

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PASADENA CITY COLLEGE FACULTY
ASSOCIATION,

Charging Party,

v.

PASADENA AREA COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case No. LA-CE-5776-E

PERB Decision No. 2444

July 30, 2015

Appearances: Lawrence Rosenzweig, Attorney, for Pasadena City College Faculty Association; Liebert, Cassidy & Whitmore by Mary L. Dowell, Attorney, for Pasadena Area Community College District.

Before Martinez, Chair; Huguenin and Winslow, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Pasadena Area Community College District (District) to the proposed decision (attached) of a PERB administrative law judge (ALJ). The charge filed by the Pasadena City College Faculty Association (PCCFA) alleged that the District violated the Educational Employment Relations Act (EERA)¹ by implementing unilaterally new terms and conditions of employment. The ALJ determined that the District violated EERA section 3543.5(a), (b) and (c) when it adopted changes to the 2012-2013 academic calendar that encompassed mandatory subjects of bargaining without first exhausting

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

its EERA duties to meet and negotiate and participate in statutory impasse resolution procedures with the PCCFA.

The Board has reviewed the record, the ALJ's proposed decision, the District's exceptions, and PCCFA's response thereto. We conclude that in the main the ALJ's findings of fact are supported by the record, and except as indicated below, we adopt the ALJ's findings as the findings of the Board itself. We affirm the ALJ's conclusions and proposed remedy, and to the extent they are consistent with our discussion below we adopt them as the decision of the Board itself.

PROCEDURAL HISTORY

On December 19, 2012, the PCCFA filed an unfair practice charge with PERB alleging multiple violations of EERA by the District.

On January 28, 2013, the District filed its response and position statement.

On February 21, 2013, PERB's Office of the General Counsel issued a complaint alleging that the District had failed and refused to bargain in good faith, interfered with the rights of bargaining unit employees and denied PCCFA its right to represent bargaining unit employees in violation of EERA section 3543.5(a), (b) and (c), when it unilaterally adopted a trimester academic calendar with fifty (50) minute Carnegie hours² for all classes and suspending step and column wage increases for bargaining unit members.

On March 12, 2013, the parties met for an informal settlement conference but the matter was not resolved.

² While PCCFA did not withdraw its allegations regarding the Carnegie hour, at hearing, PCCFA stated that "the Carnegie Hour is no longer an issue in this case." (Reporter's Transcript 8:17-18.)

On March 13, 2013, the District filed its answer, denying the material allegations of the complaint and asserting several affirmative defenses.

On August 26, 2013, the ALJ conducted a formal hearing. During the hearing, the PCCFA withdrew its allegations regarding the suspension of the step and column wage increases, and the parties submitted joint factual stipulations and a joint motion to amend paragraph 5 of the complaint to read:

On or about August 29, 2012, Respondent changed this policy by adopting a tentative calendar incorporating a trimester academic calendar without winter intersession commencing the spring semester of 2013 on January 7, 2013, and ending the spring semester on May 4, 2013. The summer session 2013 started on May 13 instead of June 24, 2013. Respondent identified October 1, 2012, as the operational date of necessity for implementation.

(Proposed Dec., pp. 1-2.) The ALJ accepted the stipulations and granted the joint motion to amend the complaint.

On October 16, 2013, the District filed its closing brief, and on October 21, 2013, PCCFA filed its closing brief.

On November 27, 2013, the ALJ issued her proposed decision.

On December 23, 2013, the District timely filed its exceptions, to which the PCCFA timely responded on January 7, 2014.

On January 23, 2014, PERB's Appeals Assistant informed the parties that the filings were complete and the matter was placed on the Board's docket.

FACTUAL SUMMARY

We provide this summary of the facts to assist the reader.

During the 2011-2012 academic year, the District's Calendar Committee³ began meeting to determine the calendar for the 2012-2013 school year. The Calendar Committee's charge was to recommend dates for a 2012-2013 academic calendar having two semesters, plus winter and summer intersessions. The Calendar Committee considered, among other matters, the beginning and ending dates of the semesters and intersessions, the dates for final exams and the dates for holiday observance. Ultimately, the Calendar Committee recommended a 2012-2013 academic calendar consistent with the status quo, viz., two semesters, plus winter and summer intersessions. (Proposed Dec., pp. 2-3.)

In Spring 2012, the District and the PCCFA presented their initial proposals for a successor collective bargaining agreement (CBA). In March 2012, the PCCFA presented its initial proposal. In April 2012, the District presented a partial initial proposal, which included changing the 2012-2013 academic calendar from the status quo model of two semesters plus winter and summer intersessions, to a trimester model with no intersessions. On May 2, 2012, the District presented the remainder of its initial proposal. (Proposed Dec., p. 4.)

Also on May 2, 2012, the District's Board of Trustees adopted the Calendar Committee's proposal for the 2012-2013 academic year calendar, which called for continuing the status quo academic year format of two semesters with two intersessions. (Parties' Joint Stipulations, p. 1.)

On May 25, 2012, District and PCCFA representatives met to commence negotiations for a successor CBA. (Proposed Dec., pp. 4-5.)

On July 16, 2012, the District informed the PCCFA that it needed to cut \$10.5 million from its budget for fiscal year 2012-2013. On July 17, 2012, District General Counsel

³ The Calendar Committee is a "shared governance" District committee composed of a representative from each of the bargaining units, a student representative and a District management representative and a member of the Academic Senate.

Gail Cooper (Cooper) sent an e-mail to PCCFA co-negotiator Argiro Julie Kiotas (Kiotas) restating the District's desire to trim \$10.5 million from its 2012-2013 budget. Cooper's e-mail explained that in order to submit a balanced budget to the state-wide chancellor's office by September 15, 2012, the District was proposing, among other measures to: (1) suspend until January 1, 2013, all 2012-2013 step and column wage increases for PCCFA-represented employees; (2) eliminate all 2012-2013 Winter intersession courses; and (3) modify the start date for the Spring 2013 semester from February 19, 2013 to January 7, 2013. The District sought PCCFA's agreement to these measures and was prepared to negotiate them. (Proposed Dec., p. 5.)

The parties' representatives met again to negotiate on July 18 and 25, 2012. During the July 25, 2012, negotiating session, PCCFA negotiators advised District negotiators that PCCFA needed more time to study the District's recent proposal to suspend salary increases, eliminate winter intersession courses and change the Spring 2013 semester start date. The parties' negotiators met again on August 2, 2012. No agreement was reached on the District's budget-related issues. (Proposed Dec., pp. 5-6.)

On August 15, 2012, the District's Superintendent-President recommended to the District's Board of Trustees that it adopt a tentative 2012-2013 academic calendar based on the trimester system. A memorandum accompanying the recommendation cited pedagogical reasons for adopting a trimester calendar, but averred that moving to the trimester system would increase District revenue by "approximately \$600,000." (Respondent's Exh. 5, p. 1.) The memorandum also averred that: (1) the winter intersession was not "the norm," having been initiated in 2004 when the economy was "robust" and the District had "full funding for enrollment growth;" (2) the proposed adoption of a trimester 2012-2013 calendar was tentative because the District had a continuing obligation to "continue to negotiate in good

faith with the collective bargaining representatives *the impacts* on the terms and conditions of the ‘work’ calendar on employees;” and (3) October 1, 2012, would be the date of “operational necessity,” at which time the District could implement the proposed trimester calendar with or without agreement of the PCCFA. (*Ibid*, emphasis added.)

On August 29, 2012, the District’s Board of Trustees approved the superintendent-president’s August 15, 2012, recommendation for the revised, tentative 2012-2013 academic calendar incorporating the trimester system. As revised, the calendar left undisturbed the then-current Fall 2012 semester. However, commencing January 7, 2013, the revised calendar eliminated the winter intersession and instead scheduled a full trimester to commence on January 7, 2013, and established a third trimester in lieu of a summer intersession, to commence on May 13, 2013. (Proposed Dec., p. 7.)

During September 2012, the parties’ negotiators met three times. (Parties’ Joint Stipulations, p. 2.) District negotiators sought PCCFA agreement to the calendar which had been adopted by the Board of Trustees on August 29, 2012. No agreement was reached. On October 1, 2012, the District implemented the 2012-2013 academic calendar adopted by the Board of Trustees on August 29, 2012. (Proposed Dec., p. 7.)

On October 3, 2012, the PCCFA filed with PERB a request for impasse determination, identifying as a disputed issue unilateral imposition of the 2012-2013 academic calendar. On November 27, 2012, the District filed with PERB a request for impasse determination, identifying as disputed issues those remaining unresolved in the successor agreement negotiations. PERB appointed a mediator, and on December 12, 2012, mediation commenced on all the disputed issues. Mediation was not successful in resolving the parties’ disputes, including the trimester calendar. (Parties’ Joint Stipulations, p. 2.)

On May 24 and 30, 2013,⁴ a factfinding hearing occurred. The factfinding panel recommended retaining the trimester academic calendar for the duration of the parties' successor CBA. Although it acknowledged the District's claim that adopting the calendar was a management prerogative, the factfinding panel itself took no position on this issue. The factfinding panel also observed that the

Faculty Association [PCCFA] never really entered into meaningful bargaining over *the effects* of the new calendar. Rather, they believed, and continue to believe, that the decision was a wrong one and should be rescinded.

(Respondent's Exh. 13, p. 2, emphasis added.)

PROPOSED DECISION

The ALJ identified the issue before her as whether the District failed to meet and negotiate in good faith over a trimester academic calendar, which it adopted while still meeting and negotiating thereon with PCCFA.

After reviewing the elements of a prima facie case, the ALJ concluded that: (1) on August 29, 2012, the District adopted a 2012-2013 academic calendar which concerned a mandatory subject of meeting and negotiating, viz., working hours, and did so while under a statutory duty to meet and negotiate (Proposed Dec., pp. 11-16); (2) absent an affirmative defense, unilateral adoption of a policy concerning a mandatory subject of bargaining prior to completing the statutory duty to meet and negotiate in good faith violates the EERA (Proposed Dec., p. 18.); and (3) the District failed to establish any of several affirmative defenses which it raised. (Proposed Dec., pp. 18-22.)

⁴ The parties' joint stipulations identify the dates of the factfinding hearing as "May 24 and May 30, 2012" and the date that the factfinding report was issued as "June 5, 2012." (Parties' Joint Stipulations, p. 2.) Since neither party requested an impasse determination prior to October 3, 2012, the dates stipulated to by the parties for the factfinding hearing and report appear to be mistaken, viz., they should read "2013."

We review each District contention and the ALJ's determination thereon.

1. The District urged that its own bylaws authorized the adoption of and changes to the calendar, thus excusing negotiations with the PCCFA. The ALJ was not persuaded, and ruled that the District's own bylaws "do not provide a basis for finding that the District may unilaterally implement a change to a mandatory subject of negotiations like the school calendar." (Proposed Dec., p. 16.)

2. The District urged that the PCCFA waived the right to negotiate over the 2012-2013 academic calendar, averring that the PCCFA refused several requests by the District to bargain over the calendar. The ALJ reviewed several Board decisions in which employers failed to persuade the Board that a union intentionally relinquished the right to bargain. The ALJ concluded PCCFA's conduct, both at and or away from the bargaining table, failed to indicate intentional relinquishment of the right to negotiate over the District's proposed revisions to the 2012-2013 academic calendar. (Proposed Dec., pp. 16-18.)

3. The District urged that business necessity justified its implementation on October 1, 2012, of revisions to the 2012-2013 academic calendar. The ALJ noted that a successful business or operational necessity defense requires an actual emergency which allows no time for meaningful negotiations before acting, and that there is no alternative to the action taken. The ALJ concluded that the District failed to establish the required emergent circumstances and the absence of an alternative, as follows: (a) the District initially proposed changing to a trimester calendar in April 2012, thus undercutting the District's claim that in August 2012 it faced a sudden change of circumstances requiring emergent action; and (b) the District itself identified an alternative to imposition of a revised 2012-2013 academic calendar, to wit, support staff layoffs, thus undercutting the claim that it possessed only the one alternative,

unilateral action on the academic calendar, to overcome its alleged fiscal shortfall. (Proposed Dec., pp. 19-20.)

4. The District urged that it should be treated like employers which adopted only a student calendar while negotiating in good faith over the employee work calendar. (*Palos Verdes Peninsula Unified School District/Pleasant Valley School District* (1979) PERB Decision No. 96 (*Palos Verdes*); *Lake Elsinore School District* (1986) PERB Decision No. 606 (*Lake Elsinore*)). The ALJ labeled this District claim “qualified unilateral action.” The ALJ concluded that the District had failed to prove up facts akin to those which excused the employer in *Palos Verdes* and *Lake Elsinore*. The ALJ noted that: (a) the District had not established that its implementation date of October 1, 2012, for the calendar revisions was the point of “operational necessity,” since the District had adopted the revised 2012-2013 calendar more than a month earlier on August 29, 2012; (b) unlike the facts in *Palos Verdes* and *Lake Elsinore* where the employer adopted a separate student calendar while continuing to negotiate in good faith over possible alternative working hours for employees, here the District adopted simultaneously both a student attendance calendar and faculty-employee working hours, leaving no room for post-implementation bargaining over faculty-employee working hours; and (c) the District’s expressed willingness to bargain after implementation was limited to the *effects* of its August 29, 2012, calendar decision, rather than to the decision itself, thereby indicating willingness to bargain only over the effects/impact of its adoption of the calendar revisions, and not over faculty-employee working hours, a mandatory subject of meeting and negotiating upon which decision bargaining, not merely effects bargaining, is required. (Proposed Dec., pp. 20-22.)

The ALJ determined that the District violated section 3543.5 (c), (a) and (b) by adopting the 2012-2013 trimester academic calendar, and proposed the traditional remedy for a

unilateral implementation violation, to wit, a cease and desist order, an order that the District make whole those employees injured by the District's wrongful conduct, an order that the District restore the status quo ante, and an order that upon request of PCCFA the District meet and negotiate in good faith over any changes to the status quo. (Proposed Dec., pp. 23-24.)

DISCUSSION

Introduction

This case presents a garden variety unilateral action undertaken by an employer while subject to the EERA's duty to meet and negotiate. Absent an affirmative defense, such conduct would violate the employer's duties to meet and negotiate in good faith and participate in good faith in impasse resolution procedures.

We turn first to our standard of review, then to the prima facie case of unilateral change and the possible defenses, and finally to the District's exceptions to the ALJ's proposed decision.

Standard of Review

The Board defers to the ALJ's findings of fact that incorporate credibility determinations, but otherwise may draw different or even opposite inferences from the factual record than did the ALJ and may reverse the conclusion of law of the ALJ. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337; *Woodland Joint Unified School District* (1990) PERB Decision No. 808a; *Santa Clara Unified School District* (1979) PERB Decision No. 104.)

The Prima Facie Case

EERA section 3543.3 obliges a public school employer to meet and negotiate with an exclusive representative "upon request" with regard to matters within scope of representation, including participation in good faith in EERA impasse resolution procedures. EERA

section 3543.5(c) states that it is an unlawful practice for a public school employer to refuse to meet and negotiate in good faith with an exclusive representative.

In determining whether a party has violated EERA section 3543.5(c), PERB applies both “per se” and “totality of the circumstances” tests, depending on the specific conduct involved and the effect of such conduct on the negotiation process. An employer violates “per se” its duty to meet and negotiate when, inter alia, it unilaterally establishes any term or condition of employment within scope of representation prior to completion of the bilateral negotiations process. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro Valley*); *San Francisco Community College District* (1979) PERB Decision No. 105 (*San Francisco*)). An employer must refrain from unilateral implementation while meeting and negotiating and impasse resolution procedures. (*Moreno Valley Unified School District* (1982) PERB Decision No. 206 (*Moreno Valley*) [“The assumption of unilateral control over the employment relationship prior to exhaustion of the impasse procedures frustrates EERA’s purpose of achieving mutual agreement in exactly the same ways that such conduct frustrates that purpose when it occurs at any earlier point.”].)

In *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262 (*Fairfield-Suisun*), we described the elements of an unlawful unilateral action:

To prove up a unilateral change, the charging party must establish that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the action was taken without giving the exclusive representative notice or opportunity to bargain over the change; (4) the action had a generalized effect or continuing impact on terms and conditions of employment.

(*Ibid.*) We have applied this formulation in subsequent decisions.⁵

⁵ *Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 20; *County of Riverside* (2013) PERB Decision No. 2307-M, p. 18; *City of Escondido* (2013)

Our statutes contemplate bilateral decision-making as to subjects within the scope of representation. The gravamen of any unilateral action is exclusion of employees through their chosen representative from participation in the decision-making process. Whether a unilateral action is the creation, implementation or enforcement of policy, or a change to existing policy as contained in a written agreement, in written employer rules or regulations, or in an unwritten established past practice, our statutes require an employer contemplating a change in policy concerning a matter within the scope of representation to provide the exclusive representative notice and an opportunity to bargain.⁶

PERB Decision No. 2311, p. 8; *County of Santa Clara* (2013) PERB Decision No. 2321-M (*Santa Clara*), p. 13; *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 13; *Regents of the University of California* (2014) PERB Decision No. 2398-H, pp. 26-27.

⁶ PERB has long recognized the following three general categories of unlawful unilateral actions: (1) changes to the parties' written agreements; (2) changes in established past practice; and (3) newly created, implemented or enforced policy. Historically, *Grant Joint Union High School District* (1982) PERB Decision No. 196 (*Grant*) has been cited as the source of PERB's black letter law for the unilateral action doctrine. Under that precedent, the first of the four criteria is whether *the employer breached or altered the parties' written agreement or its own established practice*. In *Fairfield-Suisun, supra*, PERB Decision No. 2262 we broadened wording of the first criterion from *written agreement or its own established past practice* to "policy."

PERB has always recognized *newly created, implemented or enforced policy* as subject to its unilateral action doctrine. (*Gonzales Union High School District* (1993) PERB Decision No. 1006, adopting ALJ's Proposed Dec., pp. 20-21 [additional payroll deductions to cover premium increases constituted a new policy where negotiated funding mechanism could not absorb increases]; *Healdsburg Union Elementary School District* (1994) PERB Decision No. 1033, adopting ALJ's Proposed Dec., pp. 16-20 [early morning student supervision beyond the normal workday constituted a new practice notwithstanding varying informal practices at different school sites]; accord *San Joaquin County Employees Assn. v. City of Stockton* (1984) 161 Cal.App.3d 813, 819 [employer response to increased health insurance premiums].)

By changing the wording of the first criterion, the Board in *Fairfield-Suisun, supra*, PERB Decision No. 2262 broadened the language of the first criterion to reflect the greater variety of unlawful unilateral actions encompassed by the doctrine, but without changing its traditional application of that doctrine to unilateral changes in written agreements or established past practices.

1. Action to Change Policy. Consistent with the its established practice for consideration and adoption of the academic calendar, on May 2, 2012, the District's Board of Trustees approved the recommendation of the District's Calendar Committee for the ensuing academic year calendar. The 2012-2013 calendar proposed by the Calendar Committee, and adopted by the Board of Trustees, was based on two semesters with winter and summer intersessions, thereby continuing the calendar format which had been utilized during recent academic years. In so doing, the District likewise established its policy on 2012-2013 working hours for faculty represented by the PCCFA. Thereafter, during successor agreement negotiations with the PCCFA, the District proposed to change this policy. On August 29, 2012, without either agreement of the PCCFA or exhaustion of its EERA duty to meet and negotiate and to participate in impasse resolution procedures, the District adopted its proposed changes to the calendar, imposing a trimester academic calendar for 2012-2013. The District thus "took action to change policy."

2. A Matter within the Scope of Representation. We concur with the ALJ's discussion of "Scope of Representation," pages 13 through 15 of the proposed decision, and restate it here:

The District argues that the "student" or "academic" calendar is distinct from the work calendar, and that it is authorized by its by-laws to unilaterally adopt a student calendar. As discussed at some length below, the Board has addressed the issue of school calendars as a kind of hybridized negotiable/permissive subject. This internal tension is due to the fact that it is the duty and prerogative of public schools to set the standards for pupil education, which necessarily involves decisions about the number of instructional hours and days that are provided to students. Naturally, teachers must be working on days when instruction is being provided to students. Yet work hours are an enumerated subject of negotiations. Thus, the Board has made some fine distinctions in the area of school calendar in order to accommodate these separate, and sometimes competing interests.

In *Palos Verdes Peninsula Unified School District/Pleasant Valley School District* (1979) PERB Decision No. 96 (*Palos Verdes*), the Board held that the distribution of work days in the year (beginning and ending dates of the school year for teachers and the dates of their vacations and holidays), the distribution of hours in a teacher's workday (beginning and ending times of a teacher's workday), and extra hour assignments (Back-to-School Night and Open House) are matters within the scope of representation. The Board went on to state that, since the beginning and ending dates of the school year are encompassed by distribution of workdays, they, too, are negotiable items. (*Ibid.*) The Board defined the distribution of work days as when certificated staff are to perform their services as compared to the total amount of time they must provide their services.

In *Jefferson School District* (1980) PERB Decision No. 133, the Board rejected the district's argument that because the school calendar primarily impacted the public, it should be considered nonnegotiable. There, the Board cited *Palos Verdes, supra*, PERB Decision No. 96, and stated that although the days and hours that schools are open for instruction did not always coincide with teacher's work days and hours, there was a sufficient nexus between the two that the issue of school calendar was negotiable. The Board went on to draw a careful distinction between the District's prerogative to determine the hours of instruction that students receive in order to achieve its basic mission, and teachers' working hours, which was a mandatory subject of negotiations.

In *San Jose Community College District* (1982) PERB Decision No. 240, the Board held that a redistribution of work within an existing school calendar (substituting instructional days for in-service days), absent facts demonstrating that the change affected the volume of work, the hours of work or the distribution of working days, did not amount to a change in any terms and conditions of employment. And in *Oakland Unified School District* (1983) PERB Decision No. 367, the Board cited each of the above decisions regarding school calendar, and reaffirmed its finding that the school calendar is within the scope of negotiations.

The present case involves not just the District's adjustment of starting and ending dates of the school year and changes to the winter and spring breaks on the calendar, but the wholesale adoption of a different type of calendar. Trimesters

differ from both semesters and intersessions in length and permit fewer course offerings per year. Without doubt, staff are teaching while classes are in session. Because there is no conceivable way that students could attend courses on a trimester schedule while staff members work on a semester schedule, the District's unilateral adoption of a new calendar system necessarily encroaches on the bargaining rights of employees by imposing a different distribution of work days. This clearly has a direct impact on work hours and other terms and conditions of employment, even without specific decisions having been made with regard to start and end dates. Simply comparing the dates between the class schedule based on the semester calendar adopted on May 2, 2012, against the class schedule based on the trimester calendar adopted on August 29, 2012, dramatic differences emerge. This scenario is not, as the District intimates, akin to simply eliminating the Winter Intersession classes. [Footnote omitted.]

(Proposed Dec., pp. 13-15, emphasis added.)

3. Taken without Giving PCCFA the Opportunity to Bargain over the Change. The “opportunity to bargain” includes both providing notice of the proposed change to the exclusive representative, and, when bargaining is requested,⁷ participating in good faith in meeting and negotiating and in statutory impasse resolution procedures if invoked by either party. (*Pajaro Valley, supra*, PERB Decision No. 51; *San Francisco, supra*, PERB Decision No. 105; *Moreno Valley, supra*, PERB Decision No. 206.) The District's changes to its 2012-2013 academic calendar policy were made on August 29, 2012, while the parties were negotiating. Thus, the District adopted changes to faculty working hours while it was subject to the statutory duties to negotiate in good faith and to participate in impasse resolution procedures.

4. Having a Generalized Effect or Continuing Impact. The calendar changes in question altered the starting and ending dates of the Spring and Summer 2013 academic

⁷ Here it was the District that requested to negotiate over changes to the 2012-2013 academic calendar adopted by the Board of Trustees on May 2, 2012.

periods (trimesters) as well as the dates of the 2013 Spring break and spring campus closures, thereby having a generalized effect on working hours for faculty represented by the PCCFA. Moreover, according to the factfinding panel's report, the District intended the changes to be the "status quo on a go forward basis," thus having a continuing impact. (Respondent's Exh. 13, p. 2.)

For these reasons we conclude, with the ALJ, that the PCCFA established that the District's 2012-2013 academic calendar changes adopted on August 29, 2012, constituted a unilateral change in policy concerning faculty working hours, a matter within the scope of representation and thus a mandatory subject of meeting and negotiating.

Defenses

Under our precedents, an employer may avoid a conclusion that it unlawfully failed to meet and negotiate over a mandatory subject of bargaining by establishing either of the following: (1) the union waived the right to negotiate so the employer's duty to negotiate never arose; or (2) under the particular circumstances, the employer's unilateral action should be excused (operational/business necessity). We review each type of affirmative defense.

1. Waiver. An exclusive representative may waive its right to bargain over a matter within the scope of representation. Waiver may be shown by action, inaction or bargaining history. (*San Mateo County Community College District* (1979) PERB Decision No. 94.) However, waiver is disfavored and must be clear and unmistakable. (*San Francisco, supra*, PERB Decision No. 105; *Los Angeles Community College District* (1982) PERB Decision No. 252 (*Los Angeles*)). An employer raising a waiver defense must establish that: (1) it provided the employee organization clear and unequivocal notice that it would act on a matter within the scope of representation, and (2) the employee organization clearly, unmistakably

and intentionally relinquished its right to meet and negotiate in good faith. (*San Francisco; Los Angeles; Santa Clara, supra*, PERB Decision No. 2321-M.)

2. Operational/Business Necessity. An employer may establish a compelling operational/business necessity as justification for acting unilaterally before completing its bargaining obligations. The employer must demonstrate “an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action.” (*Oakland Unified School District* (1994) PERB Decision No. 1045 (*Oakland*); *Callexico Unified School District* (1983) PERB Decision No. 357 (*Callexico*)).

We turn now to the District’s exceptions to the ALJ’s proposed decision.

District Exceptions

1. The District excepts to the ALJ’s finding that “the parties filed a joint request for impasse determination.” (Proposed Dec., p. 7.) The District’s claim has merit, since each party filed separately its own request for impasse determination. The factfinding hearing treating both impasse declarations was held jointly. We deem the ALJ’s finding that the parties submitted a joint request for impasse determination to be harmless error and find instead that each party made its own impasse declaration.

The District argues further that since the ALJ subsequently quotes from PCCFA’s impasse request, the ALJ incorrectly attributed the views expressed in PCCFA’s impasse request to the District. The District maintains that it did not agree with PCCFA that the District refused to discuss the calendar change, and instead, that it was PCCFA that failed to negotiate. But as the ALJ noted, the District was willing to negotiate over only the effects/impact of the trimester calendar on faculty working hours and not the District’s decision to adopt the trimester calendar. The District thus failed and refused to negotiate over its decision to establish working hours for PCCFA-represented employees, a matter within the

scope of representation and subject to decision bargaining. Therefore, the District's exception lacks merit.

2. The District excepts to the ALJ's determination that the "District's use of a semester system for the school calendar was an enforceable 'past practice.'" (Proposed Dec., p. 12.) The ALJ found that the District had for several years operated on the basis of two semesters with a winter intersession, and never on the basis of trimesters. We conclude that the ALJ's analysis on this issue (Proposed Dec., pp. 11-12) is consistent with Board precedent. For this reason, the exception lacks merit.

3. The District excepts to the ALJ's statement that, "[i]t is not clear why in this case, the parties requested a finding of impasse as to a single issue." (Proposed Dec., p. 12, fn. 4.) The District raises again its claim that the parties did not submit a joint request for impasse determination. See discussion under 1. above. As explained above we deem this point immaterial to our determination of the issues. For this reason, the exception lacks merit.

4. The District excepts to the ALJ's conclusion that:

The present case involves not just the District's adjustment of starting and ending dates of the school year and changes to the winter and spring breaks on the calendar, but the wholesale adoption of a different type of calendar. Trimesters differ from both semester and intersessions in length and permit fewer course offerings per year. Without a doubt, staff are teaching while classes are in session. Because there is no conceivable way that students could attend courses on a trimester schedule while staff members work on a semester schedule, the District's unilateral adoption of a new calendar system necessarily encroaches on the bargaining rights of employees by imposing a different distribution of work days. This clearly has a direct impact on working hours and other terms and conditions of employment, even without specific decisions having been made with regard to start and end dates. Simply comparing the dates between the class schedule based on the semester calendar adopted on May 2, 2012, against the class schedule based on the trimester calendar adopted on August 29, 2012, dramatic differences emerge.

(Proposed Dec., p. 15.)

The District argues that the ALJ erred because PCCFA failed to present any evidence regarding impacts of the trimester calendar and “[t]hese assumed impacts are pure speculation on the part of the ALJ.” (Respondent’s Exceptions, p. 4.) We are not persuaded. We find the inferences drawn by the ALJ from the record evidence to be both reasonable and supportive of the conclusions stated in this passage of the proposed decision.

The District argues further that the passage quoted just above contains “reversible error given that the District never refused to negotiate the start and end dates or any negotiable aspect of the calendar change.” (Respondent’s Exceptions, p. 4.) Again, we are not persuaded. The District’s position was that it would negotiate only the effects/impact of the trimester calendar on working hours of employees, not the decision itself. Working hours, including starting and ending dates and the dates of holidays, are mandatory subjects as to which decision bargaining, not merely effects/impact bargaining, is required. Offering to bargain over the effects/impact of the calendar change fails to satisfy the obligation imposed by EERA to decide bilaterally matters within the scope of representation.

We conclude that the record supports both the inferences and conclusions drawn by the ALJ that the trimester calendar adopted on August 29, 2012, established a policy concerning a matter within the mandatory scope of bargaining, and that the District violated the EERA when it adopted the trimester calendar prior to exhausting its bargaining obligations. For this reason, the exception lacks merit.

5. The District excepts to the ALJ’s determination that the:

District argues that its bylaws permit it to unilaterally adopt and change the school calendar. This argument is without merit. The Legislature gave PERB exclusive initial jurisdiction over matters covered by EERA and local regulation should not be permitted to undercut the minimum rights guaranteed by the statute.

(Proposed Dec., p. 16.) The District argues that the ALJ mischaracterizes its argument regarding District Bylaw 1610 and implies that the District refused to negotiate matters within scope of representation. We are not persuaded.

The District's interpretation of its Bylaw 1610, that only the District's governing board has the authority to adopt a calendar, is not at issue here. In the Spring of 2012, the Calendar Committee recommended, and thereafter on May 2, 2012, the District's governing board adopted, a two semester calendar with two intersessions for the 2012-2013 fiscal year. PCCFA representatives participated in the Calendar Committee. Thus, the District acted consistently with its Bylaw 1610. Concurrently, the District made an initial bargaining proposal to PCCFA for a successor CBA including a different trimester 2012-2013 calendar. The successor agreement negotiations were ongoing on August 29, 2012, when the District adopted the 2012-2013 trimester academic calendar, a subject as to which the EERA mandates bilateral, not unilateral, decision-making via good faith meeting and negotiating. District Bylaw 1610 does not excuse this unilateral action. For this reason, the exception lacks merit.

6. and 7. The District excepts to the ALJ's conclusion at pages 17-18 of the proposed decision that the District failed to establish its affirmative defense of waiver. We are not persuaded.

The defense of waiver requires demonstrative conduct by the party claimed to waive its bargaining rights. Here, the ALJ reasonably declined to find such conduct in the parties' participation in the Calendar Committee, or in PCCFA's bargaining table conduct. Noting that negotiations commenced slowly, and included five meetings before the District adopted the trimester calendar on August 29, 2012, the ALJ concluded that alleged lack of due diligence,

delay, silence and refusal to accept the other party's demands do not amount to waiver. We agree.

We conclude with the ALJ that PCCFA's participation in the Calendar Committee did not waive PCCFA's right to meet and negotiate over those aspects of the calendar within the scope of representation, nor did it satisfy the District's duty to meet and negotiate thereon. Employers and employee organizations frequently utilize internal procedures such as the Calendar Committee to achieve consensus on policies impacting employees in more than a single bargaining unit, e.g., calendar and health and welfare benefits. Upon reaching consensus, the parties negotiate separately. Here, the District itself presented the trimester calendar in its initial bargaining proposal. The PCCFA, therefore, did not have to make a bargaining demand—decision or effects—because the calendar was placed on the table by the District.

Nor did PCCFA through its bargaining table conduct indicate a “waiver” of the right to bargain. We conclude that PCCFA's disinclination to discuss or agree to the District's proposal for the trimester calendar was merely lawful “hard bargaining.” We explain.

The Board has held that:

Nothing in EERA requires parties to reach agreement or make concessions on every proposal. . . . insistence on a bargaining position is not necessarily a refusal to bargain in good faith. . . . A flat refusal to reconcile differences by failing to offer counterproposals could be construed to be in bad faith if no explanation or rationale supports the [party's] position.

(Oakland Unified School District (1981) PERB Decision No. 178, pp. 7-8.) Thus, a negotiating party need not reach agreement on, nor make a concession on, every proposal and may insist to impasse on its bargaining position. PCCFA negotiators provided an explanation and rationale for PCCFA's position. PCCFA negotiators urged that on May 2, 2012, the

District's governing board had accepted the Calendar Committee's recommended 2012-2013 two semester calendar, although the governing board had been under no obligation to do so. PCCFA preferred the status quo 2012-2013 calendar adopted in May 2012 and resisted the District's entreaties to make changes. We conclude that PCCFA thus engaged in lawful "hard bargaining" over the proposed change to a trimester calendar and that this conduct did not waive PCCFA's right to bargain.

We conclude the District's waiver exceptions lack merit.

8. The District excepts to the ALJ's conclusion the District failed to establish its business necessity defense. The ALJ concluded that the District failed to establish there was a sudden change in circumstances justifying its imposition of the calendar revisions, and that in any event, the District had an alternative course of action to unilateral imposition of the trimester calendar. (Proposed Dec., pp. 19-20.) We review the District's contentions.

The District contends that it "diligently pursued negotiations" up until the date it had identified as the date of operational necessity and had no "reasonable alternative" on October 1, 2012, other than unilateral imposition of the trimester calendar. We are not persuaded.

To establish business necessity sufficient to excuse failure to bargain, an employer must demonstrate "an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action." (*Oakland, supra*, PERB Decision No. 1045; *Calexico, supra*, PERB Decision No. 357.) Here, the District failed to demonstrate operational necessity to change the calendar. While October 1, 2012, may well have been the date of operational necessity if it did not have a 2012-2013 calendar in place for the 2013 Spring semester, the fact remains that it had already adopted a calendar on May 2, 2012. That the District desired to change to a different type of calendar and determined that it

had to have such a calendar in place by October 1, 2012, in order to complete all the tasks necessary for such a change, does not convert the District's desire into a business necessity and does not absolve the District of its bargaining obligation. Had the District completed the statutory impasse resolution procedures prior to taking action, and otherwise acted in accordance with its EERA obligations, it might then have imposed the trimester calendar on PCCFA. But acting as it did prior to exhausting its EERA duties to meet and negotiate and to exhaust impasse procedures, the District's action could be excused only on proof of operational necessity or waiver by PCCFA of its EERA rights. We conclude the District's operational necessity exception lacks merit.

9. The District excepts to two provisions of the ALJ's proposed remedy and order:

1. Upon a demand by PCCFA, to be made within sixty (60) days of the service of a final decision in this matter, rescind the implementation of a trimester calendar at the end of the trimester in which demand has been made, and restore a semester calendar no later than two weeks after the end of that trimester.

2. Make affected employees whole for any losses suffered as a result of the change, including interest at the rate of 7 percent per annum.

(Proposed Dec., pp. 24-25.) The District contends that "return to a semester calendar on an arbitrary date to be determined based on a demand by Charging Party is impossible" and that PCCFA failed to demonstrate that its members suffered any financial damages. We review each contention.

Initially, we concur with the ALJ that the appropriate remedy in a case involving a unilateral change in policy which violates the employer's duty to meet and negotiate generally includes four elements: a cease and desist order, make whole relief for employees injured by

the policy change, rescission of the policy change,⁸ and an order to bargain over the policy upon request of the exclusive representative.⁹ Under our precedents, the rescission/restoration need not occur immediately, or at all, where such action would unreasonably disrupt ongoing programs and services to the public.¹⁰ Here, the District contends that as ordered by the ALJ, the restoration would unreasonably disrupt ongoing programs and services to the public.

We conclude that the ALJ's proposed rescission/restoration remedy, viz., restoration of the two semester academic calendar at the conclusion of the trimester within which PCCFA makes a demand to bargain within sixty (60) days of service of the final decision in this matter, risks forcing the parties to change their academic calendar part way through an academic year. Such a change could disrupt unreasonably plans and schedules of students, as well as faculty and staff. We prefer instead rescission/restoration at the beginning of the next successive academic year following service of the final decision in this matter. However, if service of the final decision in this matter were to occur after May 1, 2015, of an academic year, then the rescission/restoration would occur at the beginning of the second successive academic year following service of the final decision. We believe with this modification, the ALJ's proposed rescission/restoration remedy balances reasonably the interests of the public and the parties to this proceeding.

With regard to the make whole portion provisions of the ALJ's proposed order, we leave to compliance proceedings the determination of those "losses suffered as a result of the

⁸ Rescission is frequently described as restoration of the status quo ante.

⁹ See Zerger, et al., California Public Sector Labor Relations, Ch. 42, § 44.22[6] (Matthew Bender) pp. 42-14 through 42-18, and cases cited therein.

¹⁰ *Id.* at pp. 42-17 through 42-18.

change.” There the parties will have an opportunity to present and dispute claims of loss occasioned by the “change.”

CONCLUSION

The Board hereby affirms the ALJ’s determination that the District violated EERA section 3543.5(a), (b) and (c) when it changed from a semester academic calendar with winter and summer intersessions to a trimester academic calendar without bargaining with PCCFA.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Pasadena Area Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c) when it changed from a semester academic calendar with winter and summer intersessions to a trimester academic calendar without bargaining with the Pasadena City College Faculty Association (PCCFA).

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. Unilaterally changing the school calendar from semesters to trimesters without notice and an opportunity to bargain.
2. Denying PCCFA the right to represent bargaining unit employees in their employment relations with the District.
3. Interfering with the right of bargaining unit employees to be represented by their employee organization.

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

1. Upon service of a final decision in this matter, for the next successive academic year rescind the implementation of a trimester calendar and restore a semester calendar; provided that if service of the final decision in this matter occurs on or after May 1, 2015, of an academic year, rescind the implementation of a trimester calendar and restore a semester calendar for the second successive academic year after the date of service of the final decision in this matter.

2. Make affected employees whole for any losses suffered as a result of the change, including interest at the rate of seven (7) percent per annum.

3. Upon receiving a demand therefor by PCCFA, to be made within sixty (60) days of the service of a final decision in this matter, meet and negotiate in good faith over the decision to implement a trimester calendar.

4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the District where notices to employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent 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.

4. Written notification of the actions taken to comply with this Order shall be made to the Public Employment Relations Board (PERB or Board) General Counsel, 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 the Association.

Chair Martinez and Member Winslow joined in this Decision.

**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-5776-E, *Pasadena City College Faculty Association v. Pasadena Area Community College District*, in which all parties had the right to participate, it has been found that the Pasadena Area Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section sections 3543.5(a), (b) and (c) when it changed from a semester academic calendar with winter and summer intersessions to a trimester academic calendar without bargaining with the Pasadena City College Faculty Association (PCCFA).

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing the school calendar from semesters to trimesters without notice and an opportunity to bargain.
2. Denying PCCFA the right to represent bargaining unit employees in their employment relations with the District.
3. Interfering with the right of bargaining unit employees to be represented by their employee organization.

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

1. Upon service of a final decision in this matter, for the next successive academic year rescind the implementation of a trimester calendar and restore a semester calendar; provided that if service of the final decision in this matter occurs on or after May 1, 2015, of an academic year, rescind the implementation of a trimester calendar and restore a semester calendar for the second successive academic year after the date of service of the final decision in this matter.
2. Make affected employees whole for any losses suffered as a result of the change, including interest at the rate of seven (7) percent per annum.

3. Upon receiving a demand therefor by PCCFA, to be made within sixty (60) days of the service of a final decision in this matter, meet and negotiate in good faith over the decision to implement a trimester calendar.

Dated: _____

PASADENA AREA COMMUNITY COLLEGE
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



PASADENA CITY COLLEGE FACULTY
ASSOCIATION,

Charging Party,

v.

PASADENA AREA COMMUNITY COLLEGE
DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-5776-E

PROPOSED DECISION
(November 27, 2013)

Appearances: Lawrence Rosenzweig, Attorney, for Pasadena City College Faculty Association; Liebert Cassidy Whitmore by Mary Dowell, Attorney, for Pasadena Area Community College District.

Before Alicia Clement, Administrative Law Judge.

PROCEDURAL HISTORY

The Pasadena City College Faculty Association (PCCFA or Union) filed the above-captioned unfair practice charge on December 19, 2012 alleging that the Pasadena Area Community College District (District) failed to meet and confer in good faith over the 2012-2013 calendar. On February 21, 2013, PERB issued a complaint alleging two separate instances of a failure to meet and confer in good faith. An informal settlement conference was held on March 12, 2013, but the parties failed to reach settlement. A formal hearing was held on August 26, 2013.

At the start of the formal hearing, the Union withdrew the allegations contained in paragraphs ten and eleven of the complaint. With regard to the remaining allegation, contained in paragraph 5 of the complaint, the parties agreed to amend this paragraph to read:

On or about August 29, 2012, Respondent changed this policy by adopting a tentative calendar incorporating a trimester academic calendar without winter intercession commencing the spring semester of 2013 on January 7, 2013, and ending the spring semester on May 4, 2013. The summer session 2013 started on

May 13 instead of June 24, 2013. Respondent identified October 1, 2012, as the operational date of necessity for implementation.

FINDINGS OF FACT

The District is a public school employer within the meaning of Educational Employment Relations Act (EERA)¹ section 3540.1(k). PCCFA is an exclusive representative within the meaning of EERA section 3540.1(e).

Historically, the District has maintained a semester calendar with a winter intercession and a summer intercession. Semesters were approximately sixteen weeks long, while intercessions were six to eight weeks long. Classes were typically offered during the intercession periods.

The Calendar Committee

The District has a Calendar Committee that is a subcommittee of the College Council. The Calendar Committee is comprised of a member of the Academic Senate, a representative from each of the bargaining units, a management representative, and a student representative. The Calendar Committee functions as a “shared governance” committee. In all, there are eleven members of the Calendar Committee. The job of the Calendar Committee is to propose a calendar for the upcoming school year, which is then sent to each of the participating groups for formal acceptance. The annual calendar includes the beginning and ending dates of the semesters and intercessions as well as when finals will be held, and when holidays will be observed.

When the Calendar Committee reaches a decision, it submits its proposal to the College Council, another shared governance committee. After review by the College Council, the proposal goes to the College President, who may, in turn, make a recommendation to the

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

District's Board of Trustees. District by-law 1610 grants the District's Board of Trustees the authority to approve the College Calendar.

During the 2011-2012 school year, when the Calendar Committee was meeting to determine the dates for the 2012-2013 calendar, the committee members presumed that the 2012-2013 school year would have a winter intercession. However, the District's representative on the committee was aware that due to a lack of funds, the District could not afford to offer classes during the winter intercession. This possibility was discussed by the Calendar Committee, but it is not clear if any resolution was reached, even assuming the Calendar Committee had any authority to reach such a resolution.

The Calendar Committee also discussed the possibility that the District would be changing from a semester to trimester calendar. There was never any vote by the Calendar Committee on a trimester calendar. The only proposal before the Calendar Committee during this time was to place the operational dates on a semester calendar that had been presented to it.

On May 2, 2012, the Calendar Committee finalized its proposed calendar for the 2012-2013 school year. Based on this calendar, summer intercession would begin on June 25, 2012 and end on August 26; the Fall 2012 semester would begin on August 27 and end on December 16, 2012; winter intercession would begin on January 7, 2013 and end on February 14, 2013; the Spring 2013 semester would begin on February 19, 2013 and end on June 16, 2013; and summer intercession would begin on June 24, 2013.

Successor Bargaining

In March 2012, the Union sunshined its proposal for a successor agreement. The Union's initial proposal did not contain language about the calendar. In April 2012, the District made the first part of a two-part proposal for successor bargaining. In the first part of its initial proposal, the District proposed moving to a trimester calendar. The two-part

structure of the District's initial proposal was intended by the District to get the most important, time-sensitive elements in front of the Union as early as possible. The District characterized the trimester calendar as necessary "to achieve [a] student-centered class schedule." The District also made it clear that they would need to implement the trimester schedule by October.

At the hearing, the Union took conflicting positions with regard to the significance of the Calendar Committee's May 2, 2012, proposal. The Union argued both that the proposal from the Calendar Committee was the negotiated calendar for 2012-2013 and also that the Union's signature on the Calendar Committee's proposed calendar was a negotiating proposal. Initially, the Union held the position that demands by the District to bargain over a trimester calendar at the successor bargaining sessions were illegal. As a result, there were no discussions at the bargaining table regarding the 2012-2013 calendar from the commencement of negotiations in March 2012 until May 2, 2012.

On May 2, 2012, the District sunshined the second part of its initial bargaining proposal for a successor agreement. As noted above, this is the same date that the District's Board of Trustees adopted the Calendar Committee's proposed 2012-2013 calendar, based on a semester calendar.

On May 25, 2012, after both parties' initial proposals had been sunshined, successor negotiations commenced in earnest with the exchange of more detailed proposals. The District presented its proposal as a fully composed "MOU." However, the District maintained at the hearing that it was not presented as a take-it-or-leave-it proposal.² On July 16, 2012, during a

² In a timeline of negotiations that the District attached as an exhibit to its response to the unfair practice charge, the District states that the proposed memorandum of understanding (MOU) was initially presented to the Union with an expiration date. The expiration date was apparently extended once prior to the July 30 meeting of the Board of Trustees. It is not clear if the proposed MOU was extended a second time.

non-bargaining meeting between the District and the Union, the District informed the Union that it would need to cut \$10.5 million from its budget. On July 17, 2012, District General Counsel Gail Cooper sent an e-mail message to Julie Kiotas and others regarding a collective bargaining meeting scheduled for July 18, 2012. In it, the District stated that in order to present a balanced budget to the Chancellor's office by September 15, 2012, it must take immediate measures to reduce its operating budget by \$10.5 million. Among the measures the District wished to implement immediately were the suspension of all step and column increases until January 1, 2013, and the elimination of all winter intercession classes and modification of the spring semester to begin on January 7, 2013. In relevant part, the July 17, 2012, e-mail message goes on to state the following:

On Wednesday, we will be seeking your agreement to those measures and will be prepared to negotiate them. With regard to the academic calendar and Carnegie hour, we will be prepared to negotiate those aspects that are within the scope of bargaining, i.e., to the extent that the academic calendar is also a proposed work calendar, we will be prepared to negotiate the impact of the calendar change. Please find attached the District's proposal with respect thereto.

The parties met for negotiations on July 18 and July 25, 2012. During the negotiating meeting on July 25, the Union advised the District that it needed more time to study the District's proposed MOU before it could negotiate.

On July 30, 2012, the District's chief negotiator sent an e-mail message to Union negotiators confirming an August 2 negotiating meeting. The District's Board of Trustees met on the evening of July 30, 2012, and took some unspecified action, which the Union interpreted as a withdrawal of the District's proposed MOU. As a result of the actions by the District's Board of Trustees on July 30, the Union's Chief Negotiator notified the District that there was no point to the proposed August 2 meeting, and the parties should return to the bargaining table at a previously scheduled September 7 meeting. The District denied that it

had withdrawn its proposed MOU and urged the Union to reconsider its position and meet on August 2. Ultimately, the Union agreed to keep the August 2 meeting, but stated that the faculty would not be available for a lengthy bargaining session on August 2, and would not be available the week of August 27, which was the first week of classes for the fall semester.³

According to the District, the August 2 meeting was unproductive, as the Union's negotiating team refused to discuss the proposed MOU or any of the proposals in the proposed MOU.

On August 15, 2012, in a memorandum to the Board of Trustees, Superintendent-President Rocha recommended that the Board of Trustees adopt a tentative student calendar that was based on a trimester calendar. The memorandum contained rationale for the adoption of a trimester calendar that were both financial and pedagogical.

On August 29, 2012, the District's Board of Trustees moved to adopt a tentative student calendar based on the trimester system. The tentative student calendar set operative dates including a 16 week Spring Semester commencing on January 7, 2013 and ending on May 4, 2013, as well as a summer break from May 5 through May 11 and the commencement of summer semester classes on May 13, 2013. The written recommendation to the Board of Trustees characterizes the trimester calendar as being "based entirely on what is best for the college and what will improve student success." The recommendation also states that, even if the trimester calendar is not adopted, there will be no winter intercession classes offered due to a lack of funds. The recommendation goes on to state, in relevant part, the following:

4. The current calendar with the long winter session is not the norm for PCC. It was first initiated only in 2004 during a robust

³ At some unspecified point in the negotiations, the parties discussed and agreed upon ground rules for bargaining that included a rule that no bargaining would occur during the first week of classes for a semester, or during finals week for a semester. In the 2012-2013 school year, this meant there would be no bargaining during the weeks of August 27 and December 16, 2012, and January 7, 2013.

economy and a time of full funding for enrollment growth. Due to state funding reductions, last winter PCC offered only 275 classes, serving but a few fortunate students of our nearly 30,000 students. The new calendar will unquestionably provide the greatest academic good for the greatest number of students of all types.

- The Board of Trustees has the authority to adopt a tentative “student” calendar commonly referred to as the “academic” calendar.
- The Board’s action to approve and adopt the new student calendar is labeled as “tentative” because, if adopted today, the Board has the obligation to continue to negotiate in good faith with the collective bargaining representatives the impacts on the terms and conditions of the “work” calendar on employees.
- The District may act to implement the calendar at such point that action to move forward with the 2012-2013 student calendar must be taken. This is known as the date of operational necessity, which by this action the Board identifies, upon the recommendation of the Administration, as October 1, 2012. On this date of operational necessity the District will implement the proposed student calendar, but will continue to negotiate the impacts in good faith with the affected bargaining units.

On October 1, 2012, the District implemented the student calendar that was adopted by the Board of Trustees on August 29, 2012.

On October 3, 2012, the parties filed a joint request for impasse determination. Under “Type of Dispute,” the parties checked “Other” and the typed description of the dispute is, “Unilateral imposition of a new academic calendar by District.” Under the “Statement of Facts,” it states, verbatim:

PACCD sunshined the “Recalendaring to Trimester Calendar” as a negotiable item on March 7, 2012. We met to negotiate at least five different times for a total of approximately 15 hours in July and August. On August 29, 2012 PACCD Board of Trustees approved a new “Tentative student calendar” refusing to discuss or negotiate the calendar change. Meanwhile, on or about August 30, 2012 PACCD stated on its web site, “To be clear, the negotiation with the faculty and staff unions is not about whether the calendar will be implemented. It is about addressing the negotiable effects of the change on faculty and staff.” This same

statement was subsequently disseminated in the school newspaper the Courier, and in a handout placed in all employees' mailboxes. (Continued on Attachment)

Item 11. Continuation:

The Faculty Association Negotiating team is comprised of 12 Faculty members from Pasadena City College and an attorney. May 25th, [sic] 2012 was our first meeting with the PCC district negotiating team (1 President, 3 Vice Presidents, 1 dean and 2 attorneys). We discussed ground rules, compliance issues with the FA contract and future meeting dates. The following meeting was a compliance meeting on July 17th; it was not a negotiating meeting. The district passed a MOU across the table at the end of the meeting and asked us to sign off on a new calendar and told us that if we did not sign their MOU, which required the Faculty Association to agree to a change to the 2012 – 2013 Academic Calendar or, they would implement a 10 day furlough of all staff and management to occur between January 1 and February 15, 2013. No negotiations took place at that meeting. The following two negotiation meetings were spent with the district attempting to compel us to sign their MOU without any negotiation. Beginning on September 7th, 2012 the district negotiating team completely changed. The PCC district team is now made up of the PCC president, the in house counsel and an additional counsel. The VP for Academic Affairs no longer sits on the district negotiating team. The college president presides over the meeting and presents the district's position. [T]he proposed academic calendar was never negotiated. The entire campus Shared Governance Bodies had vetted the actual calendar for the 2012 – 2013 Academic Calendar which was unanimously signed

off by all shared governance committees and bargaining units and approved by the District Board of Trustees on May 2, 2012. Nothing has been negotiated to date, and the district only intends to negotiate the effects of the imposed calendar, but not the imposed calendar. The PCCFA negotiating team believes that a mediator is required to assist us in negotiating with the PCC district negotiating team.

PERB approved the request for mediation on October 5, 2012.

The parties continued meeting for the purposes of negotiating a successor agreement and effects bargaining over the calendar after the declaration of impasse. According to the District, nothing of substance was discussed after October 1, 2012, despite its claims that it repeatedly requested that the Union engage in effects bargaining over the new trimester calendar.

The parties participated in impasse proceedings and on June 5, 2013, a factfinding panel issued a written finding. The factfinding report is valuable in elucidating the parties' positions, both then and now, and is therefore quoted at length below. The factfinding report focuses on the sole issue of "impasse concerning School Calendar" and notes that the parties refused to consolidate this issue with the "main dispute over a successor agreement." The factfinding report states explicitly that "the District's right to adopt such a tentative calendar as described above is not a part of this fact-finding process." The report goes on to state:

The District's position is that the unilateral adoption of a school calendar is a District right, subject to negotiations over the effects of that decision on the bargaining unit. Further, the District argues that since the calendar was adopted for the 2012-13 school year, it now represents that status quo on a go forward basis.

The record in this case reveals that the Faculty Association never really entered into meaningful bargaining over the effects of the new calendar. Rather, they believed, and continue to believe, that the decision was a wrong one and should be rescinded.

The District enumerated a number of reasons for the calendar change (See District Binder, Tab G), without waiving their position that this decision is a management right:

[¶ . . . ¶]

- For its part the Faculty Association has really focused on demonstrating that the new school calendar is a bad idea, and has not engaged in effects bargaining. They argue, for example, that for the local marketplace of six community colleges, the calendar of Pasadena does not provide a good match, notwithstanding the District's position [that the trimester calendar aligns with the practices of other colleges].
- Pasadena starts their Spring semester in the first week of January, some 4-6 weeks earlier than other community colleges in the same area. This overlap extends then to the Summer term. The Association claims this has a negative impact on students' ability to transition between colleges. It also has an adverse impact on part time faculty, many of whom make their living by teaching at multiple institutions.
- These faculty, the Association argues, will not be able to blend their schedules to teach both at PCC and another college in the summer. While there was a chart produced by the Association at hearing showing the various start times for the 6 colleges cited, there was no empiric data to support their other assertions.

Ultimately, the factfinding panel's recommendation is:

There does not appear to be a factual dispute that the Faculty Association has declined to participate in effects bargaining – even at hearing there was no counterproposal or request to ameliorate the effects of the new calendar.

Therefore, the recommendation of the panel is to keep the current 2012-13 [*sic*] schedule for the duration of the parties' collective bargaining agreement. That will allow both the District and the Association the ability to track the impact of the calendar over time, and to have objective data as to whether any modifications to the calendar should be made in the future.

ISSUE

Whether the District failed to meet and confer in good faith over a school calendar based on a trimester system.

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 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 (*Grant*); *Walnut Valley Unified School District* (1981) PERB Decision No. 160.)

The District’s Past Practice

For a past practice to be binding and subject to a unilateral change analysis, it must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (*County of Placer* (2004) PERB Decision No. 1630-M, citing *Hacienda La Puente Unified School District* (1997)

PERB Decision No. 1186; see also *Riverside Sheriffs' Association v. County of Riverside* (2003) 106 Cal.App.4th 1285, 1291.) PERB has also described an enforceable past practice as one that is "regular and consistent" or "historic and accepted." (*Hacienda La Puente*.)

Prior to January 2013, the District had maintained a school calendar based on the semester system with a winter and summer intercession. Both parties acknowledge that the District had never before utilized a trimester system. Based on these scant facts, it is clear that the District's use of a semester system for the school calendar was an enforceable "past practice" based on the above-described criteria as being "regular and consistent" and "historic and accepted."

Completion of Negotiations

Absent a valid defense, public sector employers may lawfully make unilateral changes in terms and conditions of employment only after completing statutory impasse procedures.⁴ (*Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 422.) A resolution by the governing body of a public school is an "official" action for determining that a unilateral change has been made, even where the action has a deferred effective date. (*Anaheim Union High School District* (1982) PERB Decision No. 201.) Impasse is not completed until the parties have considered the factfinder's report in good faith and attempted

⁴ It is not clear why in this case, the parties requested a finding of impasse as to a single issue. Notably, the parties later requested a finding of impasse as to the overall negotiations. For purposes of this analysis, the October 3, 2012 request for impasse establishes the operative dates of the beginning and ending of impasse determinations. It is not necessary to determine at this point the propriety of the finding of impasse on October 5, 2012, as to the sole issue of the calendar. I simply note that this piecemeal finding of impasse appears to be in contradiction with the position taken by the National Labor Relations Board (NLRB) and endorsed by several circuit courts of appeal, that collective bargaining involves give and take on a number of issues and permitting the employer to remove, one by one, issues from the table could impair the ability to reach overall agreement through compromise on particular items. (See *Duffy Tool & Stamping, LLC, v. NLRB* (2000) 233 F.3d 995; *Vincent Industrial Plastics, Inc. v. NLRB* (2000) 209 F.3d 727; and *Visiting Nurse Services of Western Massachusetts, Inc. v. NLRB* (2000) 177 F.3d 52.) PERB has not taken an official position on this issue.

to use it as the basis for a settlement. (*Modesto City Schools* (1983) PERB Decision No. 291.) In this case, there is little doubt that the District imposed the trimester calendar before the parties had completed impasse. The stipulated facts demonstrate that the trimester calendar was adopted on August 29, 2012, over a month before the parties requested a finding of impasse on the issue, and many months before the factfinding report was issued.

Change in Policy

In *Grant, supra*, PERB Decision No. 196, the Board made a distinction between a mere contractual breach and a unilateral change that has a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members. In this case, the District's change to the calendar is not simply the change of a single start date for the Spring Semester but a change to the length of the Spring Semester as well as to the Summer Semester. This new calendar applies to the entire bargaining unit. Notably, the District took the position at the factfinding hearing that the trimester calendar represented the "status quo on a go forward basis." Clearly, the imposition of a trimester calendar has a generalized effect and a continuing impact on bargaining unit members.

Scope of Representation

The District argues that the "student" or "academic" calendar is distinct from the work calendar, and that it is authorized by its by-laws to unilaterally adopt a student calendar. As discussed at some length below, the Board has addressed the issue of school calendars as a kind of hybridized negotiable/permissive subject. This internal tension is due to the fact that it is the duty and prerogative of public schools to set the standards for pupil education, which necessarily involves decisions about the number of instructional hours and days that are provided to students. Naturally, teachers must be working on days when instruction is being provided to students. Yet work hours are an enumerated subject of negotiations. Thus, the

Board has made some fine distinctions in the area of school calendar in order to accommodate these separate, and sometimes competing interests.

In *Palos Verdes Peninsula Unified School District/Pleasant Valley School District* (1979) PERB Decision No. 96 (*Palos Verdes*), the Board held that the distribution of work days in the year (beginning and ending dates of the school year for teachers and the dates of their vacations and holidays), the distribution of hours in a teacher's workday (beginning and ending times of a teacher's workday), and extra hour assignments (Back-to-School Night and Open House) are matters within the scope of representation. The Board went on to state that, since the beginning and ending dates of the school year are encompassed by distribution of workdays, they, too, are negotiable items. (*Ibid.*) The Board defined the distribution of work days as when certificated staff are to perform their services as compared to the total amount of time they must provide their services.

In *Jefferson School District* (1980) PERB Decision No. 133, the Board rejected the district's argument that because the school calendar primarily impacted the public, it should be considered nonnegotiable. There, the Board cited *Palos Verdes, supra*, PERB Decision No. 96, and stated that although the days and hours that schools are open for instruction did not always coincide with teacher's work days and hours, there was a sufficient nexus between the two that the issue of school calendar was negotiable. The Board went on to draw a careful distinction between the District's prerogative to determine the hours of instruction that students receive in order to achieve its basic mission, and teachers' working hours, which was a mandatory subject of negotiations.

In *San Jose Community College District* (1982) PERB Decision No. 240, the Board held that a redistribution of work within an existing school calendar (substituting instructional days for in-service days), absent facts demonstrating that the change affected the volume of

work, the hours of work or the distribution of working days, did not amount to a change in any terms and conditions of employment. And in *Oakland Unified School District* (1983) PERB Decision No. 367, the Board cited each of the above decisions regarding school calendar, and reaffirmed its finding that the school calendar is within the scope of negotiations.

The present case involves not just the District's adjustment of starting and ending dates of the school year and changes to the winter and spring breaks on the calendar, but the wholesale adoption of a different type of calendar. Trimesters differ from both semesters and intercessions in length and permit fewer course offerings per year. Without doubt, staff are teaching while classes are in session. Because there is no conceivable way that students could attend courses on a trimester schedule while staff members work on a semester schedule, the District's unilateral adoption of a new calendar system necessarily encroaches on the bargaining rights of employees by imposing a different distribution of work days. This clearly has a direct impact on work hours and other terms and conditions of employment, even without specific decisions having been made with regard to start and end dates. Simply comparing the dates between the class schedule based on the semester calendar adopted on May 2, 2012, against the class schedule based on the trimester calendar adopted on August 29, 2012, dramatic differences emerge. This scenario is not, as the District intimates, akin to simply eliminating the Winter Intercession classes.⁵

For all the foregoing reasons, it is clear that the District has implemented a change to the past practice of operating on a semester calendar, the District implemented the change before fulfilling its duty to meet and confer in good faith, the change has a generalized effect and continuing impact on bargaining unit members, and the change affected matters within the

⁵ See *Pasadena Area Community College District* (2011) PERB Decision No. 2218, holding that the decision to cancel classes was a management prerogative, subject only to effects bargaining.

scope of representation by altering the faculty's work calendar and the distribution of working days.

The District raises a number of defenses to this charge.

District By-Law 1610

The District argues that its bylaws permit it to unilaterally adopt and change the school calendar. This argument is without merit. The Legislature gave PERB exclusive initial jurisdiction over matters covered by EERA and local regulation should not be permitted to undercut the minimum rights guaranteed by the statute. (*San Francisco Unified School District* (2008) PERB Decision No. 1948.) Accordingly, the District's by-laws do not provide a basis for finding that the District may unilaterally implement a change to a mandatory subject of negotiations like the school calendar.

Waiver Defense

First, the District argues that the Union waived its right to negotiate over the calendar by refusing several requests by the District to bargain over the calendar. Consistent with the findings of the NLRB, PERB has held that an employer does not commit an unfair practice when it implements a change to a negotiable subject after it has given adequate notice to an employee organization of the proposed change and the employee organization has not requested negotiations within a reasonable time. (*Los Angeles Community College District* (1982) PERB Decision No. 252.) In order to prove that the union waived its right to negotiate, the employer must show demonstrative behavior on the part of the union waiving a reasonable opportunity to bargain. (*Solano County Community College District* (1982) PERB Decision No. 219.) The party asserting waiver bears the burden of proving it as an affirmative defense and any doubts must be resolved against that party. (*Placentia Unified School District* (1986) PERB Decision No. 595.)

In *San Diego Unified School District* (1980) PERB Decision No. 137, the Board declined to find a waiver where the union's failure to negotiate over the issue at the bargaining table was due to the belief that the matter had already been settled in another, earlier forum. Here, the Union argues that its participation on the Calendar Committee was the equivalent of bargaining. According to the Union, the District's insistence that it negotiate over the calendar outside of the Calendar Committee was bad faith. The Union also argues that the Calendar Committee's proposal was the equivalent of a bargaining proposal from the Union. These arguments are inherently inconsistent. Furthermore, the merits of both arguments are dubious given the composition of the Calendar Committee, which included representatives from each of the bargaining units at the District as well as students. Nevertheless, the fact that the Union raises the argument tends to demonstrate that it did not intentionally waive the right to negotiate over the calendar. Rather, according to the Union, it participated in the Calendar Committee with the expectation that the Committee's recommendation would be adopted. As with the Board's decision in *San Diego*, the Union's conduct in this case does not demonstrate a deliberate relinquishment of the right to bargain over the calendar.

Based on the testimony provided by both parties, it appears that the purpose of the Calendar Committee was to populate the school calendar each year with all of the significant events that occur in a given school year—start and end dates for semesters, spring and fall breaks, holidays, final exam periods, etc. Both the Union's witness and the District's witness testified that they had participated on the Calendar Committee for several years. Unlike in previous years, however, the parties' collective bargaining agreement was expiring this year and the District wanted to negotiate over a change from semesters to trimesters. The Calendar Committee's task was not to resolve the negotiable issue of whether the calendar should be based on semesters or trimesters, but to populate the calendar that existed under the current

collective bargaining agreement. Under the circumstances, the parties' conduct with regard to the Calendar Committee should not be deemed to satisfy their corresponding duties to meet and confer in good faith over the issue of whether the District should adopt a trimester calendar, nor should it be deemed a waiver of the right to meet and confer over the calendar. Accordingly, no weight is given to the fact that the Calendar Committee considered and rejected the idea of populating a second calendar based on the trimester system, as the Calendar Committee had no apparent authority to establish a trimester calendar on its own motion.

The District is similarly unable to point to any conduct at the bargaining table by which the Union waived a right to meet and confer over the calendar. By both parties' accounts, bargaining got off to a slow start. The District's initial sunshining in April included the trimester calendar, but was a partial list of subjects that the District wanted to negotiate. The full list was not presented until May 2, 2012, the same date that the Calendar Committee's proposal was adopted. After the District had sunshined all of its proposals, the parties began exchanging proposals in earnest and met for a total of five times before the District imposed the trimester calendar. The District presents evidence that the Union delayed several bargaining sessions and refused to discuss the proposed MOU at the August 2, 2012 bargaining session. Even if true, a lack of due diligence and poor judgment do not constitute a waiver of the right to bargain. (*The Regents of the University of California (UCLA)* (1982) PERB Decision No. 267-H.) As noted above, the burden is on the District to establish demonstrative behavior by the Union intentionally waiving the right to negotiate over a trimester calendar. Neither silence nor a refusal to agree to the District's demands constitute such a waiver.

Business Necessity Defense

Second, the District argues a business necessity defense to its unilateral implementation of the trimester calendar. In order to establish a business necessity defense to a unilateral action, the employer must show that there was an actual financial emergency which left no real alternative to the action taken and allowed no time for meaningful negotiations before it took the disputed action. (*Callexico Unified School District* (1983) PERB Decision No. 357.)

Here, the District argues that, had it not imposed the trimester calendar when it did, it would have been forced to take other, more drastic measures to balance its budget. The District acknowledges that there was at least one other alternative to its imposition of a trimester calendar—layoffs of classified employees.⁶ Even assuming these were the only two options available to the District, the fact that there was an option other than unilateral imposition places the claimed business necessity defense on shaky ground.

The District cites its October 1, 2012, date of “operational necessity.” This date represents the last date the District could notify students of the change in schedule in time for class registration to proceed. The District first proposed a trimester calendar in April 2012. A period of six months between the time the employer first proposed a trimester calendar until the October 1, 2012 date of operational necessity, would appear to negate the argument that the change in circumstances was “sudden” or “unavoidable,” precluding the opportunity for meaningful negotiations. Given the lack of a sudden change in circumstances as well as the existence of a reasonable alternative to unilateral imposition of a trimester calendar, the business necessity/operational necessity defense does not apply here to excuse the District from negotiating the change in the calendar.

Qualified Unilateral Action defense

⁶ The District presented these two options as “either/or” options. It is not clear from the evidence provided at hearing how the District arrived at this determination and whether the District sought input from any of the exclusive representatives of its employees prior to reaching this determination.

Finally, the District argues, in essence, that its conduct constitutes the kind of “qualified unilateral action” that the Board found lawful in *Palos Verdes, supra*, PERB Decision No. 96. There, the Board approved of the idea that there may be circumstances where an employer’s unilateral change to working conditions was justified because it was motivated by external circumstances and because the employer’s conduct otherwise evinced good faith by making it clear that the change was tentative and subject to continued meeting and conferring.

In *Palos Verdes, supra*, PERB Decision No. 96, the district waited as long as it reasonably could before it acted unilaterally, it implemented changes sparingly, and then repeatedly demonstrated its willingness to continue to meet and negotiate over matters within scope. When combined with a compelling argument of operational necessity, the Board agreed with the Hearing Officer that the district presented a valid defense to its unilateral imposition of a school calendar. Therefore, argues the District, as long as it bargained in good faith up to the point of operational necessity, it was entitled to engage in self-help, including implementation of a trimester calendar.

Even assuming PERB were to adopt the District’s argument that October 1, 2012, presented a point of operational necessity justifying the unilateral action, the facts of this case demonstrate that the District did not bargain in good faith up to that date. Rather, the District adopted the trimester calendar on August 29, 2012, more than a month before the date it identified as the last possible date to reach agreement before implementation became necessary. And, as discussed further below, the District’s claims that it repeatedly offered to continue meeting and conferring over the decision are not quite as sincere as the offer that was made in *Palos Verdes, supra*, PERB Decision No. 96. There are several reasons to doubt the sincerity of the District’s offer to bargain.

In *Lake Elsinore School District* (1986) PERB Decision No. 606, the Board held that the unilateral adoption of a school calendar may evidence a refusal to bargain if the surrounding facts and circumstances reflect that the district intends it to be a final calendar. One way of proving this is if the district implements the change and, in so doing, changes the terms and conditions of employment. (*Ibid.*) In *Lake Elsinore*, the district implemented a student calendar that differed from the previous year by one week, and changed the timing of the winter and spring semester breaks. However, after implementation of the student calendar, the district continued to meet and confer with the union and made proposals that differed from the calendar that it had just adopted. Because of this, the Board found that the district's conduct was not intended to implement a final calendar or to change the terms and conditions of employment.

In this case, the District imposed multiple changes at one time. It did not just implement a start date to the semester while continuing to bargain additional future dates. Rather, it implemented an entire year's worth of operative dates. Second, the calendar changes that were implemented, for the reasons discussed above, altered the terms and conditions of employment for bargaining unit members. These actions, as well as the District's later statement at the factfinding hearing that the trimester calendar represented the status quo, demonstrate that the District intended its adoption of a trimester calendar in August 2012, to be a final decision, rather than a tentative decision.

Second, instead of proclaiming its willingness to meet and confer over the decision to implement a school calendar, the District stated its willingness to meet and confer over the effects of the changed calendar, rather than the decision itself. Decision bargaining and effects bargaining are not interchangeable. Whether an employer has a duty to engage in decision bargaining or effects bargaining is determined by the nature of the issue in dispute—if the

issue is within the scope of bargaining, then the employer must engage in decision bargaining; if the issue is permissive, then the employer is obligated to bargain any within-scope effects of the non-negotiable decision. (See *Anaheim Union High School District* (1981) PERB Decision No. 177 and *Newman-Crows Landing Unified School District* (1982) PERB Decision No. 223, respectively.) In the event an employer is unsure whether a particular subject is negotiable, it is under an obligation to ask the union for its negotiability justification and inform the union of its reasons for its belief that a matter is out of scope. (*Trustees of the California State University* (2012) PERB Decision No. 2287-H.) Furthermore, a union is under no obligation to make any proposals in response to a unilaterally changed working condition. (*Cloverdale Unified School District* (1991) PERB Decision No. 911.)

It is clear that the school calendar is one of those hybridized issues involving some matters of managerial prerogative, but also encompassing mandatory subjects of bargaining. PERB has repeatedly held that when a subject does not merely involve an issue of managerial prerogative but is related to other mandatory terms and conditions of employment, it is within the scope of representation and cannot be altered without notice to the exclusive representative and an opportunity to bargain. (See *Lake Elsinore School District* (1988) PERB Decision No. 715; *Mt. Diablo Unified School District* (1983) PERB Decision No. 373; and *State of California (Department of Transportation)* (1983) PERB Decision No. 361-S.) In this case, the District unilaterally implemented changes to the school calendar that clearly encompassed mandatory subjects of bargaining without completing the negotiations process. The District has failed to present a valid defense to its action, and has violated EERA section 3543.5(c).

REMEDY

The appropriate remedy in a case involving a failure to meet and confer in good faith is to order a restoration of the status quo ante and to negotiate with the union. (*County of*

San Joaquin (Health Care Service) (2001) PERB Order No. IR-55-M.) A restoration of the status quo typically involves a rescission of the unlawful conduct and a make whole order for any individuals who have suffered losses resulting from the unlawful conduct. (*California State Employees' Assn. v. PERB* (1996) 51 Cal.App.4th 923, 946.) A restoration of the status quo need not occur immediately, however, and the Board has ordered a stay where immediate restoration of the status quo would cause disruption to innocent third parties or interfere with employee and student operations. (See *Lucia Mar Unified School District* (2001) PERB Decision No. 1440; and *Beverly Hills Unified School District* (1990) PERB Decision No. 789, respectively.)

As noted above, the school calendar is a subject that combines both mandatory subjects and matters of managerial prerogative. Accordingly, an immediate return to the status quo ante—a semester calendar—could prove disruptive and harmful to both bargaining unit employees as well as students, other employees and the District. A more reasonable approach would permit the parties sufficient time to return to the semester schedule at the end of a trimester, and with sufficient advance notice that it does not cause additional harm by subjecting bargaining unit employees (and students) to an abrupt and unplanned change in class schedules. Thus, upon a demand by PCCFA, within 60 days of a final decision in this matter, the District shall, at the end of the current trimester, rescind its implementation of the trimester calendar and restore a semester calendar no later than two weeks after the end of that trimester. Additionally, upon a showing of losses suffered by any affected employees as a result of the change, the District shall make employees whole. Damages shall be calculated through the end of the final trimester after a demand to bargain, or at the end of 60 days if no demand is made.

The parties are encouraged to work cooperatively toward this end.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Pasadena Area Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), (b) and (c), by unilaterally implementing a trimester calendar.

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing the school calendar from semesters to trimesters without notice and an opportunity to bargain.
2. Denying the Pasadena City College Faculty Association (PCCFA) the right to represent bargaining unit employees in their employment relations with the District.
3. Interfering with the right of bargaining unit employees to be represented by their employee organization.

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

1. Upon a demand by PCCFA, to be made within sixty (60) days of the service of a final decision in this matter, rescind the implementation of a trimester calendar at the end of the trimester in which demand has been made, and restore a semester calendar no later than two weeks after the end of that trimester.
2. Make affected employees whole for any losses suffered as a result of the change, including interest at the rate of 7 percent per annum.
3. Within 10 workdays of the service of a final decision in this matter, post at all work locations in the District where notices to employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized

agent 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.

4. Written notification of the actions taken to comply with this Order shall be made to the Public Employment Relations Board (PERB or Board) General Counsel, 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 PCCFA.

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 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 California Code of Regulations, title 8, section 32135, subdivision (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).)

