STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION and its CHAPTER 500, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5419-E PERB Decision No. 2326 September 20, 2013

Appearances: Christina C. Bleuler, Attorney, for California School Employees Association and its Chapter 500; Office of the General Counsel by Richard Ettensohn, Assistant General Counsel, for Los Angeles Unified School District.

Before Martinez, Chair; Huguenin, Winslow and Banks, Members.

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the California School Employees Association and its Chapter 500 (CSEA) to the proposed decision of a PERB administrative law judge (ALJ). The complaint, and underlying unfair practice charge, alleged that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by failing and refusing to bargain in good faith in violation of section 3543.5, subdivision (c), and by failing and refusing to participate in impasse procedures in good faith in violation of section 3543.5, subdivision (e) when, after having been notified by CSEA that they opposed including a District bargaining proposal in their successor agreement, the District insisted on it to impasse.

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

The dispute arose in the context of negotiations for a successor agreement. The District's proposal was to continue in effect contract language that defined certain reductions in hours and workyear bases as a "layoff." It also gave the District unfettered discretion over decisions with respect to such reductions. Through this contract language, the District sought to retain unilateral control over a mandatory subject of bargaining, i.e., hours of employment. Over CSEA's continuing objection, the District insisted on the proposal to the point of impasse.

CSEA filed an unfair practice charge upon which the Office of the General Counsel issued a complaint. After the formal hearing, the ALJ issued a decision dismissing the complaint and underlying unfair practice charge, concluding that the District's proposal concerned a mandatory subject of bargaining, which the District had the right to insist on to impasse.

We have reviewed the entire record in this matter and given full consideration to the exceptions and the response. We agree with the ALJ that the District did not commit an unfair practice in insisting to impasse on a bargaining proposal by which it sought to retain unfettered discretion over a mandatory subject of bargaining. As a general rule, an employer is privileged to implement its last, best and final offer upon impasse. For reasons explained below, however, we recognize an exception to this general rule for proposals such as the District's proposal here. Parties to a collective bargaining agreement are free to agree to a proposal by which the employer maintains unfettered discretion over a mandatory subject of bargaining. Where the parties do not reach agreement, however, such a proposal may not be implemented unilaterally as part of the employer's last, best and final offer. Accordingly, we hereby order that the ALJ's proposed decision be vacated and the matter remanded to the Chief ALJ for assignment to an ALJ to conduct further proceedings as directed herein.

FACTUAL BACKGROUND

CSEA is the exclusive representative of public school employees employed by the District in Bargaining Unit D. The 2005-2008 Agreement, Unit D (Office-Technical and Business Services), Los Angeles Unified School District and California School Employees Association (2005-2008 Agreement), was the last collective bargaining agreement entered into by and between the parties.

As reflected in the District's Board of Education Report dated October 14, 2008, the District sunshined its initial bargaining proposals for successor agreements commencing July 1, 2008, for Bargaining Units A, B, C, D, E, F, G, H and S. By letter to the Board of Education dated February 3, 2009, CSEA sunshined its initial bargaining proposal for a successor agreement to the 2005-2008 Agreement for Bargaining Unit D.

From March 25, 2009 through September 16, 2009, CSEA and the District were engaged in successor agreement negotiations. After 12 negotiating sessions, and the exchange of approximately 10 proposals and counter-proposals, the parties reached agreement on all but one issue. Appendix C had been part of the parties' collective bargaining agreements since 1991, but CSEA no longer agreed to its inclusion.

CSEA first made known its position on Appendix C in its February 3, 2009, letter to the Board of Education containing its initial bargaining proposal. The letter states: "CSEA maintains that, according to the Rowland decision, CSEA does not intend upon entering into an agreement to maintain the waiver in the parties' successor agreement. Please be advised that insistence to impasse on these subject matters constitutes a violation of the Educational Employment Relations Act Section 3542.5(c)." CSEA maintained its opposition to inclusion in the successor agreement of what it refers to as the "waiver" embodied in Appendix C throughout the course of negotiations.

By the conclusion of negotiations, the "waiver" language in Appendix C was moved into a new article within the main body of the successor agreement, Article XXI.[2] It provides in pertinent part:

> 1.0 Definition of layoff for purposes of this Article: "Layoff" shall mean a personnel action initiated by the District pursuant to Education Code 45308 and related Personnel Commission Rules which results in: (1) separation from District employment; (2) an involuntary reduction in hours from full-time to part-time, i.e., from a 7 or 8 hour assignment to an assignment of 6 hours or less; or (3) a change in an employee's annual assignment basis which results in a workyear reduction of ten or more working days per year.
>
> 2.0 Notice of Layoff Decision(s): Decisions with respect to layoff, as defined above, shall rest within the District's discretion, subject to the Education Code and Personnel Commission Rules, enforceable through Personnel Commission jurisdiction.

(Editing marks and text in strike-out omitted.)

The parties met for one more negotiation session on November 17, 2009, but to no avail, as they could not reach agreement on the Appendix C language. CSEA filed with PERB a request for impasse determination/appointment of mediator. CSEA described the issue in dispute as follows: "In the new Layoff Article, maintaining the unilateral right to reduce work year without negotiating with the Exclusive Representative."[3] By letter to the parties dated December 1, 2009, PERB certified that an impasse existed. On January 14, 2010, the parties

[2] Appendix C in the 2005-2008 Agreement also contains the parties' agreement on effects and implementation applicable in case of layoff, i.e., notice and seniority protections. Throughout this decision, further references to "Appendix C," "the Appendix C language," the "District's proposal," or any similar variation thereof are only to that portion of the original Appendix C embodying what CSEA refers to as the "waiver" and not to the parties' agreement on effects and implementation.

[3] Although the request for impasse determination/appointment of mediator states that there was a second issue in dispute (working out of classification), the parties reached agreement in concept on the issue subject to further "tweaking" of the language.

met with a mediator from the State Mediation and Conciliation Service. By e-mail message to the parties dated March 29, 2010, the mediator concluded that there was "really nothing to fact-find" and that the mediation would be placed in abeyance pending the outcome of the unfair practice charge.

Prior to initiation of successor agreement negotiations, there were over 6,000 employees in Bargaining Unit D. From June 2009 through October 2010, the District implemented a "layoff" plan in four phases.[4] After the plan was fully implemented, fewer than 5,000 employees remained in Bargaining Unit D. Of those who remained, 1,200 employees experienced a reduction in their workyear basis.

It was in the context of that period of hardship that the dispute over Appendix C arose. From the District's perspective:[5]

> As the District has noted, the definition of "Layoff" as contained in the District's proposal is simply the same definition which the parties previously negotiated and have lived under for some two decades . . . . By negotiating to include certain reductions in hours within the definition of "Layoff", the parties agreed that those reductions in hours would receive notice and seniority protections as do layoffs resulting in separation of employment, but also agreed that the provisions of Appendix C fully satisfied the parties' bargaining obligations with respect to such reductions in hours.
>
> In sum, there was an appropriate negotiated tradeoff between the parties. The District fully understands and appreciates its bargaining obligations. The District is simply desirous of concluding negotiations with respect to these reductions in hours in the context of the successor agreement, just as the parties did in negotiating Appendix C. The District has explained that particularly given the financial crisis facing the District, the District urgently needs your cooperation. The District has further explained that given its size, its scope and the complexity of its challenges, the

[4] The first phase began in June 2009, approximately three months after initiation of negotiations for a successor agreement. The second phase began in March 2010; the third in July 2010; and the last in October 2010.

[5] Letter dated September 23, 2009, from John Bowes, Ed. D., administrator for the District, to Dvora Mayer (Mayer), senior labor relations representative for CSEA.

District has to maintain the flexibility and ability to respond promptly to District operational needs which was properly recognized by the parties in Appendix C.

From CSEA's perspective:[6]

A [W]e had started to have problems with 1B and section two [of Appendix C] in late 2007, early 2008. And we had agreed as a team to wait until the successor proposal and put the District on notice that we're going to have to deal with this. We can't just have this answer for everything anymore. It's a waiver of our right to deal with it in separate issues.

Q And when you say there were concerns in 2007, what were those concerns? What was happening?

A It started at the school sites where the District started using this section to reduce hours of employees, and had no long any --

MR. ETTENSOHN: Objection, lack of foundation.

ADMINISTRATIVE LAW JUDGE ALLEN: Overruled. You can continue with your answer.

THE WITNESS: It started that when employees were started to be reduced in work hours that when we would object to Staff Relations, they would say they have the right to do this. It no longer became school site specific or because of budgetary. It just became an overall riding answer that we don't have the right to challenge these people losing their work hours anymore.

[¶ . . . ¶]

A We were being very adamant that this, in this successor proposal that the decision to reduce work hours and years was not something we could afford to give the District a unilateral decision-making process anymore. This was a different age. This was a different era. These were different reasons for things that were happening. And actually, each layoff that happens, or each reduction in work year that happens, is for different reasons.

[6] PERB formal hearing transcript, testimony of Mayer.

PROCEDURAL BACKGROUND

On January 20, 2010, six days after the failed mediation effort, CSEA filed the instant unfair practice charge.

Parenthetically, CSEA had filed a prior unfair practice charge, Case No. LA-CE-5373-E, on August 31, 2009, in response to the first phase of the layoff plan, which began in June 2009. In that charge, CSEA alleged that the District engaged in unlawful unilateral changes when it reduced all 12-month vacant positions to 10-month positions, and when it reduced the workyear of the bargaining unit by 40 percent. By letter dated July 8, 2010, PERB's Office of the General Counsel dismissed the charge. The letter of dismissal explains that while a waiver of a statutory right to bargain does not survive the expiration of the collective bargaining agreement, Article C also contains terms and conditions of employment that continue in effect until the parties reach a new agreement. CSEA did not appeal from the dismissal of that charge.

On July 30, 2010, 22 days after the Office of the General Counsel dismissed the unfair practice charge in Case No. LA-CE-5373-E, the Office of the General Counsel issued the complaint in this case. The complaint alleges that the District failed and refused to bargain in good faith in violation of section 3543.5, subdivision (c), when, after having been notified by CSEA that CSEA opposed including Appendix C in a successor agreement, the District insisted on it to impasse. The complaint also alleges that the District failed and refused to participate in impasse procedures in good faith in violation of section 3543.5, subdivision (e), when it continued to insist that Appendix C be included in the successor agreement while the parties were participating in impasse procedures pursuant to sections 3548 through 3548.3.

PERB held informal settlement conferences on September 9 and October 19, 2010, but the parties were unable to settle their dispute. PERB held a formal hearing on February 9,

2011. With the receipt of the final post-hearing brief on April 25, 2011, the ALJ took the matter under submission. The ALJ's proposed decision issued on August 5, 2011. CSEA timely filed exceptions to the proposed decision on September 27, 2011, and the District timely filed a response on November 10, 2011.

THE PROPOSED DECISION OF THE ALJ

The ALJ framed the issue as whether the District insisted to impasse on a non-mandatory subject of bargaining. According to the ALJ, this issue turned on the question whether a proposal to give the District discretion over hours of employment, a mandatory subject of bargaining, was itself a mandatory subject. Asserting that PERB generally follows federal law, the ALJ discussed two cases decided under federal law in answering that question in the affirmative. The first, *NLRB v. American Nat'l Ins. Co.* (1952) 343 U.S. 395 *(American Nat'l Ins. Co.)*, was cited for the principle that an employer does not violate the National Labor Relations Act (NLRA)[7] by insisting on a management functions clause. The ALJ also relied on the following passage from *NLRB v. McClatchy Newspapers, Inc.* (D.C. Cir. 1992) 964 F.2d 1153, 1159:

> At the outset, it should be noted that a mandatory subject of bargaining does not lose status as such if one party seeks to gain complete control over the subject pursuant to collective bargaining. Thus, it is now well settled that proposals by which one side would retain discretion over a mandatory subject are also mandatory subjects.

The ALJ also found that CSEA's reliance on *Rowland Unified School District* (1994) PERB Decision No. 1053 (*Rowland*) was misplaced. As the ALJ reasoned, the issue in *Rowland* concerned a post-impasse unilateral implementation of a waiver of, or limitation on, an exclusive representative's statutory right to bargain rather than an insistence to impasse on such a waiver or limitation.

[7] The NLRA is codified at 29 U.S.C. section 151 et seq.

Based on the above analysis, the ALJ concluded that the District's proposal to retain discretion over decisions concerning reductions in hours and workyear bases involved a mandatory subject of bargaining; that, as a mandatory subject, the parties were obligated to negotiate over the proposal; and that, therefore, the employer was entitled to insist to the point of impasse on the proposal in a successor agreement.

DISCUSSION

The issue presented on appeal concerns the District's conduct with respect to a proposal by which the District sought to retain unfettered managerial discretion, i.e., unilateral control, over decisions to reduce hours and workyear bases.[8] CSEA contends that the District's insistence to impasse on the Appendix C language constitutes an impermissible waiver of CSEA's statutory right to negotiate over future reductions in workyear bases and hours. According to CSEA, the Board's decision in *Rowland, supra,* PERB Decision No. 1053 supports its theory of the case, and the ALJ's reliance on federal law was misplaced.

[8] Given the factual context involved here, arguments invoking the unilateral change doctrine will not be addressed, nor will we address arguments concerning the validity of a contractual waiver. We also need not examine in detail the bargaining conduct of the parties during the course of successor agreement negotiations as the issue of surface bargaining is neither raised by the facts nor alleged as a violation.

The parties also make reference to the Office of the General Counsel's dismissal of CSEA's prior unfair practice charge in Case No. LA-CE-5373-E. The prior charge was based on a different set of factual allegations, i.e., the District's "layoff," and a different theory of law, i.e., unlawful unilateral change. The dismissal was not appealed. The Board therefore does not herein determine whether the dismissal was in error. While certain foundational principles are common to the prior charge and the one before us now, it bears mention that the Office of the General Counsel issued the complaint in this matter shortly after dismissing the prior charge. If this charge were susceptible to the same analysis and disposition as the prior charge, we would be here on appeal from dismissal, not on exceptions to a proposed decision. Moreover, despite the District's multiple references to the dismissal of the prior charge, the District fails to offer legal argument as to why dismissal of the prior charge constitutes a basis for issue or claim preclusion under principles of res judicata or collateral estoppel.

The District contends that its proposal relates to hours of employment, a mandatory subject of bargaining and, therefore, the District was entitled to insist on its inclusion in the successor agreement to the point of impasse. According to the District, the *Rowland* case is distinguishable in that it involved a proposal limiting the "statutory right" to file grievances whereas the proposal here limits collective bargaining rights.[9] Also, the District contends that the ALJ's reliance on federal law was proper.

The issue in dispute involves a complex set of considerations. We therefore begin with a review of the applicable general law.

General Principles of Law

EERA requires public school employers and exclusive representatives to meet and negotiate with one another on matters within the scope of representation. (EERA, § 3543.3.) Section 3543.2, subdivision (a), provides in pertinent part: "The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions

[9] The District also argues that the exceptions fail to comply with PERB Regulation 32300, subdivision (a), which sets forth the required content for exceptions. (PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.) Compliance with PERB Regulation 32300, subdivision (a), is required "in order to afford the respondent and the Board an adequate opportunity to address the issues raised." (*Temecula Valley United School District* (1990) PERB Decision No. 836.) Specifically, the District complains that CSEA did not make specific exceptions to the proposed decision and did not cite to the administrative record other than in the Statement of Facts.

The case tried before the ALJ rested on a single legal issue. The ALJ's analysis of the issue is contained on two pages. That CSEA did not except to individual sentences in separate exceptions is acceptable, if not appreciated. That CSEA did not designate by page citation or exhibit number the portions of the record relied on except in the Statement of Facts is not surprising given that the issue before us is primarily legal, not factual, in nature. CSEA has sufficiently designated its points of disagreement with the ALJ's proposed decision in the exceptions and the District has had an adequate opportunity to address the issues raised therein. We therefore find that, under the facts of this case, the exceptions comply with PERB Regulation 32300, subdivision (a).

of employment."[10] A decision to reduce hours or employee work year is within the scope of representation because "although the same managerial concerns are present as with layoffs, on balance, the impact is greater on employees and more directly affects both hours and wages of those employees whose positions are reduced." (Zerger et. al, California Public Sector Labor Relations (Release No. 23, July 2012) § 11.05[11][c], p. 11-56, citing *San Ysidro School District* (1997) PERB Decision 1198; *Oakland Unified School District* (1985) PERB Decision No. 540; *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375; *North Sacramento School District* (1981) PERB Decision No. 193; *Pittsburg Unified School District* (1983) PERB Decision No. 318; *Eureka City School District* (1985) PERB Decision No. 481).[11]

Neither the employer nor the exclusive representative has a duty to bargain with respect to subjects outside the scope of representation. As to these subjects, the parties may negotiate on a permissive basis. Otherwise, proposals concerning permissive subjects may not be

[10] The test for determining whether a subject is within the scope of representation under EERA is set forth in *Anaheim Union High School District* (1981) PERB Decision No. 177 (*Anaheim*), as approved by the California Supreme Court in *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 857-858. A subject is negotiable if it falls within the list of enumerated subjects in section 3543.2. Otherwise, the subject is negotiable if it meets the following three-part test: (1) it is logically and reasonably related to wages, hours, or an enumerated term and condition of employment; (2) the subject is of such concern to management and employees that conflict is likely to occur, and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict; and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of its mission.

[11] Reductions in hours and employee work year are within the scope of representation even though they are authorized under the California Education Code. A public school employer violates EERA by making unilateral changes in hours or employee work year. (*Pittsburg Unified School District, supra*, PERB Decision No. 318.)

insisted on to the point of impasse. (*NLRB v. Wooster Division of Borg-Warner Corp.* (1958) 356 U.S. 342, 349 (*Borg-Warner*) ["The duty is limited to those subjects [wages, hours and other terms and conditions of employment], and within that area neither party is legally obligated to yield. *Labor Board v. American Ins. Co.,* 343 U.S. 395. As to other matters, however, each party is free to bargain or not to bargain, and to agree or not to agree."]

When a party decides it does not wish to bargain over a nonmandatory (i.e., permissive) proposal, that party must express its opposition as a prerequisite to charging the other party with committing an unfair practice. Where opposition has been expressed on a permissive proposal, a party commits a per se violation of the duty to meet and negotiate by insisting on it to impasse. (*Lake Elsinore School District* (1986) PERB Decision No. 603 (*Lake Elsinore*).) As the Supreme Court held in *Borg-Warner*:

> The company's good faith has met the requirements of the statute as to the subjects of mandatory bargaining. But that good faith does not license the employer to refuse to enter into agreements on the ground that they do not include some proposal which is not a mandatory subject of bargaining. We agree with the Board that such conduct is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining. This does not mean that bargaining is to be confined to the statutory subjects. Each of the two controversial clauses is lawful in itself. Each would be enforceable if agreed to by the unions. But it does not follow that, because the company may propose these clauses, it can lawfully insist upon them as a condition to any agreement.

(*Borg-Warner, supra,* 356 U.S. 342, 349.)

Impasse is defined under EERA as follows: "'Impasse' means that the parties to a dispute over matters within the scope of representation have reached a point in meeting and negotiating at which their differences in positions are so substantial or prolonged that future meetings would be futile." (§ 3540.1, subd. (f).) PERB has held that an impasse in bargaining exists where "the parties have considered each other's proposals and counterproposals,

attempted to narrow the gap of disagreement and have, nonetheless, reached a point in their negotiations where continued discussion would be futile." (*Mt. San Antonio Community College District* (1981) PERB Order Ad-124.)[12]

When the parties have reached a bona fide impasse in negotiations, the parties are obligated to participate in specified statutory impasse procedures including mediation and fact-finding. EERA imposes a mutual duty on the parties to participate in good faith in the statutory impasse procedures. (§ 3543.5, subd. (e).)

If the impasse procedures are exhausted without breaking the deadlock, the parties remain at impasse.[13] At that point, the employer may "take unilateral action to implement the last offer the union has rejected." (*Public Employment Relations Bd. v. Modesto City Schools Dist., supra*, 136 Cal.App.3d 881, 900, citing *NLRB v. Katz* (1962) U.S. 736, 745.) The terms and conditions so implemented must be "reasonably comprehended within the pre-impasse proposals." (*Public Employment Relations Bd. v. Modesto City Schools Dist., supra*, 136 Cal.App.3d 881, 900.)

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[12] Impasse is only a temporary deadlock or hiatus in negotiations "which in almost all cases is eventually broken, through either a change of mind or the application of economic force." (*Charles D. Bonanno Linen Service, Inc.* (1979) 243 NLRB 1093, 1093-1094.) An impasse may be "brought about intentionally by one or both parties as a device to further, rather than destroy, the bargaining process. . . . [T]here is little warrant for regarding an impasse as a rupture of the bargaining relation which leaves the parties free to go their own ways." (*Ibid.*)

[13] Impasse suspends the parties' obligation to bargain only until changed circumstances demonstrate that an agreement may be possible. (*Modesto City Schools* (1983) PERB Decision No. 291.) If the bargaining impasse is subsequently broken, the bargaining obligation revives. (*Public Employment Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal.App.3d 881, 899.) Offers by either party to make concessions sufficient to break the impasse revive the duty to bargain. (*Ibid.*)

The Characterization of Bargaining Proposals under PERB Precedent

Consequences flow from the characterization of bargaining proposals as mandatory or permissive.[14] As described above, the duty to bargain extends to each and every subject within the scope of representation, i.e., "wages, hours of employment, and other terms and conditions of employment." It is an unfair practice for either side to refuse to bargain about such a subject upon the request of the other. (*NLRB v. Katz, supra,* 369 U.S. 736.)

There are subjects that unambiguously present as mandatory or permissive in nature where the rules described above uniformly apply. Then there are subjects that do not as easily fit within this paradigm. One type concerns individual employee rights or guarantees found in non-EERA statutes like those found in the California Labor Code. The Board's most recent decision in this area, *Berkeley Unified School District* (2012) PERB Decision No. 2268 (*Berkeley*), involved a proposal to recoup from employees' pay alleged overpayments. The proposal had previously been agreed to by the union and incorporated into the parties' collective bargaining agreement. The proposal was inconsistent with the wage garnishment statutes set forth in the Labor Code.

Relying on the California Supreme Court decision in *San Mateo City School Dist. v. Public Employment Relations Bd., supra,* 33 Cal.3d 850, the Board found the proposal to be both nonmandatory and nonnegotiable. The parties may agree to incorporate the external law-derived right into the collective bargaining agreement. The parties may negotiate in areas left

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[14] As the court said in *Retlaw Broadcasting Co. v. NLRB* (9th Cir. 1999) 172 F.3d 660, quoting *Silverman v. Major League Baseball Player Relations Comm., Inc.* (S.D.N.Y.) 880 F. Supp. 246, 253, aff'd (2d Cir. 1995) 67 F.3d 1054:

> As other courts have observed, framing a subject as mandatory or permissive has significant consequences for the parties' bargaining obligations under the Act: "The distinction between mandatory and permissive subjects of bargaining is crucial in labor disputes, because it determines to what extent one party may compel the other to bargain over a given proposal . . . ."

unaddressed by the external law. The parties may agree to incorporate the external law-derived right into the collective bargaining agreement and negotiate more generous terms. (*Regents of the University Of California* (2010) PERB Decision No. 2094-H.) The parties to a collective bargaining agreement may not, however, negotiate away individual employee rights guaranteed by statutes that "set an inflexible standard or insure immutable provisions." (*San Mateo City School Dist. v. Public Employment Relations Bd., supra,* at pp. 864-865.) To do so would be to infringe on rights that individual employees enjoy as a matter of law.

As the Board's decision in *Berkeley, supra,* PERB Decision No. 2268, demonstrates, the rules regarding permissive subjects do not uniformly apply to nonnegotiable subjects. Although a union must voice its opposition to bargaining over a permissive subject in order to preserve its right to charge the employer with an unfair practice, the same is not true of a nonnegotiable subject. As the Board stated in *Berkeley*, the "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."[15]

Another subject that PERB has characterized as nonmandatory or permissive is described as involving "statutory rights," referring to rights originating in EERA itself. Because the statutory rights line of Board precedent underlies *Rowland, supra*, PERB Decision No. 1053, the decision relied on by CSEA here, we undertake a review of those cases next.

One of the first statutory rights decisions is *South Bay Union School District* (1990) PERB Decision No. 791 (*South Bay*), affirmed in *South Bay Union School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 502. The case arose in the context of

[15] This category is similar to the category referred to as "illegal" subjects by the National Labor Relations Board (NLRB). Under the NLRB rubric, proposals on illegal subjects result in a violation when insisted on to the point of impasse similar to proposals on permissive subjects. Unlike a permissive subject, however, a proposal on an illegal subject may not by mutual consent be incorporated into the agreement. (See 1 Higgins, The Developing Labor Law (5th ed. 2006), p. 1394.)

successor agreement negotiations. The employer proposed retaining the grievance article of the collective bargaining agreement, which did not permit the union to file a contract grievance in its own name. The union proposed changes to the article that would allow the union to file a contract grievance in its own name. The employer refused to change its position and during the course of negotiations the union repeatedly asserted its right to file and prosecute grievances in its own name. After three months of negotiations, the parties reached impasse. During mediation, the parties maintained their pre-impasse positions, but ultimately, in order to secure an agreement, the union agreed to accept the grievance article without change.

South Bay held that the employer's insistence to impasse on the proposal limiting the right of the union to file a grievance in its own name was an unfair practice. There was no majority analysis, however. Member Camilli wrote a concurrence finding the employer's proposal nonmandatory but not based on the test set forth in *Anaheim*, *supra,* PERB Decision No. 177. Member Camilli analyzed the issue as "a statutory right [derived from the right of employee organizations to represent their members under section 3543.1, subdivision (a)] which is not among the enumerated mandatory subjects of bargaining." Member Camilli's statutory rights analysis would prevail as the majority analysis in subsequent cases.

The next "statutory rights" decision is *Chula Vista City School District* (1990) PERB Decision No. 834 (*Chula Vista*). It, too, involved a grievance proposal limiting the union's right to file a grievance in its own name. The Board held that such a limitation on the right to bring a grievance is categorically nonmandatory because the employer is not insisting to impasse on a "term or condition of employment, but rather is insisting that the Association waive a basic statutory right." (*Ibid.*) The Board stated that the usual rules apply, i.e., the parties may negotiate over such a proposal on a permissive basis and opposition to further negotiations must be voiced. The Board then reviewed other aspects of the grievance proposal,

dividing them into mandatory and nonmandatory subjects. The Board found that aspects of the proposal limiting the right to take grievances to arbitration without the permission of the employee grievant and limiting the right to seek unit modification were also nonmandatory. These aspects of the proposal "impinge[d] upon the Association's statutory right to represent its members." (*Ibid.*) On the other hand, the Board found that the right to be physically present at the informal stages of the grievance procedure concerned a mandatory subject. As the Board explained, the characterization of a proposal as mandatory or nonmandatory turns on the identification of a union representational right found to exist under EERA. If such a right exists, the proposal will be deemed nonmandatory. If such a right does not exist, it will not.

One of the defenses raised by the employer in *Chula Vista* was the union's failure to state its opposition to bargaining. Although the union did not take the position that the proposals were outside the scope of representation, the union did state that insistence to impasse was improper. On the issue of whether the union's opposition was adequate, the Board held:

> There is nothing in the law that says a party needs to chant the magic words that a specific subject is outside the scope of representation to preserve its right, after having bargained about a nonmandatory subject, to take the position that the nonmandatory proposal shall not be included in the contract.

(*Chula Vista, supra*, PERB Decision No. 834.)

Mt. Diablo Unified School District (1990) PERB Decision No. 844 (*Mt. Diablo*) involved proposals waiving the union's rights to arbitrate grievances without the permission of the employee grievant and to file grievances in its own name. A majority of the Board agreed with the ALJ that the proposals were nonmandatory but expressly rejected that portion of the ALJ's analysis that utilized a modified version of the test set forth in *Anaheim, supra,* PERB Decision No. 177 to arrive at that conclusion. The majority instead adopted "the 'statutory

right' analysis set forth in Chula Vista." (*Ibid.*) The Board described the *Chula Vista* analysis as follows:

> In Chula Vista, the majority found that application of the Anaheim test to determine the negotiability of the grievance proposals was unnecessary since the District was not actually insisting to impasse on a term or condition of employment, but was rather insisting that the Association waive a basic statutory right. (Chula Vista City School District, supra, PERB Decision No. 834, at pp. 22-23.)

(*Mt. Diablo, supra*, PERB Decision No. 844.)

Travis Unified School District (1992) PERB Decision No. 917 (*Travis*) demonstrated the full alignment of the Board on the statutory rights analysis. The proposal at issue barred the union from filing grievances in its own name. Based on finding that the proposal involved the statutory right to represent, the Board concluded that the proposal was nonmandatory. In response to the employer's defense that the union failed to inform the employer prior to impasse that it was removing the subject from the bargaining table, the Board stated:

> The facts of this case are very similar to those of Chula Vista. In Chula Vista, the parties reached impasse with the Association continuing to propose changes to the restrictive grievance language, and the District insisting on maintenance of the status quo. While the Association did not explicitly state that the proposals in question were "outside the scope of bargaining," the Association did make clear its contention that it was improper for the District to insist on language which it believed deprived it of its statutory rights. The Board found in Chula Vista that "the Association's statements [were] sufficient to put the District on notice that the Association was unwilling to waive its statutory right to represent its members." (Chula Vista, p. 26.)

(Travis, supra, at pp. 4-5.)

In *San Mateo County Community College District* (1993) PERB Decision No. 1030 (*San Mateo)*, the PERB complaint alleged that the employer conditioned a final agreement on the union's waiving the right to a reasonable amount of released time. The ALJ analyzed released time as a statutory right and therefore a nonmandatory subject of bargaining that the

employer was not privileged to insist to impasse. The Board disagreed, affirming the principle that released time is a mandatory subject of bargaining in addition to a statutory right. At first blush, this decision appears to take a different approach than the "statutory rights" cases by characterizing the proposal at issue as mandatory. For this reason, the District stresses the importance of this decision in its response to the exceptions. The District's reliance on it, however, is misplaced. In *San Mateo*, the proposal did not seek to waive the union's statutory right to released time. The dispute between the parties turned on the issue of reasonableness. In contrast, in the statutory rights cases where a violation was found, the proposals at issue sought a waiver of a right guaranteed by statute.

In *San Mateo*, the Board made a distinction between ordinary nonmandatory subjects and proposals concerning statutory rights:

> As with a nonmandatory or permissive subject, the employer cannot insist to impasse on a proposal concerning a statutory right. The distinction is that while statutory rights are not directly rooted in terms and conditions of employment, as is the case with nonmandatory subjects, statutory rights are directly based on rights protected by the Legislature.
>
> To reach impasse unlawfully on a nonmandatory or permissive subject is to engage in bad faith bargaining by injecting extraneous subjects in preference to subjects on wages, hours, and other terms and conditions of employment. With statutory rights, the employer cannot insist to impasse because to do so is an infringement on a right not given the employer.

(*San Mateo, supra,* PERB Decision No. 1030.)

On the heels of these statutory rights cases the Board issued its decision in *Rowland, supra,* PERB Decision No. 1053. This case arose in the context of a post-impasse implementation of the employer's last, best and final offer, which included the following language:

> [T]erms and conditions of employment shall be effective July 1, 1992 through August 31, 1993, . . . This implementation resolves

> negotiations affecting the 1992-93 school year except as follows: [The Association] and the District may select up to two subjects for meeting and negotiating in connection with the 1992-93 school year.

Following implementation, the union submitted to the employer initial proposals for the 1992-1993 school year covering a large number of contractual items. The ALJ concluded that although the employer was entitled to implement, the union's proposals constituted changed circumstances breaking the parties' impasse and reviving the employer's duty to negotiate. Relying on the "statutory rights" holdings in *South Bay, supra,* PERB Decision No. 791, and *Chula Vista, supra*, PERB Decision No. 834, the Board disagreed with the ALJ's analysis, holding:

> If an employer cannot insist to impasse on the waiver/limitation of a statutory right, certainly an employer is prohibited from implementing the waiver/limitation of a statutory right following impasse. EERA gives the parties the right to collectively negotiate terms and conditions of employment. If the employer can unilaterally implement a waiver/limitation of the right to bargain it would negate the purposes of EERA. Accordingly, an employer may not, following impasse, unilaterally impose a waiver/limitation of an exclusive representative's statutory right to bargain. Such a waiver/limitation of the statutory right to bargain may only occur within the context of a mutually agreed collective bargaining agreement.

(*Rowland, supra,* PERB Decision No 1053.)

Rowland differed from the prior statutory rights decisions in two ways. First, it arose in the context of a post-impasse implementation of the employer's last, best and final offer, as opposed to pre-impasse negotiations. Also, specific manifestations of the right to represent, such as the right to arbitrate grievances or to file grievances in the union's own name, were not at issue. *Rowland* is therefore significant in extending the "statutory rights" analysis to a broader type of representational interest, i.e., the right to engage in collective bargaining as the exclusive representative of the bargaining unit.

In *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2081-S (*State of California I*), the issue on appeal from dismissal was whether the union expressed "its opposition to further negotiation on the [statutory right] proposal as a prerequisite to charging the other party with bargaining to impasse on a nonmandatory subject of bargaining," citing *San Mateo, supra,* PERB Decision No. 1030 and *Lake Elsinore, supra,* PERB Decision No. 603. The union argued that the standard articulated in these cases imposed a more difficult burden by requiring the union to refuse to bargain over the proposal. The union argued that the Board should apply the standard articulated in *Chula Vista, supra*, PERB Decision No. 834, and *Travis, supra,* PERB Decision No. 917. The Board held that there was no difference in standard between the two sets of cases. The Board rejected the union's claim that the following language was sufficient to put the employer on notice that it was unwilling to agree to language waiving or limiting its statutory rights: "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." (*State of California I, supra,* PERB Decision No. 2081-S.)

In *State of California (Department of Personnel Administration)* (2010) PERB Decision No. 2130-S (*State of California II*), the Board clarified the holding in *Rowland.* The Board explained that the problematic language in *Rowland, supra,* PERB Decision No. 1053, was not the duration clause but the intrusion into the union's bargaining rights. The Board held that the "inquiry in a case involving implementation upon impasse of a term of agreement provision is whether the provision has the effect of waiving or limiting the union's statutory right to bargain." (*Ibid.*)

These cases affirm a number of basic principles. Under the "statutory rights" decisions, an employer proposal premised on the abandonment of representational rights guaranteed to an

exclusive representative by statute may be negotiated on a permissive basis and memorialized in a collective bargaining agreement if agreement is reached. Such proposals may not, however, be insisted on to the point of impasse if the exclusive representative has expressed its opposition.[16] Such conduct violates EERA.

In addition, under *Rowland, supra,* PERB Decision No. 1053, the Board made clear that the range of matters subject to implementation by the employer upon impasse is not unlimited. As the Board explained in *State of California II, supra,* PERB Decision No. 2130-S, an employer's post-impasse implementation of a proposal that undermines fundamental principles of collective bargaining constitutes an unfair practice.

The NLRB Approach

The proposed decision states that federal law "seems to be reasonably clear" that proposals by which one side seeks to retain discretion over a mandatory subject of bargaining are also mandatory subjects of bargaining. In concluding that the District did not commit an unfair practice by insisting to impasse on the Appendix C language regarding reduction in hours and workyear bases, the ALJ stated that *Rowland* was distinguishable and found "no reason not to follow federal law as PERB has done in the past." We have identified two main problems with this analysis.

First, the proposed decision correctly distinguishes *Rowland* as involving a charge alleging a violation based on a post-impasse implementation rather than on a pre-impasse insistence to impasse. The proposed decision fails, however, to explain whether the reasoning in *Rowland*, which was based on the statutory rights line of precedent, would apply in a pre-

[16] The exclusive representative need not specifically state that the proposal is outside the scope of bargaining. As the Board has always stated, there are no magic words. The exclusive representative must, however, place the employer on notice that insisting to impasse on language it believes deprives it of its statutory right to represent its members is improper, and that such language may not be included in a contract.

impasse insistence to impasse setting. Similarly, the proposed decision fails to explain whether post-impasse implementation of the District's proposal would constitute a violation even if pre-impasse insistence to impasse on it would not. These issues are integrally interconnected.

Second, the proposed decision paints an incomplete picture of federal decisional law. The United States Court of Appeals for the District of Columbia Circuit issued two decisions in the *McClatchy* case. In the first decision, the court refused enforcement of an NLRB decision and order, which found an employer in violation of the NLRA for implementing upon impasse a discretionary merit pay proposal, a mandatory subject of bargaining. The court found the NLRB's "waiver" analysis to be contrary to law. The ALJ's proposed decision in the instant case relies on the court's critique of the NLRB decision as expressed in its first decision. The proposed decision does not, however, explain that the court, in remanding the matter to the NLRB for further consideration, was willing to consider enforcement under an alternate theory of law. On remand, the NLRB maintained its position that the employer was in violation of the NLRA for implementing a merit pay proposal upon impasse, despite the fact that the subject matter of the proposal was a mandatory subject of bargaining, but this time girded its decision to a different legal rationale. On appeal, the same court affirmed the new NLRB approach as correctly premised and reasoned, and granted enforcement. The proposed decision in this matter does not discuss these further developments in the law of the case, nor other private-sector cases in which the NLRB, and to some extent, the federal courts, have extended and clarified the reasoning adopted in the *McClatchy* case.

We therefore next review federal decisional law so as to provide a more complete treatment of the *McClatchy* case and, more broadly, a better understanding of the NLRB approach to the issues raised herein. As will be seen below, the *McClatchy* case is well

accepted doctrine in private sector labor law and its reasoning has been applied and developed beyond the specific facts of that case.

The McClatchy Decisions

The NLRB issued its first decision in this case in 1990. (*McClatchy Newspapers* (1990) 299 NLRB 1045 (*McClatchy I.*) During successor agreement negotiations, the union sought a 25 percent wage increase and discontinuance of merit pay. The employer counter-proposed that all compensation be based solely on merit, that starting salaries be established by the employer, and that merit pay decisions not be subject to bargaining or the grievance and arbitration procedure. Unlike the merit pay arrangement in the expiring contract, the employer's proposal contained no provision for union participation in the evaluation and appeal processes. The NLRB's ALJ agreed with the NLRB's General Counsel that the employer's merit pay proposal was a permissive subject of bargaining and that the employer was guilty of bad faith bargaining when it insisted on it to impasse. Agreeing with the result but disagreeing with the ALJ's analysis, the NLRB concluded that the parties were engaged in good faith negotiations and reached impasse on a mandatory subject of bargaining, i.e., negotiated wages versus merit pay, but that the employer unlawfully implemented its proposal after reaching impasse. The NLRB reasoned that a proposal seeking unlimited managerial discretion over the determination of the timing and amounts of merit increases was in reality seeking the union's waiver of its statutory right to bargain. The NLRB stated that the employer "was free to insist to impasse that the Union agree to waive its statutory rights, but was not privileged to proceed with implementation after impasse as though it had successfully secured the Union's waiver." (*Id.* at pp. 1046-1047.)

On petition by the NLRB to the United States Court of Appeals for the District of Columbia for enforcement, a majority of the panel in a per curiam order found that *McClatchy I* did not constitute reasoned decision-making. The court denied enforcement and remanded the case to the NLRB for further consideration. (*NLRB v. McClatchy Newspapers Inc., supra,* 964 F.2d 1153.) Each of the justices wrote separate statements[17] to accompany the court's per curiam order. In the lead opinion, Justice Edwards described the issue as follows: "While seemingly narrow in scope, this is a deceptively difficult question, reaching to the heart of labor law. And, although this particular question only recently has been raised, it occupies a space between several well-established doctrines of labor law." (*Id.* at p. 1154.) Justice Edwards summarized those doctrines as follows: (1) proposals covering wages are mandatory subjects of bargaining, with respect to which the parties must bargain in good faith in an effort to reach agreement; (2) even where a party is guilty of bargaining in bad faith, the NLRB may not compel either side to accede to a particular proposal; (3) following good faith negotiations, a party may take unilateral action with respect to a mandatory subject of bargaining over which impasse has been reached (the impasse rule); (4) unilateral action may not be taken with

[17] Because the NLRB ultimately adopted Justice Edwards' approach on remand, we have summarized his statement at length. For the same reason, we forego discussion of the statements of the other two justices. It suffices to say that Justice Silberman found the NLRB's waiver theory to "have a certain symmetrical elegance." Justice Henderson, on the other hand, while agreeing with Justices Edwards and Silberman to refuse enforcement of *McClatchy I*, disagreed that remand was appropriate. She found the decision was unsupportable and objected to serving up "a smorgasbord of possible explanations of what the Board has done." (*NLRB v. McClatchy Newspapers Inc., supra*, 964 F.2d 1153,1179, quoting *Enterprise Ass'n of Steam, Hot Water, Hydraulic Sprinkler, Pneumatic Tube, Ice Mach. & Gen. Pipefitters of N.Y. & Vicinity v. NLRB* (D.C. Cir. 1975) 521 F.2d 885, 891, fn. 9.)

respect to permissive subjects of bargaining; and (5) with respect to certain categorical exceptions to the impasse rule, i.e., provisions concerning the statutory right to strike, arbitration, union security and dues check-off,[18] and withdrawal from multi-employer bargaining, such provisions can be implemented only by mutual consent of the parties to the bargaining relationship.[19]

The ALJ in the case before us relied on a portion of Justice Edwards' opinion stating that a mandatory subject of bargaining does not lose that status if one party seeks to gain complete control over it pursuant to collective bargaining. As Justice Edwards explained, it is well settled that proposals by which one side would retain discretion over a mandatory subject are also mandatory subjects. (*NLRB v. McClatchy Newspapers, Inc., supra,* 964 F.2d 1153, 1159.) Relying on *American Nat'l Ins. Co., supra,* 343 U.S. 395, as did the ALJ in this case, Justice Edwards stated "whether the subject will be committed to one party's discretion or set

[18] Closely related to these doctrines is the status quo doctrine, which requires that the employer honor contractually established terms and conditions of employment until a new contract is negotiated or until the parties reach impasse. In a recent decision overturning decades of NLRB precedent, the NLRB ruled that a dues check-off provision, which requires an employer to deduct union dues from an employee's paycheck, survives expiration of the contract. (*WKYC-TV, Inc.* (2012) 359 NLRB 30.) The NLRB acknowledged that some mandatory subjects of bargaining, like arbitration provisions, no-strike clauses and management rights clauses, do not survive expiration of the contract because they involve a voluntary waiver of rights. By contrast, according to the NLRB, dues check-off is an "administrative convenience" like employee savings accounts that does not entail a waiver of rights and therefore survives a contract's expiration. (*Ibid.*)

[19] The Supreme Court in *Litton Financial Printing Div. v. NLRB* (1991) 111 S. Ct. 2215 explained that provisions coming within these categorical exceptions, like the one concerning the right to arbitration, are by statute a matter of consent.

by definite terms should be decided by bargaining and the relative economic strength of the employer and union."[20] (*Ibid.*)

That a merit pay proposal does not lose its status as a mandatory subject of bargaining where one party seeks unfettered discretion over its implementation did not, in Justice Edwards' view, entirely resolve the issue. There are countervailing legal doctrines that come into play as discussed in *Borg-Warner*. For example, as Justice Edwards explained, where a proposal seems on its face to address a mandatory subject but includes direct dealing between the employer and the employee or would deprive a union of its central statutory role as the collective representative of the workers, the proposal may constitute only a permissive subject. Examples given included proposals that seek to gain discretion over a bargaining unit or to set the amount of an agency fee. In Justice Edwards' view, these issues demonstrate a tension

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[20] In *American Nat'l Ins. Co., supra*, 343 U.S. 395, 409, the Supreme Court held:

> Whether a contract should contain a clause fixing standards for such matters as work scheduling or should provide for more flexible treatment of such matters is an issue for determination across the bargaining table, not by the Board. If the latter approach is agreed upon, the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargaining.
>
> Accordingly, we reject the Board's holding that bargaining for the management functions clause proposed by respondent was, *per se*, an unfair labor practice. Any fears the Board may entertain that use of management functions clauses will lead to evasion of an employer's duty to bargain collectively as to "rates of pay, wages, hours and conditions of employment" do not justify condemning all bargaining for management functions clauses covering any "condition of employment" as *per se* violations of the Act. The duty to bargain collectively is to be enforced by application of the good faith bargaining standards of Section 8 (d) to the facts of each case rather than by prohibiting all employers in every industry from bargaining for management functions clauses altogether.

between the teachings of *Borg-Warner, supra,* 356 U.S. 342, and *American Nat'l Ins. Co., supra,* 343 U.S. 395.

Justice Edwards criticized the NLRB decision for the following reason:

> The Board has attempted to take the words from decisions involving claims of "waiver" in situations where an agreement exists and apply them to cases where the parties are bargaining to secure an agreement; it does not work because, in the latter situation, the impasse rule comes into play (thus making "waiver" irrelevant).

(*NLRB v. McClatchy Newspapers, Inc., supra,* 964 F.2d 1153, 1168.)

As Justice Edwards explained, where a collective bargaining agreement is in effect, consent as memorialized in the agreement, not bargaining to impasse, is required in order to lawfully implement a change in a mandatory subject of bargaining. The doctrine of waiver arises in this context. By contrast, where parties are negotiating over a successor agreement, an employer may lawfully implement a change in a mandatory subject of bargaining, not through consent, but by having made a lawful proposal that the parties bargained over in good faith to impasse. The doctrine of waiver, as it has come to be understood as an affirmative defense to an unlawful unilateral change allegation, does not arise in this context.

Justice Edwards agreed to a remand in order to give the NLRB the opportunity to justify the result reached pursuant to a coherent theory of labor law, which he offered might include classifying a unilateral merit pay proposal as a permissive subject of bargaining, as a categorical exception to the impasse rule, or as a new category of subjects somewhere between mandatory and permissive.

Justice Edwards observed:

> Admittedly, the unilateral change doctrine generally presumes that implementing changes post-impasse does not hurt collective bargaining. But if the employer can indefinitely adjust employee

> wages pursuant to the implemented proposal, impasse will no longer be the "temporary" phenomenon described in *Bonanno*. Impasses generally will be broken by the application of economic pressure by one side or by changing conditions which alter the economic calculus of one of the sides. [Citations.] . . . Where the employer has the unconstrained authority to adjust wages to respond to changing conditions, it will have substantially smaller incentives to restart collective bargaining.
>
> Additionally, when the employer grants individualized merit pay increases, it disturbs the "collectivized" nature of collective bargaining over wages. See J.I. Case. Co., 321 U.S. at 339 (direct dealing impermissible where majority "collectivizes" employment relationship). When the employer presses to impasse a demand for discretion on individual merit payments, it takes a position which pits it against the employees as a group. But when the employer goes the next step and grants merit pay increases to selected individuals, it necessarily divides the employees and "de-collectivizes" the employees' bargaining position with respect to wages. The employees' group decision to utilize each individual's "merit" as a group asset has been nullified. This is very nearly direct dealing. . . .

(*NLRB v. McClatchy Newspapers, Inc., supra*, 964 F.2d 1153, 1172-1173, fn. omitted.)

The NLRB issued *McClatchy Newspaper* (1996) 321 NLRB 1386 *(McClatchy II)*[21] on remand, maintaining its position that the merit pay proposal was a mandatory subject of bargaining on which the employer could lawfully insist to impasse but that implementation upon impasse was unlawful. The NLRB, however, abandoned its prior rationale that the merit pay proposal sought a *waiver* of the union's right to bargain. The NLRB summarized its new rationale as follows: "[W]e find that preservation of the integrity of the collective-bargaining process requires that we recognize a narrow exception to the implementation-upon-impasse rules, at least in the case of wage proposals, such as the one at issue here, that confer on an

[21] The NLRB issued a second decision on remand, *McClatchy Newspaper* (1996) 322 NLRB 812. This decision, which borrowed heavily from *McClatchy II*, found that the employer failed and refused to satisfy its obligation to bargain with the union prior to granting merit wage increases to unit employees.

employer broad discretionary powers that necessarily entail recurring unilateral decisions regarding changes in the employees' rates of pay." (*Id.* at p. 1388.)

In *McClatchy II*, the NLRB reviewed the purpose of impasse. As the NLRB stated, impasse is designed to be a "temporary circumstance." It is not "a device to allow any party to continue to act unilaterally or to engage in the disparagement of the collective-bargaining process." (*McClatchy II, supra*, 321 NLRB 1386, 1390.) After reviewing the case law regarding exceptions to the post-impasse implementation rule, the NLRB found that if the employer was granted "carte blanche authority over wage increases (without limitation as to time, standards, criteria, or the Guild's agreement), it would be so *inherently* destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining." (*Id.* at pp. 1390-1391, italics in original, fn. omitted.) As the NLRB pointed out, the employer's ongoing exercise of discretion in setting wage increases and the union's ongoing exclusion from negotiating directly impacts a key term and condition of employment and a primary basis for negotiations as well as disparages the union by demonstrating "its incapacity to act as the employees' representative in setting terms and conditions of employment." (*Id.* at p. 1391.) In concluding, the NLRB held:

> Were we to allow the Respondent here to implement its merit wage increase proposal and thereafter expect the parties to resume negotiations for a new collective-bargaining agreement, it is apparent that during the subsequent negotiations the Guild would be unable to bargain knowledgably and thus have any impact on the present determination of unit employee wage rates. The Guild also would be unable to explain to its represented employees how any intervening changes in wages were formulated, given the Respondent's retention of discretion over all aspects of these increases. Further, the Respondent's implementation of this proposal would not create any fixed, objective status quo as to the level of wage rates, because the Respondent's proposal for a standardless practice of granting raises would allow recurring, unpredictable alterations of wages

> [sic] rates and would allow the Respondent to initially set and repeatedly change the standards, criteria, and timing of these increases. The frequency, extent, and basis for these wage changes would be governed only by the Respondent's exercise of its discretion. . . .
>
> [¶ . . . ¶]
>
> . . . We are confident that this modification of the impasse doctrine will maintain a proper balance, designed to further the bargaining process, between the competing legitimate interests of the parties by preserving the employer's right to propose and bargain to impasse over merit pay and the obligation to provide the employees' statutory bargaining agent with the opportunity for negotiation over the terms and conditions of employment.

(*Id.* at p. 1392, fns. omitted.)

On petition for enforcement, the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the NLRB in *McClatchy II* and granted enforcement. (*McClatchy Newspapers v. NLRB* (D.C. Cir. 1997) 131 F.3d 1026.) The court viewed the NLRB's new analysis as creating a narrow exception to the post-impasse implementation rule in cases where post-impasse implementation of a discretionary proposal on a mandatory subject of bargaining would have a deleterious impact on the collective bargaining process.[22]

In the final chapter of this saga, the United States Supreme Court denied the employer's petition for writ of certiorari on June 22, 1998.

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[22] The court observed that despite the NLRB's view that the merit pay proposal was a mandatory subject of bargaining, the NLRB acknowledged that the proposal contained no substantive terms. *McClatchy II* cited *NLRB v. Katz*, *supra,* 369 U.S. 736 for the proposition that a purely discretionary merit wage policy, i.e., without identifiable procedures and criteria, does not "establish" terms and conditions of employment at any point prior to the actual exercise of discretion. Although the court observed that this might suggest that such a proposal is permissive and that the impasse rule would not even apply, the court declined to comment further because it was not the view ultimately adopted by the NLRB in *McClatchy II.* The court further observed that the NLRB decision would not preclude an employer from implementing a merit pay proposal post-impasse so long as there are objective procedures and criteria.

The Post-McClatchy Decisions[23]

The rationale underlying the *McClatchy* exception was aptly summarized in *Edward S. Quirk Co. v. NLRB* (1st Cir. 2001) 241 F.3d 41, 43:

> The reasons for this limitation, on the part of both the Board and the D.C. Circuit, are highly pragmatic. The Board thinks that allowing a succession of unilateral changes by the employer, as opposed to an initial change, would make a union seem impotent to its members over time and further undermine the union's bargaining ability by creating uncertainty about prevailing terms. By contrast, permitting one set of unilateral changes per impasse lets the employer make an initial adjustment, but forces it to bargain again with the union if it wishes to make further adjustments down the road. [Citations.]

The court in *Quirk* pointed out that nothing in the NLRA explicitly gives the employer the right to impose its last offer unilaterally at impasse. The NLRB and the courts developed the doctrine administratively and judicially to achieve a workable balance. And, although generally the NLRB and the courts should not sit in judgment on the substantive terms of an agreement, the *McClatchy* exception is designed to promote bargaining by requiring the

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[23] We undertake a review of post-*McClatchy* administrative and judicial decisions to demonstrate both that the *McClatchy* doctrine is well established and accepted doctrine in private sector labor law and that it has been applied in a variety of factual settings. The decisions discussed herein are included for consideration and guidance, not necessarily for explicit adoption. (See *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.) Moreover, although decisions of circuit courts are included in our review, the following is noted:

> "It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise. . . . Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved."

(*Iowa Beef Packers, Inc.* (1963) 144 NLRB 615, 616, quoting *Insurance Agents (The Prudential Insurance Company of America)* (1957) 119 NLRB 768, 773, and *Novak Logging Co.* (1958) 119 NLRB 1573, 1575-1576.)

employer to return to the bargaining table instead of engaging in recurring unilateral changes over time. As the court in *Quirk* stated, "[e]mployer discretion in setting wages is fine if the parties agree: It is the unilateral use of such a plan to impair further bargaining that concerns the Board." (*Id.* at p. 44.)

Woodland Clinic (2000) 331 NLRB 735 involved a pay-for-performance proposal, which the Board found to fall within the *McClatchy* exception because it conferred on the employer broad discretionary powers. The NLRB's General Counsel charged that the employer was not privileged to insist to impasse on a proposal permitting the employer to deal directly with the employees in the determination of merit wage increases because such a proposal by its nature was a permissive subject of bargaining. The NLRB rejected the General Counsel's argument, explaining that the employer was required to bargain with the union prior to implementation of any pay-for-performance system and prior to any employee being given an increase under such system, and that therefore the proposal was mandatory. The NLRB dismissed the complaint allegation that the employer unlawfully bargained to impasse over the proposal.

KSM Indus. (2001) 336 NLRB 133, reconsideration granted in part *KSM Indus.* (2002) 337 NLRB 987, applied the *McClatchy* exception to a medical and dental insurance proposal. The employer implemented a proposal that reserved to it sole discretion to change the method/means for providing medical/dental benefits provided that the change is first *discussed* with the union and any deductibles/co-insurance limits not exceed a certain amount. The NLRB found the employer's implementation of the proposal upon impasse to be unlawful because the proposal nullified the union's authority to bargain and therefore was "inimical to the postimpasse, ongoing collective bargaining process." (*Id.* at p. 135.)

In *E.I. du Pont de Nemours & Co.* (2006) 346 NLRB 553, enforced *E.I. du Pont de Nemours & Co. v. NLRB* (D.C. Cir. 2007) 489 F.3d 1310, the majority found that the employer's implementation of its healthcare proposal was not unlawful because it was a narrow, specific clause that "by its terms, sets limits on the Respondent's discretion to act with respect to healthcare." (*Id.* at p. 560.) In reaching this result, the majority recognized that the health care plan contained a broad provision permitting the employer to make changes in the plan, including prices and level of coverage, subject to a time limitation. The majority found that the broad provision "predated current negotiations, and indeed had always been included in the Beneflex plan." (*Ibid.*) And, the majority found that the specific provision offered during the negotiations did not reserve to the employer "'the manner, method, and means of providing'" benefits and therefore did not run afoul of the *McClatchy* rule. (*Ibid.*, quoting *KSM Indus., supra,* 336 NLRB 133, 135.)[24]

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[24] The dissent stated:

> It cannot be argued that the prior agreement between the parties indicates the scope and limitations of the Respondent's discretion on implementing cost-sharing changes. Such prior agreements are irrelevant. In *McClatchy, supra*, the parties had also previously agreed to give the employer broad discretion in granting merit wage increases, but this history did not permit the employer to unilaterally implement its proposal for continued discretion following subsequent negotiations which resulted in lawful impasse. On the contrary, the Board held that an employer could retain discretion over changes in mandatory subjects of bargaining only if "definable objective procedures and criteria have been negotiated to agreement or to impasse." *McClatchy*, 321 NLRB at 1391. Those limitations are conspicuously absent here, and the Union certainly did not agree to cede broad discretion to the Respondent over further health insurance cost changes, whatever their previous agreements or discussions entailed.

(*E.I. du Pont de Nemours & Co., supra,* 346 NLRB 553, 564.)

In *Mail Contractors of America v. NLRB* (D.C. Cir. 2008) 514 F.3d 27, the proposal at issue involved a change to the relay point on one of the trucking routes. Because compensation was determined by hours spent driving, the location of a relay point potentially affected the compensation of drivers who served the relay point. During successor negotiations, the employer offered a proposal seeking to retain the right to unilaterally change the location of relay points. The issue was whether the employer was entitled to implement the relay point proposal when negotiations with the union had reached impasse. The NLRB found a violation based on the *McClatchy* exception. On petition for review, the court found the NLRB decision to be arbitrary and capricious, and denied enforcement, for three reasons. Placement of a relay point is a "quintessentially managerial decision" with no more effect on wages than the effect of any management decision regarding the scheduling of work or its allocation amongst plants or shifts. The employer's reservation of the right to change a relay point posed no "realistic threat" to the process of collective bargaining. Finally, a non-discretionary proposal was not possible because relay points, unlike wages, are changed in response to infrequent and external events.

In sum, under the *McClatchy* line of cases, there is a narrow, and well-defined, exception to the post-impasse implementation rule. The exception applies where implementation of a particular proposal would be inherently destructive of the principles of collective bargaining.

The post-*McClatchy* decisions demonstrate a number of points. First, the *McClatchy* exception is a well-established doctrine that has been applied and affirmed over time. Second, the *McClatchy* exception has been applied outside the context of merit pay proposals. Last, the common denominator amongst the proposals that have been found subject to the *McClatchy* post-impasse implementation exception is that they attempt to give the employer unconstrained

authority to make unlimited and recurring decisions regarding mandatory subjects of bargaining, which is precisely the problem with the District's proposal in the instant case.

The Analysis

By the District's proposal, the District seeks to retain unfettered discretion to engage in unilateral decision-making for an unlimited length of time regarding reductions in the hours and workyear bases of bargaining unit members. Pursuant to the Appendix C language, the District asserts that it has the authority to unilaterally decide to reduce an employee's status from full-time to part-time or to unilaterally decide to reduce an employee's workyear basis where the reduction in working days per year is 10 or more. At the same time, the District acknowledges that reductions in hours and workyear bases are mandatory subjects of bargaining. Wielding Appendix C during successor negotiations, the District unilaterally decided to reduce the workyear bases of 1,200 employees.

CSEA consented to the adoption of Appendix C in 1991, and it has been incorporated into every collective bargaining agreement between these parties[25] since that time. During negotiations for a successor agreement to the 2005-2008 Agreement, CSEA voiced its opposition to inclusion of the Appendix C language at issue. The complaint alleges, and CSEA argues, that the District committed an unfair practice by insisting to the point of impasse on the Appendix C language to which CSEA had objected.

Relying on a passage from *NLRB v. McClatchy Newspapers, Inc., supra,* 964 F.2d 1153, the ALJ concluded that the Appendix C language concerns a mandatory subject of bargaining, and that therefore the District's insistence to impasse on it was not unlawful. Although the allegations of the complaint are limited to allegations concerning pre-impasse bargaining, we find that the proposed decision falls short in its failure to explain the parameters

[25] No other bargaining unit in the District works under such a contract provision.

of post-impasse implementation. Pre-impasse insistence to impasse and post-impasse implementation involve corollary concepts that are better understood together. In addressing the allegations concerning pre-impasse insistence to impasse, the Board is presented with an opportunity to answer an analytical question lurking beneath the surface of this case, i.e., what happens after impasse.

There is a fundamental problem here, which is that CSEA no longer wishes to consent to adoption of the Appendix C language at issue, but appears incapable of removing it from the parties' collective bargaining agreement on Bargaining Unit D's behalf. Thus, contract language reserving to the District unfettered managerial discretion to make unilateral decisions regarding reductions in hours, a mandatory subject of bargaining, will continue in effect where the District merely remains firm in its resolve. The District's position implies that what the District won at the bargaining table in 1991 through skillful negotiations, the employer retains in perpetuity as a form of entitlement. This type of bargaining conduct replaces bilateralism in decision-making with unfettered managerial discretion and unilateral control.

Through this device, the District is handed an advantage over CSEA that is plainly inimical to the bilateral nature of collective bargaining. Bargaining by the employer for exclusive control of decision-making over mandatory subjects, particularly those at the top of the hierarchy such as wages and hours, tests the remedial powers of the Board. Unless the statutory scheme dictates otherwise, the Board should not apply general rules blindly if to do so has the unwitting effect of weakening, rather than strengthening, the collective bargaining relationship. (See *State of California II, supra*, PERB Decision No. 2130-S.)

We agree with the ALJ that we should look to the NLRB for guidance.[26] In so doing, we agree with the ALJ that the District did not commit an unfair practice by insisting to impasse on the Appendix C language. This is so because the Appendix C language regarding reduction in hours and workyear bases concerns a mandatory subject of bargaining, i.e., hours of employment. Bargaining over the amount of managerial discretion an employer may retain over a mandatory subject is part of bargaining over the mandatory subject itself. Therefore, the District was privileged to insist on the Appendix C language to the point of impasse and through statutory impasse procedures.[27] We do not agree, however, with the ALJ that the complaint and underlying unfair practice charge should be dismissed. We hold that although the District was privileged to insist on its proposal through the impasse procedures, it was not privileged to implement the proposal after the completion of impasse procedures.

The corollary to insisting to impasse is what happens after impasse occurs. Adoption of the NLRB approach, as stated in *McClatchy II*, as a framework for resolving disputes arising out of employer bargaining proposals seeking unfettered discretion over mandatory subjects of bargaining strikes an appropriate balance. With this approach, the employer is privileged to bargain for a proposal that seeks to retain unfettered managerial discretion over a mandatory subject, and even insist on it to impasse, as the District did here. An exclusive representative may be willing to agree to it, as CSEA also did here beginning in 1991. Where no agreement is reached, however, the exclusive representative will no longer be left with the Hobson's choice. As the NLRB in *McClatchy II, supra*, 321 NLRB 1386, stated, unilateral

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[26] PERB may refer to the NLRA and cases interpreting it for guidance in construing California's labor laws. (*Fire Fighters Union v. City of Vallejo*, *supra*, 12 Cal.3d 608.)

[27] PERB applies the same legal standard to determine if a party has participated in impasse proceedings in good faith as it does when determining if the party negotiated in good faith before impasse was reached. (*Temple City Unified School District* (2008) PERB Decision No. 1972.)

implementation upon impasse "would be so inherently destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining." (*Id.* at pp. 1390-1391, italics in original, fn. omitted.) If we failed to recognize an exception to the post-impasse implementation rule, impasse would become an opportunity to act unilaterally concerning matters within the scope of representation on a recurring basis without regard to the collective bargaining process.

In reaching this conclusion, we have determined that the doctrine of waiver is inapplicable, for the reasons given by Justice Edwards in *NLRB v. McClatchy Newspapers, Inc., supra,* 964 F.2d 1153. The District has not unilaterally decided to change an existing policy falling within the scope of representation during the life of the agreement without providing the exclusive representative with notice and opportunity to bargain. Such cases turn on whether the exclusive representative has consented to the change by waiving its right to bargain in clear and unmistakable contractual terms. (*Amador Valley Joint Union High School District* (1978) PERB Decision No. 74.) By contrast, the context involved here is negotiations over a successor agreement. Ordinarily the employer need not obtain the union's consent to implement a proposal if the proposal is lawful and the parties have negotiated over it in good faith and reached impasse.

We likewise are not persuaded that a proposal that seeks to retain unfettered managerial discretion over a mandatory subject of bargaining is a permissive subject of bargaining under the statutory rights line of Board precedent. The statutory rights cases involve proposals that limit or waive the union's substantive representational rights. These rights derive directly from the statute codifying a union's right to represent. The statutory rights analysis is predicated on the existence of a representational right found in the collective bargaining statute, such as the

exclusive representative's right to pursue a grievance in its own name or to elevate a grievance to arbitration.

Although the exclusive representative has collective bargaining rights in a general sense, the statutory scheme speaks about collective bargaining in terms of a procedural duty shared equally by the employer and the exclusive representative. Where the parties are engaged in good faith negotiations over the amount of discretion an employer may retain over a mandatory subject, a union's collective bargaining rights are not being waived or limited. The parties are in fact fulfilling their statutory obligations. There is a procedural duty to bargain collectively, but there is no substantive right to a fixed pay rate, the issue in *McClatchy*, or to a fixed set of hours, the issue here. Thus, the statutory rights analysis, though sound where a representational right is at stake, has no direct application here.

Our decision is predicated on two main factual points. First, CSEA no longer is willing to consent to inclusion of the Appendix C language in the successor agreement. Second, an aura of absolute power has seemingly allowed the District to maintain the Appendix C language in place as part of the status quo after expiration of the 2005-2008 Agreement,[28] and insist on it to impasse in successor negotiations ostensibly in order to continue to impose it on Bargaining Unit D, in theory, in perpetuity. In the face of CSEA's unwillingness to consent, the District's position is untenable. If we were to characterize the District's proposal as permissive and thereby remove it from any bargaining obligation, that would be one way to address this problem. For the following reasons, however, we come down in favor of adopting

[28] During the life of a collective bargaining agreement, the Appendix C language would serve as a waiver of CSEA's right to bargain over reduction in hours and workyear bases. Not all contract provisions involving mandatory subjects of bargaining survive the expiration of a collective bargaining agreement. A waiver of the statutory right to bargain, for example, does not remain in effect beyond the negotiated term of the agreement. (*Antelope Valley Union High School District* (1998) PERB Decision No. 1287.)

the NLRB approach used in the private sector of creating a narrow exception to the post-impasse implementation rule for bargaining proposals involving unfettered employer discretion.

First, distinctions between public and private sector labor relations do not dissuade us from adopting the NLRB approach. Under both public and private sector labor law, employers and exclusive representatives have similar bargaining obligations, namely the good faith duty to try to reach agreement. Although an employer may insist on a discretionary proposal such as Appendix C to the point of impasse as a matter of bargaining strategy, the employer's overriding obligation to *try* to reach agreement should be informed by the knowledge that such a proposal cannot be imposed upon impasse.

Second, either approach would require the Board to engage in line-drawing around degrees of employer discretion,[29] whether for the purpose of determining whether a proposal involves a mandatory or permissive matter under one approach or whether it falls within the *McClatchy* exception under the other. Regardless of approach, the Board will be called on to determine on a case-by-case basis whether a proposal contains sufficient objective standards with respect to the implementation of discretionary decision-making to ensure that the role of the exclusive representative is preserved rather than undermined, and to ensure for bargaining unit members a measure of certainty, or at least predictability, in their wages, hours and terms and conditions of employment. Under the NLRB approach, we move that line-drawing determination to the end of the bargaining process at the point impasse is reached and implementation is threatened.

Third, because discretion is a matter of degree subject to modification, concession or compromise, proposals involving employer discretion are better left to the bargaining table

[29] "[D]iscretion is a matter of degree, implicating policy judgments informed by Board expertise." (*Quirk v. NLRB, supra*, 241 F.3d 41, 45.)

where a party can decide for itself whether and how such a proposal can best be used to its own advantage. The NLRB approach recognizes that all collective bargaining negotiations involve give and take on matters within the scope of representation and that the parties are in the best position to determine the terms and conditions of employment under which they are willing to work. It also avoids the dilemma faced by the exclusive representative of having to voice opposition to a bargaining proposal in order to preserve its right to charge the employer with insistence to impasse as an unfair practice while at the same time attempting to horse trade over the proposal as a way of gaining something of greater value or benefit in exchange.

Under the approach adopted by the NLRB in *McClatchy* and other cases, parties remain free to propose, and agree to, provisions that would permit one side to retain discretion over one or more subjects of bargaining, just as the parties had done here for many years before the present dispute arose. With this decision, however, we ensure that when no such agreement is reached, broad discretionary proposals will not become a way for an employer to make recurring, unilateral decisions over fundamental subjects of bargaining such as hours and employee workyear by simply "imposing" its last, best and final offer, and thereby eroding the very basis for collective bargaining with the employees' representative. Although we recognize that the rule adopted here may encourage employers to temper their discretionary proposals, by including objective standards or criteria or by abandoning such proposals altogether before reaching impasse, we neither require that they do so, nor do we express any view on what substantive terms should or should not be included in the parties' agreements. (*H. K. Porter Co. v. NLRB* (1970) 397 U.S. 99, 106.)

Last, adopting the NLRB approach with respect to bargaining proposals involving employer discretion is consistent with prior Board precedent, specifically *State of California II,*

supra, PERB Decision No. 2130-S. Citing to the federal *McClatchy* decisions, the Board opined:

> Nonetheless, PERB and NLRB precedent also counsel against interpreting [Ralph C. Dills Act[30]] section 3517.8, subdivision (b) to grant DPA absolute discretion as to which LBFO provisions it may implement upon impasse. As discussed above, an employer may not implement a provision that waives or limits the union's right to bargain over a particular subject for a specified period of time. (*Rowland Unified School District, supra.*) The NLRB has held that an employer may not implement a provision that grants the employer authority to unilaterally change wages without further bargaining. (*McClatchy Newspapers, Inc.* (1996) 321 NLRB 1386, 1390-1391, enforced *McClatchy Newspapers, Inc. v. National Labor Relations Bd.* (D.C. Cir[.] 1997) 131 F.3d 1026.) In each case, the respective board concluded that the employer's unilateral implementation of the provision undermined fundamental principles of collective bargaining.

(*Ibid.*)

As we see it, the *McClatchy* exception functions as a gate, at the end of a process that assumes good faith on both sides, and is designed to ensure that the employer's unilateral implementation of its last, best and final offer does not include a proposal that has a destabilizing effect on the collective bargaining process itself. That both sides must be negotiating with the requisite subjective intent to reach agreement is a given. We will examine carefully the facts of each case that comes before us to ensure that the *McClatchy* exception is not being worked as a way of avoiding a contract or otherwise evading a good faith engagement in the process as is required of both sides.[31]

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[30] The Dills Act is codified at section 3512 et seq.

[31] The facts here do not suggest that the parties were bargaining without the requisite subjective intent to reach agreement. If that were not the case, regardless of the applicability of the *McClatchy* exception, PERB would not be precluded from finding a per se violation on other grounds such as refusal to bargain or a surface bargaining violation based on the totality of circumstances such as failing to act on the other side's proposals or to offer counter proposals, taking inflexible bargaining positions, engaging in piecemeal bargaining, failing to attempt to reconcile differences, etc.

At present we cannot opine on the applicability of the *McClatchy* post-impasse implementation exception in this case because, understandably, there is no evidentiary record as to what happened after impasse was reached. Given the interconnectedness between insistence to impasse and post-impasse implementation where a discretionary bargaining proposal such as Appendix C is at issue, a decision without such a ruling would leave the parties without a complete understanding of their respective obligations. In adopting the *McClatchy* exception, we recognize that there is not a meaningful difference between refusing to negotiate over a mandatory subject (an unfair practice), on the one hand and on the other, insisting to impasse and implementing upon impasse a proposal to not negotiate a mandatory subject, i.e., a proposal that seeks unfettered managerial discretion over that subject. Because we agree with the NLRB that implementation upon impasse of such a proposal is inherently destructive of the bargaining relationship, the applicability of the *McClatchy* exception to the general rule allowing an employer to implement its last, best and final offer upon impasse must be determined.

EERA was enacted in order to accomplish these goals:

> [T]o promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by the organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy. . . .

(§ 3540.)

Without an exception to the post-impasse implementation rule, fundamental principles of collective bargaining as recognized in the above-quoted section of EERA are turned on their head. Impasse, intended as a temporary state, becomes the status quo, in which the employer

may take *recurring unilateral actions*, each ostensibly authorized by the broad discretionary language of its last, best and final offer. Where the employer has unconstrained authority to adjust employees' hours to respond to changing conditions, that employer has less motivation to restart collective bargaining. Implementation of the last, best and final offer, rather than imposing a fixed set of terms and conditions of employment on the bargaining unit, imposes a discretionary employment practice devoid of objective standards governing the frequency or timing of the changes permitted to be unilaterally decided upon by the employer, the basis or criteria for such changes or the extent to which such changes may be made. Allowing an employer to implement a proposal upon impasse retaining unfettered managerial discretion over a mandatory subject of bargaining, such as hours of employment, has the effect of "de-collectivizing" the employees' bargaining position with regard to that subject, in the words of Justice Edwards. Bilateralism in decision-making is replaced by unilateral control unilaterally imposed. Each of these byproducts is antithetical to the fundamental principles of collective bargaining, and destructive of the bargaining relationship between the employer and the exclusive representative.

Accordingly, we hereby order that the ALJ's proposed decision be vacated and the matter remanded to the Chief ALJ for assignment to an ALJ to conduct further proceedings consistent with our decision. The Board directs the assigned ALJ to do the following: (1) allow CSEA 30 days within which to move to amend the complaint to allege that the District's Appendix C proposal (contained in Article XXI) was in effect as of the date of issuance of our decision as a result of the District's implementation of its last, best and final offer; (2) allow the District 10 days from issuance of an amended complaint by which to file an answer; (3) notice the setting of an informal settlement conference to allow the parties an opportunity to resolve their dispute and enter into a settlement agreement that disposes of the

amended complaint without further proceedings; (4) in the event the parties are unable to resolve their dispute informally, notice the setting of a formal hearing to take evidence and hear argument on the amended complaint; and (5) issue a new proposed decision based on the augmented hearing record consistent with the Board's decision herein.

Because the Board's opinion employs a new analysis with respect to bargaining proposals involving employer discretion, we apply it prospectively as of the date of issuance of the Board's decision. Prospective application under the unique facts and procedural posture of this case ensures no undue prejudice to the parties from lack of notice of the Board's reasoning. Should the assigned ALJ find that the Appendix C language was still in effect as of the date of issuance of the Board's decision as a result of the District's implementation of its last, best and final offer upon impasse in successor negotiations, the ALJ is directed to order the District to rescind it and to cease and desist from enforcing it. The ALJ is to consider appropriate posting and notice remedies, as well.

In addition to the question whether the District implemented the Appendix C language as part of its last, best and final offer following impasse in successor negotiations, there is also the question whether the District subsequently unilaterally reduced an employee's hours or workyear basis pursuant to its purported Appendix C authority. To the extent any Bargaining Unit D members have suffered losses in wages and/or benefits as a result of a District decision to enforce the Appendix C language, amendment of the complaint will be subject to the following: (1) the date of the District decision will determine whether an independent unlawful unilateral change violation may be pursued; (2) District decisions made prior to the date of issuance of the Board's decision may not be pursued; and (3) District decisions made subsequent to the date of issuance of the Board's decision may be pursued and will be subject to a potential remedy.

ORDER

Upon the foregoing discussion and the record as a whole, the Public Employment Relations Board VACATES the Administrative Law Judge's (ALJ) proposed decision and REMANDS Case No. LA-CE-5419-E to the Chief ALJ for assignment to an ALJ to conduct further proceedings consistent with the decision herein.

Members Huguenin, Winslow and Banks joined in this Decision.