, because there was no notice or opportunity to bargain prior to the district's adoption of the policy. By contrast, in the instant case, STA President Beerle had received a copy of the BP prior to December 5, knew that it would be read at that meeting, and attended the meeting. And although STA witnesses claim that they were uncertain how many readings the board might hold, STA certainly knew prior to the December 19 meeting that adoption at that meeting was recommended. Beerle and Sanderson discussed the matter and made a reasoned decision on behalf of STA not to seek bargaining prior to adoption, but to wait and seek bargaining prior to implementation. Thus, I find that STA had sufficient notice of the District's intended action, but engaged in "demonstrable behavior" waiving its right to bargain.[22]

STA also cites Goleta Union School District (1984) PERB Decision No. 391, wherein the school district made a unilateral decision to employ outside consultants to perform bargaining unit work. The union did not demand bargaining because it believed, in error, that it was protected by a clause in the parties' contract prohibiting subcontracting. Instead, the union requested a meeting with the district, warned that its action was a breach of contract, and

[22] STA's argument that two weeks' notice is insufficient time to demand bargaining is rendered moot by its decision not to demand bargaining, thus I make no finding thereon.

demanded a return to the status quo. PERB found that by this conduct, the union had made a bargaining demand. Here, by contrast, although STA representatives spoke against the BP and the AR at the December 5 and 19 board meetings, it did not accuse the District of breaching the Agreement, nor did it demand that the BP or AR not be adopted or that they be rescinded. Further, in light of STA's avowed decision not to demand bargaining in December, it is not reasonable for STA to contend, in retrospect, that it actually made such a demand.

Accordingly, I conclude that the District provided STA with notice and opportunity to bargain prior to its adoption of the BP, that STA waived its right to bargain, and that the District's adoption of the BP did not violate EERA.

Adoption of Administrative Regulation 4141.6

In Barstow Unified School District (1982) PERB Decision No. 215 (Barstow), the employer, in anticipation of an employee slowdown, unilaterally passed a resolution changing its leave policy. In finding a violation, PERB stated:

> Regardless of the unprotected character of employee conduct, an employer may not unilaterally change matters within the scope of representation in violation of the duty to negotiate in good faith.

Here, it is clear from the expired Agreements well as the parties' stipulations regarding past practices, that implementation of the BP, through the AR, would have far-reaching effects and a general adverse impact on unit employees regarding numerous matters within the scope of representation,[23] including personal leave, sick leave, causes for discipline, disciplinary procedures, contents of employee personnel files, compensation, salary advancement, health

[23] A comparison of the AR to the Agreement and stipulations shows clearly that impact is "reasonably foreseeable" and not merely presumed; thus I reject the District's argument in this regard. (UC Regents (Lawrence Livermore).)

and retirement benefits, tenure, work year, and union dues deductions.[24]

It is undisputed that STA received a copy of the AR prior to the December 19 board meeting, and knew it corresponded to the BP which was recommended for adoption at that meeting. But the AR was not adopted at the December 19 meeting; rather, it was held for board review. STA was uncertain as to whether the board itself was required to adopt the AR or what further procedures might be required before it became final. However, STA did not seek clarification from the District, believing that the AR would not be adopted without the District first considering STA's position. Rather, as it had done with the BP, STA initially made a decision not to demand bargaining regarding the AR.

Shortly after the winter break, on January 10, 2001, STA changed its position and demanded to bargain the "impact" of the BP. As the AR defines the impact of the BP on unit employees, I find that STA's demand was, in effect, a demand to bargain the AR. Johnson claims that she adopted the AR on December 19; if this were true, it would predate STA's demand to bargain. However, adoption of the AR was not communicated to STA until January 26, 2001, at the earliest, nor is there evidence that it was communicated to any other person or entity, including the board, prior to that date. Thus, I cannot credit Johnson's private conclusion as to the adoption date of the AR. Rather, I find that the AR was not adopted at any time prior to Schaffer's transmittal of January 26, 2001, which postdates STA's bargaining demand as well as the District's refusal of that demand. I therefore find that the District unilaterally adopted the AR without honoring STA's prior demand to bargain.

[24] There is no dispute that these terms and conditions survived expiration of the Agreement.

Accordingly, I conclude that the District failed its obligation to bargain in good faith with STA regarding the adoption of AR 4141.6, in violation of EERA section 3543.5(c). By this conduct, the District also interfered with the rights of unit employees to be represented by STA in violation of EERA section 3543.5(a), and denied STA its right to represent unit employees in violation of EERA section 3543.5(b).

Refusal to Bargain the Impact of BP 4141.6

An employer must bargain the reasonably foreseeable impact on unit employees of matters within the scope of representation contained in a change in policy, even when there is no obligation to bargain the decision to change the policy. (UC Regents (Lawrence Livermore); Mt. Diablo Unified School District (1983) PERB Decision No. 373.)

As discussed above, the AR, which implements the BP, would affect several matters within the scope of representation including, inter alia, personal leave, sick leave, causes for discipline, disciplinary procedures, contents of employee personnel files, compensation, salary advancement, health and retirement benefits, tenure, and work year. And as noted above, on January 10, 2001, STA demanded to bargain the impact of the BP and on January 19, 2001, the District refused its demand.

Accordingly, I conclude that the District failed its obligation to bargain in good faith with STA regarding the impact of BP 4141.6, as set forth in AR 4141.6, in violation of EERA section 3543.5(c). By this conduct, the District also interfered with the rights of unit employees to be represented by STA in violation of EERA section 3543.5(a) and denied STA its right to represent unit employees in violation of EERA section 3543.5(b).

Unalleged Violations

There is another issue which must be considered here, i.e., whether the BP or the AR themselves might unlawfully interfere with employees' statutory rights to engage in concerted activities and their right have union dues deducted from their paychecks. I recognize that this issue was not alleged as an independent violation in either the charge or the complaint; however, STA raised it in its opening statement at the hearing and in its post-hearing briefs. The District made no response, either in its opening statement, its original brief, or its reply brief.

PERB has held that an Unalleged violation may be found by the trial judge provided it is intimately related to the subject matter of the complaint, part of the respondent's same course of conduct, and was fully litigated at the hearing, with respondent having the opportunity to examine and cross-examine witnesses. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.) At this hearing, Superintendent Johnson was asked to explain various phrases of the BP and the AR, and there was nothing precluding the District from eliciting more testimony from her or from other witnesses in this regard. Thus, I find that the District had notice of the issue, that the language of the BP and the AR was fully litigated, and that the issue may be entertained.

EERA section 3543(a) guarantees to employees the right to "form, join, and participate in the activities of employee organizations of their own choosing." And section 3543.5(a) declares it unlawful for a public school employer to "[i]mpose or threaten to impose reprisals on employees,... or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter." To demonstrate an independent violation of

EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89.)

The standard for showing that an employer has interfered with the rights of employees under EERA has been described in State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S, at p. 12, as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. Los Angeles Community College District (Kimmett) (10/19/79) PERB Decision No. 106. Carlsbad Unified School District (1/30/79) PERB Decision No. 89___

It is not required that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. Nor is it required to establish that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity. (Clovis Unified School District (1984) PERB Decision No. 389.)

In Los Angeles County Federation of Labor v. County of Los Angeles (1984) 160 Cal.App.3d 905 [207 Cal.Rptr. 1] (LA County Federation).[25] the court dealt with a county charter amendment which, in effect, punished unions and employees for striking. Disciplinary provisions of the amendment would be applied to "any employee who instigates, participates in or affords leadership to a strike," or who "engage[s] in any concerted action to withhold . . .

[25] This case was filed and processed under the Meyers-Milias-Brown Act.

services" from the county. The court found that the words "instigates," "participates," and "engage[s]," which were undefined in the amendment, to be overbroad and unduly chilling, as they might restrain employees from talking to each other about a potential desire to strike, or from staying at home to avoid crossing a picket line. Thus, notwithstanding the severability clause, the court held that the objectionable portions permeated the amendment to such an extent that the entire amendment had to be stricken.

Similarly, BP 4141.6 prohibits not only strikes, walkouts and slowdowns, but "other such strike-related type activities" as well. Nowhere in the BP is this phrase defined, and Johnson's opinion as to its meaning is no guarantee against a broader interpretation by the District at some future time. Thus, unit employees could reasonably be restrained from talking among themselves or to STA about the possibility or need for a strike, and from engaging in rallies, leafletting, peaceful picketing, and the Work-to-Rule program, believing them to be prohibited. I therefore find that this language is overbroad and would tend to have a chilling effect on unit employees, restraining and coercing them from engaging in activities guaranteed in EERA section 3543(a). (LA County Federation; see also, Lafayette Park Hotel (1998) 326 NLRB 824 [159 LRRM 1243] and Aroostook County Regional Ophthalmology Center (1995) 317 NLRB 218 [150 LRRM 1310], decisions of the National Labor Relations Board striking down overbroad rules limiting protected activities.)

The BP also prohibits slowdowns of "discretionary" as well as of "mandatory" duties. In Los Angeles Unified School District (1990) PERB Decision No. 803, citing Palos Verdes Peninsula Unified School District (1982) PERB Decision No. 195, and Modesto City Schools (1983) PERB Decision No. 291, PERB reiterated the distinction between mandatory, discretionary, and purely voluntary duties, and held that only a slowdown or cessation of

purely voluntary duties is protected against punishment. Thus, I do not find the language of the BP unlawful in this regard.

As to the AR, it would, inter alia, deprive employees of their "payroll deduction privileges," a right guaranteed by EERA section 3543.1. In Rio Hondo Community College District (1983) PERB Decision No. 292 (Rio Hondo). PERB held that eliminating payroll dues deductions is unlawful per se, even by emergency no-strike resolution, and stated, at p. 10:

> [I]f in the name of preparedness a district proceeds to violate legally protected rights of employees and employee organizations, then calm and reason have given way to labor law violations.

Further, although the AR has not yet been implemented, PERB has held that "even without implementation, the threat to suspend the statutorily protected employee organization rights in an emergency resolution constitutes a violation of subsection 3543.5(a)." (Ibid., citing Barstow.)

Accordingly, I conclude that on their face, the prohibition of "other such strike-related type activities" in BP 4141.6 and the threatened "loss of payroll deduction privileges" in AR 4141.6 interfere with, restrain, and coerce employees in the exercise of their statutory rights to engage in activities in support of STA and to dues deductions, in violation of EERA section 3543.5(a).

REMEDY

EERA section 3541.5(c) gives 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,... as will effectuate the policies of this chapter.

Here, the District refused to meet and negotiate in good faith with STA regarding matters within the scope of representation, i.e., the adoption of Administration Regulation

4141.6 and the impact of Board Policy 4141.6. The District also interfered with, restrained, and coerced employees in the exercise of their statutory rights to form, join and participate in the activities of an employee organization for the purpose of representation, by its promulgation of an overly broad policy prohibiting concerted activities and by its threat to cease payroll dues deductions. The appropriate remedy for the refusal to negotiate is an order that the District rescind the AR, and meet and negotiate in good faith with STA regarding the impact of the BP. (Barstow.) The appropriate remedy for interference, restraint and coercion is an order to rescind the offending language in Board Policy 4141.6 and in Administrative Regulation 4141.6. (LA County Federation; Rio Hondo.)[26]

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

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, those portions of the charge and complaint alleging the Santee Unified School District's (District) unilateral adoption of Board Policy 4141.6 (BP 4141.6) is dismissed. However, those portions of the charge and complaint alleging the District's unilateral adoption

[26] I do not find, however, that the phrase "other such strike-related type activities" so permeates the BP as to warrant striking the entire policy.

of Administrative Regulation 4141.6 (AR 4141.6) and its refusal to bargain the impact of BP 4141.6 in violation of the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c) are sustained. In addition, Unalleged violations of EERA section 3543.5(a) are found in certain language of BP 4141.6 and AR 4141.6. Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its governing board and its representatives, shall:

A. CEASE AND DESIST FROM:

1. Maintaining AR 4141.6, which we adopted unilaterally without providing the Santee Teachers Association (STA) prior notice or opportunity to bargain;

2. Failing and refusing to meet and negotiate in good faith with STA regarding the impact of BP 4141.6;

3. Denying to STA rights guaranteed by EERA, including the right to represent bargaining unit members;

4. Interfering with, restraining, and coercing employees in the exercise of rights guaranteed by EERA, including the right to be represented by, and engage in activities in support of, their chosen representative;

5. Interfering with, restraining, and coercing employees in the exercise of their statutory rights by prohibiting them from engaging in "strike-related type activity" in BP 4141.6, and by threatening them with "loss of payroll deduction privileges" in AR 4141.6.

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

1. Within ten (10) working days of the service of a final decision in this matter, rescind AR 4141.6;

2. Upon request, meet and negotiate with STA regarding the impact of BP 4141.6, until the parties reach agreement or exhaust the statutory impasse procedures;

3. Within ten (10) working days of the service of a final decision in this matter, rescind the language "other such strike-related type of activity by employees" from BP 4141.6;

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

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

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with 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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, 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 Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ann L. Weinman
Administrative Law Judge