STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BERKELEY COUNCIL OF CLASSIFIED EMPLOYEES, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2732-E PERB Decision No. 2268 May 29, 2012

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Berkeley Council of Classified Employees; Kingsley Bogard by Paul R. Gant, Attorney, for Berkeley Unified School District.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Berkeley Unified School District (District) to a proposed decision (attached) of a PERB administrative law judge (ALJ). The ALJ concluded that the District unlawfully insisted to impasse on a non-mandatory subject of bargaining during successor agreement negotiations with the Berkeley Council of Classified Employees (BCCE), and thereby violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA).[1]

The Board has reviewed the entire record in this case, including the parties' stipulation of facts, the ALJ's findings of fact and conclusions of law, the District's exceptions, and BCCE's response thereto. The ALJ's findings of fact are supported by the record and neither

[1] EERA is codified at Government Code section 3450 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

party excepts thereto.[2] Accordingly, we adopt the ALJ's findings of fact as the findings of the Board itself, except as expressly noted below. The ALJ's conclusions of law are well reasoned and in accordance with applicable law. We adopt the ALJ's conclusions, as supplemented by our discussion below of issues raised by the District's exceptions.

FACTUAL SUMMARY

The parties' stipulated facts are described in the proposed decision. In short, the parties' collective bargaining agreement expired on June 30, 2007. From June 30, 2007 through mid- June 2008, the parties sought agreement through negotiations for a successor agreement. PERB declared impasse in mid-June 2008, and thereafter the parties continued to negotiate with assistance of a mediator.

The parties' expired prior agreement contained a provision permitting the District to recoup erroneous overpayments in salary by withholding from the employee's wages "over the same period of time the error occurred unless other arrangements are made with the Director of Classified Personnel or designee." The District demanded to include this provision in the successor agreement. BCCE refused to renew the recoupment provision, contending that the old language improperly waived statutory rights of employees, and instead proposed alternate language. The District insisted on the old language. It is undisputed that during their negotiations and mediation BCCE contended that the recoupment provision waived employee rights and was a non-mandatory subject of bargaining.[3]

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[2] PERB Regulation 32300(c) provides that "[a]n exception not specifically urged shall be waived." (PERB regs. are codified at Cal. Code Regs., tit.8, sec. 31001, et seq.)

[3] The ALJ relied on the parties' written communications included with their stipulation to find that "BCCE made clear to the District [BCCE's] position that it could not be required to bargain over the subject" of renewal of the recoupment provision. The District does not except to this finding, and we do not disturb it here. (PERB Reg. 32300(c).) We deem this finding sufficient on the matter of notice by BCCE to the District that it declined to negotiate renewal of the expired recoupment provision, despite our dissenting colleague's different view.

On September 30, 2008, BCCE filed the instant charge. Thereafter, in October 2008 the parties determined they had resolved all other outstanding issues relating to the successor agreement, including compensation and benefits. The remaining unresolved issue concerns the disputed recoupment provision, as to which the parties sought but were unable to reach agreement.

DISCUSSION

The District challenges four of the ALJ's conclusions of law. We review each.

1. The District excepts first to the ALJ's conclusion at page 6 that the recoupment procedure proposed by the District was "indistinguishable from the recoupment procedure considered" in *California State Employees' Assn. v. State of California* (1988) 198 Cal.App.3d 374 (*CSEA*). We deny the exception.

CSEA involved a state effort to recoup alleged salary overpayments to individual employees. After an audit allegedly revealed erroneous salary advances (overpayments), the state sent affected employees a form letter notifying each of the amount and the basis for the claimed overpayment. The letter described a repayment schedule for deducting the repayments from wages, and offered the employee a one-week opportunity to negotiate a modification to the proposed repayment schedule based on hardship.

The *CSEA* court ruled that the state's recently-enacted statutory policy of protecting employee wages took precedence over an older statute ostensibly permitting the state to recoup alleged overpayments by offsetting past overpayments directly against current employee

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Moreover, we conclude below at page 11 that the District's proposal to renew the recoupment provisions was not merely non-mandatory but at variance from mandatory external law and thus nonnegotiable. While obliged to discuss whether a subject is within the scope of representation (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 (Healdsburg)), a negotiating party does not waive its right not to negotiate over an otherwise non-negotiable subject by failing to object that the subject is also non-mandatory.

wages. The *CSEA* court quoted with approval from *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, at p. 6, as follows:

> [t]he policy underlying the state's wage exemption statutes is to insure that regardless of the debtor's improvidence, the debtor and his or her family will retain enough money to maintain a basic standard of living, so that the debtor may have a fair chance to remain a productive member of the community. . . . Moreover, fundamental due process considerations underlie the prejudgment attachment exemption. Permitting appellant to reach respondent's wages by setoff would let it accomplish what neither it nor any other creditor could do by attachment and would defeat the legislative policy underlying that exemption. We conclude that an employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee.

(*CSEA*, at p. 377)

The District urges that because its proposed recoupment procedure was contractual – a bargaining proposal relating to wages – its proposed procedure was dissimilar to and distinguishable from the statutory recoupment procedure used in *CSEA*. We are not persuaded.

We conclude, with the ALJ, that it is the similarities, not the distinctions, between the District's procedure and that in *CSEA* which are of moment to our analysis. Both procedures transgress state policy protecting employee wages from prejudgment attachment. Like the statutory procedure in *CSEA*, the District's proposed procedure permits the District, without employee consent and without a court order or other due process, to withhold alleged past overpayments from wages currently due and owing to the employee. The District's proposed recoupment procedure, like the statutory procedure in *CSEA*, conflicts with mandatory external law.

2. The District excepts next to the ALJ's conclusion at page 6 that the District cited "no authority persuasively contradicting" the holding in *CSEA*. We deny the exception.

The District relies on *Social Services Union v. Board of Supervisors* (1990) 222 Cal.App.3d 279 (*Social Services*), contending that it constitutes "persuasive authority" contradicting the holding in *CSEA*. We are not persuaded.

We conclude that *Social Services* does not contradict *CSEA*. *Social Services* involved a wage deduction reimbursing the County of Tulare (County) for premium increases in employee health insurance dependent coverage paid by the County while negotiations and mediation transpired under the Meyers-Milias-Brown Act (MMBA)[4] over those very premium increases. After mediation the parties proceeded to a final outcome under procedures in the County's local rules (local rules) adopted pursuant to the MMBA.

Under the local rules a bargaining dispute unresolved after mediation would be submitted to the County's Board of Supervisors for a binding decision on the merits. Among the disputed matters thus ultimately determined by the Board of Supervisors was how employees with dependent coverage would pay the premium increases accrued during the fourteen (14) month period over which bargaining and mediation had occurred. The Board of Supervisors, in the exercise of its discretion under its local rules, determined that the employees with dependent coverage should repay the County the fourteen (14) month cost-of-premium increases in prospective monthly wage deductions over eight months.[5]

The union thereafter challenged the prospective monthly deductions, likening them to the wage deductions disapproved of in *CSEA* and claiming that in any event the union lacked authority to waive employee rights under the state policy forbidding prejudgment wage attachments. The *Social Services* court acknowledged the state policy underlying *CSEA*'s rule

[4] MMBA is codified at Government Code section 3500 et seq.

[5] Under the EERA, an employer's ability to shift to employees the cost of increased health insurance premiums during the period of negotiations and impasse resolution turns on the parties' past practice and the dynamic status quo. (*Pajaro Valley Unified School District* (1979) PERB Decision No. 51 (*Pajaro*).)

prohibiting employers from attaching employee wages to recoup alleged wage overpayments. The *Social Services* court then distinguished *CSEA*, ruling that wage deductions for increased insurance premiums were expressly permitted under Labor Code section 224. In these circumstances, concluded the court, application of the *CSEA* rule would be inappropriate.

Labor Code section 224 provides:

> The provisions of Sections 221, 222 and 223 shall in no way make it unlawful for an employer to withhold or divert any portion of an employee's wages when the employer is required or empowered so to do by state or federal law or when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute, or when a deduction to cover health and welfare or pension plan contributions is expressly authorized by a collective bargaining or wage agreement.
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> Nothing in this section or any other provision of law shall be construed as authorizing an employer to withhold or divert any portion of an employee's wages to pay any tax, fee or charge prohibited by Section 50026 of the Government Code, whether or not the employee authorizes such withholding or diversion. (Emphasis added.)

The *Social Services* court observed:

> The County correctly contends that Labor Code section 224 is a 'specific' statute permitting the withholding of insurance premiums by an employer 'when a deduction is expressly authorized in writing by the employee to cover insurance premiums, hospital or medical dues, . . . or when a deduction [to cover health and welfare or pension plan contributions[6]] is expressly authorized by a collective bargaining or wage agreement.'
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> Of course, the County had no right to collect additional insurance premiums until bargaining obligations under the MMBA were concluded. At that time, however, prospective salary deductions to cover premium increases were authorized by the board's resolution as part of the collective bargaining process. As such,

[6] The bracketed portion was omitted from the text of Labor Code section 224 quoted in the court's opinion.

> the deductions were not prohibited by the attachment and garnishment laws. To hold otherwise would be an unlawful interference with the rights and obligations of the parties to resolve disputes regarding conditions of employment by collective bargaining pursuant to the MMBA. It would also be violative of the MMBA's purpose of 'providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations.' (§ 3500.)

(*Social Services*, at pp. 286-287.)

The *Social Services* court also rejected the union's alternative claim that the union lacked authority to waive its members' rights under state attachment and garnishment laws. The court acknowledged that in general unions lack the capacity to waive employees' statutory or constitutional rights, but held that Labor Code section 224 "expressly authorizes agreements between public employees and their employers for the payment of health care costs through payroll deductions. (Lab. Code, § 224.)" (*Social Services*, at p. 287.)

The court's holding in *Social Services* is based on the accepted principle that parties have full power through collective bargaining to establish a health and welfare program and to provide for earnings deductions to pay for it, as expressly authorized by Labor Code section 224. The court in *Social Services* held that *CSEA* was not applicable because "[n]either the debt itself nor the method of payment resulted from collective bargaining." (*Social Services*, at p. 287.) The court in *Social Services* implicitly recognized the applicability of the *CSEA* rationale in a collective bargaining setting, but concluded that it did not apply "at least in the circumstances of this case" based on the factual distinctions between the two cases. (*Social Services*, at p. 288.) Based on those distinctions, the court concluded that the payroll deductions were not extra judicial seizures of the type condemned in *CSEA*, because both the obligation to pay increased costs incurred for dependent coverage and the method of payment by payroll deduction came into existence as a result of collective

bargaining. By contrast, here the debt itself does not result from collective bargaining. Instead, the debt comes into existence as a result of an employer's determination that it has overpaid an employee wages earned. *Social Services* therefore is not analogous.

We conclude for the reasons discussed above, and for those recited by the ALJ, that *Social Services* permits collectively-bargained deductions from wages, but only for the limited purposes authorized in Labor Code section 224.[7] *Social Services* does not authorize employers and unions to create through collective bargaining additional exceptions to the state policy confirmed in *CSEA* against prejudgment attachment of wages.

3. The District excepts next to the ALJ's conclusion at page 7 that the disputed recoupment provision was not a mandatory subject of bargaining, and that because of BCCE's lawful refusal to negotiate over it, the provision expired. We deny the exception.

The District relies, in part, for this exception on its own reading of *CSEA* and *Social Services*. We have considered the District's analysis of these cases, and as discussed above, we conclude the District is mistaken. In addition, the District urges that under traditional scope of representation analysis its recoupment proposal relates to wages and thus is a mandatory subject of bargaining. We disagree.

Generally, matters related to wages fall within the scope of representation under our statutes, including EERA. (*Anaheim Union High School District* (1981) PERB Decision No. 177; *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850 (*San Mateo*).) Thus, matters relating to wages customarily are mandatory subjects of bargaining.

[7] Statutory exceptions to a general rule conferring rights are narrowly construed. (*Los Rios Community College District* (1977) EERB Decision No. 18 [Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.]; *City of National City v. Fritz* (1949) 33 Cal.2d 635.)

However, when external law establishes immutable provisions in an area otherwise within the scope of representation, matters are negotiable only to the extent of the employer's discretion, that is, to the extent that the external law does not "set an inflexible standard or insure immutable provisions." (*San Mateo,* at pp. 864-865.) Thus, where the external law is silent or otherwise fails clearly to "set an inflexible standard or insure immutable provisions," the parties may negotiate. (*Ibid.*) Contrarily, where external law sets an immutable standard, the parties may negotiate only over including such a provision without a change in substance in their negotiated agreement. (*Id.* at p. 866.)

We conclude, with the ALJ, that California's state policy against prejudgment attachment of employee wages, codified in garnishment and attachment statutes (discussed in *CSEA*) and in Labor Code sections 221-224 (discussed in *Social Services*) establishes an inflexible standard and immutable provisions. Under California law, absent an employee's written authorization an employer is forbidden to reduce wages currently due and owing to the employee in order to recoup monies allegedly due and owing by the employee to the employer. Exceptions to this general rule are described in Labor Code section 224. The only exception permitted solely on the basis of an express authorization in a collective bargaining or wage agreement is a deduction for health and welfare or pension plan contributions. (Labor Code section 224; *Social Services*.)

The District urges that our precedents, and those of the National Labor Relations Board (NLRB), regarding voluntary payroll deductions support its contention that its recoupment procedure is a mandatory subject. We find the District's analogy to voluntary payroll deductions unpersuasive. The issue there was whether the employer would provide to employees who voluntarily request it, the service of withholding from their wages an authorized sum and remitting the sum to a third party designated by the employee.

(*Jefferson School District* (1980) PERB Decision No. 133.) The deductions were voluntary, authorized by employees, not involuntary recoupment initiated by the employer of wages allegedly overpaid in a prior pay period.

The District relies also on our decision in *Laguna Salada Union School District* (1995) PERB Decision No. 1103 (*Laguna Salada*). There, we held that after negotiating with a teachers' union for general wage adjustment (there a decrease), and maintaining the status quo wage scale throughout the negotiations and impasse resolution procedures, the school district employer was obligated to negotiate as well over the methodology of adjusting the employees' wages to the new (there lower) wage level, and that this subject matter was not reasonably comprehended in the school district employer's last best and final offer to the teachers' union.[8] In that case, the employer unilaterally imposed the adjustment for an entire annual salary within a single one-month payroll period. We concluded that the methodology for implementing the overall wage adjustment, like the adjustment itself, was negotiable, and that having failed to address the matter in its last best and final offer to the union, the employer acted unlawfully when it thereafter imposed a lump-sum adjustment in the final payroll period for the fiscal year.

We distinguish *Laguna Salada* from the case before us. Here, the District's proposal seeks the BCCE's agreement to transgress external law forbidding an employer to implement a prejudgment attachment of an individual employee's wages based on an alleged, previous overpayment to the particular employee. In *Laguna Salada*, by contrast, the employer implemented a general wage adjustment applicable unit wide. This case is not about the methodology used by an employer for adjusting a negotiated decrease in wages, as was the

[8] By contrast in *Social Services* the employer and the union did negotiate without agreement on the methodology for implementing the affected employees' payment of the premium increase for health benefits dependent coverage.

case there. This case is about agreeing to allow an employer to set off a prior alleged overpayment against wages due without the employee's written authorization – a type of self-help collection that violates the absolute exemption wages have from prejudgment attachments. As the California Supreme Court has long expressed, "[w]ages of workers in California have long been accorded a special status generally beyond the reach of claims by creditors including those of an employer." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 325.)

We conclude, with the ALJ, that the District's proposed recoupment procedure for wages allegedly overpaid to individual employees exceeds the ambit of negotiable exceptions to California's policy protecting employee wages from prejudgment attachment, and that the District's proposal is therefore a non-mandatory bargaining subject to which the parties had no right to agree in the first place as it was at variance from mandatory external law and thus nonnegotiable. As the California Supreme Court held in *San Mateo*, "[w]here statutes are mandatory, as are these [Education code provisions], a contract proposal which would alter the statutory scheme would be nonnegotiable ... ." (*San Mateo*, at p. 866.) The state statutes regarding wage garnishment, attachment and deductions are mandatory. Because the recoupment procedure embodied in the contract provision here at issue alters the state's statutory scheme, the provision is not only non-mandatory but, more importantly, non-negotiable.[9]

The District contends in addition that as a provision in its expired collective agreement with BCCE, its proposed recoupment procedure survived expiration of its prior collective bargaining agreement, and that upon satisfying its duty to bargain over renewal thereof,

[9] We note that negotiating parties are free to propose and to include in their collective bargaining agreement references to and restatements of mandatory external law, but not provisions inconsistent therewith. (*San Mateo*, at p. 866.)

including exhaustion of mandatory impasse procedures, the District may continue to implement this contractual procedure. We disagree.

As a general matter, employers and unions operating under our statutes must meet and negotiate in good faith regarding mandatory bargaining subjects, either to an agreement or through the conclusion of mandatory impasse resolution procedures. (*San Mateo County Community College District* (1979) PERB Decision No. 94 (*San Mateo CCD*).) During the negotiations and any impasse procedures, the duty to participate in good faith in negotiations (and the correlative duty during impasse procedures to participate therein in good faith), oblige the parties not to act unilaterally regarding mandatory bargaining subjects. (*Pajaro*; *San Francisco Community College District* (1979) PERB Decision No. 105; accord, *NLRB v. Katz* (1962) 369 U.S. 739; *San Mateo CCD*; *Moreno Valley Unified School District* (1982) PERB Decision No. 206 (*Moreno Valley*).)

During negotiations and impasse resolution procedures, parties must refrain from changing the policies concerning mandatory subjects of bargaining contained in an expired collective agreement. (*San Mateo CCD*; *Moreno Valley*.) At the conclusion of impasse resolution procedures, if impasse persists, or if impasse is broken and thereafter is again reached, the employer may implement proposals on mandatory subjects "reasonably comprehended within previous offers made and negotiated between the parties." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 33, 38; *Modesto City Schools/Modesto City Schools, et al.* (1980) PERB Order IR-12, pp. 4-5; *Laguna Salada*.) However, even at impasse, an employer may not impose proposals on non-mandatory subjects or which conflict with statutory rights of employees or of the union. (*Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*); *Rowland Unified School District* (1994) PERB Decision No. 1053.)

By contrast, as to non-mandatory bargaining subjects, employers and unions operating under our statutes may meet and negotiate in good faith regarding such subjects, or they may decline to do so. (*Lake Elsinore School District* (1986) PERB Decision No. 603 (*Lake Elsinore*); *Chula Vista.*) Negotiating over a non-mandatory subject does not convert it to a mandatory subject, nor does it oblige the party who has begun so negotiating to continue. (*Chula Vista.*) Subject to the duty to discuss whether any matter is within the scope of representation (*Healdsburg*, at pp. 8-10), a party may at any time announce its decision not to negotiate further regarding a non-mandatory subject, and decline thereafter to discuss it. (*Chula Vista.*) A party may not condition its negotiation of, or agreement to, mandatory subjects on agreement by the other party to negotiate on or reach agreement on a non-mandatory subject. (*Lake Elsinore*; *Chula Vista.*) Conditioning to impasse an agreement on any mandatory subject upon the other party's agreement regarding a non-mandatory subject constitutes a per se refusal to bargain in good faith as to the mandatory subject. (*Ibid.*) Parties who reach final agreement on a non-mandatory subject may incorporate that agreement along with other agreements into an overall collective bargaining agreement. (*Poway Unified School District* (1988) PERB Decision No. 680 (*Poway*).) Once ratified the agreement on the non-mandatory subject is effective for its term. (*Eureka City School District* (1992) PERB Decision No. 955; *Poway.*) At the expiration of the agreement on the non-mandatory subject either party may refuse to negotiate or renegotiate on that non-mandatory subject. (*Ibid.*) Neither party is required by its statutory duty regarding mandatory subjects to refrain from making a change in any non-mandatory subject. (*Ibid*; *El Centro Elementary School District* (2006) PERB Decision No. 1863.)

Having exhausted its EERA bargaining and impasse resolution obligations, an EERA employer may impose. However, by exhausting these statutory obligations, an EERA

employer neither sheds its external law limitations, nor acquires greater authority over employee terms and conditions of employment.

Labor Code section 224 permits withholding "required or empowered. . . . by state or federal law." This language refers to mandatory withholding of payroll taxes and the like, or to levies based on post-judgment debts pursuant to court order, but does not permit withholding of the employer's own pre-judgment claims of past wage overpayments. (Dept. Industrial Relations, DLSE Opn. Letters, Nos. 1998.07.31 (July 31, 1998) p. 2 [designed to prevent "an employer from being able to deduct from an employee's wages anything other than those items that the employer is obligated by law to make ..."]; 1998.09.18 (Sept. 18, 1998) p. 2 [examples given include "income tax withholding, FICA and the like"].)[10]

EERA obliges unions and employers to undergo defined processes in good faith pursuit of agreement. EERA neither requires nor empowers an employer to make deductions from wages due an employee in order to satisfy the employer's own claims. As to claims against its employees, an EERA employer stands in the same position as any other pre-judgment creditor under California's wage exemption statutes, that is, a court order is a prerequisite to a levy on employee wages to satisfy the employer's claim.

We thus conclude, with the ALJ, that the recoupment provision in the District's prior agreement with BCCE was a non-mandatory subject, and consequently neither party was

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[10] *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029, fn. 11:

> The DLSE 'is the state agency empowered to enforce California's labor laws, including IWC wage orders.' "(*Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 581. . . .) The DLSE's opinion letters," ' " 'while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.' " ' " (*Seymore v. Metson Marine, Inc.* (2011) 194 Cal.App.4th 361, 369, fn. 5 . . . ; see *Morillion*, at p. 584 [relying on DLSE opinion letters to inform its interpretation of the IWC's wage orders].)

obliged to negotiate nor renew it. We also conclude, with the ALJ, that as a non-mandatory subject, the recoupment provision in the District's prior agreement with BCCE was not part of the status quo on mandatory subjects. Thus, the recoupment provision did not survive expiration of that agreement, since only mandatory subjects are governed by EERA duty to make no change while negotiating or participating in impasse resolution procedures.

4. The District excepts lastly to the ALJ's proposed order at page 7 that the District violated EERA section 3543.5(a), (b) and (c) by insisting to impasse on a non-mandatory subject of bargaining. We deny the exception.

We have concluded, as discussed herein above, that the District failed and refused to meet and negotiate in good faith with BCCE when the District insisted to impasse on a non-mandatory bargaining subject, viz., its recoupment procedure. We conclude that the District violated EERA section 3543.5(a) and (c) as well. We explain.

Where the same employer conduct concurrently violates more than one unfair practice provision, it is the duty of the Board to find more than one violation. (*San Francisco Community College District* (1979) PERB Decision No. 105 (*San Francisco*).) The District's insistence to impasse on the recoupment provision, a non-mandatory subject, violated EERA section 3543.5(b) by denying the BCCE its statutory right as an exclusive representative to represent unit members in their employment relations with the District. (EERA § 3543.1(a); *San Francisco*.) The same conduct interfered with employees because of their exercise of representational rights in violation of EERA section 3543.5(a). As the Board observed in *San Francisco*:

> Collective negotiations [are] the cornerstone of the EERA. To this end, employees have the right to select an exclusive representative to meet and negotiate with the employer on their behalf. (Sec. 3543.) An employer's [insistence to impasse on a non-mandatory subject of bargaining] is in derogation of its duty to negotiate with the exclusive representative and necessarily

> interferes with employees in their exercise of protected rights. This interference constituted at least slight harm, and although the District offered . . . reasons for its actions, none constituted operational necessity that might excuse the District's conduct. . . . (*Carlsbad Unified School District* (1/30/79) PERB Decision No. 89 at pages 1-12.)

(*San Francisco*, at pp. 19-20.)

PERB has broad authority to remedy unfair practices. (EERA § 3541.5(c).) We conclude that the ALJ's proposed remedy falls well within the ambit of that authority.

CONCLUSION

We hold that by insisting upon a proposal permitting it to recoup from current wages alleged wage overpayments made in prior payroll periods, the District insisted to impasse on a non-mandatory subject of bargaining, thereby violating EERA section 3543.5(c). We hold that this conduct likewise denied to employees their right to participate in an employee organization for the purpose of representation, thereby violating EERA section 3543.5(a), and that this conduct likewise denied to BCCE, an employee organization, rights to represent employees in their employment relations with the District, thereby violating EERA section 3543.5(b).

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to the Government Code, Educational Employment Relations Act (EERA) section 3541.5(c), it is hereby ORDERED that the Berkeley Unified School District (District) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Insisting to impasse on its proposal for recoupment of overpayments.

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

3. By the conduct described in paragraph 1, denying to the Berkeley Council of Classified Employees (BCCE) its right to represent its members in their employment relations with the District.

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

1. Upon request, reopen the negotiations for the successor agreement without maintaining its proposal, or in the alternative (since the parties have reached agreement as to the remaining subjects), if it is BCCE's choice, withdraw the proposal for recoupment of overpayments and execute the parties' remaining agreement.

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

3. Within thirty (30) workdays following service of a final decision in this matter, notify the General Counsel of the Public Employment Relations Board, or her designee, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on BCCE.

Chair Martinez joined in this Decision

Member Dowdin Calvillo's dissent begins on page 18.

DOWDIN CALVILLO, Member, dissenting: I respectfully dissent from the majority opinion. In my view, the record fails to establish that the Berkeley Unified School District (District) unlawfully insisted to impasse on a non-mandatory subject of bargaining. I therefore would reverse the administrative law judge's (ALJ) proposed decision for the reasons set forth below.

DISCUSSION

Notice of Opposition to Bargaining

As noted by the majority, parties are free to negotiate over non-mandatory subjects of bargaining if they wish. (*Lake Elsinore School District* (1986) PERB Decision No. 603 (*Lake Elsinore*); *Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*).) PERB has held repeatedly, however, that a party opposing negotiation over a purportedly non-mandatory subject must communicate its opposition to further negotiations about the non-mandatory proposal. (*San Mateo County Community College District* (1993) PERB Decision No. 1030 (*San Mateo*); *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2081-S (*DPA*); *Chula Vista.*) In *San Mateo*, the Board stated:

> Under *Lake Elsinore*, the Board held that parties may engage in negotiations dealing with permissive, nonmandatory subjects of bargaining, but once a party subsequently decides to take a position that the nonmandatory subject not be included in the collective bargaining agreement, that party must express its opposition to further negotiation on the proposal as a prerequisite to charging the other party with bargaining to impasse on a nonmandatory subject of bargaining.

San Mateo involved the issue of whether released time for union activities was a mandatory subject of bargaining. The Board held that, while there was a statutory right to reasonable released time under Higher Education Employer-Employee Relations Act

(HEERA)[1] section 3569, released time was also a mandatory subject of bargaining over which the employer could insist to impasse. The Board further held that, although the union raised the issue of released time during negotiations and impasse proceedings, there was no evidence that it informed the employer it would not bargain over the subject based upon its statutory right to reasonable released time.

DPA involved similar facts to the case before us. In *DPA*, the parties engaged in negotiations over several provisions that the union contended were non-mandatory subjects of bargaining because they would require a waiver of statutory rights. Those statutory rights are included in the provisions under Labor Code section 233 protecting against discrimination for having used sick leave to attend to a family member, the right to sue under the federal Fair Labor Standards Act, and statutory rights concerning notice of a proposed transfer. The union expressed its opposition to the state's proposal as follows:

> YOUR CURRENT PROPOSAL HAS SEVERAL SECTIONS THAT REQUIRE US TO AGREE TO WAIVE STATE LAW FOR OUR MEMBERS. THAT IS NOT A LEGITIMATE EFFORT TOWARDS AGREEMENT.

(Emphasis in original.)

The Board found this statement insufficient to put the state on notice that it opposed negotiations on the subjects it believed were non-mandatory, in that it merely set forth the union's belief that the state's proposals sought a waiver of state law, but did not communicate whether or not the union would be willing to consider such proposals. Thus, the Board held that the state did not unlawfully insist to impasse on a non-mandatory subject of bargaining requiring the waiver of statutory rights.

[1] HEERA is codified at Government Code section 3560 et seq.

Nothing in the record before the Board indicates that the Berkeley Council of Classified Employees (BCCE) ever communicated to the District a clear opposition to negotiating over the wage overpayment recoupment procedure. (*DPA*.) To the contrary, the parties stipulated that they exchanged proposals regarding Article 9.10.3 but were unable to reach agreement. The fact that the District did not except to the ALJ's finding that "BCCE made it clear to the District [BCCE's] position that it could not be required to bargain over the subject" of renewal of the recoupment provision does not establish that BCCE communicated a clear opposition to further negotiations over the provision. As in *DPA*, I would find this language insufficient to put the District on notice that BCCE would not negotiate over the subject, but merely set forth its belief that the subject was not a mandatory subject of bargaining. Accordingly, because BCCE failed to put the District on notice that it opposed further negotiations on what it believed was a non-mandatory subject, I would dismiss this case on that basis alone. (*DPA*; *San Mateo*.)

Mandatory Subject of Bargaining

Even assuming, arguendo, that BCCE communicated its opposition to further negotiations to the District, it must still establish that the wage overpayment recoupment provisions of Article 9.10.3 amounted to a waiver of statutory rights, such that it constituted a non-mandatory subject of bargaining over which the District was not privileged to insist to the point of impasse.

In support of its determination that the District could not continue to impose the provisions of Article 9.10.3 after impasse, the majority, like BCCE, relies on the decision of the court of appeal in *California State Employees' Assn. v. State of California* (1988) 198 Cal.App.3d 374 (*CSEA*). In that case, the state sought to recoup alleged erroneous salary

overpayments by unilaterally imposing a repayment schedule on affected employees under which the state would deduct the amounts due directly from the employees' paychecks. Unlike in this case, there was no collective bargaining agreement provision addressing the issue, and the state did not seek to bargain prior to imposing the deductions. Instead, the state relied on the provisions of Government Code section 17051, which had previously been interpreted to authorize the setoff of prior wage overpayments from current wages.[2] (See *Geftakys v. State Personnel Board* (1982) 138 Cal.App.3d 844.) The court held, however, that the subsequently-enacted wage garnishment law superseded the more general provisions of Government Code section 17051 and "provides the exclusive judicial procedure by which a judgment creditor can execute against the wages of a judgment debtor." Thus, the court concluded, the state was not authorized to setoff the wage overpayments from the wages due to the employees. (*CSEA* at p. 377, citing *Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6.)

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[2] Government Code section 17051 provides:

> Whenever any warrant is drawn in favor of a payee having a claim against the State and is delivered to a State agency for delivery to a payee, and prior to delivery to the payee any facts or circumstances exist which would affect the validity or alter the amount of the claim, the person authorized to make payments out of any funds under the direct control of the State agency may indorse and deposit the warrant in the treasury to the credit of the fund or appropriation upon which it was drawn or deposit it to the credit of the appropriate account under his control. Where such a warrant is deposited to the account under the control of the State agency, it shall, when necessary, pay the portion of the claim then due and payable and return the balance to the treasury to the credit of the fund or appropriation upon which the warrant was drawn.

I believe the more analogous situation to the one at hand was addressed by the court in *Social Services Union v. Board of Supervisors* (1990) 222 Cal.App.3d 279 (*Social Services*). In *Social Services*, the Tulare County board of supervisors authorized a twenty percent increase in the premiums for dependent health insurance coverage. The parties bargained over the implementation of the increase, during which time the county continued to pay the increase. Upon reaching impasse and exhaustion of the county's impasse procedures, the county unilaterally sought to recoup the past due employee health insurance premium increases by deducting them from employee paychecks over a specified period of time. The union raised the same arguments as in this case, that it could neither voluntarily agree through collective bargaining to collection of the past due premiums by way of payroll deduction without individual authorization, nor could the county legally do so upon termination of the impasse procedures, citing *CSEA*. The court disagreed, holding that the county was entitled to implement its proposal upon reaching impasse and exhaustion of the local impasse resolution procedures. In so doing, the court found that the deductions "were authorized by the board's resolution as part of the collective bargaining process" and, as such, were not prohibited by the attachment and garnishment laws. Thus, the court stated:

> To hold otherwise would be an unlawful interference with the rights and obligations of the parties to resolve disputes regarding conditions of employment by collective bargaining pursuant to the MMBA. It would also be violative of the MMBA's purpose of 'providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between public employers and public employee organizations.'

(*Social Services* at pp. 286-287.)

The court distinguished *CSEA*, finding that "[n]either the debt itself nor the method of payment resulted from collective bargaining." In contrast,

> the obligation of the affected employees to pay the increased costs incurred for coverage of their dependents, as well as the method of payment (by payroll deductions over eight pay periods), came into existence as a result of collective bargaining and impasse proceedings undertaken pursuant to the MMBA and the County policy. Therefore, the payroll deductions did not constitute extrajudicial seizures condemned in [*CSEA*].

The court in *Social Services* also addressed the argument that, even if the right to recoup premiums is properly determined through collective bargaining procedures, the union cannot voluntarily waive its members' rights under the attachment and garnishment laws. While noting that "[g]enerally, a collective bargaining agreement may not waive statutory rights which arise from an extraordinarily strong and explicit state policy" (citing *Wright v. City of Santa Clara* (1989) 213 Cal.App.3d 1503, 1506) and that "[c]ollective bargaining agreements may not contain provisions abrogating employees' fundamental constitutional rights" (citing *Phillips v. State Personnel Bd.* (1986) 184 Cal.App.3d 651, 660), the court found that the Labor Code expressly authorizes agreements between public employees and their employers for the payment of health care costs through payroll deductions. Thus, the court concluded, "public policy would not be promoted by limiting the County's recourse to the filing of individual lawsuits against each of its affected employees."

The same principles apply to this case. On its face, the recoupment of wage overpayments relates to wages, an enumerated subject of bargaining. (EERA § 3543.2(a).) PERB has also held that the methodology used by an employer for adjusting wages is a mandatory subject of bargaining. (*Laguna Salada Union School District* (1995) PERB Decision No. 1103.) In this case, there is no dispute that the parties bargained over the

recoupment provision and exhausted applicable impasse resolution procedures. Thus, as in *Social Services*, the method of repayment of wage overpayments resulted from the collective bargaining and impasse procedures undertaken pursuant to EERA. While the majority argues that the "debt itself" did not result from collective bargaining, the amount of wages properly due to employees is a direct product of collective bargaining. Therefore, the obligation to repay overpaid wages did arise at least indirectly from collective bargaining. The issue in this case is the methodology to be used in recovering those overpayments.

Accordingly, as in *Social Services*, I do not find that, under the circumstances presented here, public policy would be promoted by limiting the District's recourse to the filing of individual lawsuits against each affected employee.[3]

Based upon the foregoing, I conclude that the District did not violate EERA when it insisted to impasse on the procedure for recovering wage overpayments set forth in Article 9.10.3.

[3] Because I would find that the wage overpayment procedure set forth in Article 9.10.3 was a mandatory subject of bargaining, I would not address the District's alternate theory that Article 9.10.3 itself continued in effect upon expiration of the agreement.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-2732-E, *Berkeley Council of Classified Employees v. Berkeley Unified School District*, in which the parties had the right to participate, it has been found that the Berkeley Unified School District (District) violated the Government Code, Educational Employment Relations Act (EERA) section 3543.5(a), (b) and (c), by insisting to impasse on its proposal for recoupment of erroneous overpayments directly from the paychecks of employees.

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

A. CEASE AND DESIST FROM:

1. Insisting to impasse on its proposal for recoupment of overpayments.

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

3. By the conduct described in paragraph 1, denying to the Berkeley Council of Classified Employees (BCCE) its right to represent its members in their employment relations with the District.

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

1. Upon request, reopen the negotiations for the successor agreement without maintaining its proposal, or in the alternative (since the parties have reached agreement as to the remaining subjects), if it is BCCE's choice, withdraw the proposal for recoupment of overpayments and execute the parties' remaining agreement.

Dated: _____ BERKELEY UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

BERKELEY COUNCIL OF CLASSIFIED EMPLOYEES, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-2732-E PROPOSED DECISION (December 10, 2009)

Appearances: Weinberg, Roger & Rosenfeld by Stewart Weinberg, Attorney, for Berkeley Council of Classified Employees; Miller Brown & Dannis by John R. Yeh and Ingrid A. Scherschel, Attorneys, for Berkeley Unified School District.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Berkeley Council of Classified Employees (BCCE) initiated this case under the Educational Employment Relations Act (EERA or Act)[1] by filing an unfair practice charge against the Berkeley Unified School District (District) on September 30, 2008. On January 2, 2009, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the District maintained to the point of bargaining impasse a proposal for contract language permitting the District to recover erroneous overpayments made to employees by deducting the overpaid amounts directly from the employee's paycheck. This conduct is alleged to violate section 3543.5(a), (b), and (c) of the Act.

On January 22, 2009, the District filed its answer to the complaint, denying the material allegations of the complaint and raising a number of affirmative defenses.

[1] The EERA is codified at Government Code section 3540 et seq. Hereafter all statutory references are to the Government Code unless otherwise indicated.

On February 3 and 19, 2009, informal settlement conferences were held, but the matter was not resolved.

On November 24, 2009, the parties, in lieu of formal hearing, submitted a stipulated record of facts for determination of the issues in the case, together with briefs, and the matter was submitted for decision.

FINDINGS OF FACT

By way of its answer, the District admitted that it was a public school employer within the meaning of section 3540.1(k).

The facts submitted by way of stipulation are as follows:

1. BCCE is an exclusive representative within the meaning of section 3540.1(e) of certain unit member employees of the District.

2. During the period from June 30, 2007, through September 30, 2008, and continuing thereafter, BCCE and the District were meeting and negotiating over a successor agreement to their July 1, 2004—June 30, 2007, agreement pursuant to section 3543.3. The complete expiring agreement has been entered in the record as an exhibit.

3. On June 16, 2008, PERB declared the parties were at impasse.

4. BCCE and the District conducted mediation sessions on July 28, September 4, 25 and 29, 2008, and October 24, 2008, with State-appointed mediator Steve Pearl in attendance at most sessions.

5. BCCE and the District have met and negotiated, and resolved all outstanding issues relating to the successor agreement, including compensation and benefits, with BCCE's salary increases for 2007-2008 and 2008-2009 paid to unit members retroactive to July 1 of each respective year. BCCE and the District also reached agreements on articles related to Payroll Advances, Industrial Accident Leave, Seniority and Salary Notice.

6. The only remaining unresolved issue between the parties pertains to the deduction of overpayments made to employees by the District, as provided in Article 9.10.3, "Errors in Payment," of the expiring agreement between the parties.

7 Article 9.10.3 of the July 1, 2004—June 30, 2007, agreement states that "[a] payroll overpayment shall be repaid to the District over the same period of time the error occurred unless other arrangements are made with the Director of Classified Personnel or designee."

8. BCCE and the District exchanged proposals regarding Article 9.10.3 of the July 1, 2004—June 30, 3007 agreement but were unable to reach agreement on an alternative provision.

9. On January 2, 2009, PERB issued the complaint in the instant case.

10. During the processing of the case the parties filed position papers with PERB, which have been included in the record.

ISSUE

Did the District unlawfully insist to impasse on maintenance of the payroll overpayment recoupment provisions because it was not a mandatory subject of bargaining?

CONCLUSIONS OF LAW

Insistence to impasse on non-mandatory subjects of bargaining constitutes a per se violation of the duty to bargain. (*Modesto City Schools* (1983) PERB Decision No. 291; *Lake Elsinore School District* (1986) PERB Decision No. 603, citing *NLRB v. Wooster Div. of the Borg-Warner Corp.* (1958) 356 U.S. 342.) Under the supersession doctrine, a bargaining proposal that would alter a statutory scheme, such as one set forth in provisions of the Education Code, is considered a non-mandatory subject of bargaining. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-866 [proposal that "would

replace or set aside" a statutory provision amounting to an "inflexible standard" or "immutable provision"].) A subject that is covered by statute is negotiable to the extent a party seeks to include such a provision without any change in substance. (*Id.* at p. 866.)

BCCE contends that the proposal authorizing the District to recoup overpayments occurring as a result of "error" is a non-mandatory subject of bargaining because the Labor Code prohibits such involuntary deductions from employee paychecks, and that by insisting to impasse on inclusion of such authorization in the successor agreement, the District violated the EERA. BCCE further contends that the overpayment recoupment provisions violate the Code of Civil Procedure which sets forth the exclusive means for such action in terms of wage garnishment and attachment procedures for the collection of legal debts.

The District contends that the recoupment provisions, which existed in the prior agreement, constitute a mandatory subject of bargaining that in no way conflicts with the Labor Code.[2] Further, it argues that because the parties previously agreed to the arrangement and the current negotiations resulted in agreement as to all subjects except the disputed provision, that provision continues in effect under the legal requirement obligating the employer to refrain from unilaterally changing contract terms following the expiration of an existing contract.

More specifically, BCCE relies on Labor Code sections 221, 222, and 224, for the proposition that employers in California are prohibited from imposing any involuntary deductions or offsets against wages earned and owed to the employee. Section 221 states, in pertinent part, that it "shall be unlawful for any employer to collect or receive from an

[2] Based on the correspondence of the parties included in the stipulated record, I find that BCCE made clear to the District its position that it could not be required to bargain over the subject. (See *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2081-S.)

employee any part of wages theretofore paid by said employer to said employee." Section 222 provides that it "shall be unlawful, in case of any wage agreement arrived at through collective bargaining, either willfully or unlawfully or with intent to defraud an employee, a competitor, or any other person, to withhold from said employee any part of the wage agreed upon." Section 224, citing sections 221 and 222, provides that it is not "unlawful for an employer to withhold or divert any portion of an employee's wages when the employer is required or empowered so to do by state or federal law or when a deduction *is expressly authorized in writing by the employee* to cover insurance premiums, hospital or medical dues, or other deductions not amounting to a rebate or deduction from the standard wage arrived at by collective bargaining."[3] (Italics added by BCCE.) BCCE asserts: "In other words, the employee may authorize a deduction from his or her paycheck, but unless the employee has done so in writing, the employer may not make a deduction unless authorized by law to do so. A union cannot agree on the employee's behalf."

In support of this reasoning, BCCE notes *California State Employees' Assn. v. State of California* (1988) 198 Cal.App.3d 374. In that case the union filed a petition for writ of mandate to compel the employer to make full salary payments without deductions to recoup prior alleged overpayments. (*Id.* at p. 375.) The state's defense relied on Government Code section 17051, which a prior appellate court had concluded authorized recoupment of such overpayments through deductions from salary warrants coming due. (*Id.* at p. 376, citing *Geftakys v. State Personnel Board* (1982) 138 Cal.App.3d 844.) The appellate court concluded that the *Geftakys* decision, previously relied upon, had been superseded by the Legislature's subsequent enactment of the wage garnishment and attachment procedures set forth in the

[3] See *San Lorenzo Education Assn. v. Wilson* (1982) 32 Cal.3d 841.

Code of Civil Procedure. (*Id.*, citing Code of Civil Procedure, sections 481.010, et seq. and 706.010, et seq.) The court stated:

> Both the wage garnishment law and the attachment law protect wages from creditors. The wage garnishment law provides the exclusive judicial procedure by which a judgment creditor can execute against the wages of a judgment debtor, except for cases of judgments or orders for support. [Citation.]

(*Id.* at p. 377.) The court added that such a recoupment procedure also conflicts with the "fundamental due process considerations" underlying the statutory debtor procedure. (*Ibid.*)

The parties have presented PERB with one issue: whether the language of the existing contract, proposed for renewal, constitutes a mandatory or non-mandatory subject of bargaining. I find that the contract proposal at issue here is a non-mandatory subject because it is indistinguishable from the recoupment procedure considered in *California State Employees' Assn. v. State of California*, *supra*, 198 Cal.App.3d 374. The District cites no authority persuasively contradicting the cited case, and I therefore choose to follow its reasoning in concluding that the recoupment procedure proposal here would be in conflict with the statutory provisions for wage garnishment and attachment procedures, as well as the state constitutional due process guarantee. (See *Randone v. Superior Court* (1971) 5 Cal.3d 536; *Rios v. Cozens* (1972) 7 Cal.3d 792; see also *California State Personnel Bd. v. California State Employees Assn.* (2005) 36 Cal.4th 758; *State Personnel Bd. v. Department of Personnel Administration, et al.* (2005) 37 Cal.4th 512.)

The District does cite *Social Services Union Local 35 v. Bd. of Supervisors of Tulare County, et al.* (1990) 222 Cal.App.3d 279. However, in that case the court concluded that the involuntary collection of increases to health insurance premium were distinguishable from the erroneous salary advances in *California State Employees' Assn. v. State of California*, *supra*, 198 Cal.App.3d 374, because the increased costs incurred "came into existence as a result of

collective bargaining" and therefore the deductions "did not constitute extrajudicial seizures." (*Social Services Union Local 35 v. Bd. of Supervisors of Tulare County, et al.*, *supra*, 222 Cal.App.3d at p. 287.) The court added that the wage garnishment and attachment law was not implicated since the employees, who had prior notice of the planned premium increases, could have chosen to cancel insurance coverage if they wished to avoid the involuntary deductions imposed once the union and the employer negotiated to impasse. (*Id.* at pp. 287-288; see also *Chula Vista City School District* (1990) PERB Decision No. 834, pp. 38 [union may not by contract waive employees' statutory rights].)

The District's contention that it acted lawfully in maintaining the practice of recoupment, alongside the subjects as to which the parties have reached agreement, must also be rejected. I find misplaced the District's reliance on the rule that provisions as to which agreement has not been reached are status quo terms and conditions the employer is required to maintain following the expiration of the prior agreement. Here the parties have agreed to disagree regarding whether the disputed proposal constitutes a mandatory subject of bargaining which the District maintained to impasse.[4] Since the disputed provision was not a mandatory subject of bargaining, it expires by virtue of BCCE's lawful assertion that it cannot be required to negotiate over it. (*Chula Vista City School District*, *supra*, PERB Decision No. 834, pp. 39-41.)

Accordingly, I find that the District violated section 3543.5(c) by insisting to impasse on a non-mandatory subject of bargaining. This conduct also violated sections 3543.5(a) and 3543.5(b).

[4] The stipulated record contains correspondence from the District stating its desire to move forward with conclusion of all terms for which there was agreement, and to sever the overpayment issue, in a manner similar to the way such subjects had been reserved for post-execution negotiation in the past.

REMEDY

Section 3541.5(c) grants PERB

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

In this case it has been determined that the District violated its obligation to negotiate in good faith by insisting to impasse on its proposal for recoupment of erroneous overpayments directly from the paychecks of employees. As a result of this violation, the District has also interfered with employees' right to participate in the activities of an employee organization of their choosing and denied BCCE its right to represent employees in their employment relations with a public school employer. The appropriate remedy is to cease and desist from such unlawful conduct.

The District shall also be ordered to reopen the negotiations for the successor agreement without maintaining its proposal, or in the alternative (since the parties have reached agreement as to the remaining subjects), if it is BCCE's choice, withdraw the proposal for recoupment of overpayments and execute the parties' remaining agreement. (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 946.)

It is also appropriate that the District be required to post a notice incorporating the terms of this order. The Notice should be signed by an authorized agent of the District indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting of such notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy.

(*Davis Unified School District* (1980) PERB Decision No. 116; see also *Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(b), it is hereby ordered that the Berkeley Unified School District (District) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Insisting to impasse on its proposal for recoupment of overpayments.

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

3. By the conduct described in paragraph 1, denying to the Berkeley Council of Classified Employees (BCCE) its right to represent its members in their employment relations with the District.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Upon request, reopen the negotiations for the successor agreement without maintaining its proposal, or in the alternative (since the parties have reached agreement as to the remaining subjects), if it is BCCE's choice, withdraw the proposal for recoupment of overpayments and execute the parties' remaining agreement.

2. Within ten (10) workdays of service of a final decision in this matter, post at all locations where notices to employees are customarily posted, copies of the Notice attached hereto as an appendix. The Notice must be signed by an authorized agent for the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive calendar days. Reasonable steps

shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered by an other material.

3. Within 30 workdays of service of a final decision in this matter, notify the General Counsel of the Public Employment Relations Board, or her designee, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the General Counsel, or her designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on BCCE.

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 the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

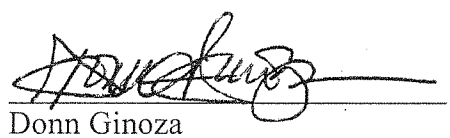
Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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, § 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, §§ 32135, subd. (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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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, §§ 32300, 32305, 32140, and 32135, subd. (c).)



Donn Ginoza
Administrative Law Judge