STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 41, Charging Party, v. SANTA ANA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5203-E PERB Decision No. 2332 October 3, 2013

Appearances: A. Alan Aldrich, Senior Labor Relations Representative, and Marianne Monfils, Labor Relations Representative, for California School Employees Association and its Chapter 41; Law Offices of Eric Bathen, Eric Bathen, Attorney, for Santa Ana Unified School District.

Before Huguenin, Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both the California School Employees Association and its Chapter 41 (CSEA) and Santa Ana Unified School District (District) to the attached proposed decision by an administrative law judge (ALJ). This dispute centers on the District's obligation under the Educational Employment Relations Act (EERA)[1] to negotiate over its decision to reduce the work year of approximately 244 bargaining unit members in light of a settlement agreement the parties reached in July, 2006 (2006 Agreement) that ostensibly resolved an earlier unfair practice charge filed by CSEA over a similar earlier decision to reduce hours and work years of employees.

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

The instant unfair practice charge alleges that the District unilaterally changed terms and conditions of employment when it repudiated the 2006 Agreement and reduced the work year for employees in May 2008, without completing negotiations regarding the decision and effects of that decision. Rejecting the District's claim that the 2006 Agreement was void, the ALJ ordered the District to honor that agreement. However, the ALJ refused to order any remedy for the District's unilateral reduction in the 2008-2009 work year for approximately 244 employees, concluding that CSEA had waived its right to pursue a remedy at the conclusion of negotiations for a successor contract in September 2008.

Both parties except to the proposed decision. CSEA appeals from the ALJ's conclusion that it waived its right to pursue its claim for back pay for approximately 244 unit members whose work year was reduced in fiscal year (FY) 2008-2009; and the District appeals from the ALJ's conclusion that the settlement agreement in the earlier unfair practice case was authorized and valid.

The Board has reviewed the hearing record, the proposed decision, and both parties' exceptions and supporting briefs. Based on this review, we find that the ALJ's findings of fact that form the basis for his conclusion that the settlement agreement in PERB unfair practice charge Case No. LA-CE-4706-E was binding on the District are supported by the record. We therefore adopt them as the findings of the Board itself, except as noted specifically and as supplemented in the decision below. We also affirm the ALJ's conclusion that the initial settlement agreement is binding on the District in accordance with the discussion below.

However, for reasons discussed below, we reverse the ALJ's conclusion that CSEA waived its right to seek a remedy for that part of the instant unfair practice charge alleging the District unilaterally reduced the work years of approximately 244 employees; and we reject the District's claim that this dispute should be deferred to arbitration.

FACTUAL SUMMARY

Beginning in 2003, the parties began litigating Case No. LA-CE-4706-E, based on a complaint alleging that the District had refused to negotiate over its decision to reduce employees' work years. At issue in Case No. LA-CE-4706-E, was the meaning of two separate articles in the parties' collective bargaining agreement (CBA). CSEA claimed that Article 3.7.2.1 required the District to negotiate all "work year changes," and to refrain from implementing those changes until negotiations were completed.[2] The District claimed that CSEA had waived the right to negotiate over any decision to reduce the work year by virtue of the language in Article 16.1.2, which provided, in pertinent part:

> The District reserves the right to reduce the hours of an occupied or unoccupied position; the Association knowingly and specifically waives its right to meet and negotiate over such decisions. . . . The District will not reduce the hours of an occupied position below the minimum level required for benefits, unless the incumbent can be transferred or reassigned to a position with the minimum level of hours required for benefits. . . . Both parties reaffirm that Article 16 constitutes the parties' agreement concerning the impact, if any, of the District's decision to reduce hours of employment or to lay-off bargaining unit employees.
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> When the District decides that it is necessary to reduce the work year of a unit member, the District shall notify the Association and provide an opportunity to meet and confer regarding the decision and to negotiate the impact of such decision.

In July 2006, after completing the administrative hearing, the parties settled Case No. LA-CE-4706-E by agreeing to remove Article 16.1.2 from the CBA effective July 1, 2007, "unless negotiated to continue in a successor agreement." CSEA also explicitly waived its

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[2] Article 3.7.2.1 provides, in pertinent part:

> All work year changes shall be brought to the attention of CSEA. . . . Negotiations shall be scheduled regarding work year changes. Work Year Changes will be implemented after the conclusion of negotiations.

claim for back wages "or restoration of positions as a function of the remedy requested in Case No. LA-CE-4706-E." The attorney for the District, Keith Breon (Breon), explained that he recommended this settlement to his client even though Article 16.1.2 contained language favorable to management's interests, because he believed there was a risk that the District could incur substantial financial liability if PERB ordered a back pay remedy in Case No. LA-CE-4706-E.

The parties signed the 2006 Agreement in two stages. CSEA signed it on July 13, 2006 at the District office in the presence of Breon and Amelia Ayala (Ayala), the District's director of classified services. The District did not sign the 2006 Agreement until July 18, 2006, because Ayala had to discuss it with her superior, Juan Lopez (Lopez), the associate superintendent of human resources. On July 18, 2006, Ayala verbally authorized Breon to sign the agreement, according to Breon's testimony.

The 2006 Agreement was not submitted to the District's governing board for ratification or approval. Lopez and other District witnesses testified that they were unaware the settlement was being negotiated, were unaware of its terms and would not have assented to removing Article 16.1.2 if they had been aware of such a proposal. Ayala was not called as a witness by the District, although it had identified her as a possible witness.

The CBA expired on June 30, 2007, and during that summer the parties exchanged proposals for a successor agreement, including proposals to modify Article 16.1.2, as envisioned by the last clause of the 2006 Agreement. The District proposed to reinstate Article 16.1.2, at least as to its provisions securing CSEA's waiver of the right to negotiate over decisions to reduce work years. CSEA proposed certain modifications of this article. During these negotiations the District was represented at the table by Ayala and occasionally Lopez. Breon was replaced at the table in April 2007, by Lopez, but continued advising the

District regarding negotiations until September or October 2007. In July 2007, Breon submitted to Ayala his ideas for District proposals concerning Article 16.1.2, including one which read: "Establish and clarify the District's right to reduce the work year of positions (occupied or unoccupied) and establish CSEA's right to meet and confer regarding the affects [sic] of District's decisions." [3]

By September 13, 2007, the parties agreed to a successor CBA for a new three-year term. This agreement simply continued all the terms of the previous agreement for a three-year term and permitted the parties to continue making proposals on all topics, except duration.

In January 2008, CSEA learned that the District was considering reducing the work years of approximately 244 custodians and public safety officers. It demanded to bargain over this decision, to which the District, through Eric Bathen, replied that Article 16.1.2 relieved the District of any obligation to negotiate over a decision to reduce work years. After CSEA cited the settlement agreement in Case No. LA-CE-4706-E, and ultimately produced a copy of it, the District claimed to be unaware of the settlement or any other agreement to remove Article 16.1.2 from the CBA.

The parties continued to negotiate for a successor agreement while maintaining their respective positions about Article 16.1.2, the District insisting it had no obligation to bargain over the decision to reduce work years and CSEA insisting on the validity of the 2006 Agreement, eliminating its prior waiver of the right to bargain over work year reductions.

In May 2008, the District sent notices to approximately 244 custodians, safety officers and other employees, notifying them that their work year would be reduced for the

[3] This proposal essentially attempts to reinstate provisions of Article 16.1.2. Clearly such a proposal would have been unnecessary from the District's perspective, unless it believed Article 16.1.2 had been deleted from the CBA.

2008-2009 FY. Negotiations regarding work year reduction for these employees had not occurred.

Ultimately the parties sought the assistance of a mediator in June 2008. Among the 48 unresolved issues listed by CSEA were Article 16.1.2 and "dispute over reduction of work years." The instant unfair practice charge was also filed in June 2008, alleging unilateral reduction in work years and repudiation of the settlement agreement in Case No. LA-CE-4706-E, among other things.

Mediation proceeded through the summer, resulting in a tentative agreement in August 2008. However, CSEA's membership decisively rejected this tentative agreement and the parties returned to the bargaining table. By September 2008, a new tentative agreement was reached and was ratified by the membership. The September agreement incorporated tentative agreements reached the previous June and provided generally that "no further negotiations will occur regarding 2007-2008 and 2008-2009." At issue here, is paragraph 16 of the September, 2008 agreement which provided:

> 16) The [present] P.E.R.B. case shall be dismissed with prejudice after ratification by both parties with the exception of the allegations related to 16.1.2. Both parties agree to negotiate any and all issues related to 16.1.2 as soon as possible.

PERB issued a complaint on January 6, 2009, alleging that the District had unilaterally changed its policy regarding work year reductions on January 22, 2008, when it approved the reductions in work year without satisfying its duty to meet and negotiate with CSEA.[4]

[4] The complaint cites Article 3.7.2 and the settlement agreement in Case No. LA-CE-4706-E as the basis for the District's policy concerning work year reductions. Article 3.7.2 provides, in pertinent part:

> "Any proposed changes in work year, shall be monitored by Human Resources, in cooperation with CSEA and negotiation with CSEA: . . . Negotiations shall be scheduled regarding work

PROPOSED DECISION

After assessing the credibility of various witnesses, the ALJ concluded that Breon had the apparent authority to enter into the settlement agreement that removed Article 16.1.2 from the parties' CBA. He also concluded that the 2006 Agreement was enforceable even though it had not been ratified by the District's governing board, distinguishing the legal authority relied on by the District because it both pre-dated EERA, and because the statutes cited were not applicable to labor agreements. Therefore, the ALJ held that the District had violated EERA section 3543.5(c) by repudiating the settlement agreement in Case No. LA-CE-4706-E. He ordered the District to honor the 2006 Agreement.[5]

The ALJ rejected CSEA's request for a make whole remedy for approximately 244 employees whose work year was unilaterally reduced beginning in the 2008-2009 FY. In the ALJ's view, the agreement reached by the parties in September 2008, laid to rest all disputes arising in 2007-2008 and 2008-2009 and specifically called for the dismissal with prejudice of the allegations contained in this unfair practice case, "with the exception of the allegations related to [CBA Article] 16.1.2." The ALJ reasoned that because he resolved the issue of the status of Article 16.1.2 by deleting that article from the CBA, the issue was resolved. He also reasoned that because the reduction in work years occurred in 2008, and the parties agreed no further negotiations would occur regarding 2008-2009, CSEA had therefore waived its right to claim a remedy for the District's alleged failure to bargain over the 2008 work year reduction.

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year changes. Work year Changes will be implemented after the conclusion of negotiations."

[5] Both parties have pointed out in their exceptions that the proposed order mistakenly refers to Case No. LA-CE-5203-E. We agree that this was a clerical error that the order should have referred to Case No. LA-CE-4706-E.

The District excepts to the part of the proposed decision upholding the 2006 Agreement in Case No. LA-CE-4706-E, and CSEA excepts to the ALJ's conclusion that CSEA waived its right to a make whole remedy for the employees whose work year was reduced for the 2008-2009 FY.

DISCUSSION

The Settlement Agreement in Case No. LA-CE-4706-E

The District asserts two separate reasons to nullify the 2006 Agreement settling Case No. LA-CE-4706-E. First, it claims that Breon did not have authority to act as its agent in entering into the 2006 Agreement. Second, the 2006 Agreement is invalid, according to the District, because the governing board never ratified it and ratification of the 2006 Agreement was required because the effect of the settlement was to alter the CBA. We address each claim in turn.

The Authority of the District's Agent

PERB first addressed the issue of agency in *Antelope Valley Community College District* (1979) PERB Decision No. 97 (*Antelope Valley*), a case relied upon by the ALJ to conclude that settlement of Case No. LA-CE-4706-E was within the scope of Breon's authority or apparent authority, as an agent of the District. However, only two of three Board members participated in *Antelope Valley,* and although they agreed on the result, they based their conclusion on two differing rationales. Drawing on the National Labor Relations Act (NLRA) and California common law, Chairperson Harry Gluck (Chairperson Gluck) fashioned a test that would find an agency relationship where "[a]pparent authority results from conduct of the principal upon which third persons rely in dealing with agents. The liability of the principal attaches where such reliance was reasonable and results in a change in position by the third party." (*Antelope Valley*, at p. 11.)

Member Ray Gonzales (Member Gonzales) concurred in the result, but disagreed with Chairperson Gluck's application of the NLRA rule to EERA. The NLRA section 2(2) specifically includes in its definition of employer "any person acting as an agent of the employer, directly or indirectly." EERA has no similar definition. Therefore, in Member Gonzales' view, the Legislature did not intend for the Board to adopt the private sector rule, but instead PERB must decide agency on a case-by-case basis. It is not necessarily reasonable to attribute acts of supervisors to the principal in all cases, even if the employees perceive employer involvement in the supervisor's actions, according to Member Gonzales.

Because there was a split opinion in *Antelope Valley*, it is not considered precedential authority, and the ALJ's reliance on it was misplaced. (*Inglewood Unified School District* (1990) PERB Decision No. 792 (*Inglewood*), affd. *sub nom., Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767.) In *Inglewood*, PERB determined that in order to establish ostensible or apparent authority of an employer's agent, the union "was bound to establish representation by the principal [the employer] of the agency, justifiable reliance by the party seeking to impose liability on the principal . . . and a change in position resulting from that reliance." (*Inglewood*, at pp. 19-20.)

More recent PERB decisions concerning agency articulate slightly different tests. For example, in *Compton Unified School District* (2003) PERB Decision No. 1518 (*Compton*), the Board described the test as "whether the perception of agency is reasonable under the circumstances" and cited with approval National Labor Relations Board (NLRB) case law: "whether under all circumstances, employees 'would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management.'" (Citations omitted.) In *West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M (*West Contra Costa*), at p. 7, the Board reiterated this test: "Both

PERB and the courts have held that apparent authority to act on behalf of the employer may be found where the manifestations of the employer create a reasonable basis for employees to believe that the employer has authorized the alleged agent to perform the act in question."

Under either the *Inglewood* test or the tests more recently articulated in *Compton and West Contra Costa*, the facts in this case sufficiently demonstrate that CSEA's reliance on Breon's authority was reasonable. Breon had represented the District in labor relations matters with the CSEA bargaining unit since 1978. In the particular case, Case No. LA-CE-4706-E, Winston Best (Best), the District's then-associate superintendent of human resources, signed PERB's Notice of Appearance form designating Breon as the District's representative in the case.[6] He testified without contradiction that the District, through its former Associate Superintendent for Human Resources, Archie Polanco (Polanco), sought Breon's services in defending against Case No. LA-CE-4706-E. Breon appeared on behalf of the District at the informal conference in that case along with Polanco, and Breon prepared and signed a brief on behalf of the District at the close of the formal hearing.[7]

On July 13, 2006, Breon and Ayala, met with CSEA President, Ira Hyepock, and CSEA Staff Member, Margie Strike, to discuss the settlement of Case No. LA-CE-4706-E. On that day, CSEA signed off on the agreement in the presence of Breon and Ayala. The District did not sign on that day because Ayala had to discuss changes in it with her superior, Lopez. On July 18, 2006, according to Breon, Ayala authorized him to sign the 2006 Agreement. He did

[6] The Notice of Appearance indicates that it remains valid until a written revocation of it is filed with PERB. No revocation was filed by the District in Case No. LA-CE-4706-E.

[7] During the litigation of Case No. LA-CE-4706-E, but before the 2006 settlement, Best, Polanco and the District's Superintendent, Al Mijares, were all replaced.

so, and copies were distributed to CSEA officials who were present and to Ayala who was also present.[8]

After entering into the 2006 Agreement on the District's behalf, Breon continued to represent the District in negotiations with CSEA during part of the 2006-2007 FY until April 2007. Ayala, and occasionally Lopez, attended these negotiations as the District's representative after Breon was no longer at the bargaining table. During these sessions, the parties bargained over Article 16.1.2, the District proposing to restore it, or a modified version, to the CBA, and CSEA resisting these proposals.[9]

In its exceptions, the District disputes that Breon had apparent authority to settle Case No. LA-CE-4706-E, citing Lopez' testimony that he never authorized anyone to sign the settlement agreement and did not even know settlement was being discussed. We concur with the ALJ's credibility determination in favor of Breon based on the fact that the District did not call Ayala to testify. Ayala was the director of classified personnel and was identified by Breon as the District's management representative who relayed to him that Lopez authorized Breon to sign the 2006 Agreement. The unexplained failure to call Ayala after having listed her as a potential witness allows us to reasonably infer that her testimony would have been

[8] There are sufficient facts in this record to conclude that Breon also had actual authority to enter into the settlement agreement in Case No. LA-CE-4706-E. In *Chula Vista Elementary School District* (2004) PERB Decision No. 1647, at p. 7, PERB noted: "'Actual authority' is that which an employer intentionally confers upon the agent, or intentionally or negligently allows the agent to believe him or herself to possess." By designating Breon as the District's representative in Case No. LA-CE-4706-E, the District gave him actual authority to defend the District in the unfair practice proceedings in that case. By permitting a high-level manager (the director of classified personnel) to accompany Breon in settlement discussions which ultimately resulted in her direction to him to sign the agreement, the District allowed Breon to believe he had actual authority from the District to enter into the agreement.

[9] For example, the District submitted a proposal to CSEA as early as January 2007, seeking to restore the terms of Article 16.1.2. This proposal references the earlier PERB settlement "regarding layoffs" and notes that the settlement did not preclude either party from negotiating changes in the contract language. (Charging Party's Exh. IV.)

contrary to the District's litigation position. (*Daikichi Sushi* (*2006*) 335 NLRB 622, 633.) This is especially so, as Ayala presumably had direct knowledge of whether Lopez had authorized Breon, through her, to sign the settlement agreement.[10]

PERB has "determined that it will normally afford deference to the [ALJ's] findings of fact involving credibility determinations unless they are unsupported by the record as a whole." (*Anaheim City School* District (1984) PERB Decision No. 364a.) Nor will the Board overturn credibility determinations absent evidence to support overturning those determinations. (*County of Santa Clara* (2012) PERB Decision No. 2267-M.) We conclude that the ALJ's factual finding that Ayala authorized Breon to sign the 2006 Agreement is supported by the record as a whole. The District has offered no basis in its exceptions for overturning this finding. Instead, the District asserts that the 2006 Agreement is not enforceable as a matter of law because the District's governing board did not ratify it, relying on various provisions in the Education Code. We turn now to those assertions.

The Validity of the Settlement Agreement Under the Education Code

The District claims that certain sections of the Education Code and cases interpreting those sections prevent enforcement of the 2006 Agreement. We note at the outset of this discussion that it is not within PERB's jurisdiction to enforce the Education Code, and we are

[10] The District also claims that Breon lacked authority to enter into the settlement agreement in Case No. LA-CE-4706-E, because attorneys are not permitted to enter into agreements on behalf of their clients without specific authority to do so. This argument begs the question we have resolved. Breon did have the specific authority to enter into the settlement agreement in Case No. LA-CE-4706-E as evidenced by his unrebutted testimony that the District's Director of Classified Services, Ayala, gave him specific authorization to sign the 2006 Agreement. Moreover, any limit a client may place on an attorney's authority to settle a case is usually privileged communication. Neither CSEA nor PERB was in any position to know of any limits the District may have allegedly placed on Breon's settlement authority, and neither CSEA nor PERB can be held to a belated assertion that the settlement of Case No. LA-CE-4706-E exceeded that authority.

powerless to remedy violations of the Education Code. (*Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 664; *Desert Community College District* (2007) PERB Decision No. 1921.) However, PERB does have jurisdiction to interpret the Education Code in an effort to harmonize its provisions with EERA and other statutes under PERB's jurisdiction. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 865; *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168; *Sonoma County Bd. of Education v. Public Employment Relations Bd.* (1980) 102 Cal.App. 3d 689; *Cajon Valley Union School District* (1989) PERB Decision No. 766; *Wilmar Union Elementary School District* (2000) PERB Decision No. 1371, at p. 13.) With these principles in mind, we turn to the District's claims.

The District argues that Education Code section 17604 invalidates the settlement agreement in Case No. LA-CE-4706-E, because that agreement was never ratified by the governing board. This section permits school districts to delegate the power to contract to a superintendent or his or her designee and provides, in pertinent part: "Wherever in this code the power to contract is invested in the governing board of the school district or any member thereof, the power may by a majority vote of the board be delegated. . . ." (Emphasis added.) The statute also contains the caveat, "no contract made pursuant to the delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board." We do not agree with the District's assertion that this provision applies to unfair practice settlement agreements.

Education Code section 17604 appears in the division and chapter of the Education Code pertaining to school facilities and has not been applied outside the context of vendor and construction contracts. (*American Federation of Teachers v. Board of Education* (1980)

107 Cal.App.3d 829, 836.) This statute does not govern settlement agreements made pursuant to PERB proceedings, which are governed by EERA and found in the Government Code. For similar reasons we are not persuaded by *Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228 (Amelco) or *Seymour v. State of California* (1984) 156 Cal.App.3d 200 (Seymour), both cited by the District. These cases involved a public works contract and a contract for the lease of a building, respectively. Both of these transactions are governed by specific statutory authorization and delegation requirements.[11] There are no similar requirements applicable to the settlement of unfair practice cases.

The District also argues that *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898 (*Cooper*), renders the settlement agreement void because it was not ratified by the governing board. We agree with the ALJ's analysis of *Cooper*. That case was decided under the Winton Act, the predecessor to EERA. By its specific terms, the Winton Act, at former Education Code section 13081(d) required that binding decisions arising from the meet and confer process must be ratified by a "written resolution, regulation, or policy of the governing board effectuating [the negotiators'] recommendations." Thus, as *Cooper* observed, any agreements reached pursuant to the Winton Act between employers and employee representatives must be ratified by the governing board before they are binding on the school district. As the ALJ correctly points out, the Winton Act, including Education Code section 13081(d) was repealed by SB 160, which enacted EERA, and no similar requirement of ratification is found in EERA. Thus, *Cooper* is inapplicable to this case. *Cooper* was decided

[11] In *Amelco,* the Court refused to hold a city liable for abandonment of a public works contract because "such [a] theory is fundamentally inconsistent with the purpose of the competitive bidding statutes." (*Id.* at p. 228.) In *Seymour*, the court held that oral agreements regarding the lease of a building were invalid because they were not approved by the Director of General Services as required by Government Code section 11005, et seq., and Government Code section 14608.

a year before EERA was enacted. It must be presumed that the Legislature was aware of the Supreme Court's interpretation of the Winton Act explicitly requiring governing board ratification of agreements arising from the meet and confer process. (*Estate of Sax* (1989) 214 Cal.App.3d 1300, 1304; *Summerfield v. Windsor Unified School Dist.* (2002) 95 Cal.App.4th 1026, 1032). Yet, the Legislature consciously chose not to import former Education Code section 13081(d) into EERA.[12] As noted in *Employment Development Dept. v. California Unemployment Ins. Appeals Bd.* (2010) 190 Cal.App.4th 178, 193 (*EDD*): "every word excluded from a statute must be presumed to have been excluded for a purpose."

We are not willing to import a requirement that the Legislature rejected, especially in light of our own precedents holding that ratification by a vote of a governing board is not the sine qua non of a binding agreement entered into by an employer's duly authorized agents.[13] See *San Francisco Unified School District* (1984) PERB Decision No. 476 (*San Francisco*), at pp. 5-6, where the Board upheld the validity of an agreement between the union and district negotiators to extend a collective bargaining agreement beyond its termination date, even though the district's governing board had not approved the agreement to extend.

> First, we find no basis to conclude that the acceptance mandated by EERA [sec. 3540.1(h)] must be nothing short of formal adoption by the District board of education. Secondly, good faith bargaining requires that designated negotiators be invested with sufficient authority to fully engage in negotiations on their principals' behalf. [Citations omitted.] Here, the District's signatory to the extension agreement held himself out to be the District's legitimate spokesperson and, except for the Petitioner's assertion, there is nothing to indicate he was not.

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[12] Compare MMBA section 3505.1, which does require that a memorandum of understanding (MOU) be presented to the governing body "for its determination" as a condition for the MOU to be binding on the parties.

[13] See *Muroc Unified School District* (1978) PERB Decision No. 80, at p. 21: "customs indulged under the limited rights and obligations of the Winton Act are unpersuasive in the context of negotiations pursuant to the EERA."

(See also *Apple Valley Unified School District* (1990) PERB Order No. Ad-209.)[14]

The District also cites to Education Code section 35161 in support of its claim that the settlement agreement of an unfair practice case was void without ratification or approval by its governing board. This section does not support the District's argument. Section 35161 permits delegation of any of its powers to an "officer or employee of the district . . . . The . . . board, however, retains ultimate responsibility over the performance of those powers or duties so delegated."[15] This provision supports CSEA's claim—once the settlement was entered into by an agent of the District, it is the District's responsibility to assure performance of the duties so delegated. In contrast to Education Code section 17604, this delegation provision conspicuously omits the phrase, "no contract made pursuant to the delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board." (Ed. Code § 17604.)

The District's reliance on Education Code section 35163 to repudiate or deny the legitimacy of Breon's agency is also misplaced. This statute states that every "official action taken by the governing board of every school district shall be affirmed by a formal vote of the members of the board. . . ." The District urges us to read into this statute the same provisions

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[14] We note that ratification is required to secure a binding agreement when such requirement has been explicitly agreed to by the parties, either through negotiating ground rules or in express contract language. (*Capistrano Unified School District* (1994) PERB Order No. Ad-261; *Downey Unified School District* (1980) PERB Order No. Ad-97.) No evidence was produced in this case to indicate that ratification by the governing board was a prerequisite for the validity of the settlement agreement in Case No. LA-CE-4706-E.

[15] Education Code section 35204 authorizes school districts to contract with a qualified "attorney in private practice, as an employee or independent contractor . . . for whatever purpose the governing board deems appropriate."

contained in section 17604, namely a ratification requirement by a vote of the governing board. For reasons following, we do not read section 35163 so expansively.

Section 35163 is more general than section 17604 in that it does not contain language invalidating contracts brokered by district agents unless they are ratified by the governing board. Section 35163 prescribes no consequence for the failure of a governing board to affirm "official actions" by a vote. Because the Legislature has shown that it knows how to impose a requirement that contracts entered into by delegated agents be ratified (Ed. Code § 17604) and in particular that labor agreements be ratified by a governing board (MMBA § 3505.1; former Education Code § 13081(d)), it cannot be inferred that the more generally-worded section 35163 imposes the same ratification requirement. (*EDD.*)

Reading section 35163 as expansively as the District urges, would conflict with Education Code section 35161, which explicitly permits delegation of any power the district itself possess. In this case, the District gave Breon apparent and actual authority to settle Case No. LA-CE-4706-E. There is no evidence that it limited his authority in terms of settlement parameters. Without such parameters or other limits on his authority, it is the original delegation to Breon to represent the District in Case No. LA-CE-4706-E that is "official action" by the District. There is nothing in the record that indicates Breon was not authorized to represent the District in the litigation of LA-CE-4706-E by appropriate "official action."

There is scant judicial guidance on the question of what constitutes "official action" by a school district, although courts have invoked Education Code section 35163 to invalidate non-ratified contracts in certain limited circumstances. Significantly, at least two have demurred on the question of whether Education Code section 35163 is mandatory or directory. (*California School Employees Assn. v. King City Union Elementary School Dist.* (1981) 116 Cal.App.3d 695, 702 (*King City*); *Lucas v. Board of Trustees* (1971) 18 Cal.App.3d 988,

992.) *Cloverdale Union High School Dist. v. Peters* (1928) 264 Pac. 273, held that a vote of the governing board was required to validate an employment contract to a teacher. *King City* held that section 35163 required a vote or other manifestation of governing board assent to lay off employees.

Other cases have invoked Education Code section 35163 to immunize a school district from tort liability for the unauthorized actions of school board members who allegedly engaged in malicious conduct (*Lipman v. Brisbane Elementary Sch. Dist.* (1961) 55 Cal.2d 224), or to void a contract where ratification is required by some other statute, as in *Santa Monica Unified Sch. Dist. v. Persh* (1970) 5 Cal.App.3d 945 (former Ed. Code § 15961).

We have found no case in which Education Code section 35163 supports the invalidation of a litigation settlement agreement entered into by a district's agent under circumstances present in this case, i.e., where the agent was authorized generally to represent the District in the litigation with no apparent limitation on his authority; where the agent was given explicit authority to enter into such agreement; where the settlement agreement placed no encumbrance on the public fisc; and where there is no underlying statute or regulation either requiring the governing board to ratify this agreement, or prohibiting an agreement unless it is ratified.

Important public policy considerations also inform our interpretation of Education Code section 35163. The purpose of EERA is to promote the improvement of employer-employee relations. (EERA § 3540.) To that end, PERB is empowered to investigate alleged violations of the EERA and take any actions the Board deems necessary to effectuate the policies of EERA. (EERA § 3541.3(i).) Since the inception of the agency, settlement conferences preceding formal hearings have been deemed actions necessary to effectuate the policies of

EERA. (PERB Reg. 32650.[16]) Policies encouraging voluntary settlement of labor disputes, including alleged unfair practices, cannot be overstated. Early resolution of disputes without litigation plays an obvious role in improving employer-employee relations, as it eliminates the cost, acrimony, and time of litigation and allows the parties to craft an agreement that fits their particular circumstance, PERB's interest in assisting parties in settling their disputes cannot be gainsaid. If an employer could, by simply failing or refusing to present a settlement agreement for ratification, renege on an agreement consented to by its agent on which both PERB and the other party rely, there would be no stability or peace in labor relations. Public employers could enter into agreements with exclusive representatives on any manner of disputes--grievance settlements, collective bargaining agreements, unfair practice settlements--which more often than not require concessions on both sides, and then renege on the agreement simply by refusing or failing to put the matter to a vote of the governing board.[17] PERB's role as a credible broker in assisting parties to settle their disputes would also be seriously undermined if a party could renege on an agreement simply by claiming its governing body did not vote to ratify a settlement of an unfair practice case. (See *Victor Valley Joint Union High School District* (1980) PERB Decision No. 148; *Union of American Physicians and Dentists (Stewart)* (1988) PERB Decision No. 663-S [both of which noted that PERB's policy of encouraging

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

[17] While employee organizations are not subject to similar statutes regarding delegation of public authority, it would be equally detrimental to labor stability if unions could renege on agreements with impunity simply by claiming that their executive board did not vote on the agreement. See *Alhambra City and High School Districts* (1986) PERB Decision No. 560, at p. 14: "Absent good cause, once a tentative agreement is reached, there is an implication that both parties' negotiators will take the agreement to their respective principals in a good faith effort to secure ratification. (*NLRB v. Electra-Food Machinery* (9th Cir. 1980) 621 F.2d 956 [104 LRRM 2806]; *H. J. Heinz Co. v. N.L.R.B.* (1941) 311 U.S. 514 [7 LRRM 291].)

voluntary settlement agreements would be undermined if a party refused to honor the agreement].)

Consequently, we believe that harmonizing Education Code section 35163 with other sections of the Education Code, such as sections 35161 and 35204 and with EERA requires us to read Education Code section 35163 narrowly. Its requirement that "every official action" taken by a governing board shall be affirmed by "a formal vote of the members of the board" does not by its plain meaning require that an unratified agreement be invalidated. This is in contrast to section 17604, which explicitly requires ratification of contracts entered into pursuant to that section as a condition to their enforceability. This difference between sections 17604 and 35163 suggests that if the Legislature intended that "every official action," including agreements entered into by delegated agents, must be ratified as a condition of validity, it would have replicated the wording of section 17604 in section 35163.

Nor does Education Code section 35163 supersede Education Code sections 35161 or 35204, both of which permit a school district to delegate any of its powers to employees, officers and attorneys, including attorneys in private practice who are retained as either an employee or independent contractor.[18] The principles developed under PERB's precedents regarding agency and the requirements of EERA section 3540.1(h) are served by an interpretation of section 35163 that recognizes that school districts frequently act through their agents, especially in the area of labor relations, and that when those agents act with apparent or

[18] Common sense requires some reasonable limitation on an alleged requirement that "every official action" taken by a school district must be affirmed by a vote of the governing board, otherwise the district would be paralyzed by the fact that its governing board cannot be in session perpetually. For example, in a litigation context, it defies credulity that a governing board would have to vote to approve litigation strategies, such as not calling Ayala as a witness, or a hypothetical agreement by its attorney to assent to an extension of time to file a pleading.

actual authority, a district may not rely on a failure to comply with Education Code section 35163 to disavow an agreement made by the agent that was within the scope of his or her apparent authority. This is especially true where, as here, the school district employer fails to put the employee organization or PERB on notice that any settlement of an unfair practice charge needs to be ratified by the governing board.[19] The District produced no evidence of regulations or written policy or established practice requiring governing board ratification of unfair practice settlements.

For all of the reasons discussed above, we conclude that Education Code section 35163 does not require a vote of the District's governing board to bind the District to a settlement agreement of an unfair practice charge entered into by its duly authorized agent who had apparent and actual authority to enter into the agreement where no one from the District put either PERB or CSEA on notice that a ratification vote would be required.

Even if we were to accept the District's assertion that it must ratify an unfair practice settlement agreement, the doctrine of equitable estoppel applies in this case to prevent the District from relying on Education Code section 35163 under the circumstance of this case. Equitable estoppel may be applied against the government where justice and right require it. (*Driscoll v. City of Los Angeles* (1967) 67 Cal.2d 297, 306; *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 493 (*Mansell*).) Traditionally stated, "the vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted."

[19] If ratification by the governing board was in fact required in this case, it is logical to presume that Ayala would have alerted the parties, including PERB, to that fact. Had that occurred, PERB would have refrained from dismissing the complaint in Case No. LA-CE-4706-E until ratification had occurred. There was no evidence that she or anyone else informed the parties to the settlement agreement that ratification by the governing board would be required, although she did inform CSEA that she needed Lopez' approval before the District signed the 2006 Agreement.

(*Seymour v. Oelrichs* (1909) 156 Cal. 782, 795.) Generally, estoppel will be applied when four elements are present: (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estopped had a right to believe it was so intended; (3) the other party must be ignorant of the true facts; and (4) he must rely on the conduct to his injury. (*Mansell, id.*) However, estoppel will not be applied "against the benefit of the public." (*County of San Diego v. Cal. Water Etc. Co.* (1947) 30 Cal.2d 817, 829-830.)

Equitable estoppel has been applied to estop a county from recouping public assistance payments where those payments were made as a result of the county's negligent misrepresentations. (*County of Orange v. Carl D.* (1999) 76 Cal.App.4th 429). The doctrine has also been invoked to prevent a city from asserting paramount title to land (Mansell); to prevent a school district from asserting the statute of limitations against a teacher seeking reinstatement after having been erroneously advised by the district that reinstatement was unavailable (*Lerner v. Los Angeles Board of Education* (1963) 59 Cal.2d 382); to prevent a county from asserting a tort claims limitation statute after a county agent advised the plaintiff not to hire an attorney (*Farrell v. County of Placer* (1944) 23 Cal.2d 624.)

In this case, we find the four elements of equitable estoppel present. By its assertion, that ratification of the 2006 Agreement was required in order to bind the District, it must have known of that position when its agents entered into the agreement. Yet such "fact" was concealed from both CSEA and PERB, both of whom relied on the actual representation by the District's agents, Breon and Ayala, that they had authority to enter into the agreement and no further ratification or authorization was required. The District intended both CSEA and PERB to rely on its representation that the unfair practice in Case No. LA-CE-4706-E was settled by Breon's signature on July 18, 2006, because it was obviously bargaining for the outcome of

that agreement--CSEA would drop its litigation of Case No. LA-CE-4706-E and the accompanying potential back pay award in exchange for the deletion of Article 16.1.2 from the collective bargaining agreement the following year. The District also intended that PERB would permit the withdrawal of the complaint it issued in the case, with prejudice. There is no evidence that either PERB or the CSEA knew or should have known that ratification by the District's governing board was required, and both PERB and CSEA obviously relied on the District's representation that the settlement was final when Breon signed it. If CSEA had not so relied, it would not have withdrawn its unfair practice charge, and PERB would not have sanctioned the withdrawal.

We assume for the sake of this discussion that Education Code section 35163 is a policy adopted for the benefit of the public. This statute assures, for example, that claims on the public fisc will not be made based on unauthorized transactions by low-level employees; or that employees will not be laid off without the formality of a vote by a majority of the governing board at a public meeting; or that long-term employment obligations will not be entered into absent a vote by the governing board.

Balanced against these interests are the equities in this case. Relying on the District's representations, CSEA withdrew from litigation that could have resulted in a back pay remedy for unit members. In deleting Article 16.1.2 from the CBA, it also gave up a significant protection for unit members, i.e., the guarantee that the work hours of any position would not be reduced below what was needed to qualify for health benefits.

PERB also relied on the bona fides of the parties when it assisted in the settlement of LA-CE-4706-E. As the agency charged with the administration of EERA, PERB has an institutional interest in assuring that settlements of unfair practice charges achieve labor peace. PERB's ability to broker settlement agreements is seriously undermined by conduct such as

occurred here, where a party claims that a settlement is void years after it was entered into, after PERB nor CSEA has virtually any ability to revive the original charge. And, as the subsequent developments evolved in this case, it is plainly evident how the District's complete reneging on the 2006 Agreement created additional conflict, rather than labor peace.

No harm to the public fisc will occur as a result of estopping the District from using Education Code section 35163 to deny the 2006 Agreement. To the contrary, that agreement relieved the District of potential liability. The only arguably adverse result to the District flowing from the 2006 Agreement relevant here was that it had a duty to bargain over the decision to reduce the work year of bargaining unit employees. The duty to bargain this decision does not obligate the employer to commit to any particular outcome. (*Oakland Unified School District* (1982) PERB Decision No. 275; *San Francisco Community College District* (1979) PERB Decision No. 105.) It is a process, not a prescription.

On balance, we conclude that estopping the District from asserting Education Code section 35163 in this case does not nullify a strong rule of public policy adopted for the benefit of the public. As discussed above, it is not established that section 35163 even applies to the settlement of unfair practice charges. PERB precedent strongly suggests that it does not. (*San Francisco*.) We find the more significant public policy favoring labor peace and the credibility of the PERB settlement process requires that parties coming to this Board with the ostensible and actual authority to settle unfair practice charges do in fact bind their principals to an agreement, unless the other party and PERB are put on notice of the limits of their authority. Any remedies the District believes it may have against its former agent or its employees for failing to bring the 2006 Agreement to the governing board for approval lie in other forums.

Deferral to Arbitration

In its post-hearing brief to the ALJ, the District argued that because Article 16.1.2 is still in the CBA due to the alleged invalidity of the 2006 Agreement, any dispute as to the meaning of Article 16.1.2 must be deferred to binding arbitration. The proposed decision did not address this deferral claim, and the District renews the claim in its exceptions. The District asserts that both Article 16.1.2. and Article 3.7.2 are at the "center of the dispute between the parties," that there is binding arbitration and therefore deferral is required. We disagree.

EERA section 3541.5(a)(2) prohibits PERB from issuing a complaint "against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort of the contract grievance procedure would be futile, exhaustion shall not be necessary." We conclude that resort to arbitration would be futile and that the dispute is not covered by the grievance machinery.

The CBA prohibits the arbitrator from awarding back pay for any period greater than the pay period immediately preceding the filing of the grievance. This limitation could produce an award, if favorable to CSEA, that conflicts with EERA, which directs PERB to remedy unfair practices with make-whole orders.[20] A make-whole order in this case could encompass a longer time period than that proscribed by the CBA.

While we recognize that we are not called upon in this case to rule on a post-arbitration deferral claim, we note that contractual limitation on the scope of an arbitrator's authority to

[20] Arbitrators' refusal to order make-whole remedies when they find bargaining violations has resulted in PERB finding that such awards are repugnant to EERA. (*Ramona Unified School District* (1985) PERB Decision No. 517; *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a.)

fully remedy contract violations that are also unfair practices could render resort to arbitration futile within the meaning of EERA section 3541.5(a)(2). (See *Texaco, Inc.* (1977) 233 NLRB 375, 376.) We see no reason to defer to a process that on its face, cannot provide the same scope of remedy available in an unfair practice proceeding.

The parties' CBA defines a grievance as a "statement by a unit member that the District has violated an express term of this agreement." (Art. 10.1.) With respect to Article 16.1.2, the dispute is not about whether it has been violated, but is more existential: Is Article 16.1.2 "an express term of" the CBA or not? Therefore, the statutory requirement of EERA section 3541.5(a)(2) that the grievance machinery cover "the matter at issue" is not met here.

We also conclude that deferral would be inappropriate here because resorting to the grievance procedure regarding Article 16.1.2 would be futile. Article 10.8.5 of the CBA limits the arbitrator's authority by prohibiting him or her from adding to, subtracting from or altering, deleting amending, or modifying the terms of the CBA. Presented with the issue in this case--whether the 2006 Agreement removed Article 16.1.2 from the CBA--the arbitrator would be called upon to remedy the grievance either by "adding" Article 16.1.2 back into the CBA, if he/she found for the District, or by "removing" it if he/she found in favor of the Union. Doing either would exceed the authority given to the arbitrator by the CBA and he/she would be powerless to order such a remedy. This would make resort to arbitration to settle the issue of the status of Article 16.2.1 futile. (See *Inglewood Unified School District* (1991) PERB Order No. Ad-222 [an arbitration award in excess of the scope of the arbitrator's authority may be unenforceable].)

Finally, the Union represents that the CBA does not permit it to pursue grievances in its own name except as to certain limited articles not relevant to this dispute. PERB has refused to defer cases to arbitration where the employee organization itself did not have the right to file

a grievance over the alleged violation. (*Moreno Valley Unified School District* (1995) PERB Decision No. 1106; *Redwoods Community College District* (1994) PERB Decision No. 1047.) Article 10.1.1 provides: "If rights guaranteed to the Association are violated, the Association President may file a grievance without the signature of another individual unit member." The District disagrees that this prevents the Union from pursuing a grievance alleging a violation of Article 3.7.2, but it presented no evidence of bargaining history that would rebut the Union's interpretation or that illuminates the meaning or past application of Article 10.1.1.

Deferral is an affirmative defense and the party asserting it bears the burden of producing facts that justify deferral. (*San Francisco Unified School District* (2004) PERB Decision No. 1730; *Charter Oak Unified School District* (1982) PERB Order No. Ad-125.) The District failed in its burden to prove that the Union could in fact file a grievance in its own name, or that the grievance procedure authorizes an arbitrator to resolve the dispute, or that an arbitrator could award an appropriate remedy. For these reasons deferral is not appropriate in this case.

The September, 2008 CBA

CSEA excepts to the conclusion by the ALJ that by entering into the September 2008 CBA settlement, the Union waived its right to pursue any make-whole remedy for those employees whose work year was unilaterally reduced beginning in the 2008-2009 FY. We reverse the ALJ's determination for the following reasons.[21]

It is well settled that a waiver of statutory rights, such as the right to pursue unfair practice cases, or the right to negotiate, will not be lightly inferred. (*San Marcos Unified*

[21] Because the language of the September 2008 agreement is not in dispute, the question of whether there was a clear and unmistakable waiver is a question of law. (*Long Beach Community College District* (2003) PERB Decision No. 1568, at p. 12.) The ALJ concluded there was a waiver without making any credibility determinations. Consequently, we review those conclusions without any particular deference to the proposed decision.

School District (2003) PERB Decision No. 1508.) As this Board recently noted in *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, at p. 16: "Waivers of the right to bargain are disfavored and must therefore be shown by 'clear and unmistakable' language." (See also *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74, at p. 8; *Compton Community College District* (1989) PERB Decision No. 720, at p. 19 [waiver by contract effective only if it was "fully discussed" and "consciously yielded" to].)

If the language of the agreement is clear, PERB may interpret the parties' agreement and determine whether there is a waiver according to the agreement's plain meaning. If the language is ambiguous, the Board may consider bargaining history or other extrinsic evidence to assist in interpretation. (*Clovis Unified School District* (2002) PERB Decision No. 1504.) However, the party arguing in favor of the waiver bears the burden of proving its existence, given the strong public policy disfavoring waivers based on inference. (*Long Beach Community College District* (2003) PERB Decision No. 1568.)

The ALJ determined that the Union had waived its right to pursue the current unfair practice complaint with respect to any claim concerning the reduction in work year in 2008-2009. He based this conclusion on two portions of the parties' September 2008 CBA settlement agreement: "No further negotiations will occur regarding 2007-2008 and 2008-2009" and paragraph 16, which states:

> The [present] P.E.R.B. case shall be dismissed with prejudice after ratification by both parties with the exception of the allegations related to 16.1.2. Both parties agree to negotiate any and all issues related to 16.1.2 as soon as possible.

The ALJ refused to order back pay or otherwise remedy the District's May 2008 unilateral reduction of the work year for approximately 244 employees. He interpreted the above-quoted paragraph 16 as a waiver of the Union's right to pursue a make-whole remedy,

noting that in the Union's first amended unfair practice charge and in the requested remedy, Article 16.1.2. was mentioned only as "an issue separate and distinct from work year reductions." (Proposed Dec., at p. 16.) As we discuss below, this is a mis-reading of the first amended charge.

We disagree that the language in the September 2008 CBA agreement constituted a waiver of the Union's right to seek a remedy for the District's unilateral reduction in the work years of approximately 244 employees. As a starting point, the language in question, "allegations related to [Article] 16.1.2," is ambiguous. It becomes even more ambiguous after a close reading of the first amended unfair practice charge, filed 13 days before the parties reached their September 2008 settlement.

The amended charge alleged numerous unfair practices including: refusing to bargain over the decision to reduce the work year and unilaterally implementing work year reduction for approximately 244 employees before negotiations were completed; refusing to negotiate over the decision to transfer duties from one classification to another; refusing to provide relevant information; engaging in surface bargaining, etc.

The factual statement accompanying the unfair practice form organizes the allegations in different groups associated with the separate alleged unfair practices. For example, "[p]aragraphs 6 through 18 below address the District's unilateral reduction of unit member work years." Those paragraphs narrate the following events: the settlement of Case No. LA-CE-4706-E, resulting in Article 16.1.2 being removed from the CBA; no further agreements to add Article 16.1.2 back in to the contract; the January 2008 notification by the Union to the District that Article 16.1.2 had been removed from the CBA; the District's denial of the settlement of Case No. LA-CE-4706-E; the District's approval of a work year reduction for hundreds of custodians, school police and other safety officers; the Union's demand to

bargain over this decision to reduce work years; the exchange of proposals in the Spring 2008 without agreement on work year reduction; the May 18, 2008, District notification to approximately 244 employees that their work years would be reduced in the 2008-2009 FY; the occurrence of this reduction while the parties were engaged in negotiations over the matter.

The central dispute in this case is the status of Article 16.1.2--whether the 2006 settlement of Case No. LA-CE-4706-E was valid and therefore removed that article from the CBA. The District maintained that this clause was in the CBA and it waived the Union's right to bargain over any management decision to reduce work years. The Union believed the opposite--that the waiver that was Article 16.1.2 was removed from the contract as of July 1, 2007, and therefore the District was obligated to bargain over the decision to reduce work years before unilaterally reducing them. The parties' actions in the first six months of 2008, regarding work years, were inextricably related to their opposing views of Article 16.1.2. If the District believed that Article 16.1.2 had been removed, it presumably would have negotiated over its decision to reduce work years. Conversely, if CSEA believed that Article 16.1.2 remained in the CBA, it presumably would not have demanded to negotiate over the decision to reduce work years, a right arguably waived by contract. In short, the actions the District took in January and May 2008 to effectuate the reduction of the work years and about which CSEA complained in this unfair practice charge, flowed from their respective views regarding the status of Article 16.1.2. On this basis, it is more than reasonable to interpret the allegations regarding the 2008 work year reduction as being "related to Article 16.1.2."

In the proposed decision, the ALJ misapprehended the first amended charge. He stated, "CSEA's first amended unfair practice charge listed seven 'charges' against the District. Only

the last 'charge' mentioned CBA Article 16.1.2:"[22] Charge No. 7 (to be distinguished from paragraphs in Factual Statement) reads, in pertinent part: "By repudiating the express provisions of Article 16.1.2, which respondent asserts is in full force and effect, by reducing unit member daily hours below 4 hour[s] per day and eliminating district provided Health and Welfare benefit coverage, RESPONDENT . . . refuses or fails to bargain in good faith."

There were several provisions in Article 16.1.2. One of them read: "The District will not reduce the hours of an occupied position below the minimum level required for benefits, unless the incumbent can be transferred or reassigned to a position with the minimum level of hours required for benefits." By the time PERB issued a complaint in the instant unfair practice charge, the allegations concerning this portion of Article 16.1.2 regarding minimum hours and benefits were either moot or settled. Obviously, this part of Article 16.1.2 was not part of the parties' dispute when the case went to hearing. The dispute was over the part of Article 16.1.2 regarding the waiver of bargaining rights: "When the District decides that it is necessary to reduce the work year of a unit member, the District shall notify the Association and provide an opportunity to meet and confer regarding the decision and to negotiate the impact of such decision."

By its allegations in Charge No. 7, CSEA attempted to lay claim to the beneficial language of Article 16.1.2, but it consistently maintained throughout this litigation that Article 16.1.2 was excised from the CBA in its entirety. Charge No. 7 was ultimately irrelevant to the question of the validity of the 2006 settlement, and it was not logical for the ALJ to imply that because Charge No. 7 was the only place in the first amended unfair practice

[22] This statement is also inaccurate. Paragraph 7 of the factual statement of charges in the first amended unfair practice charge references the settlement agreement in Case No. LA-CE-4706-E and attaches it as an exhibit to the instant unfair practice charge. Because the settlement agreement in Case No. LA-CE-4706-E mentions Article 16.1.2, we deem the unfair practice charge itself to "mention" that article in paragraph 7.

charge that cited Article 16.1.2, that CSEA intended to waive its remedy for the wrongs that flowed from the District's repudiation of the 2006 Agreement settling Case No. LA-CE-4706-E.

We are also persuaded by the testimony concerning negotiations of the September 2008 CBA settlement that there was no clear and unmistakable waiver by that agreement. Both Alan Aldrich (Aldrich), the CSEA staff representative for the Union, and Robert Chavez (Chavez), the Union president, testified about the events that led to the September 2008 agreement. They both testified that they, Lopez, and others participated in two sidebar meetings assisted by a mediator on September 16, 2008. Chavez testified that when the subject of the work year unfair practice charge came up, Aldrich said he was not going to withdraw the "reduction of work year unfair." Aldrich communicated this multiple times, and Chavez was certain of this in his testimony.

Later that day, after an agreement had been reached, the parties reconvened to summarize the terms of their agreement. According to Aldrich, Lopez, who took the lead in the summarizing, failed to mention paragraph 16 in his summary. At that point, Aldrich declared that that paragraph allowed CSEA to pursue the unfair practice on the "reduction of work year" and "will also create a vehicle for the parties to try to fix that language [regarding Article 16.1.2] through subsequent negotiations." (Reporter's Transcripts [R.T.], Vol. II.) Lopez did not object to this statement. Nor did anyone else on the District's bargaining team make any objection or contradict Aldrich's declaration.

Lopez also testified about the events of September 16, 2008, but was less definite than the Union witnesses. He was not sure of who attended what sidebar meetings with the mediator. Nor did he recall discussing the reduction of work year issue in the sidebar meetings. Most significantly, Lopez did not deny Aldrich's account of the summary meeting.

For these reasons, we credit Aldrich's and Chavez' testimony and find that the District did not dispute the Union's statement at the bargaining table, that the September 2008 settlement agreement did not waive CSEA's right to pursue the reduction of work year portion of this unfair practice charge.

The reduction in work years for the 2008-2009 FY is inextricably related to the parties' dispute over Article 16.1.2. There is no evidence of a clear and unambiguous waiver of the right to seek a remedy for the unilateral reduction in the work years, and we conclude there was no such waiver.

The Remedy

PERB has broad powers to remedy unfair practices. EERA section 3541.5(c) provides:

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

In cases in which the employer has unilaterally changed a term and condition within the scope of negotiations, PERB has used its remedial power to order a return to the status quo ante, including a restoration of pay, benefits and positions, if necessary. (*Pittsburg Unified School District* (1983) PERB Decision No. 318 [make whole remedy is appropriate in a unilateral change case in which the decision itself is negotiable]; *Davis Unified School District, et al.* (1980) PERB Decision No. 116.) Decisions to change employees' work year are negotiable. (*North Sacramento School District* (1981) PERB Decision No. 193.)

In this case, the District violated EERA section 3543.5(c) when it reduced the work year of approximately 244 employees, effective July 2008, without negotiating over its decision with

CSEA.[23] Therefore, an order directing the District to negotiate with CSEA over its decision to reduce the work year for these employees is appropriate. It is also appropriate to order a restoration of the status quo, including reinstatement to a full work year, back pay and benefits for employees whose work year was reduced.

However, in this case we believe it is desirable to give the parties a limited time to negotiate over the restoration of the status quo. The dispute between these parties over the District's obligation to bargain over work year reductions began as early as 2003. Beginning with the 2006 Agreement and continuing through the 2008 CBA settlement, the parties have consistently agreed to "negotiate any and all issues related to 16.1.2 as soon as possible." (September, 2008 CBA, par. 16.) As far as the record in this case indicates, the parties have not reached agreement on matters related to Article 16.1.2. In addition, there may be several different methods for these affected employees to be made whole. Therefore, a negotiated remedy is quite likely the best way to determine the scope of a make-whole remedy in this case. We note also that the record is not clear as to the extent of the work year reduction for these employees. The initial unfair practice charge alleges that their work year was reduced from twelve months to eleven-and-a-half months. In CSEA's June 14, 2008 request for factfinding, it avers that approximately 244 employees had their work year reduced by either two weeks or one month for the 2008-2009 FY.

In order to give the parties an opportunity to fulfill the obligations to negotiate over any and all issues related to Article 16.1.2, including matters related to back pay, we will order the

[23] The proposed decision did not specifically find a violation regarding the reduction in these employees' work year because the ALJ concluded that the Union had waived its right to seek a remedy. Based on our review of the administrative record presented to the ALJ, there is substantial evidence that the District reduced the work year of 244 custodial and school safety employees in May 2008 and did so without completing negotiations concerning this work year reduction with the Union. We hold that such conduct violated EERA section 3543.5(c).

parties to negotiate for a period of 60 days a remedy mutually satisfactory to them before the matter will be submitted for compliance. (See *Desert Sands Unified School District* (2010) PERB Decision No. 2092.)

If the parties have not reached an agreement regarding the remedy within that time, we will order the District, upon demand by CSEA, to restore to each bargaining unit member whose work year was reduced effective July 2008 the work year schedule he or she would have worked in 2008-2009 and in years following had the District not unilaterally reduced his or her work year in the 2008-2009 FY. We will also order that each employee whose work year was reduced in July 2008 be paid back pay and benefits, with interest thereon at the legal rate, between July 1, 2008, and the date he or she was offered reinstatement to the work year he/she worked before the July 2008 reduction.

Finally, it is the ordinary remedy in PERB cases to order that the party found to have committed an unfair practice to post a notice incorporating the terms of the order. Posting of such a notice informs employees of the resolution of the matter and of the employer's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.) We order that remedy here.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Santa Ana Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540, et seq., by repudiating a settlement agreement with the California School Employees Association and its Chapter 41 (CSEA) in Case No. LA-CE-4706-E; and by unilaterally reducing the work year of approximately 244 custodians, public safety officers and other unit members effective

July 2008 without negotiating with CSEA concerning the decision to reduce the work year for those employees.

Pursuant to section 3543.5(c) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Repudiating agreements with CSEA, including the settlement agreement in Case No. LA-CE-4706-E.

2. Taking unilateral action to reduce the work year of bargaining unit members effective in July 2008 without negotiating with CSEA over the decision to reduce the work year of those unit members.

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

1. Honor the settlement agreement with CSEA in Case No. LA-CE-4706-E.

2. Bargain with CSEA upon request about the decision to reduce the work year of the approximately 244 employees who were notified of such reductions in May 2008.

3. Make whole all bargaining unit members whose work year was reduced as of July 1, 2008, by restoring each of them, upon request by CSEA, to the work year he or she would have worked had the reduction not occurred and by paying each of them back pay and benefits from July 1, 2008, to the date each of them is offered reinstatement to the work year they each worked before July 1, 2008, with interest at seven (7) percent per annum.

With regard to the make whole remedy, this Order shall be stayed for 60 days to provide the parties an opportunity to meet and negotiate over a mutually acceptable remedy. In the event no agreement is reached within 60 days and the parties have not mutually agreed to an extension of time within which to do so, CSEA shall notify the General Counsel of the

Public Employment Relations Board (PERB), or the General Counsel's designee, so that compliance proceedings may be initiated.

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

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or her designee. All reports regarding compliance with this Order shall be concurrently served on CSEA.

Members Huguenin and Banks joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-5203-E, *California School Employees Association and its Chapter 41 v. Santa Ana Unified School District*, in which all parties had the right to participate, it has been found that Santa Ana Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by repudiating a settlement agreement with the California School Employees Association and its Chapter 41 (CSEA) in Case No. LA-CE-4706-E; and by unilaterally reducing the work year of approximately 244 custodians, public safety officers and other unit members in July 2008, without negotiating with CSEA concerning the decision to reduce the work year for those employees.

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

A. CEASE AND DESIST FROM:

1. Repudiating agreements with CSEA, including the settlement agreement in Case No. LA-CE-4706-E.

2. Taking unilateral action to reduce the work year of bargaining unit members effective in July 2008 without negotiating with CSEA over the decision to reduce the work year of those unit members.

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

1. Honor the settlement agreement with CSEA in Case No. LA-CE-4706-E.

2. Bargain with CSEA upon request about the decision to reduce the work year of the approximately 244 employees who were notified of such reductions in May 2008.

3. Make whole all bargaining unit members whose work year was reduced as of July 1, 2008, by restoring each of them, upon request by CSEA to the work year he or she would have worked had the reduction not occurred and by paying each of them back pay and benefits from July 1, 2008, to the date each of them is offered reinstatement to the work year they each worked before July 1, 2008, with interest at seven (7) percent per annum.

With regard to the make whole remedy, this Order shall be stayed for 60 days to provide the parties an opportunity to meet and negotiate over a mutually acceptable remedy. In the event no agreement is reached within 60 days and the parties have not mutually agreed to an extension of time within which to do so, CSEA shall notify the General Counsel of the Public Employment Relations Board (PERB), or the General Counsel's designee, so that compliance proceedings may be initiated.

Dated: _____ SANTA ANA UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 41, Charging Party, v. SANTA ANA UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5203-E PROPOSED DECISION (6/15/2011)

Appearances: A. Alan Aldrich, Senior Labor Relations Representative, and Marianne Monfils, Labor Relations Representative, for California School Employees Association and its Chapter 41; Eric Bathen, Attorney, for Santa Ana Unified School District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union argues that an employer made a unilateral change in policy by repudiating the settlement of an earlier case before the Public Employment Relations Board (PERB or Board) in violation of Educational Employment Relations Act (EERA) section 3543.5(c).[1] The employer denies any violation of law, arguing in part that the PERB settlement is unenforceable.

The California School Employees Association and its Chapter 41 (CSEA) filed an unfair practice charge against the Santa Ana Unified School District (District) on June 12, 2008. CSEA filed amended charges on September 3 and October 31, 2008. The Office of the General Counsel of PERB issued an unfair practice complaint (complaint) against the District on January 6, 2009. The District filed an answer to the complaint on January 22, 2009.

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

PERB held an informal settlement conference on February 17, 2009, but the case was not settled. PERB held a formal hearing on June 30, August 5 and September 30, 2009. After briefing, the case was submitted for decision on January 14, 2010.

FINDINGS OF FACT

The District is a public school employer under EERA. CSEA is the exclusive representative of a unit of the District's classified employees.

From December 2003 to July 2006, CSEA and the District were parties to PERB Unfair Practice Case No. LA-CE-4706-E (LA-CE-4706-E), which ended in a settlement agreement mediated by a PERB Regional Attorney (PERB Settlement). The PERB Settlement was on PERB letterhead and stated in full:

> In the interest of promoting harmonious labor relations between the parties and to avoid the uncertainty, inconvenience, and expense of litigation, the California School Employees Association & its Chapter 41 and the Santa Ana Unified School District, in settlement of the above-captioned unfair practice charge before the Public Employment Relations Board, agree as follows:
>
> 1. A dispute has arisen between the parties concerning negotiations over regarding [sic] reductions of unit member work years.
>
> 2. California School Employees Association & its Chapter 41 hereby withdraws Unfair Practice Charge No. LA-CE-4706-E with prejudice.
>
> 3. This Settlement Agreement does not constitute an admission of wrongdoing, contract or statutory violation, or liability on the part of any party to the agreement.
>
> 4. This Settlement Agreement represents a full and complete resolution of the claims and disputes between the parties based upon the above-referenced matter.
>
> 5. The undersigned parties represent that they have read and understand the terms of this settlement and that they are

> authorized to execute this Settlement Agreement on behalf of their principals.
>
> 6. Effective July 1, 2007, Article 16.1.2 shall be removed from the provisions of the Agreement between CSEA Chapter 41 and the Santa Ana Unified School District; unless negotiated to continue in a successor contract.
>
> 7. Effective July 1, 2007, the parties shall retain all rights with respect to layoff and reductions of hours as established by provis[i]ons of the Education Code and Educational Employment Relations Act [EERA].
>
> 8. Charging party will make no claim for back wages or res[t]oration of positions as a function of the remedy requested in Case No. LA-CE-4706-E.

The date of July 1, 2007, referenced in the sixth and seventh numbered paragraphs, was the expiration date of the parties' collective bargaining agreement (CBA).

The preamble and the first five numbered paragraphs of the PERB Settlement represent standard language in settlement agreements mediated by PERB. Pursuant to the second numbered paragraph, PERB gave official notice that CSEA's unfair practice charge was withdrawn with prejudice, the complaint was dismissed, and the case was closed.

In LA-CE-4706-E, CSEA alleged that the District refused to negotiate a decision to reduce employees' work years. The District argued that CSEA had waived its right to negotiate the decision under CBA Article 16.1.2, which stated in part:

> When the District decides that it is necessary to reduce the work year of a unit member, the District shall notify the Association and provide an opportunity to meet and confer regarding the decision and to negotiate the impact of such decision.

CSEA denied this was a waiver and pointed to CBA Article 3.7.2.1, which affirmatively stated:

> All work year changes shall be brought to the attention of CSEA. All work year change requests submitted to Human Resources between October 30 and April 30 shall be noticed to CSEA in the following May; all work year change requests submitted to Human Resources between April 30 and October 30 shall be

> noticed to CSEA in the following November. Negotiations shall be scheduled regarding the work year changes. Work Year Changes will be implemented after the conclusion of negotiations.

The matter went to formal hearing before a PERB Administrative Law Judge (ALJ) on September 29, 2004, but the ALJ retired before writing the decision.

Before another ALJ prepared to write the decision, a PERB Regional Attorney made an effort to settle the matter. On April 6, 2006, the Regional Attorney sent the parties a letter stating in part:

> This letter is to confirm that the parties have agreed to make one last attempt to settle this case. With that goal in mind, we have scheduled telephonic informal settlement conferences on April 25, 2006 from 10:30 to 11:30 a.m. and April 27, 2006 at 2:30 p.m. If we are making progress, the door is always open for our having additional discussions.

Later, on May 30, 2006, the Regional Attorney issued an official notice of a telephonic informal settlement conference to be held on June 15, 2006. Both the letter and the notice went to CSEA and to attorney Keith Breon (Breon), who represented the District throughout the litigation.

On December 16, 2003, the unfair practice charge in LA-CE-4706-E was served by mail on Al Mijares (Mijares), the District's superintendent. On January 9, 2004, a notice of appearance form designating Breon as the District's representative was signed by Winston Best (Best), the District's associate superintendent of human resources. The notice of appearance stated:

> I, the undersigned party, hereby designate as my representative the person whose name and address appears below, and authorize such representative to appear on my behalf in this preceding [sic]. This designation shall remain valid until I file a written revocation of it with the Public Employment Relations Board.

After PERB issued a complaint on February 23, 2004, Breon represented the District at an informal settlement conference, accompanied by Archie Polanco (Polanco), the District's executive director of classified personnel. During the litigation, Mijares, Best and Polanco were all replaced, but Breon was not.

In 2006, in response to the Regional Attorney's post-hearing settlement efforts, Breon drafted a five-paragraph settlement proposal, stating in part:

> 2. CSEA shall make no claim for back wages or restoration of positions as a function of the remedy requested in LA-CE-4706-E.
>
> 3. Effective July 1, 2007, Article 16.1.2 shall be deleted from the provisions of the agreement between CSEA Chapter 41 and the Santa Ana Unified School District unless negotiated to continue in a successor contract.

Breon shared the draft proposal with Amelia Ayala (Ayala), the District's director of classified personnel services and Breon's contact at the District.

Breon testified that Ayala told him she had shared the draft proposal with Juan Lopez (Lopez), the District's assistant or associate superintendent of human resources. Breon further testified that Ayala told him Lopez had problems only with the fourth numbered paragraph (not quoted above). The District identified Ayala as a potential witness in this case but she did not testify at the hearing. Under the circumstances, I credit Breon's testimony as to what Ayala told him.

Lopez testified he had no recollection of seeing Breon's draft and "would never support" the deletion of language in CBA Article 16.1.2, as Breon's draft proposed. Lopez also signed a declaration, admitted into evidence by stipulation, that neither he nor "anyone in the District" participated "in the negotiation, drafting or approval" of the PERB Settlement. Having credited Breon's testimony about Ayala's participation, I cannot credit Lopez'

testimony that no one in the District participated in drafting or approving the PERB Settlement. I also do not credit Lopez' denial that he participated, through Ayala, in the drafting and approval of the PERB Settlement.

Some version of Breon's draft proposal was transmitted to the PERB Regional Attorney, who prepared the final PERB Settlement. On July 13, 2006, CSEA Chapter President Ira Hyepock (Hyepock) and CSEA Labor Relations Representative Margie Strike (Strike) signed the PERB Settlement during negotiations in the District's executive conference room. Hyepock, Strike and Breon testified that Ayala witnessed the signing, and her secretary, Kelly Perlangeli (Perlangeli), made copies for everyone present. Like Ayala, Perlangeli did not give evidence.

Hyepock and Strike testified that Camille Boden (Boden), the District Executive Director of Risk Management, was present and received a copy of the PERB Settlement. In a declaration, admitted by stipulation, Boden denied she was present or had any knowledge of the PERB Settlement. Boden also denied meeting Breon or participating in negotiations. Although Breon did not specifically testify that Boden was present at the signing of the PERB Settlement, he did testify she was there "part of the time" at negotiations that day. Given the testimony of Hyepock, Strike and Breon, and the lack of testimony from Ayala or Perlangeli, I do not credit Boden's denial, that she was present and had knowledge of the PERB Settlement.

Unlike CSEA, the District did not sign the PERB Settlement on July 13, 2006. Breon testified that Ayala told him "she had to discuss it with Juan [Lopez], and whom else I don't know." Later, on July 18, 2006, she authorized Breon to sign it in her office and in Strike's presence. Perlangeli again made copies for those present.

In his declaration, Lopez stated in part, "I had no knowledge of the [PERB Settlement]," and, "Neither I, nor any other District administrators or staff members, had seen

the [PERB Settlement]." Because I credit the testimony of Hyepock, Strike and Breon about Ayala and Boden, I cannot credit Lopez' claim that no District administrators or staff members had seen the PERB Settlement. I also do not credit Lopez' denial that he knew about the PERB Settlement.

On this record, I cannot determine which District personnel, besides Ayala and Boden, knew about the PERB Settlement. The District's current Superintendent and its current Executive Director of Human Resources submitted declarations, admitted by stipulation, that they had no knowledge of the PERB Settlement, but they did not assume their positions until after the PERB Settlement was signed, and their predecessors did not testify. The record does not show who, if anyone, normally monitored litigation for the District, but such a person would presumably know that LA-CE-4706-E had been settled. Breon testified that "nobody in the District administration ever asked me what happed to LA-CE-4706-E."

There seems to be no doubt that the PERB Settlement was not submitted to the District Board of Education (District Board) for approval. Various declarations submitted by the District, and admitted by stipulation, offered the conclusion that such approval would be required, but none stated the basis for that conclusion. There was no evidence that the District had any policy to that effect.

In the summer of 2007, the parties attempted to negotiate a successor to their CBA. Both parties proposed modified language for Article 16.1.2 without specifically discussing the PERB Settlement. The parties did not agree on any modified language. Instead, in September 2007, the parties signed the following agreement (2007 Agreement):

> The parties agree that it is in the interest of the District and CSEA to have stability during the period in which the parties negotiate the successor agreement. To this end the parties agree as follows:

1. The parties agree to create a new collective agreement between CSEA and the District with a term of July 1, 2007 to June 30, 2010.

2. The above referenced collective agreement shall embody all of the continuing specific terms of the agreement that expired on June 30, 2007 with the exception of the duration clause.

3. Pursuant to the provisions of this agreement the parties shall have a free and unlimited right to make successor agreement proposals on any subject matter within scope, with the exception of the previously determined duration clause.

4. Nothing in this agreement shall be construed as limiting any rights the parties otherwise retain under the provisions of the Educational Employment Relations Act (EERA).

Lopez signed the 2007 Agreement on behalf of the District after replacing Breon on the District's bargaining team. There is no evidence that the 2007 Agreement was submitted to the District Board for approval.

The parties continued their attempts to negotiate modified contract language, without much success. In December 2007, Strike sent a letter to Lopez demanding that the District bargain "the decision and effects of any decision to reduce the hours" of certain employees. Attorney Eric Bathen (Bathen), who replaced Breon as District legal counsel, responded that the matter was controlled by CBA Article 16, especially by the following language in Article 16.1.2:

> Both parties reaffirm that Article 16 constitutes the parties' agreement concerning the impact, if any, of the District's decision to reduce hours of employment or to lay-off bargaining unit employees.

Strike replied that Article 16.1.2 had been removed by the PERB Settlement. Bathen had no previous knowledge of the PERB Settlement, nor was he able to locate a copy at the District. Eventually, Strike provided him with a copy

In January 2008, the District Board took action to approve reductions in employees' work years. CSEA Senior Labor Relations Representative, Alan Aldrich (Aldrich), who joined the CSEA bargaining team, demanded to bargain any such reductions. Bathen, who joined the District bargaining team, responded that the matter was controlled by CBA Article 16.1.2. The parties continued to negotiate regarding contract language and other issues between them, reaching some tentative agreements in April 2008.

In April 2008, the District Board approved specific reductions in employees' work years for 2008-2009, and in May 2008 it notified employees about those reductions. In June 2008, CSEA filed this unfair practice charge. In June, CSEA filed with PERB a request for impasse determination and appointment of a mediator, listing "CBA Article 16, [section] 16.1.2" and "Dispute over Reduction of Work years" as two of forty-eight unresolved issues in dispute. In August 2008, with the help of a State Mediator, the parties reached a comprehensive tentative agreement, but the CSEA membership voted against ratification.

In September 2008, with further aid from the State Mediator, the parties reached another agreement (2008 Agreement), stating in part:

> WHEREAS, the Parties have been negotiating for a successor CBA since before the expiration of the previous agreement on June 30, 2007; and
>
> WHEREAS, the Parties now desire to end these negotiations and settle all outstanding issues pursuant to the terms of this agreement.
>
> NOW THEREFORE, the Parties agree as follows:
>
> 15) All tentative agreements as of June 3, 2008 shall be incorporated into a new 2007-2010 agreement as set forth in Exhibit A including the MOU regarding seniority tie breakers dated August 1, 2008.
>
> No further negotiations will occur regarding 2007-2008 and 2008-2009.

16) The [present] P.E.R.B. case shall be dismissed with prejudice after ratification by both parties with the exception of the allegations related to 16.1.2. Both parties agree to negotiate any and all issues related to 16.1.2 as soon as possible.

The 2008 Agreement was ratified by both the CSEA membership and the District Board.

At the time of the 2008 Agreement, CSEA's first amended unfair practice charge listed seven "charges" against the District. Only the last "charge" mentioned CBA Article 16.1.2:

> Charge No. 7: By repudiating the express provisions of Article 16.1.2, which respondent asserts is in full force and effect, by reducing unit member daily hours below 4 hour[s] per day and eliminating district provided Health and Welfare benefit coverage, RESPONDENT [the District] refuses or fails to bargain in good faith in violation of sections [sic] 3543.5(c). Said conduct constitutes derivative violations of sections 3543.5(a) and 3543.5(b). Said conduct also constitutes additional evidence of the district refusal to bargain over reduction of assignments as described in paragraphs 6-18 of the initial charge filed of June 12, 2008.

Two separate "charges" mentioned work year reductions:

> Charge No. 1: By flatly refusing to bargain over the decision to reduce unit member work years, Respondent refuses or fails to negotiate in good faith with the exclusive representative in violation of EERA section 3543.5(c). Said conduct constitutes derivative violations of EERA sections 3543.5(a) and 3543.5(b).
>
> Charge No. 2: By unilaterally implementing some 244 reductions of unit member work years before the parties reached agreement during contractually mandated negotiations, RESPONDENT breaches the established terms of the collective agreement in violation of EERA section 3543.5(c). Said conduct constitutes derivative violations of EERA sections 3543.5(a) and 3543.5(b).

The first amended charge also listed thirteen requested remedies, only one of which mentioned Article 16.1.2:

9. The District shall be ordered to cease and desist engaging in repudiation of Article 16.1.2 of the agreement with respect to daily hours and Health and Welfare benefits.

Two separate requested remedies specifically mentioned work year reductions:

1. The District shall be ordered to cease and desist engaging in a flat refusal to negotiate over the decision to reduce unit member work years; and engaging in a flat refusal to negotiate over the decision to reduce hours in general.

2. The District shall be ordered to cease and desist engaging in unilateral reductions of unit member work years and daily hours of employment.

Another requested remedy (number 3) was to order the District to "cease and desist engaging in a generalized breach of the provisions of article 3.7.2 of the [CBA]," which required negotiations regarding work year changes.

Aldrich testified that during mediation he said in the presence of Lopez and Chad Hammitt (Hammitt), the District's Executive Director of Human Resources, that CSEA would not withdraw its unfair practice charge with regard to work year reductions. Aldrich remembered that when he said this, Lopez was looking down at his papers. CSEA Chapter President Robert Chavez, who was present, testified similarly: that Aldrich said CSEA would not withdraw its charge regarding the reductions. Lopez and Hammitt testified they never heard anyone in mediation say that the 2008 Agreement did not resolve the work year reduction issue.

ISSUE

Did the District make a unilateral change of policy?

CONCLUSIONS OF LAW

In determining whether a party has violated EERA section 3543.5(c), PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) Unilateral changes are considered "per se" violations if

certain criteria are met. Those criteria are: (1) the employer implemented a change in policy concerning a matter within the scope of representation, and (2) the change was implemented before the employer notified the exclusive representative and gave it an opportunity to request negotiations. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

In the present case, there is no dispute that the PERB Settlement concerned a matter within the scope of representation, and the District repudiated it. The District argues, however, that there was no change in policy because the PERB Settlement was never enforceable.

The District argues first that the PERB Settlement was unenforceable because it was never approved by the District Board. The District's argument relies in part on *City and County of San Francisco v. Cooper* (1975) 13 Cal.3d 898, in which the Supreme Court agreed with the conclusion:

> that under the act a written agreement, though executed by representatives of both the employer and employees, could not, *in itself,* bind the school board. [Emphasis in the original.]

The District's argument seems to ignore the fact that the "act" to which the Supreme Court referred was the Winton Act (formerly Education Code section 13080 et. seq.), which was completely repealed and replaced by EERA. The Supreme Court explicitly relied on former Education Code section 13081(d), noting:

> By the specific terms of section 13081, subdivision (d), the Winton Act provides that binding decisions arising out of the "meet and confer" process must be culminated "*by written resolution, regulation, or policy of the governing board* effectuating [the negotiators'] recommendations." (Italics added [by the Supreme Court].)

EERA does not so provide.

The District's argument also relies on Education Code section 17604, which states in part:

> Wherever in this code the power to contract is invested in the governing board of the school district or any member thereof, the power may by a majority vote of the board be delegated to its district superintendent, or to any persons that he or she may designate, or if there be no district superintendent then to any other officer or employee of the district that the board may designate. The delegation of power may be limited as to time, money or subject matter or may be a blanket authorization in advance of its exercise, all as the governing board may direct. However, no contract made pursuant to the delegation and authorization shall be valid or constitute an enforceable obligation against the district unless and until the same shall have been approved or ratified by the governing board, the approval or ratification to be evidenced by a motion of the board duly passed and adopted.

On its face, Education Code section 17604 applies "[w]herever in this code [that is, the Education Code] the power to contract is invested in the governing board of the school district or any member thereof." Since the repeal of the Winton Act, contracts with exclusive representatives are governed by EERA in the Government Code, and not the Education Code.

Furthermore, Education Code section 17604 appears in title 1, division 1, part 10.5, chapter 5 of the Education Code; part 10.5 is entitled "School Facilities," while chapter 5 is entitled "Property Maintenance and Control." Education Code section 17604 has not been applied outside the context of construction and vendor contracts. (See *American Federation of Teachers, Local No. 1050 v. Board of Education* (1980) 107 Cal.App.3d 829 [limiting the application of former Education Code section 39656].)

I conclude that neither the Education Code nor EERA required that the PERB Settlement be approved by the District Board to be enforceable. Furthermore, there was no evidence that the District had any policy requiring such approval.

The District also argues that Breon lacked authority to sign the PERB Settlement. The question is one of agency. In *Antelope Valley Community College District* (1979) PERB Decision No. 97, PERB stated:

> Under California common law, the acts of an agent within his actual or *apparent* authority are binding on the principal. [Emphasis in the original; footnote omitted.] Apparent authority results from conduct of the principal upon which third persons rely in dealing with agents. The liability of the principal attaches where such reliance was reasonable and results in a change in position by the third party.
>
> Although the EERA does not specifically include "agent" in the definition of employer, it is concluded that historically accepted labor relations principles of agency authority and principal liability must be applied to cases arising under the EERA.

In the present case, both CSEA and PERB changed positions in reliance on Breon's apparent authority: CSEA withdrew with prejudice its unfair practice charge in LA-CE-4706-E, specifically waiving any claim for back wages or restoration of positions, while PERB dismissed its unfair practice complaint and closed the case. The question is whether this reliance was reasonable.

After the original unfair practice charge in LA-CE-4706-E was served on the District's Superintendent, the District's Associate Superintendent of Human Resources designated Breon as the District's representative. That designation was never revoked. Breon represented the District at the informal settlement conference, accompanied by the District Executive Director of Classified Personnel Services, and later throughout the litigation. CSEA representatives signed the PERB Settlement in the presence of the District's Director of Classified Personnel Services and Executive Director of Risk Management, in the District's executive conference room. A CSEA representative later saw Breon sign the PERB Settlement in the presence and the office of the Director of Classified Personnel Services.

I conclude that both PERB and CSEA reasonably relied on Breon's apparent authority, and that the PERB Settlement is therefore enforceable. The District's repudiation of the Settlement Agreement was therefore a unilateral change in policy that violated EERA section 3543.5(c). Because this conduct interfered with the rights of employees and denied the rights of CSEA, it also violated EERA section 3543.5(a) and (b).

REMEDY

EERA section 3541.5(c) states:

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

In the present case, the District has been found to have violated EERA by repudiating the settlement agreement with CSEA in Unfair Practice Case No. LA-CE-4706-E. It is therefore appropriate to order the District to cease and desist from such conduct and to honor the settlement agreement, including its deletion of CBA Article 16.1.2. It is also appropriate to order the District to post a notice incorporating the terms of the order. (*Placerville Union School District* (1978) PERB Decision No. 69.)

CSEA argues that it is appropriate to order a remedy for employees whose work years were reduced in 2008-2009. The problem with CSEA's argument is the 2008 Agreement between CSEA and the District, which states in part:

> WHEREAS, the Parties have been negotiating for a successor CBA since before the expiration of the previous agreement on June 30, 2007; and
>
> WHEREAS, the Parties now desire to end these negotiations and settle all outstanding issues pursuant to the terms of this agreement.

NOW THEREFORE, the Parties agree as follows:

15) All tentative agreements as of June 3, 2008 shall be incorporated into a new 2007-2010 agreement as set forth in Exhibit A including the MOU regarding seniority tie breakers dated August 1, 2008.

No further negotiations will occur regarding 2007-2008 and 2008-2009.

16) The P.E.R.B. case shall be dismissed with prejudice after ratification by both parties with the exception of the allegations related to [CBA Article] 16.1.2. [Emphasis added.] Both parties agree to negotiate any and all issues related to 16.1.2 as soon as possible.

In this Proposed Decision, I have resolved the allegations related to CBA Article 16.1.2 by upholding the PERB Settlement, which deleted that Article in its entirety.

The 2008 Agreement looks to the future. The parties express a desire to end their negotiations and settle "all outstanding issues." The parties agree to negotiate "any and all issues related to [Article] 16.1.2," but no further negotiation will occur "regarding 2007-2008 and 2008-2009" when the work year reductions occurred. Most significantly, the parties agreed that the present case should be dismissed with prejudice "with the exception of the allegations related to [Article] 16.1.2." In both the specific "charges" and the requested remedies in CSEA's first amended unfair practice charge, Article 16.1.2 was mentioned only as an issue separate and distinct from work year reductions.

The 2008 Agreement could have excepted from dismissal "the allegations related to work year reductions" or "the allegations related to Article 3.7.2," which required negotiations regarding work year changes, but it did not. Reading the 2008 Agreement together with the unfair practice charge, I conclude that the 2008 Agreement clearly and unambiguously disposed of all issues relating to past work year reductions. I therefore conclude that it would

be inappropriate to order a remedy for employees whose work years were reduced in 2008-2009.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Santa Ana Unified School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3540 et seq., by repudiating a settlement agreement with the California School Employees Association and its Chapter 41 (CSEA) in Unfair Practice Case No. LA-CE-5203-E.

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

A. CEASE AND DESIST FROM:

Repudiating agreements with CSEA, including the settlement agreement in Unfair Practice Case No. LA-CE-5203-E.

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

1. Honor the settlement agreement with CSEA in Unfair Practice Case No. LA-CE-5203-E.

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

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CSEA.

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

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

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

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

Thomas J. Allen
Administrative Law Judge