STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CENTINELA VALLEY SECONDARY TEACHERS ASSOCIATION, Charging Party, v. CENTINELA VALLEY UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5606-E PERB Decision No. 2378 June 17, 2014

Appearances: California Teachers Association by Jean Shin, Staff Attorney, for Centinela Valley Secondary Teachers Association; Dannis, Woliver & Kelley by Candace M. Bandoian, Attorney, for Centinela Valley Union High School District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Centinela Valley Union High School District (District) to the proposed decision (attached) of an administrative law judge (ALJ). The ALJ determined that the District violated section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally terminating a policy in section 12.19 of the parties' collective bargaining agreement (CBA) providing 40 percent release time to the president of the Centinela Valley Secondary Teachers Association (CVSTA or Association).

The Board has reviewed the entire record in this case, including the complaint, the hearing record, the ALJ's findings of fact and conclusions of law, the District's exceptions and CVSTA's response thereto. The ALJ's proposed decision is well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board adopts

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

the ALJ's proposed decision as the decision of the Board itself subject to our discussion below of the District's exceptions.

PROCEDURAL HISTORY

On September 12, 2011, CVSTA filed its initial unfair practice charge alleging that the District violated EERA sections 3543.1, 3543.2, 3543.5(b), (c), and (e), and 3543.7, when it ceased providing 40 percent release time to the CVSTA president on April 18, 2011. The District filed its position statement on October 11, 2011. CVSTA filed its first amended charge on December 2, 2011. The District filed a second position statement on December 23, 2011.

On March 5, 2012, PERB's Office of the General Counsel issued a complaint alleging that the District violated EERA section 3543.5(a), (b) and (c) when it requested reimbursement from CVSTA for past release time and unilaterally terminated section 12.19 release time without prior notice and an opportunity to bargain. The District timely filed its answer on March 26, 2012, denying any violation of EERA and raising several affirmative defenses.

On April 13, 2012, the parties met for an informal conference but the matter was not resolved. A formal hearing was held on October 8 and 9, 2012. The ALJ issued the proposed decision on March 12, 2013. On April 26, 2013, the District filed its statement of exceptions. On June 7, 2013, CVSTA filed its opposition to the District's exceptions.

FACTUAL SUMMARY

The District is a public school employer within the meaning of EERA section 3540.1(k). CVSTA is an employee organization within the meaning of EERA section 3540.1(e). CVSTA's bargaining unit consists of certificated teachers and counselors. The District and CVSTA have been parties to a CBA at all times relevant to this matter.

Section 12.19 of the CBA provides:

> The CVSTA President will be released from 40% of his/her assignment in order to participate in district/school meetings, educate/train staff, visit school sites, improve community relations, and perform other functions necessary for carrying out his/her duties.

Section 12.19 has been included in successive CBA's since, at least, the 2004-2005 school year, has remained largely unchanged and is part of the current CBA between the parties.

Full-time classroom teachers in the District are typically assigned to teach five (5) periods with a sixth unassigned period used for preparation. Full-time counselors in the District are typically assigned a case-load of 500 students. Prior to April 14, 2011, the District implemented section 12.19 by releasing the CVSTA president from two of his or her teaching periods if he or she was a teacher or reducing the CVSTA president's caseload to 300 students if he or she was a counselor. Although released from 40 percent of their duty, CVSTA presidents never had their salaries reduced as a result. At no time prior to January 21, 2011, had the District asked CVSTA to reimburse it for the salaries paid to the CVSTA president during release time granted pursuant to section 12.19.

On January 21, 2011, the District sent CVSTA an invoice for $312,387.26 to be paid within ten days (10) after receipt. The letter accompanying the invoice purported that the invoice represented the total amount of compensation paid to CVSTA presidents during their section 12.19 release time since the 2001-2002 school year and was due within 10 days under Education Code section 44987.[2]

Party representatives met on or about January 25, 2011 and April 1, 2011, the first meeting involved an unrelated grievance and the second meeting specifically pertained to the

[2] At hearing, the testimony of a District representative suggested that the District decided to seek reimbursement under Education Code section 44987, because it learned that a neighboring school district had done so successfully.

reimbursement issue. It was unclear whether termination of the section 12.19 release time was discussed at the January 25, 2011 meeting.

On April 14, 2011, the District sent CVSTA a letter stating that it would terminate section 12.19 release time effective April 18, 2011, and reiterated its demand for $312,387.26 plus an additional $11,083.23 paid to then CVSTA President Elizabeth Setterlund between January and March of 2011. Since April 14, 2011, no CVSTA president has been granted release time pursuant to section 12.19.

PROPOSED DECISION

The ALJ framed the issues thusly: (1) Did the District unilaterally change policy by requesting reimbursement for past presidential release time? (2) Did the District unilaterally change policy by discontinuing the practice of providing the CVSTA president with release time from 40 percent of his or her assignment?

Timeliness

Because the District first requested reimbursement for past release time for CVSTA presidents on or about January 21, 2011, and CVSTA did not file its unfair practice charge until September 12, 2011, the ALJ determined that the Association did not timely allege that the District had unilaterally changed its policy by requesting reimbursement and dismissed that allegation. However, the ALJ determined that the District did not clearly communicate that it would discontinue the practice of providing the section 12.19 release time prior to April 14, 2011, when it notified CVSTA by letter that it would do so. Therefore, the ALJ determined that CVSTA had timely alleged that the District unilaterally changed policy when it discontinued its practice of providing CVSTA presidents with 40 percent release time.

Unilateral Change

In applying PERB's "per se" test for failure or refusal to meet and negotiate in good faith, the ALJ determined that only two criteria were at issue. (See *Stockton Unified School District* (1980) PERB Decision No. 143 [unilateral changes are considered per se violations of EERA, § 3543.5(c) if: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) the change was implemented without the employer fulfilling its duty to meet and negotiate with the exclusive representative, including providing adequate notice; (3) the change was not merely an isolated breach, but amounted to a change in policy; and (4) the change in policy concerns a matter within the scope of representation].)

The District admitted that it no longer granted the release time provided for in section 12.19 of the CBA and that it had regularly granted such release time in the past. The District also contended that it had the right to discontinue section 12.19, because CVSTA had failed to compensate the District in accordance with Education Code section 44987. Therefore, the ALJ determined that the first and third criteria, respectively, of the "per se" test had been met.

The ALJ noted the District's argument that section 12.19 release time was leave available to union officers under Education Code section 44987, not release time under EERA, and was therefore not within the scope of representation. According to the District, since section 12.19 release time was governed by the Education Code and not EERA, PERB lacked jurisdiction over the matter. The District relied on *Berkeley Unified School District* (2008) PERB Decision No. 1954 (*Berkeley*)[3] for the proposition that release time under Education Code section 44987 was not within the scope of representation.

[3] The *Berkeley, supra,* PERB Decision No. 1954 decision involved a union president on full-time leave from his work duties, whose salary was paid by the district and reimbursed by the union. The union sought to have the district pay the president's salary while he was

The ALJ determined that release time "to participate in negotiations and perform other union-related duties has long been found to be a subject within the scope of representation because it is logically related to both wages and hours of work." (Proposed Dec., p. 13.) The ALJ then distinguished *Berkeley, supra,* PERB Decision No. 1954, which she found inapposite and limited to the facts of that case. The ALJ determined that

> *Berkeley* did not conclude or even suggest that bargaining proposals which involve leave provisions under the Education Code are outside the scope of representation under EERA. That simply was not the controversy, and furthermore, such a finding would be contrary to a long line of case law directly applicable to this issue.

(*Id.* at p. 15.)

The ALJ also noted several Board decisions which have held that EERA section 3540's preclusion against supersession of the Education Code only applied where the Education Code mandates a "specific and unalterable policy" (*Jefferson School District* (1980) PERB Decision No. 133); that bargaining obligations will not be set aside unless the language of the Education Code and EERA "cannot be harmonized" (*Solano County Community College District* (1982) PERB Decision No. 219); and that negotiations are only prohibited "where the provisions of the Education Code would be replaced, set aside or annulled by the language of the proposed contract clause" (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865 (*San Mateo*).) Therefore, the ALJ concluded that section 12.19 leave was within scope of representation because the release time policy did not replace immutable provisions under section 44987.

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engaged in negotiations and grievance processing (i.e., "release time" under EERA). The Board held that "[b]ecause such an employee is already on leave from their normal duties, it stands to reason that released time is not possible, as the employee is already on leave." (*Berkeley,* p. 8.)

Lastly, the ALJ determined that because the District only gave CVSTA four (4) days' notice of its firm decision to discontinue section 12.19 release time, the District did not provide a reasonable opportunity to bargain and, even if the amount of time was reasonable, CVSTA had not waived its right to bargain because to request to bargain at that point would have been futile. Therefore, the ALJ determined that the District had violated its duty to negotiate in good faith when it discontinued section 12.19 release time without first bargaining with CVSTA.

POSITIONS OF THE PARTIES

The District takes four (4) exceptions to the proposed decision: (1) that the ALJ erred when she stated in a footnote that the section 12.19 "Association Leave" is not granted pursuant to Education Code section 44987; (2) that the ALJ erred by implicitly finding that PERB has jurisdiction over this matter; (3) that the ALJ erred in determining that the section 12.19 leave provision is negotiable; and (4) that the ALJ erred in determining that CVSTA did not waive its right to bargain over the leave provision.

CVSTA takes no exceptions to the proposed decision. CVSTA submitted a brief in opposition to all of the District's exceptions and urges us to affirm the proposed decision.

DISCUSSION

We agree with the ALJ that there **is** no evidentiary support for the District's contention that the section 12.19 Association leave provision is granted under Education Code section 44987. As the ALJ states:

> The District's main argument seems to be that because section 44987 exists and section 12.19 also pertains to time off for union duties, that the parties obviously intended the contractual release time here to be covered by section 44987. There are at least two problems with that theory. First, the contract language specifically provides for released time in order to participate in district/school meetings, employee training, school site visits, and improvement of community relations.

> These activities bear no relationship to the exemplar of section 44987, which is to provide the ability to attend *employee organization* meetings. Second, the contract does not expressly refer to section 44987, nor is there any evidence that during bargaining the parties ever discussed that the released time at issue was intended to be governed by the Education Code provision.

(Proposed Dec., pp. 15-16, fn. 10, emphasis in original.) We agree and would add that the ALJ's determination is also supported by the fact that the District never treated section 12.19 leave as section 44987 leave. Section 44987 has been in the Education Code since 1978. The parties are presumed to have knowledge of the laws affecting their workplace and bargaining rights. That section 12.19 provided CVSTA presidents with 40 percent leave since, at least, the 2001-2002 school year without the District requesting reimbursement strongly suggests that section 12.19 was never intended to be governed by Education Code section 44987.

We also determine that Education Code section 44987 does not set an "inflexible standard" or insure "immutable provisions" which precludes negotiability over the subject. (See *San Mateo, supra,* 33 Cal.3d 850, 864-865.) Therefore, since employee release time pertains to a matter within the scope of representation, we conclude that release time for CVSTA elected officials is negotiable. Therefore, a unilateral repudiation of a collectively bargained release time provision or a change in past practice without affording CVSTA the opportunity to bargain is conduct that falls squarely within our jurisdiction. We thus conclude that the District's first three exceptions lack merit.

Waiver

The District also maintains that CVSTA waived its right to bargain over the termination of section 12.19. According to the District, CVSTA was informed at a grievance meeting on an unrelated matter held on January 25, 2011, that the District would seek reimbursement for past release time granted to CVSTA presidents and would terminate granting this leave if

CVSTA did not reimburse the District. While there was conflicting evidence regarding the January 25, 2011 meeting, the ALJ found that it was "more likely than not that the issue of possible termination of the released time policy was not raised during the January 25 meeting." (Proposed Dec., p. 10.) We find no basis in the record to disturb the ALJ's finding on this matter and conclude with the ALJ that there was no clear evidence prior to April of 2011 that the District would terminate section 12.19. Therefore, we conclude with the ALJ that there was no "clear and unmistakable" waiver of CVSTA's right to bargain. (See *Oakland Unified School District* (1982) PERB Decision No. 236.)

CONCLUSION

The Board hereby affirms the ALJ's determination that the District implemented a change in policy when it ceased granting 40 percent release time to the CVSTA president in April 2011, and that it did so without providing CVSTA adequate notice and the opportunity to bargain. In doing so, the District violated EERA section 3453.5(a), (b) and (c).

REMEDY

In this case, it has been found that the District breached its duty to negotiate in good faith when it unilaterally implemented a policy terminating the granting of 40 percent release time to CVSTA presidents as bargained for in section 12.19 of the parties' CBA. The normal remedy for a unilateral change is to restore the status quo by rescinding the change and making affected employees whole for any losses suffered as a result of the change. (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 946.)

It is, therefore, appropriate to order the District to cease and desist from such activity in the future, return to the status quo which existed prior to the District's unilateral change on April 18, 2011 and, upon request, meet and negotiate with CVSTA prior to making future changes in negotiable terms and conditions of employment.

We also deem it likely that the District's unilateral termination of section 12.19 had the effect of lengthening the workday for CVSTA presidents who were no longer able to fulfill their section 12.19 duties during release time. Under these circumstances, it is therefore appropriate to order the District to make whole the employees affected by the unilateral change in policy. (See *Healdsburg Union Elementary School District* (1994) PERB Decision No. 1033, p. 11.)

Therefore, the District shall make the affected CVSTA presidents whole by providing them with back pay which comports to the extra hours each affected president spent outside his or her normal duty hours performing duties which would have been performed during his or her release time. The District and CVSTA shall meet and negotiate over the manner in which the back pay is calculated.

In the event negotiations over the manner of granting compensatory time or back pay are unsuccessful, the dispute shall be submitted to PERB's Office of the General Counsel for compliance proceedings.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Centinela Valley Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), by implementing a unilateral change in policy and by failing to provide to the Centinela Valley Secondary Teachers Association (CVSTA) with adequate notice and the opportunity to bargain.

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:

1. Failing to negotiate in good faith by unilaterally implementing policy changes concerning matters within the scope of representation.

2. Interfering with the rights of bargaining unit employees to be represented by CVSTA.

3. Denying CVSTA its right to represent bargaining unit employees.

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

1. Rescind the policy change terminating 40 percent release time for the CVSTA president and return to the status quo ante as it was prior to April 18, 2011.

2. Return bargaining unit employees to their status prior to the April 18, 2011, unilateral change in policy and make them whole for any losses suffered, if any, as a result of the District's unlawful action. Back pay shall be based on actual time spent outside of the CVSTA president's work-hours performing duties which normally would have been performed during their section 12.19 release time. Any financial losses should be augmented by interest at the rate of 7 percent per annum. In the event the parties cannot reach an agreement on back pay, the dispute shall be submitted to PERB's Office of the General Counsel for compliance proceedings.

3. 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 CVSTA bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that 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. In addition to physical posting of paper notices, the Notice

shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the bargaining unit represented by CVSTA. (*City of Sacramento* (2013) PERB Decision No. 2351-M.)

All other allegations in Case No. LA-CE-5606-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member 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-5606-E, *Centinela Valley Secondary Teachers Association v. Centinela Valley Union High School District* in which all parties had the right to participate, it has been found that the Centinela Valley Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by implementing a unilateral change in policy and by failing to provide to the Centinela Valley Secondary Teachers Association (CVSTA) adequate notice and the opportunity to bargain.

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

A. CEASE AND DESIST FROM:

1. Failing to negotiate in good faith by unilaterally implementing policy changes concerning matters within the scope of representation.

2. Interfering with the rights of bargaining unit employees to be represented by CVSTA.

3. Denying CVSTA its right to represent bargaining unit employees.

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

1. Rescind the policy change terminating 40 percent release time for the CVSTA president and return to the status quo ante as it was prior to April 18, 2011.

2. Return bargaining unit employees to their status prior to the April 18, 2011, unilateral change in policy and make them whole for any losses suffered, if any, as a result of the District's unlawful action. Back pay shall be based on actual time spent outside of the CVSTA president's work-hours performing duties which normally would have been performed during their section 12.19 release time. Any financial losses should be augmented by interest at the rate of 7 percent per annum. In the event the parties cannot reach an agreement on back pay, the dispute shall be submitted to PERB's Office of the General Counsel for compliance proceedings.

3. 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 CVSTA bargaining unit customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that 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. In addition to physical posting of paper notices, the Notice

shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees in the bargaining unit represented by CVSTA.

Dated: _____

CENTINELA VALLEY UNION HIGH SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CENTINELA VALLEY SECONDARY TEACHERS ASSOCIATION, Charging Party, v. CENTINELA VALLEY UNION HIGH SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5606-E PROPOSED DECISION (03/12/2013)

Appearances: California Teachers Association by Jean Shin, Staff Attorney, for Centinela Valley Secondary Teachers Association; Dannis Woliver Kelley by Candace M. Bandoian, Attorney, for Centinela Valley Union High School District.

Before Valerie Pike Racho, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union alleges that an employer committed a unilateral change in policy without discharging its bargaining obligation in violation of the Educational Employment Relations Act (EERA).[1] The employer denies any unfair practices.

On September 12, 2011, the Centinela Valley Secondary Teachers Association (Association) initiated this action by filing an unfair practice charge against the Centinela Valley Union High School District (District). On December 2, 2011, an amended charge was filed. On March 5, 2012, the Public Employment Relations Board (PERB or Board) Office of the General Counsel issued a complaint alleging that the District violated EERA section 3543.5(a), (b), and (c) by requesting reimbursement from the Association for past released time and by unilaterally terminating a policy that provided 40 percent released time to the

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

Association president. On March 26, 2012, the District filed its answer to the complaint, denying any violation of EERA and raising various affirmative defenses.

PERB conducted an informal settlement conference on April 13, 2012, but the matter was not resolved. A formal hearing was held on October 8-9, 2012. During the hearing, the parties stipulated to the submission of a joint statement of facts and several exhibits. With the receipt of the parties' post-hearing briefs on December 20, 2012, the record was closed and the case was submitted for decision.

FINDINGS OF FACT

The Parties

The District is a public school employer within the meaning of EERA section 3540.1(k). The Association is an exclusive representative of a bargaining unit of certificated employees within the meaning of EERA section 3540.1(e). The Association and the District were and are parties to a collective bargaining agreement (CBA) in effect at all times relevant to this dispute.

CBA Article 12

CBA Article 12, "Association Rights," is central to the issues presented in this case. Section 12.19 of this article provides a set amount of time for the Association president to be released from his or her work assignment.[2] This section states verbatim:

> The [Association] President will be released from 40% of his/her assignment in order to participate in district/school meetings, educate/train staff, visit school sites, improve community relations, and perform other functions necessary for carrying out his/her duties.

[2] Such arrangements are commonly referred to interchangeably as "released" or "release" time provisions.

In addition to this language appearing in the CBA that was in effect at the time of the instant dispute—i.e., the CBA dated July 1, 2008-June 30, 2011—this provision also has appeared in all of the parties' agreements since at least July 1, 2004. Furthermore, this same language was also recently incorporated into the parties' successor CBA that was negotiated during the 2011-2012 school year and is currently in effect through at least 2014. Neither party sought to change this language during these most recent contract negotiations.

During the 2010-2011 school year, Elizabeth Setterlund was the Association president. Setterlund has taught physical education in the District for the last 13 years. From the beginning of the school year in 2010 through April 2011, Setterlund was released from 40 percent of her teaching assignment under section 12.19. This worked out to being released from two instructional periods per day. Sandra Goins was president of the Association from 2005-2007 and was an art teacher for the District. During that period of time, Goins was also released from two instructional periods per day in order to perform Association duties pursuant to the contract.

Both past presidents testified in detail to their activities during their released periods. Both frequently participated in and prepared for various committee meetings held at different school sites. Setterlund attended meetings with representatives of the classified employees' union and the District to discuss possible changes to employee health benefits. Goins participated on several committees and attended related meetings including the health benefits committee, the safety committee, and the superintendent advisory committee. These various committees also included representatives from the classified union as well as the District. The subject matter of these meetings appeared to touch on both contractual and non-contractual issues.

Both Goins and Setterlund also frequently used their released time to meet with employees at various school sites regarding grievance issues, and to participate in contract negotiations.[3] According to Setterlund, approximately half of her released time was spent handling grievance issues and 35 percent on negotiations. Setterlund also sometimes met with new teachers at the beginning of the school year to acquaint them with District procedures and inform them of their rights and responsibilities. Finally, both Goins and Setterlund occasionally used released time to do community outreach. Setterlund met several times with some concerned parents at a library, and Goins periodically attended a local farmers' market to speak with members of the community about issues related to student performance.

In addition to being released from two instructional periods under section 12.19, it is undisputed that both Goins and Setterlund were also granted further released time by the District, as necessary, to participate in contract negotiations. It is also undisputed that the District never directed the activities of Association presidents during the time they were released from 40 percent of their instructional duties.

Events in 2011[4]

On or about January 21, Setterlund received a letter from Bob Cox, District Assistant Superintendent of Human Resources, regarding presidential released time under section 12.19. In short, this letter requested that the Association reimburse the District for "all compensation granted to chapter presidents on account of the leave" pursuant to section 12.19. An invoice purporting to provide an accounting of such released time taken between 2001-2011 was

[3] The president is not an official member of the bargaining team but is available to the team upon request and therefore needs to be onsite during negotiations. Additionally, the president meets with the bargaining team for preparation prior to bargaining sessions. These meetings sometimes lasted up to six hours.

[4] Unless otherwise indicated, all dates hereafter refer to 2011.

attached to the letter. In total, the District requested reimbursement for released time granted to Association presidents in the amount of $312,387.26. The District cited to Education Code section 44987 (hereafter "section 44987") for the proposition that reimbursement for union leave time needs to paid within ten days after receipt of an invoice, but offered that the Association could discuss setting up a payment plan. Prior to sending this letter, the District had never before asked for reimbursement of section 12.19 released time.

A few days later, approximately January 25, Goins and Cox met to discuss a grievance and the letter was mentioned.[5] Setterlund was also present at this meeting, as well as District Superintendent Jose Fernandez. Cox remembered stating words to the effect that if the District did not receive reimbursement from the Association, then the District would terminate the leave provision. Goins only remembered being asked whether the Association had received the letter, which she confirmed, but had no recollection that Cox also threatened to stop granting future released time under section 12.19. Setterlund did not appear to have a specific memory of this meeting at all. Rather, she recalled only that she spoke at some point to Fernandez about the issue, but could not really remember the substance of their conversation or when it occurred. Fernandez did not testify at the hearing.

Goins met again with Cox and Fernandez over the reimbursement issue on or about April 1. At this second meeting, Fernandez asked when the Association would pay the invoiced amount. Goins replied that the Association president was entitled to the released time because that was what had been negotiated between them.

[5] By this time, Goins had left District employment and had become the executive director of South Bay United Teachers (SBUT). Although it is not expressly stated in the record, it can be gleaned from witness testimony that SBUT is an organization that provides bargaining and representational support to the Association.

On April 14, Setterlund was notified by letter that because the Association had neither made payment of the amount requested nor discussed setting up a payment plan, the District was terminating "the policy of providing two periods of leave per school day" effective as of April 18.

Goins testified that the Association made a written demand to bargain over the termination of section 12.19 released time at some point in the spring of 2011, but this document was not introduced into the record and she could not recall any salient details regarding the demand. Cox denied ever receiving any written or verbal bargaining demands from the Association over the issue.

True to its word, the District cancelled Setterlund's released time after April 18 and assigned "substitute classes" to her for those periods. The District admits that the current Association president, a counselor, does not receive a 40 percent reduction in his assignment. Counselors are typically assigned a caseload of around 500 students. In the past, when a counselor was serving as the president of the Association, the student caseload was reduced by 40 percent.

Cox provided a straightforward reason that the District decided to request reimbursement for the 40 percent released time. He stated that because of the extremely difficult financial circumstances of the time, the District was "trying to find a better way to do business." The District became aware of their right to reimbursement under section 44987 and heard of another school district that may have successfully recouped some money and so he said, "we wanted to do the same thing."

ISSUES

1. Did the District unilaterally change policy by requesting reimbursement for past presidential released time?

2. Did the District unilaterally change policy by discontinuing the practice of providing the Association president with release from 40 percent of his/her assignment?

CONCLUSIONS OF LAW

I. Timeliness of the Allegations in the PERB Complaint

The PERB complaint alleges in relevant part:

> 3. Before April 14, 2011, [the District]'s policy and past practice relating to the parties' collective bargaining agreement (CBA), Article 12, section 12.19, provided to [the Association]'s President release time from 40% of his/her assignment to participate in "district/school meetings, educate/train staff, visit school sites, improve community relations, and perform other functions necessary for carrying out his/her duties."
>
> 4. On or about April 14, 2011, [the District] requested reimbursement for past release time pursuant to CBA Article 12, section 12.19, and Education Code section 44987(a), and the District stated that, ["][e]ffective April 18, 2011, the District terminates its policy of providing two periods of leave per school day."

The complaint further alleges that the District engaged in the conduct in paragraph four without prior notice to the Association and without the opportunity to bargain, and that these acts violated EERA sections 3543.5(a), (b) and (c).

Essentially, paragraph four of the complaint sets forth two separate alleged unilateral policy changes on April 14: (1) the request for reimbursement, and (2) the termination of the policy effective April 18. The District contends that the Association brought an untimely charge to PERB, because it claims to have provided notice to the Association of both alleged policy changes in January 2011, some eight months before the charge was filed. The Association admits receipt of the District's January 21 letter requesting reimbursement, as well as its participation in a meeting a few days later where the letter was discussed, but denies that the District stated at that time that the policy would be discontinued absent payment. The

January 21 letter itself is, in fact, silent on that point. As further discussed below, only one allegation here is timely.

EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) The way that this standard has been interpreted in charges alleging a unilateral change in policy is "the limitations period begins to run on the date the charging party obtains actual or constructive notice of the respondent's clear intent to implement the change, provided that nothing subsequently evinces a wavering of that intent." (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, at p. 16; citation omitted.) Thus, a charging party that waits to file a charge until the employer has actually implemented the change "bears the risk of running afoul of the statute of limitations." (*Ibid.*)

Regarding the District's request for reimbursement of past presidential released time under section 12.19, it is undisputed that the Association was notified of this proposed change in the application of the policy on January 21. Furthermore, the record shows that the District never wavered in its intent to pursue reimbursement after that date, as all subsequent communications between the parties over the issue involved the District reiterating its demand for reimbursement.[6] Thus, the record establishes that the Association was aware of this alleged violation approximately eight months before the charge was filed. This allegation is therefore untimely and must be dismissed.

[6] For example, Goins admitted that Fernandez reiterated the District's demand for payment during the meeting on April 1.

Regarding the termination of the released time provision, the weight of the evidence does not establish that the Association knew or should have known that the policy would be terminated prior to April 14. The sole evidence in the record to support the District's position on this point are Cox's statements during the January 25 meeting with Goins, Setterlund, and Fernandez. Cox contends that the District offered the Association "the opportunity to move forward with the leave if they would compensate the District..." and that if agreement could not be reached, then the District would "terminate the leave." However, when questioned about Goins's or Setterlund's response to the threatened cessation of the policy, Cox stated: "I don't remember a specific response. At the end of the meeting there was no resolution though."

Goins denied that she heard Cox or Fernandez threaten to terminate the policy going forward if the Association did not accede to the District's demand for reimbursement.[7] Instead, Goins maintained that the discussion over the issue that day was brief and limited to whether the Association acknowledged receipt of the January 21 letter. Goins stated that the reimbursement issue was only raised tangentially as the focus of the meeting was regarding an unrelated grievance. As previously noted, the letter wherein the District first demanded reimbursement does not discuss future application of the leave policy. Rather, the first time the District notified the Association in writing that presidential released time would be discontinued was in the April 14 letter. When questioned about the reason why the District finally terminated the released time policy in April 2011, Cox stated: "Ultimately we realized we weren't going to resolve it any other way."

[7] Although Setterlund denied generally that she was ever notified before April 2011 that the District planned to terminate the released time policy, her recollection regarding any meetings and/or discussions with District representatives about these issues was vague at best. Therefore, only Goins's and Cox's account of the January 25 meeting have been relied upon.

After weighing the conflicting evidence on this point, it is more likely than not that the issue of possible termination of the released time policy was not raised during the January 25 meeting, and even if it was, it was not communicated in clear enough terms to find that the Association had actual notice of the proposed change. This conclusion is based on the fact that Cox could not remember any specific response from Goins or Setterlund regarding that point, coupled with Goins's testimony that she did not recall the statement being made. If the Association did not verbally respond, then it is likely that the point did not get across. Furthermore, the admission that the District did not decide to terminate the policy until April, after finally realizing that the Association was not going to pay, bolsters this finding. It suggests that until that point in time, the District was focused only on reimbursement and had not yet evinced a firm decision to terminate the policy. Thus, it is concluded that the Association received notice of the District's clear intent to terminate the policy on April 14. The allegation is timely.

II. Unilateral Change

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 breached or altered the parties' written agreement or its own established past practice; (2) the change was implemented without the employer fulfilling its duty to negotiate with the exclusive representative, including providing adequate notice; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the

change in policy concerns a matter within the scope of representation. (*San Joaquin County Employees Association v. City of Stockton* (1984) 161 Cal.App.3d 813; *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802; *Grant Joint Union High School District* (1982) PERB Decision No. 196; *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

Only two of the four elements in the above test for unlawful unilateral change are in dispute in this case. The District has admitted that it is no longer granting released time as provided under the parties' agreement at section 12.19, and that it had regularly granted 40 percent released time to Association presidents in the past. That takes care of the first element required to show a unilateral change. Moreover, the District contends that it had the right to take such action because the Association has failed to remunerate consistent with obligations under the Education Code. That satisfies the third element of the test. (*Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186 [an action affecting only one or a few individuals has a generalized effect or continuing impact on unit members' terms and conditions of employment where the employer's action is based upon a belief that it had the right to act without first negotiating with the union]; see also *County of Riverside* (2003) PERB Decision No. 1577-M.) Thus, only the second and fourth criteria are in dispute, namely: whether the change was implemented without the District fulfilling its bargaining obligation, and whether the change concerned a matter within the scope of representation. The scope of representation will be addressed first.

A. Scope of Representation

The District argues that the released time policy at issue here involves leave

available to union officers under section 44987, not released time under EERA. Therefore, the District concludes that the issue does not involve a matter within the scope of representation under EERA and accordingly PERB lacks jurisdiction over the subject matter of the charge.

Section 44987 states in relevant part:

> (a) The governing board of a school district shall grant to any employee, upon request, a leave of absence without loss of compensation *for the purpose of enabling the employee to serve as an elected officer of any local school district public employee organization. . . .*
>
> The leave shall include, *but is not limited to*, absence for purposes of attendance by the employee at periodic, stated special, or regular meeting *of the body of the organization on which the employee serves as an officer.*
>
> Following the school district's payment of the employee for the leave of absence, the school district shall be reimbursed by the employee organization of which the employee is an elected officer for all compensation paid the employee on account of the leave.
>
> The leave of absence without loss of compensation provided for by this section *is in addition to* the released time without loss of compensation granted to representatives of an exclusive representative by subdivision (c) of Section 3543.1 of the Government Code.

(Emphasis added.) EERA provides a right to released time that is broader than the leave described above. It is also not limited to be taken by the elected officers of an employee organization. EERA section 3543.1 provides in relevant part:

> (c) A reasonable number of representatives of an exclusive representative shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances.

The District argues that because it did not direct the various activities of Association presidents while they were released from instructional duties under section 12.19, and because the basic purpose of both section 44987 and the parties' contractual provision are to provide

time off so that an elected union official is able to perform union functions, the leave provided by section 12.19 falls exclusively within the ambit of the Education Code. The District also considers leave time under the Education Code and released time under EERA to be mutually exclusive. In its post-hearing brief, the District contends that negotiable released time is strictly limited to time off from duty "*only for negotiations and grievance processing...*" and argues that the activities of past presidents during their 40 percent released time "went well beyond the limited released time authorized under EERA." (Emphasis in original.) As will be addressed more fully below, the District's narrow interpretation of the negotiability of union released time is contrary to relevant case law.

Time released from work duties to participate in negotiations and perform other union-related duties has long been found to be a subject within the scope of representation because it is logically related to both wages and hours of work. (*Los Rios Community College District* (1991) PERB Decision No. 867; *NLRB v. BASF Wyandotte Corp.* (5th Cir. 1986) 798 F.2d 849;[8] *Anaheim Union High School District* (1981) PERB Decision No. 177.)

The District relies on *Berkeley Unified School District* (2008) PERB Decision No. 1954 (*Berkeley*) for the proposition that PERB in that decision "[d]istinguished leave taken pursuant to the Education Code [footnote omitted], which is not within the scope of representation, and EERA leave, which is in the scope of representation." While it is true that the Board discussed differences between leaves under the Education Code and released time under EERA in that case, it is not true that the Board made any determination regarding the scope of representation for these issues. The facts in that case are also distinguishable from the instant dispute.

[8] When interpreting EERA, PERB may rely on authority interpreting analogous federal statutes and parallel provisions of California law. (See, e.g., *San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12-13; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

In *Berkeley*, *supra*, PERB Decision No. 1954, the union president had, for many years, been on a full-time leave of absence pursuant to Education Code section 45210,[9] and the union had fully reimbursed the school district employer for his salary and benefits. During negotiations for a successor agreement, the employer proposed status quo on that issue—i.e., that the president continue to be on a full-time leave, and the union continue to reimburse salary and benefits under section 45210. The union, however, believed that EERA section 3543.1(c), entitled it to "credit" for the time that the president spent negotiating and handling grievances. Thus, the union proposed to account for the president's time in negotiations and grievance processing, and that such time periods be exempt from Education Code reimbursement. The employer rejected this proposal and maintained its position. The union filed a charge alleging that by refusing to modify its position, the employer engaged in bad faith or "surface" bargaining.

The Board rejected the union's argument, finding that because the union president in that case was already taking a full-time leave of absence, and therefore not performing *any* work duties, it was simply not possible for him to use EERA released time. (*Berkeley*, *supra*, PERB Decision No. 1954.) The Board stated:

> While it is not inconceivable that the duties performed by a union officer while on a leave of absence would include negotiations and grievance processing, . . . the possible overlap does not change the fact that an employee who is on leave under Education Code section 45210 is on leave from their normal work duties to serve as a union officer. Because such an employee is already on leave from their normal duties, it stands to reason that released time (which is afforded to allow an employee time away from their normal duties) is not possible, as the employee is already on leave.

[9] This section of the Education Code provides leave time for union officers in classified employment. It has nearly identical language and is analogous to section 44987 covering certificated employees.

(*Id.* at p. 8.) The Board concluded that the employer's decision to maintain a firm bargaining position over this issue did not demonstrate bad faith or surface bargaining, and thus upheld the dismissal of the charge. (*Ibid.*) Here, the District contends that because the record shows that it never denied the Association released time for negotiations, there was no change in policy regarding "EERA leave." Thus, the District concludes that the disputed leave provision in this case is not within the scope of representation and *Berkeley* is somehow applicable. The District misconstrues the Board's conclusion in *Berkeley*.

The holding in *Berkeley*, *supra*, PERB Decision No. 1954 is limited to factual situations where an employee is already on a full-time leave of absence and therefore not performing any work duties. In such a situation, because there is no ability to be "released" from any duties, there is no opportunity for an employee to avail himself or herself of the released time provision in EERA section 3543.1(c). That is not the factual situation here. The past presidents in this case were not on a full-time leave of absence, thus the outcome in *Berkeley* is inapposite to the issue presented in this case. More importantly, the Board in *Berkeley* did not conclude or even suggest that bargaining proposals which involve leave provisions under the Education Code are outside the scope of representation under EERA. That simply was not the controversy, and furthermore, such a finding would be contrary to a long line of case law directly applicable to this issue.

Even if the District's key assertion in this case is correct—i.e., that section 12.19 released time is mandated by section 44987—that does not automatically remove this subject from the scope of bargaining.[10] In *Jefferson School District* (1980) PERB Decision No. 133

[10] But it is noted that the record evidence does not actually support the District's assertion on this point. The District's main argument seems to be that because section 44987 exists and section 12.19 also pertains to time off for union duties, that the parties obviously intended the contractual released time here to be covered by section 44987. There are at least

(*Jefferson*), the Board found that the preclusion against supersession of the Education Code embodied in EERA section 3540,[11] only applies to Education Code provisions that mandate "a specific and unalterable policy..." however, "proposals which otherwise meet our test of negotiability are within scope, unless a conflicting Education Code provision precludes variance from its terms." (*Jefferson* at p. 8.) The Board further opined that bargaining over mandates derived from other statutory schemes, "assuming the subject matter is or relates to a subject specified in section 3543.2, certainly does not constitute supersession of that statute whether it is the Education Code or any other statute." (*Jefferson* at p. 9.) Rather, permitting such items to be included in a collective bargaining agreement inherently improves employer-employee relations "when the respective parties are well-informed as to their mutual rights and obligations." (*Ibid.*)

In *Solano County Community College District* (1982) PERB Decision No. 219 (*Solano County*), the Board rejected the employer's argument that certain provisions of the Education Code compelled the employer to transfer bargaining unit work from the classified bargaining unit to the certificated unit, and also excused its failure to negotiate over the transfer. Noting

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two problems with that theory. First, the contract language specifically provides released time in order to participate in district/school meetings, employee training, school site visits, and improvement of community relations. These activities bear no relationship to the exemplar of section 44987, which is to provide the ability to attend *employee organization* meetings. Second, the contract does not expressly refer to section 44987, nor is there any evidence that during bargaining the parties ever discussed that the released time at issue was intended to be governed by the Education Code provision.

[11] This section of EERA currently provides in relevant part:

> This chapter shall not supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

that EERA's supersession clause had received clear judicial interpretation in *Certificated Employees Council v. Monterey Peninsula Unified School District* (1974) 42 Cal.App.3d 328 (*Monterey Peninsula*), the Board acknowledged that Education Code provisions are to be harmonized whenever possible with meet and confer requirements, and that bargaining obligations will not be set aside unless "the language of the two statutory enactments cannot be harmonized." (*Solano County* at p. 14, citation omitted.)[12] Later, the California Supreme Court agreed with PERB that "only where provisions of the Education Code would be 'replaced, set aside or annulled by the language of the proposed contract clause'" should negotiations be prohibited. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 864-865, quoting *Healdsburg Union High School District and Healdsburg Union School District* (1980) PERB Decision No. 132 at p. 18.) The Court determined that PERB's approach was "consistent with the fact that EERA explicitly includes matters such as leave, transfer, and reassignment policies within the scope of representation, even though such matters are also regulated by the Education Code." (*San Mateo City School Dist.* at p. 865.)

Thus, in order for the District's bargaining obligations to be excused, the contractual released time policy would need to replace mandatory, immutable provisions under section 44987. Such a result is not compelled here. PERB has squarely addressed the negotiability of

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[12] As the Board in *Solano County* noted, *Monterey Peninsula*, *supra*, 42 Cal.App.3d 328 was decided under the Winton Act (former Education Code section 13080), which also contained supersession language. When adopting EERA, the Legislature incorporated the Winton Act's supersession language into the statute, and therefore, "is presumed to have knowledge of and acquiesced in the judicial construction given to the provision." (*Solano County*, *supra*, PERB Decision No. 219 at p.14, citation omitted.)

the type of leave time contemplated under section 44987, as well as released time for other union purposes, and concluded in both instances that they must be bargained over.

In *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375 (*Healdsburg*), the Board considered whether proposals regarding released time for union officers to: (1) attend to "necessary" union business; (2) conduct orientation for employees regarding the collective bargaining agreement; (3) participate on employer-employee advisory committees; and (4) attend an annual union conference, were within the scope of representation. The Board stated:

> While EERA specifically grants representatives of employee organizations release time, it does so for the purposes of meeting and negotiating and for processing grievances. . . . The negotiability of these proposals, however, does not depend on this statutorily defined release time provision. We find these proposals negotiable because they directly concern hours of employment, which is specifically enumerated in [EERA] section 3543.2.

(*Id.* at p. 23.) Furthermore, the fact that union officer leave was also mandated under the Education Code did not preclude the negotiability of these proposals. (*Id.* at pp. 6-8.) Citing to *Healdsburg* in a later decision, the Board found that a long-standing past practice allowing a union president paid time off from his work duties in order to attend the employer's governing board meetings could not be unilaterally terminated by the employer because such a change impacted both wages and hours of work. (*Compton Community College District* (1990) PERB Decision No. 790, see proposed decision pp. 19-21 (*Compton*).)

Here, the released time authorized under section 12.19 is of the precise character as that found negotiable in *Healdsburg*, *supra*, PERB Decision No. 375, as it permits the Association president to be released from duty in order to participate in "district/school meetings, educate/train staff, visit school sites, improve community relations, and perform other

functions necessary for carrying out his/her duties." As in *Compton, supra*, PERB Decision No. 790, the policy change in question here concerned a matter within the scope of representation because it directly impacted the hours of employment of Association presidents. Thus, the District was required to give proper notice and the opportunity to bargain before implementation of the change in policy.

B. The Employer Implemented the Change Without Fulfilling the Bargaining Obligation

The District contends that the Association waived its right to bargain over the termination of section 12.19 released time because the Association did not submit a written or verbal bargaining demand over the proposed change to the District.[13] An employer asserting a defense of waiver by inaction has the burden of proof to demonstrate by a preponderance of evidence that it gave the union notice and opportunity to bargain over the proposed change and the union failed to act. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun.*) A waiver of a union's right to bargain must be clear and unmistakable and therefore is not lightly inferred. (*Oakland Unified School District* (1982) PERB Decision No. 236.) In order to be found sufficient, the employer's notice of a proposed change must allow a reasonable amount of time for the exclusive representative to decide whether to make a demand to negotiate. (*Victor Valley Union High School District* (1986) PERB Decision No. 565.) What constitutes a "reasonable amount of time" necessarily depends upon the individual circumstances of each case. (*Ibid.*) The District here has not met its burden.

As previously noted, the Association did not receive notice of the District's clear intent to terminate the released time policy until April 14, 2011. The policy was actually

[13] Although Goins testified that she believed the Association submitted a written demand to bargain sometime in the spring of 2011, because she could not recall any details over the demand and it was not produced for the record, her assertion is not credited.

discontinued four days later. Four days does not provide a reasonable opportunity to bargain. (See, e.g., *Arvin Union School District* (1983) PERB Decision No. 300; *Sutter Union High School District* (1981) PERB Decision No. 175.) However, even if the short period of time could be deemed a reasonable opportunity, there was no waiver of rights here because the Association had no obligation to request bargaining under these circumstances.

PERB has consistently held that when an employer has made a firm decision to make a change in policy, the failure to request bargaining will not be considered a waiver of that right because such a request would be futile. (*Fairfield-Suisun*, *supra*, PERB Decision No. 2262 [notice of an agenda indicating a drug testing policy would be effective retroactively rendered negotiations futile].) Futility is demonstrated here, because the District's letter to Setterlund unambiguously informed the Association that the released time policy was to be terminated by a certain date. This situation is factually similar to that in *Fall River Joint Unified School District* (1998) PERB Decision No. 1259. In that case, the employer argued that the union waived its right to bargain after failing to make a bargaining demand regarding a special education teacher "swap" program. The employer had issued letters to affected teachers informing them that their assignments were to be changed as a result of the program, and the union may have known about these letters. The Board rejected the waiver argument, however, finding that any request to bargain would have been futile as the letters clearly demonstrated that the employer had decided to implement the program via the change in assignments. (*Ibid.*; see also *State of California (Department of Veterans Affairs)* (2010) PERB Decision No. 2110-S.) Similarly, in this case, the April 14, 2011 letter to Setterlund clearly demonstrated that the District had already decided to terminate released time under section 12.19. At that point, with

the decision made, there was nothing left to bargain over. Accordingly, it cannot be found that the Association waived its right to bargain by failing to make a demand.[14]

It is undisputed that the policy change here was implemented without bargaining with the Association. By doing so, the District violated its duty to negotiate in good faith.

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5(c) states:

> 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 or without back pay, as will effectuate the policies of this chapter.

The District has violated EERA section 3543.5(a), (b) and (c) by unilaterally terminating the policy in section 12.19 providing 40 percent released time to the Association president without providing adequate notice and opportunity to bargain. The appropriate remedy in such a case is to order the District to rescind the policy change and to return to the status quo ante. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092; *Rio Hondo Community College District* (1983) PERB Decision No. 292.)

In addition, the traditional make-whole remedies in a unilateral change case are ordered. Such remedies may be different for each affected unit employee depending on the harm they suffered, if any, from the employer's change in policy. Harm may be demonstrated

[14] Moreover, even if a bargaining demand would not have been futile under the circumstances, "neither party to a collective bargaining agreement has a duty to negotiate over any matter covered by the agreement during its term (subject, of course, to reopener provisions.)" (*Los Rios Community College District* (1988) PERB Decision No. 684, p. 14; citations omitted.) There is no dispute that the 2008-2011 CBA containing section 12.19 was in full effect on April 14, 2011 when the District unilaterally decided to terminate the policy contained therein. Thus, the Association was under no duty to bargain over that provision at that time simply because the District desired to alter the terms of the negotiated agreement.

to the extent that an Association president may have been forced to use his or her own time to perform the duties formerly accomplished during the 40 percent released time. Any financial losses should be augmented with interest at a rate of 7 percent per annum. (See *Journey Charter School* (2009) PERB Decision No. 1945a.) A negotiated solution is the preferred method for determining such damages, and the parties are hereby ordered to exhaust such means within a 60 day period before submitting the matter for compliance.

Finally, it is appropriate that the District be ordered to post a notice incorporating the terms of this order at all locations where notices to certificated employees are customarily posted. Posting such a notice, signed by an authorized agent of the District, will inform employees that the District acted in an unlawful manner, is being required to cease and desist from that activity, and will comply with the order. It effectuates the purpose of EERA that employees be informed of the controversy and the District's willingness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Centinela Valley Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c). The District violated EERA by unilaterally terminating a policy in the collective bargaining agreement at Article 12, section 12.19, providing 40 percent released time to the president of the Centinela Valley Secondary Teachers Association (Association.) All other allegations in the complaint are dismissed.

Pursuant to section 3541.5(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. Failing to negotiate in good faith by enacting unilateral policy changes concerning issues within the scope of representation.

2. Interfering with the right of unit employees to be represented by the Association.

3. Denying the Association its right to represent unit employees.

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

1. Rescind the policy change terminating 40 percent released time for the Association president and return to the status quo ante.

2. Return unit employees to their status prior to the unilateral change in policy and make them whole for losses suffered, if any, as a result of the District's unlawful action. Any financial losses should be augmented by interest at the rate of 7 percent per annum.

3. Regarding the make-whole remedy, this order shall be stayed for 60 days to provide the parties an opportunity to meet and confer over a mutually acceptable remedy. If, however, the parties are unable to reach agreement within 60 days, this order shall take effect. In such a case, the District shall immediately notify the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee, so that compliance proceedings may be initiated.

4. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to employees represented by the Association 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 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or to 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 served concurrently on the Association.

Right to Appeal

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).)