STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS LOS ANGELES, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5824-E PERB Decision No. 2518 March 6, 2017

Appearances: Littler Mendelson by William J. Emanuel, Barrett K. Green, and Rachael Lavi, Attorneys, for Los Angeles Unified School District; Holguin, Garfield, Martinez, & Quiñonez by Jesús Quiñonez, Michael Wertheim, and Michael Plank, Attorneys, for United Teachers Los Angeles.

Before Gregersen, Chair; Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by Los Angeles Unified School District (District or LAUSD) to a proposed decision (attached) by an administrative law judge (ALJ). The complaint alleged that the District violated the Educational Employment Relations Act (EERA)[1] by unilaterally implementing a new teacher evaluation rating policy. The complaint alleged that this conduct constituted a violation of EERA section 3543.5 subdivisions (a), (b), and (c).[2]

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

[2] The complaint also alleged that the District violated EERA by creating a new "Teacher Growth and Development Cycle Lead Teacher" position, by distributing a notice to bargaining unit employees announcing the creation of this position, and by soliciting

The ALJ concluded that the District violated EERA by unilaterally implementing the new four-level observation rating system and ordered the District to rescind any and all use of the system.

The Board itself has reviewed the administrative hearing record in its entirety and considered the District's exceptions and United Teachers Los Angeles's (UTLA) responses thereto. The record as a whole supports the ALJ's factual findings, and the proposed decision is well-reasoned and consistent with applicable law. Accordingly, the Board affirms the ALJ's rulings, findings and conclusions of law and adopts the proposed decision as the decision of the Board itself, subject to the discussion of the District's exceptions below and with a modification to the proposed remedy.

PROCEDURAL HISTORY

UTLA filed an unfair practice charge in this case on June 18, 2013, and a complaint issued on September 4, 2013, alleging that the District violated EERA by unilaterally implementing "a new evaluation rating policy that includes classroom observations based on the 'Teaching & Learning Framework' which incorporates four levels of evaluation ratings: 'Ineffective, Developing, Effective, and Highly Effective.'" The complaint alleged that prior to May 24, 2013, the District did not have an evaluation policy that used a "four-level rating that

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employees to apply for the position. The ALJ dismissed these allegations in the proposed decision which UTLA did not except to.

The ALJ permitted the parties to amend the complaint to include an allegation that the District unilaterally changed its policy by implementing a Final Evaluation Form for the 2013-2014 school year that contains: (1) a section on "Observation of Teacher's Practice," (2) a new section on "Contributions to Student Outcomes/Support for Student Learning," and (3) new evaluation criteria in a section on "Additional Professional Responsibilities." The amended complaint alleged that these items were not previously contained in the District's Final Evaluation Form. The amended complaint alleged that this conduct constituted a violation of EERA section 3543.5, subdivisions (a), (b), and (c). The ALJ dismissed these allegations, to which UTLA did not except.

included classroom observations." (Complaint, paras. 3 and 4.) This complaint was amended shortly before the hearing to add allegations that the District made additional unilateral changes to the Final Evaluation Report form by adding sections to the form.[3]

An informal conference held on October 23, 2013, failed to produce a settlement, and the case proceeded to a four-day formal hearing held June 2-5, 2014. The proposed decision issued on December 24, 2014. The District filed timely exceptions, to which UTLA filed a timely response.

SUMMARY OF FACTS

Since at least 2009, the parties have been engaged to one degree or another in dialogue concerning improving the teacher evaluation system. Task forces and working groups were convened with District administrators, representatives of UTLA, and representatives of education community groups. Outside contractors were hired. Reports were made. "Group Thoughts" were written and circulated.

In November 2010, the District convened an Evaluation Working Group (Working Group) with UTLA and the Associated Administrators of Los Angeles (AALA) to "'facilitate the [. . .] eventual resolution of performance evaluation issues at the separate negotiation tables.'" (Proposed dec. at p. 7.) The discussions of this Working Group were not considered by any party to be formal negotiations.

By late March 2011, the Working Group issued a document entitled "Group Thoughts" that was intended to inform subsequent negotiations regarding the next certificated performance evaluation system. Included in the "Group Thoughts" was the concept of using an

[3] The allegations contained in this amendment were dismissed by the ALJ and not excepted to.

"'evaluation/observation rubric that delineates at least four levels of teaching proficiency.'" (Proposed dec. at p. 7.)

Around the same time the Evaluation Working Group was created, the District hired a private company, Teaching and Learning Solutions (TLS) to develop a new teacher training and development framework. In the ensuing months, TLS created what became known as LAUSD's Teaching and Learning Framework (TLF) based on a nationally-recognized body of research. The TLF designed a set of standards related to different aspects of teaching. These standards were consistent with the California Standards for the Teaching Profession (CSTP), and were divided into "'components'" which were in turn sub-divided into "elements." Further refining the endeavor of describing teaching performance, each "element" was reduced to "'rubrics'" which illustrate performance along a continuum with four categories, ranging from "'ineffective,'" to "'highly effective.'" (Proposed dec. at p. 9.) The term "rubric" was also defined by Ronni Ephraim, who oversaw the District's Open Court reading program as "a rating." (Reporter's Transcript (RT) V. III, p. 12:23.)

On April 28, 2011, the District sent a letter to certificated employees describing its efforts to reform its teacher and administrator support mechanisms, including evaluations. Those efforts would later be named the Teacher Growth and Development Cycle (TGDC).

LAUSD also announced a new pilot program starting in the 2011-2012 school year to incorporate the TLF into the teacher observation and evaluation process at a select set of school sites. LAUSD represented in this announcement that it would seek "the input and participation of our collective bargaining partners" and that "LAUSD remains committed to the collective bargaining process." (Unfair practice charge, Exh. 4.) UTLA objected to the implementation of the pilot program, to the extent it changed matters subject to negotiations and filed an unfair

practice charge.[4] Despite the objections, the pilot program ran during the 2011-2012 and the 2012-2013 school years.

As a result of the pilot program, the District presented feedback to the Ad Hoc TLF Committee and made some changes to the TLF system in or around March 2012. The District repeated its earlier assertions that it would negotiate over implementation of the TLF as required by law.

Doe v. Deasy Litigation[5]

In July 2012, a superior court judge issued a writ of mandate ordering the District to comply with a purported requirement of the Stull Act[6] that evaluation procedures incorporate elements of students' progress. Pursuant to this order, the parties focused on on-going negotiations over evaluation reform on this specific requirement and reached agreement on November 30, 2012, known as the Supplemental Agreement. This agreement required that the initial planning phase of the evaluation process include review and discussion of multiple measures of student achievement toward District and State standards.

The May 24, 2013 Letter

After the Supplemental Agreement was reached, the District wished to continue bargaining over additional proposed changes to the evaluation process. In early February 2013, it gave UTLA an initial proposal, and the parties had one bargaining session. The proposal identified interests the District sought to pursue, including implementing multiple measures and ratings to improve the evaluation process, improving the observation of classroom practices,

[4] The charge, PERB Case No. LA-CE-5561-E was held in abeyance by mutual request of the parties during the litigation of this case. It has since been withdrawn.

[5] Los Angeles County Superior Court Case No. BS134604.

[6] The Stull Act, codified in part at Education Code section 44660 et seq., sets forth minimum requirements for evaluation of certificated employees.

and improving the quality and measurement of employee contributions to the school community. No further proposals were exchanged, and no agreement or impasse was reached.

On May 24, 2013, the District sent UTLA a draft version of a letter it planned to send to all teachers. The letter announced the full-scale incorporation of the TLF for the 2013-2014 year, including use of a four-level rating system for observing teachers' performance as part of the evaluation process. These four levels were "Ineffective," "Developing," "Effective," and "Highly Effective." Prior to this, ratings of teachers' classroom teaching as observed by school administrators had varied widely across the District. The collective bargaining agreement prescribes no rating or ranking system with respect to observations.

In response to this draft letter, counsel for UTLA, Jesus Quiñonez, e-mailed John Bowes, the District's then-Director of Labor Relations, asking, "What is this? I suggest that the District not distribute this letter until there has been an opportunity for review and discussion between the parties." (Joint Exh. 15.) The District issued the letter to all teachers later that day. On May 31, 2013, Quiñonez demanded that the District rescind the May 24, 2013 letter and bargain over changes to the evaluation procedure, among other things.

Bowes responded to Quiñonez on June 4, 2013, assuring him that the District did not intend to change the overall evaluation ratings (as opposed to the observation ratings) from a two-level system, i.e., "'Meets Standards'" or "'Below Standard.'" Bowes acknowledged that changing the final evaluation ratings would require negotiations. No negotiations over the observation rating system took place, and the new observation rating system was implemented for the 2013-2014 school year.

Implementation of the New Observation Ranking System

The May 24, 2013 letter informed teachers that the District "will continue our work to fully implement the Teacher Growth and Development Cycle," which is comprised of two measures: classroom observations and data-driven student learning outcomes as adopted in the Supplemental Agreement. The classroom observations were to be based on the District's TLF, which, according to the District, "provides all of our teachers and school leaders with a common definition of effective instruction and is the basis of more specific and detailed feedback." (Joint Exh. 14, p. 1.)

The TLF did more than simply create four new levels of rating for observation of teachers' performance. It described tasks and instructional techniques expected of teachers and included in narrative detail the characteristics of four levels of performance that pertain to the task. The TLF attempted to describe what ineffective, developing, effective, and highly effective performance looks like with respect to each aspect or standard of instructional practice.

For example, one component of the TLF is "Creating an Environment of Respect and Rapport." An element of this component is "Classroom Climate," which is described: "The classroom environment is safe and supportive; risk-taking is encouraged, students freely contribute their ideas, and student mistakes are treated as learning opportunities, never with ridicule." Teachers' effectiveness at creating this goal is assessed as either "ineffective" (where students do not freely share their ideas; students mistakes may be ridiculed by the teacher or other students); "developing" (some students freely share their ideas; risk-taking and mistakes receive unpredictable responses from the teacher or other students); "effective" (students freely share their ideas and take risks in learning); or "highly effective" (students freely share their

ideas, opinions or struggles, and student and teacher mistakes are treated as learning opportunities by teacher and students). Similar components include "managing classroom procedures" and "managing student behavior." (Joint Exh. 12.)

PROPOSED DECISION[7]

The ALJ framed the relevant issue here: "Did LAUSD enact an unlawful unilateral policy change by . . . implementing a four-level rating system for teacher observations, based on the TLF?" (Proposed dec. at p. 13.)

The ALJ analyzed the District's use of a four-level observation rating system for teacher observations in the 2013-2014 school year under the elements of a unilateral policy change: (1) the employer took action to change existing policy; (2) the policy change concerned 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; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9 (*Fairfield-Suisun USD*) citing *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5.)

The ALJ found that the District began to use the four-level observation rating system in the 2013-2014 school year and that it had refused to bargain over that change. The primary issues then were whether the change was within the scope of representation and/or whether the District was excused from bargaining due to waiver by UTLA, as the District asserted.

[7] For the convenience of the reader, a summary of the proposed decision is provided in the body of the Board's decision. This summary is no substitute for reading the proposed decision itself.

The ALJ concluded that the four-level observation rating system was within the scope of representation because it was an enumerated subject in EERA section 3543.2, subdivision (a), as it is a procedure to be used for the evaluation of employees. According to the ALJ, PERB has long interpreted the evaluation procedures clause in EERA section 3543.2, subdivision (a) broadly, citing to *Modesto City Schools* (1983) PERB Decision No. 347 (*Modesto*), *Compton Community College District* (1990) PERB Decision No. 798 (*Compton CCD*), and *Jefferson School District* (1980) PERB Decision No. 133 (*Jefferson SD*).

The ALJ reasoned that the four-level observation rating system is an evaluation procedure within the meaning of EERA section 3543.5, subdivision (a) primarily because, at its core, the new rating system is the process or methodology used for assessing and giving feedback to teachers about their performance. As in *Compton CCD*, *supra*, PERB Decision No. 798, and *Jefferson SD*, *supra*, PERB Decision No. 133, the rating system pertains to how LAUSD documents material used to evaluate employees, and it is undisputed that employees' scores on the new four-level observation rating system are part of employees' personnel files.

Even if the observation rating system was not an evaluation procedure, the ALJ concluded it is nevertheless within the scope of representation under PERB's longstanding test for determining the negotiability of issues not enumerated in EERA section 3543.2 as set forth in *Anaheim Union High School District* (1981) PERB Decision No. 177, p. 4 (*Anaheim*), which deems a subject to be within the scope of representation if it: (1) is logically and reasonably related to wages, hours, or an enumerated term and condition of employment; (2) the subject is of such concern to management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict; and (3) negotiation would not significantly abridge managerial prerogatives, including matters of

fundamental policy essential to the school district's mission. Applying this test, the ALJ first found that the ranking system was negotiable. (*Id*. at pp. 3-4.)

The ALJ rejected the District's argument that Education Code section 44660 et seq. (the Stull Act) supersedes EERA and relieves the District from any obligation to bargain over evaluation procedures. According to the ALJ, the Stull Act does not create an "'inflexible standard'" or "'immutable provisions'" regarding the use of a four-level observation rating system. (Proposed dec. at p. 25.)

The ALJ also rejected the District's argument that any duty to bargain over the observation rating system in this case was excused because UTLA waived its right to bargain over the matter. According to the ALJ, there was no clear and unmistakable waiver of UTLA's right to bargain either through provisions in the parties' collective bargaining agreement or by failing to request bargaining after it had notice of proposed changes.

The ALJ also rejected the District's contention that its history of making changes to its evaluative rating systems had created a "'dynamic status quo'" that allowed for unfettered discretion to create the four-level observation rating system at issue in this case. (Proposed dec. at p. 37.) The ALJ concluded that there was no evidence that the new observation rating system was consistent with a fixed methodology.

DISTRICT'S EXCEPTIONS TO PROPOSED DECISION

The District filed 104 exceptions to the proposed decision, many of them repetitive, taking issue with virtually every page of the proposed decision from page 14 through page 43,

and many of them unrelated to the ultimate issues in this case.[8] They can be grouped by the following categories or arguments.

(1) The District did not impose a four-level rating system on May 24, 2013, but instead "adopted new **standards** based on a four-level rubric for use in classroom observations and other educational purposes." (District's Exceptions, p. 2; passim; bold and underline in original.) The observation procedure has not changed.

(2) Standards or criteria for evaluating teachers are not within the scope of representation and the ALJ erred in his reliance on *Modesto*, *supra*, PERB Decision No. 347; *Compton CCD*, *supra*, PERB Decision No. 798; and *Jefferson SD*, *supra*, PERB Decision No.133. Requiring negotiation over criteria for evaluation would abridge the District's freedom to exercise its managerial prerogatives.

(3) Even if the rating system were within the scope of representation, the District was excused from bargaining under *State of California (Department of Corrections)* (2008) PERB Decision No. 1967-S. Because there is a need to provide a constitutionally acceptable education and prevent a poorly educated public, the need for unfettered decision-making with respect to teacher evaluations is as important as the constitutional requirement to provide adequate healthcare for prisoners.

[8] For example, in its first exception the District asserts that the ALJ erroneously concluded that the Office of the General Counsel issued a complaint alleging that LAUSD unilaterally imposed a new four-level observation rating system as part of its evaluation process. According to the District, the complaint "does not allege that the District imposed a new observation rating system. See PERB complaint at paragraph 4." (District's Exceptions, p 1.) Paragraph 4 of the Complaint reads: ". . . Respondent changed this policy by implementing a new evaluation rating policy that includes classroom observations based on the 'Teaching & Learning Framework' which incorporates four levels of evaluation ratings." Any fair reading of the complaint shows that the ALJ's paraphrase of it was accurate.

(4) The ALJ erred in concluding that the observation rating system was not subject to the duty to consult over educational objectives.

(5) The Stull Act supersedes the duty to negotiate over the observation procedure because it requires the District to "establish a uniform system of evaluation and assessment of the performance of all certificated personnel." (Ed. Code, § 44660.) Requiring administrators to conduct observations in a uniform manner ensures that the District will be able to comply with the Stull Act.

(6) UTLA waived its right to negotiate over the new observation rating system by failing to demand to bargain when it was on notice well before May 24, 2013, that the District intended to implement the change.

(7) The collective bargaining agreement (CBA), including the management rights clause, gives the District the right to determine how it conducts observation of teacher practice.

(8) Bargaining history shows that UTLA waived its right to bargain over evaluation procedures in part because the evidence established there was a dynamic status quo that permitted the District to make changes in evaluation procedures.

The exceptions are discussed in more detail below.

DISCUSSION

After the proposed decision issued, the Board issued *Pasadena Area Community College District* (2015) PERB Decision No. 2444, in which we noted:

> 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.

(*Id*. at p. 12; see also *Gonzales Union High School District* (1993) PERB Decision No. 1006 [newly created policy subject to unilateral change doctrine].)

Therefore, whether the new observation rating system represented a change from an identifiable past practice or was an implementation of new policy is not important because in either event, we analyze liability under the unilateral change doctrine. Thus, a unilateral policy change, or implementation of a new policy will be considered a "per se" violation of the duty to bargain in good faith where: (1) the employer took action to change existing policy or implement a new policy; (2) the policy change concerned 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; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun USD*, *supra*, PERB Decision No. 2262, p. 9.)

Prior to implementation of the new observation ranking system, the District used numerous rubrics without any uniform standard. The CBA makes no mention of ranking procedures for classroom observations. Thus, the May 24, 2013 letter represented the implementation of a new policy and the first prong of the test for unilateral change is satisfied.[9] Because the District indicated it intended to continue using the new observation ranking system, and because it applies to all classroom teachers, there is no doubt that the policy has a

[9] In so concluding we reject the District's argument that there was no change in the observation process because teachers continued to be observed within the timeframes and frequency set forth in the CBA. While that may be true, the change at issue in this case is in the implementation of the four-level ranking system and the detailed rubrics or criteria that are the TLF.

continuing impact and generalized effect on terms and conditions of employment. Therefore, the fourth prong of the "per se" test is satisfied.

As the ALJ noted, the two issues in dispute here are whether the new observation rating policy announced by the District in its May 24, 2013 letter is within the scope of representation and whether UTLA waived its right to bargain over the policy by inaction and/or by language in the CBA.

We first consider whether the subject was within the scope of bargaining.

Negotiability of the Observation Ranking System

EERA section 3543.2, subdivision (a)(1) provides that the scope of representation:

> shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, . . .

(Emphasis added.)

The District asserts that the new observation ranking system is not negotiable because it imposed standards or criteria for evaluation, which the District contends is a managerial prerogative. It made the same argument to the ALJ, who rejected it, noting, "The rating system does not set forth the standards for assessing employees. Rather it is *the mechanism LAUSD employed to score employees in their adherence to performance standards*." (Proposed dec. at p. 16; emphasis added.) We agree with the ALJ and conclude that the observation rating system, including its incorporation of portions of the TLF, is negotiable, either because it is a term specifically enumerated in EERA section 3543.2, subdivision (a) (a procedure for evaluation of employees), or because it is reasonably and logically related to that enumerated subject and satisfies the *Anaheim* test as we discuss below.

As the ALJ correctly noted, our precedents have broadly and liberally construed the duty to bargain over evaluation procedures, and have explicitly held that "procedures" encompass evaluation criteria. For example, in *Walnut Valley Unified School District* (1983) PERB Decision No. 289 (*Walnut Valley*), the Board held that the criteria unilaterally adopted by the employer to determine the competency of teachers over the age of 65 to continue in employment were negotiable. Those criteria included such factors as the employee's effectiveness as a teacher, his or her classroom management and control, professionalism, planning and preparation, all factors remarkably similar to those involved in the instant case. *Walnut Valley* described these factors as "criteria for determining competency to continue employment because they establish the areas the District will evaluate. As such these criteria "are negotiable because they relate to wages, hours and terms and conditions of employment." (*Id*. at p. 9.) Applying the *Anaheim* test, the Board found that the matter is of such concern to both employees and management that conflict is likely to occur because it touches on the "most fundamental aspect of the employment relationship, its continuity." (*Id*. at p. 9. See also *Holtville Unified School District* (1982) PERB Decision No. 250 (*Holtville*).)

Trustees of the California State University (San Marcos) (2004) PERB Decision No. 1635-H (*San Marcos*) is also on point. In that case the employer unilaterally changed performance evaluation and overall rating procedures to include two above-satisfactory ratings (where there had previously been only one) and to allow different weights to be given to various performance criteria instead of averaging the various scores on those criteria, as had been the previous practice. The Board held that these changes were within the scope of representation because they related to evaluation and merit systems.

The District excepts to the ALJ's reliance on these three cases, arguing that they should be distinguished on various grounds. It asserts that *Walnut Valley*, *supra*, PERB Decision No. 289 and *Holtville*, *supra*, PERB Decision No. 250 are inapposite to this case because the criteria used to evaluate whether certain teachers were competent to continue working involved a basic employment condition, but not a fundamental policy decision related to the quality and nature of essential public services. The District claims that its revised standards for classroom observations constituted a policy decision that did not affect basic employment conditions.

We disagree. The District argues throughout its exceptions that it must be unhindered in its attempts to improve its teacher evaluation system because such improvements are critical to improving the quality of education by improving the quality of the teacher workforce. The inescapable implication of this position is that underperforming teachers will be dismissed if they are unable to meet District standards, as measured in part by the new evaluation system, including the observation ranking system. Just as the criteria for determining continued competency of teachers over age 65 were used to determine suitability for continued employment, the District's observation ranking system is intended for the same purpose. The observation ranking system implicates basic employment conditions in the same way that the criteria for assessing suitability for continued employment did in *Walnut Valley*, *supra*, PERB Decision No. 289 and *Holtville*, *supra*, PERB Decision No. 250. While the District intends its evaluation system to assist teachers in improving their practice, it is undeniable that the ultimate consequence of no improvement will be dismissal from employment.

The CBA provides for an unpaid suspension as a consequence of poor evaluations, and Education Code section 44938, subdivision (b)(1) provides, as a prelude to dismissal, a 90-day period of notice and opportunity for improvement of unsatisfactory performance. An evaluation

system, including performance standards, is logically and reasonably related to continued employment, whether the purpose of that system is to determine fitness for teachers over a certain age, or to determine continued suitability for employment, training, or other remedies.

The District further attempts to distinguish this case from our precedents by asserting that in the earlier cases there was no evidence in *Walnut Valley*, *supra*, PERB Decision No. 289 or in *Holtville*, *supra*, PERB Decision No. 250, that "incompetent teachers had undermined the educational process on a large scale, or that even a single student had suffered in any way." (District's Brief in Support of Exceptions (District's Brief), p. 26.) The District cites to the fact that 99.3 percent of LAUSD teachers were rated as "'meets standards,'" but only 56 percent of the District's students graduated from high school. Yet there was no evidence in the record that demonstrated that the evaluation system caused the low high school graduation rate. Nor was there any evidence that poor teaching methods caused the low graduation rate. Equally plausible explanations include factors beyond the control of teachers, such as the poverty rate of students and other socio-economic factors, the numbers of English-learner students, student discipline policies that disproportionally expel or suspend students, poor curriculum policies, etc. At most, the fact that 99.3 percent of the teachers met the District's standards shows either that the vast majority of teachers are in fact competent, or that the evaluation system was not administered or designed in such a way as to rate teachers on a bell curve. It does not prove that the evaluation system caused an educational emergency that would justify jettisoning EERA's requirement that evaluation criteria be negotiated with the teachers' exclusive representative.

Nor do we agree with the District's assertion that *Walnut Valley*, *supra*, PERB Decision No. 289 and *Holtville*, *supra*, PERB Decision No. 250 cannot be applied to this case because

those were smaller school districts—"single institutions," in the District's words. (District's Brief, p. 26.) Every school district in the state is smaller than LAUSD. The purpose of the collective bargaining laws in this state is to give a voice to employees and their representative organizations on matters related to wages, hours and working conditions as defined in EERA, regardless of the employer's size. The urgency of improving teaching and learning through evaluation systems, or by dismissing incompetent teachers or administrators, or by strengthening the curriculum is no more or less urgent based on the size of the employer. Neither does the magnitude of the problem excuse the District from complying with the policy of this state embodied in EERA.

The District also attempts to distinguish the *San Marcos* decision, asserting that it involved unilateral changes in the overall evaluation ratings of a final evaluation form that directly impacted decisions regarding merit increases. (*San Marcos*, *supra*, PERB Decision No. 1635-H.) The District searches for differences without distinction. The employer in *San Marcos* unilaterally changed the overall rating procedures and the performance evaluation procedures by including two above-satisfactory rating categories, in place of one, and by giving evaluators more discretion to weigh certain criteria than they previously had. The fact that merit increases were implicated in the *San Marcos* case, or that the changes were to a final evaluation as opposed to an interim procedure is immaterial. In both cases, the evaluation procedure was changed by altering the number of ranking categories on an evaluation instrument. For this reason the ALJ correctly relied on *San Marcos* for his conclusion that the observation ranking system implemented by the District was within the scope of representation.

As the District's May 24, 2013 letter states, the TGDC intends to base classroom observations on the TLF, "which provides all of our teachers and school leaders with a common

definition of effective instruction and is the basis of more specific and detailed feedback." (Joint Exh. 14.) In the words of the ALJ, "the new rating system is the process or methodology used for assessing and giving feedback to teachers about their performance." (Proposed dec. at p. 16.) This describes an evaluation system as well as a scoring mechanism. It therefore is obviously a "procedure related to evaluations." Regardless of whether the new observation ranking system was merely a procedural change or an incorporation of new standards for evaluating employees, our precedent establishes that it is within the scope of representation, either because it is a procedure for evaluating employees or because it satisfies the *Anaheim* test. *(Walnut Valley*, *supra*, PERB Decision No. 289; *San Marcos*, *supra*, PERB Decision No. 1635-H.)

Despite the changes in the performance observation protocol that were brought about by implementing the new observation ranking system, the District argues that the observation procedure itself has not changed because procedures for observing teacher performance have not changed, and therefore no negotiable change occurred. We disagree. By increasing the categories by which classroom instruction will be measured and by decreeing the common definition of effective instruction to provide the basis of more specific and detailed feedback, the District has changed evaluation procedures.

The District notes that EERA section 3543.2, subdivision (a) contains the term "procedures" for the evaluation of employees and "procedures" for processing grievances. Subdivision (b) refers to "procedures" for disciplinary action. However, subdivision (c) refers to "procedures and criteria" for layoffs. Subdivision (d) refers to "criteria" for the payment of additional compensation. Subdivision (e) refers to "criteria" for a salary schedule. According to

the District, it is not logical to conclude that the Legislature intended to use "procedures" and "criteria" in different ways in the same section of a statute.

As noted above, PERB long ago determined that criteria for evaluation are negotiable. (*Walnut Valley*, *supra*, PERB Decision No. 289.) We see no reason that precedent should be disturbed. Moreover, the District's argument that the Legislature intended to define "procedures" and "criteria" as distinct statutory terms of art is undermined by the language of the Higher Education Employer-Employee Relations Act (HEERA)[10] section 3562, subdivision (r)(1) which states in relevant part:

> For purposes of the California State University only, "scope of representation" means, and is limited to, wages, hours of employment, and other terms and conditions of employment. The scope of representation shall not include: . . . (D) Criteria and standards to be used for the appointment, promotion, evaluation, and tenure of academic employees, which shall be the joint responsibility of the academic senate and the trustees.

(Emphasis added.)

This language demonstrates that the Legislature knew how to explicitly exclude evaluation criteria from the scope of representation. The fact it did not do so in EERA strongly suggests that the Legislature intended a broad interpretation of "procedures" for evaluation as that term is used in EERA section 3543.3, subdivision (a).

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

Application of the *Anaheim* test

The District also excepts to the ALJ's conclusion that the observation ranking system is negotiable under the *Anaheim* test.[11] We agree with the ALJ for reasons we now explain.

1. The Change in Performance Observation Protocol is Logically and Reasonably Related to Enumerated Subjects of Bargaining.

The District excepts to the ALJ's conclusion that "even [if] the new rating system was not an evaluation procedure, in-and-of itself, the system unquestionably relates to such procedures." (District's Exceptions, p. 8, citing to proposed dec. at p. 17.) The ALJ's conclusion is supported by *Rio Hondo Community College District* (2013) PERB Decision No. 2313 (*Rio Hondo*), in which the Board held:

> Applying the Board's *Anaheim*, *supra*, PERB Decision No. 177 test, we first conclude that the type of evidence an employer relies on or is permitted to use to substantiate employee performance evaluations is logically and reasonably related to evaluation procedures, which is an enumerated term and condition of employment in EERA section 3543.2(a).

(*Id.* at p. 14; emphasis added.)

[11] That test provides:

> . . . a subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.

(*Anaheim*, *supra*, PERB Decision No. 177 at pp. 4-5.)

If the "type of evidence an employer relies on or is permitted to use to substantiate employee performance evaluations" logically and reasonably relates to evaluation procedures, a tiered system of describing and ranking the quality of classroom performance which provides feedback to teachers based on observed evidence, i.e., the District's observation ranking system, is also necessarily logically and reasonably related to evaluation procedures. (*Rio Hondo*, *supra*, PERB Decision No. 2313 at p. 14.) Therefore, under *Rio Hondo*, evaluation "criteria" are related to evaluation procedures.

The new observation ranking system is also logically and reasonably related to "causes and procedures for disciplinary action." (EERA section 3543.2, subd. (b); *Rio Hondo*, *supra*, PERB Decision No. 2313 at pp. 14-15.) The Board noted in *Rio Hondo* that disciplinary procedures are within the scope of representation. (*Rio Hondo* at pp. 14-15.)

Article X of the parties' CBA ("Evaluation and Discipline"), Section 11.0(a), states in relevant part:

> Employees may be disciplined for cause. Such discipline may include Notices of Unsatisfactory Service or Act and/or suspension from duties without pay for up to fifteen working days, . . . If the discipline is based upon incompetence, the observation, records and assistance provisions of Section 5.0[12] apply.

[12] CBA Article X Section 5.0 states in relevant part:

> Observations, Records and Assistance: Observations should be followed by conferences to discuss the employee's performance. If problems are identified, the evaluator shall make specific written recommendations for improvement, and offer appropriate counseling and assistance. Within four working days of the conference, a copy of written records relating to observations, advisory conferences and assistance offered or given shall be given to the employee for the employee's information, guidance, and as a warning to improve performance.

(Emphasis added.) This CBA language directly connects disciplinary procedures with the observation portion of the employer's evaluation, at least in cases of alleged incompetence.

For these reasons, as well as those relied on by the ALJ, we reject the District's assertion that the observation ranking system was not logically and reasonably related to enumerated subjects of bargaining.

Subject is of Concern to Both Management and Employees.

The District excepts to the ALJ's conclusion that the second element of the *Anaheim* test was satisfied. The District bases this exception on what it alleges is an admission by UTLA that "[t]he only ratings that matter to an individual teacher are on the final evaluation, of which there are still only two – 'Meets Standard Performance' or 'Below Standard Performance.'" (Joint Exh. 57 at p. 2.)

We do not find the District's argument persuasive. The second prong of the *Anaheim* test is not a question of fact to which a party may be found to have admitted. Instead, it is a mixed question of law and fact, requiring PERB to exercise its expertise and discretion to assess whether the issue is one in which conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict. In this case, there is ample basis to support our conclusion that the subject of evaluations for certificated employees was of great concern to both management and employees. As the ALJ described at pages 6-9 and 18 of the proposed decision, over the course of several years, both the District and UTLA participated in several joint work groups and task forces to study ways to improve evaluations. UTLA itself formed a Teacher Evaluation Workgroup to develop guiding principles for an effective evaluation system. Teachers as well as administrators wanted a method for providing

effective and meaningful feedback on their performance and a system that more objectively and robustly provided that feedback.

The District's assertion that teachers are only interested in the final evaluation rating disregards the fact that an employee's classroom observation ratings have a direct effect on the employee's final evaluation ratings. (See CBA Article X Sections 5.0 and 6.0.)[13] Evaluation procedures in general are a subject that clearly meet the second prong of the *Anaheim* test, regardless of what one opinion may be about the importance of a particular part of the evaluation procedure.

As noted by the ALJ, the parties have historically negotiated over various aspects of evaluation procedures, a fact that provides further reason to conclude that the "mediatory influence of collective negotiations is the appropriate means of resolving the conflict." (*Anaheim*, *supra*, PERB Decision No. 177 at pp. 4.)

Negotiations Would Not Significantly Abridge Managerial Prerogatives.

The District argues that the third prong of the *Anaheim* test is not met in this case because negotiations would significantly abridge its freedom to exercise managerial prerogatives that are essential to the achievement of its mission, "which is to provide teachers

[13] CBA Article X Section 6.0 states in relevant part:

> Final Evaluation Report: . . . [T]he evaluator shall prepare and issue the Final Evaluation Report in which the employee's overall performance and progress toward objectives is evaluated. . . . When a Final Evaluation Report is marked "Below Standard Performance," the evaluator shall specifically describe in writing the area of below standard performance, together with recommendations for improvement, and the assistance given and to be given.

(Emphasis added.)

with standards for teaching and effectiveness in order to lead to the Districts' mission of greater student achievement." (District's Brief, p. 30.)

It is beyond dispute that a core purpose of any school district is to increase student achievement. However, the District errs in equating a duty to bargain over the changes it made in May 2013 with any significant abridgement of its exercise of managerial prerogatives (including matters of fundamental policy) essential to the achievement of its mission.

Our precedents have applied the *Anaheim* test to evaluation systems that have both changed the number of rankings (*San Marcos*, *supra*, PERB Decision No. 1635-H*)*, and have imposed criteria or standards to be used in assessing teacher performance (*Walnut Valley*, *supra*, PERB Decision No. 289) and have concluded that bargaining over such subjects would not significantly abridge the employer's right to exercise its managerial prerogatives.

The District's argument regarding its core mission to improve student performance conflates a systemic protocol—the evaluation system—with the individual actions implementing that protocol. It is not an evaluation system, however flawed or robust, that implicates student achievement. It is the application of that system by school administrators that ideally assists teachers in improving their performance and when improvement is not possible, provides the basis for termination from employment. Illustrating this point, albeit on the similar but related issue of teacher dismissal, the California Court of Appeal in its recent decision in *Vergara v. State of California* (2016) 209 Cal.Rptr.3d 532 (*Vergara*) noted:

> Records from LAUSD showed that a larger number of teachers resigned to avoid the formal dismissal process than those who elected to go through the process. These records also showed that the number of teachers dismissed or resigning to avoid dismissal increased from a total of 16 in 2005-2006 to a total of 212 in 2012-2013. This change was due in part to an LAUSD policy of initiating the dismissal process whenever a teacher received two below-standard evaluations.

(*Id*., at p. 546.)[14]

By the same token, the District's mission of improving student performance is not abridged by a requirement that it negotiate over the evaluation ranking system, because it is the application of an evaluation system, not the negotiation over the system, that presumably improves teacher performance. Responding to the District's depiction of the educational emergency facing the District, it is also worth underscoring that the District always has the ability to unilaterally implement whatever evaluation policy it chooses after it has completed negotiations with the exclusive representative, and exhausted all impasse procedures. (*Orange Unified School District* (2000) PERB Decision No. 1416 at p. 12; *San Mateo Community College District* (1979*)* PERB Decision No. 94; *Modesto City Schools* (1983) PERB Decision No. 291 at p. 38.)

We are not persuaded that simply because the evaluation system needed improvement, the matter was therefore outside the scope of bargaining. Nor does it follow that poor student performance means that teachers and their employee organization should be excluded from negotiating over improvements to the evaluation system. No evidence was presented showing any link between student performance and the evaluation process in effect prior to May 2013, yet the District presumes that teacher performance is the sole or primary factor in student achievement scores. Moreover, the District itself stated in its February 15, 2013 letter to District employees: "We believe—and research and experience tells us—that measures of student achievement should not be used as the sole means of measuring quality or effectiveness

[14] It is worth noting that the 212 teachers referred to in *Vergara*, *supra*, 209 Cal.Rptr.3d 532 resigned in the school year prior to the District's adoption of the new observation ranking system, demonstrating that the District's ability to effectively dismiss underperforming teachers was not dependent on it having in place the observation procedures at issue here.

of instruction." (Joint Exh. 9.) Yet the District's Brief relies on the implicit argument that low student achievement proves and is caused by a low quality of teacher evaluation protocols. Correlation does not prove causation. It therefore is an overreach for the District to claim that its core mission of educating its students excuses it from bargaining with its teachers' representative over evaluation procedures.

Finally, the District's claim of managerial prerogative is belied by the fact that it had negotiated with UTLA over evaluation procedures in the past, and even as recently as 2012, when it negotiated successfully over changes in the evaluation process necessitated by the superior court's decision in the *Doe v. Deasy* litigation. It also appears that the District had every intention of bargaining over future changes in the evaluation process, and specifically over classroom observations when, in February 2013, it sunshined its initial bargaining proposal concerning employee evaluation procedures. (Joint Exh. 7, p. 4.) That document reads in relevant part:

> For its initial proposals for 2012-2013 . . . negotiations and discussions with . . . UTLA concerning procedures to be used for Evaluation of Employees to become effective commencing in 2013-[20]14, the District identifies the following interests that the District will be seeking to pursue:
>
> 1. The District will continue to pursue enhancements in the quality of employee evaluations, performance, accountability and services, with the intention of enhancing achievement in student academic performance. . . . Among the topics for such negotiations will be multiple measure and ratings to improve the efficacy, fairness, clarity, . . . quality, and consistency of the . . . evaluation processes across the District; *improve the observation of classroom professional practices. . . .* [Emphasis added.]
>
> 2. These continued negotiations and discussions, . . . are required by the recently-completed LAUSD-UTLA

> November 2012 Evaluation Procedures Supplement to Article X, . . . [the *Doe v. Deasy* negotiations].[15]

This document was presented to UTLA to continue negotiations over evaluations.

The District's position that classroom observation criteria are a matter of fundamental policy and exempt from bargaining is further undermined by the language in California Education Code section 44661.5, which states in relevant part:

> When developing and adopting objective evaluation and assessment guidelines . . . a school district may, by mutual agreement between the exclusive representative of the certificated employees of the school district and the governing board of the school district, include any objective standards from the National Board for Professional Teaching Standards or any objective standards from the California Standards for the Teaching Profession if the standards to be included are consistent with this article. If the certificated employees of the school district do not have an exclusive representative, the school district may adopt objective evaluation and assessment guidelines consistent with this section.

(Emphasis added.)

This language indicates that the Legislature considered "developing and adopting objective evaluation and assessment guidelines" was not so fundamental to a school district's core mission that it should be outside its obligation to bargain with an exclusive representative. (Ed. Code, § 44661.5.) To the contrary, Education Code section 44651.5 endorses the concept that evaluation standards must be negotiated with the exclusive representative of certificated employees at least to the extent that they include objective standards from the CSTP or the National Board for Professional Teaching Standards and that such standards may not be incorporated into the evaluation process absent mutual agreement.

[15] The District also reserved its position that "most of the matters that will be discussed" fall within its authority under the current CBA and/or applicable law. (Joint Exh. 7, p. 4.)

Department of Corrections Decision

The District further argues that the ALJ erred by refusing to apply *Department of Corrections*, *supra*, PERB Decision No. 1967-S to this case. Specifically, the District excepts to the ALJ's conclusion that the present case does not rise to the extraordinary circumstances presented in *Department of Corrections*. The District argues that, even assuming that evaluation criteria are generally a mandatory subject of bargaining, the exception recognized by PERB in *Department of Corrections* applies equally to the facts of the present case.

According to the District, it must provide constitutionally acceptable education and prevent a poorly educated public, just as the State of California had a constitutional duty to provide adequate healthcare for prisoners in *Department of Corrections*, *supra*, PERB Decision No. 1967-S. The District argues that this case involves a constitutional crisis at least as important as that in *Department of Corrections.* The District further contends that *Department of Corrections* is not limited only to "emergency circumstances," but applies to any decision "made primarily to implement a fundamental policy decision related to the quality and nature of essential public services." (District Exceptions, p. 15, citing *Department of Corrections*, *supra*, PERB Decision No. 1967-S, proposed dec. at p. 52) We agree with the ALJ that there is "no evidence that any failures of LAUSD's existing observation and evaluation system ever reached emergency proportions." (Proposed dec. at p. 21.)

As the ALJ correctly noted, *Department of Corrections*, *supra*, PERB Decision No. 1967-S is factually very different from the present case. The unique facts in *Department of Corrections* that are not present in this case include:

> (1) Physicians were treating patients outside their field of training, and potentially life-threatening mistakes were being made.

(2) Inmate deaths had occurred as a result of the substandard care, and more were sure to suffer and die if the system was not immediately overhauled.

(3) At one facility, the experts found some physicians had problems such as mental health disorders, and some physicians lost privileges due to substance abuse or incompetence.

(4) The evaluation program implemented by the Department of Corrections was the only program in the country capable of evaluating physicians on the scale needed by the Department.

As these factual distinctions indicate, the employer's need for unencumbered decision-making in managing its operations in *Department of Corrections*, *supra*, PERB Decision No. 1967-S was significantly more compelling than in the current case, where there is no evidence of deaths, or a lack of qualified supervisors to conduct evaluations. Nor is there evidence in this case of a direct and substantial causation between the alleged deficiencies in evaluation procedures and student achievement. In *Department of Corrections* there was evidence that the inability to weed out incompetent physicians and to correct their performance deficiencies caused inmate deaths and resulted in an utterly broken prison health system. In contrast, there is no evidence in this case that the allegedly deficient teacher evaluation system has caused students to fail or has prevented the District from achieving its mission. Nor is there any evidence that the District lacked competent supervisors or that those supervisors were unable to identify deficient teachers. In fact, according to the facts recited in *Vergara v. State of California*, *supra*, 209 Cal.Rptr.3d 532, it appears that the District was able to substantially increase its ability to weed out underperforming teachers at least in 2012-2013 when it initiated the dismissal process after a teacher received two below-standard evaluations.

In *Department of Corrections*, *supra*, PERB Decision No. 1967-S, the employer was under a federal court order to fix its healthcare system, an order to which the Department stipulated. No similar court order applied to the evaluation system in the District, except for the *Deasy* order that was limited to incorporating elements of student progress in teacher evaluations. As noted above, negotiations addressing that limited issue were completed well before implementation of the new observation ranking system in May 2013. Observation rankings were not the subject of any court order.

The balance between the benefit of negotiations against the employer's right to make fundamental policy decisions is one made on a case-by-case basis. (*Department of Corrections*, *supra*, PERB Decision No. 1967-S, proposed dec. at p. 47.) For all the reasons cited above, we agree with the ALJ that *Department of Corrections* does not control this case. *Department of Corrections* was limited to the unique facts of the prison health care crisis described in that case.

We also reject the District's contention that *Department of Corrections*, *supra*, PERB Decision No. 1967-S applies wholesale to any decision claimed to implement a fundamental policy decision related to the quality and nature of essential public services. Accepting such a premise would put us in the middle of the quandary identified by the California Supreme Court in *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 615:

> [W]e approach the specific problem of reconciling the two vague, seemingly overlapping phrases of the statute: "wages, hours and working conditions," which, broadly read could encompass practically any conceivable bargaining proposal; and "merits, necessity or organization of any service" which, expansively interpreted, could swallow the whole provision for collective negotiation and relegate determination of all labor issues to the city's discretion.

Forty years of our decisions regarding the scope of bargaining, as well as those of the courts, point to balancing tests, such as articulated in *Anaheim*, *supra*, PERB Decision No. 177 that reject an overly expansive view of managerial prerogative.

Consultation Requirement Under EERA

The ALJ rejected the District's argument that it was obligated only to consult with UTLA regarding the observations ranking system. The District renews its argument here.

EERA section 3543.2, subdivision (a)(3) grants to the exclusive representative of certificated personnel the right to consult with a public school employer "on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks. . . ." In addition, EERA section 3543.2, subdivision (a)(4) permits the public school employer to consult with any employee organization on any matter outside the scope of representation. According to the District, the observation ranking system defines educational objectives, rendering a subject of consultation, not negotiation. In support of this argument, the District contends that the ALJ conceded that the District had a right to develop the TLF, and that it is illogical to then require negotiation when the District seeks to incorporate the educational objectives contained in the TLF into the observation process.

We reject the District's exception. First, it mischaracterizes the proposed decision regarding the TLF. The ALJ described the new rating system as:

> the "mechanism LAUSD employed to score employees on their adherence to performance standards. . . . I note that LAUSD's use of TLF elements to discuss the teaching practice is not squarely at issue in this case. The PERB complaint focuses upon LAUSD's use of the new four-level observation rating system. UTLA's closing brief, likewise, focuses on the scoring system, not the TLF itself. It is accordingly beyond the scope of this proceeding to decide whether it was unlawful for LAUSD to develop the TLF and use as part of its effort to improve discourse about the teaching practice. But . . . LAUSD is required to bargain with

> UTLA prior to incorporating those efforts into its evaluation procedures."

(Proposed dec. at p. 16; emphasis added.)

He did not "concede" or otherwise rule that the District had a right to develop the TLF, unilaterally or otherwise. He merely noted that issue was not before PERB. We agree with the ALJ.

Second, for reasons previously explained, the observation ranking system is a matter within the scope of representation. Even if elements of the TLF contained educational objectives, their incorporation into a new observation ranking system does not convert a negotiable topic into a non-mandatory subject. Defining educational objectives is different from using those objectives to evaluate employees. There is no doubt that a school district may, for example, determine that its educational objective is to teach algebra to all eighth graders. If requested to consult on this policy, it is obligated to do so, but it need not negotiate with the exclusive representative over the decision.[16] However, if the public school employer decides that a factor in evaluating its teachers will include whether eighth grade students learned algebra, it must negotiate with the exclusive representative.

[16] The difference between negotiating and consulting under EERA was discussed in *San Dieguito Union High School District* (1977) EERB Decision No. 22, p. 12, fn. 11, where the Board noted that although the term "consult" is not defined in EERA, it appeared to be the same duty to "meet and confer" that was used in the Winton Act, a labor relations statute that preceded and was replaced by EERA. Former Education Code section 13081, subdivision (d) of the Winton Act defined "meet and confer" as a mutual obligation to exchange information, opinions and proposals and to consider recommendations in an effort to reach agreement by written resolution or regulation of the governing board. But there was no requirement to "negotiate" in the sense of striving to reach a contract. (*San Juan Teachers Assn. v. San Juan Unified School District* (1974) 44 Cal.App.3d 232, 252.) Because EERA section 3543.2, subdivision (a)(3) contains the same educational policy matters as those described in the Winton Act, the Board concluded that the extent of the duty to consult is a carry-over from the Winton Act. After EERA imposed a duty to negotiate in good faith over wages, hours and defined terms and conditions of employment, the residual Winton Act topics of educational-policy issues remained subject only to the duty to consult.

The District excepts to the ALJ's statement that "[a] matter is not outside the scope of representation because it is subject to the consult provision in EERA section 3543.2, subdivision (a). Rather, a subject may be covered by the consult clause if it is outside the scope of representation. (See *Redwoods Community College District* (1987) PERB Decision No. 650, proposed dec., pp. 49-50.)" (Proposed dec. at p. 23, fn. 9.) We interpret this statement to refer to EERA section 3543.2, subdivision (a)(4), which reads: "All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, except that this section does not limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation." This language simply permits consultation on permissive subjects of bargaining. It is a right distinct from the items listed in EERA section 3543.2, subdivision (a)(3). In any event, the ALJ's observation is not dispositive of the legal conclusions in this case. We therefore dismiss this exception.

The Stull Act

The District excepts to the ALJ's rejection of its assertion that Education Code section 44660 et seq., the Stull Act, removes the District's action from the scope of bargaining because the changes announced in the May 24, 2013 letter were an attempt to bring uniformity to the evaluation process as required by the Stull Act.[17] The ALJ considered this argument and concluded that the Education Code does not establish an immutable or inflexible standard regarding the use of the observation rating system implemented here. Therefore he concluded that the Education Code did not remove the subject of evaluations from EERA's scope of representation. We agree with the ALJ.

[17] EERA section 3540 provides in pertinent part: "This chapter shall not supersede other provisions of the Education Code. . . ."

Education Code section 44660 declares a legislative intent that school districts establish a uniform system of evaluation and assessment of all certificated employees. That uniform system "shall involve the development and adoption . . . of objective evaluation and assessment guidelines. . . ." (Ed. Code, § 44660.) Nothing in this section indicates that the District has a right to unilaterally establish guidelines without negotiating with the exclusive representative as required by EERA. In fact, Education Code section 44661.5 contemplates such negotiations by requiring mutual agreement with the exclusive representative of certificated employees before including in evaluation guidelines the objective standards from the National Board for Professional Teaching Standards or from the CSTP.

In *San Mateo City School District v. Public Employment Relations Board* (1983) 33 Cal.3d 850, 864-865, the Supreme Court approved PERB's interpretation of the supersession clause of EERA section 3540 to prohibit negotiations only where the provisions of the Education Code would be "replaced, set aside, or annulled by the language of the proposed contract clause." (*Ibid.*) Nothing in the observation rating system replaces, annuls or sets aside provisions of the Education Code.

For these reasons and for those articulated by the ALJ, we reject the District's argument that the Stull Act excuses it from its duty to bargain over the observation ranking system.

Past Practice of Using Four-Level Ratings

The District argues that it has established a practice over many years of using various four-level and similar ratings for classroom observations without bargaining with UTLA, and that this practice justifies the decision to use the rating levels in the new observation ranking system.

As the Board noted in *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186 (*Hacienda La Puente USD*):

> It is widely recognized that a binding past practice must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. . . . The Board has long taken a similar approach. It has described a valid past practice as one that is "regular and consistent" or "historic and accepted."

(*Id.*, PD at p. 13; citations omitted.)

As evidence of the alleged practice, the District points to various rubrics that have been used for such observations in the District for many years. However, those rubrics are not "regular and consistent," because they depart from the May 2013 observation ranking system and each other in numerous ways. For example, the Open Court rubric has four levels of ratings, but different level titles and descriptions from the TLF. The Beginning Teacher Support & Assessment (BTSA) has a five-level rating rubric form, but with different level titles and descriptions from the TLF. The Peer Assistance and Review Program (PAR) five-level rating rubric form has different level titles and descriptions from the TLF. The Local District 4 four-level rating form using the Charlotte Danielson rubric and covering 108 schools has similar elements and rating level descriptions to the TLF, but unlike the TLF, does not mention "21st Century Skills," a recurring theme in the TLF (Joint Exh. 12); furthermore, this form only covered one local district, and therefore was not consistently used over the entire LAUSD. None of these rubrics were universally used throughout the District. Nor were they "regular" or "consistent" amongst themselves. Without comparable substance or content of the individual ratings, the similarity in the number of ratings between the various rubrics does not establish a binding past practice.

Furthermore, the District pointed to no evidence that the District informed UTLA, or that UTLA was on constructive notice of the District's implementation of any of these prior rubric or ratings forms, except for the pilot program the District announced it would implement at the beginning of the 2011-2012 school year to incorporate the TLF into the observation and evaluation process at select school sites. UTLA objected to this pilot program and filed an unfair practice charge over the matter (LA-CE-5561-E).

Thus, we reject the District's assertion that there was a binding past practice regarding observation ranking procedures. The ALJ's conclusion is supported by the record. The District has failed to show that the practice met any of the criteria described in *Hacienda La Puente USD*, *supra*, PERB Decision No. 1186.

Dynamic Status Quo

Related to its past practice assertions, the District also excepts to the ALJ's rejection of its "dynamic status quo" defense. (District's Exceptions, p. 31, citing Proposed dec. at p. 39.) The District contended that its history of making changes to its evaluation rating systems created a "dynamic status quo" that allowed it unfettered discretion to create the observation rating system it implemented in May 2013.[18] The ALJ rejected this defense, relying on *Regents of the University of California* (2004) PERB Decision No. 1689-H (*Regents I*), where the Board concluded that the employer's change in its contribution amount towards health care premiums was not within the dynamic status quo because the changes were a product of the employer's discretion rather than a product of a pre-determined methodology. The ALJ noted, "changes that derive from an employer's exercise of discretion are not considered to be within the

[18] The "dynamic status quo" doctrine permits changes that are consistent with an established pattern of changes to negotiable subjects. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro*); *City of Alhambra* (2010) PERB Decision No. 2139-M.)

'dynamic status quo.'" (Proposed dec. at p. 37.) Applying this rule to the facts, the ALJ concluded that there was no showing that the District's prior changes in various past rubrics used for evaluating employees followed a discernible pattern or methodology. The District itself maintains that administrators made prior changes through the exercise of their discretion and for subjective reasons.

The ALJ correctly applied PERB precedents. The Board has recognized the existence of a dynamic status quo against which an alleged unilateral change may be measured. A practice can be demonstrated by a regular and consistent pattern of past changes in employment conditions. (See, e.g., *Pajaro*, *supra*, PERB Decision No. 51 at p. 6 [complaint of unilateral change dismissed where employer had consistent and accepted practice of passing along to employees increased cost of health benefit premiums pending the outcome of negotiations].) The ALJ's conclusion is also supported by *Regents of the University of California* (1983) PERB Decision No. 356-H (*Regents II*) [employer's past "unfettered discretion" prevents the establishment of a dynamic status quo past practice].

Based on these cases, the District's claim that it has unfettered discretion in changing evaluation rubrics or observation ranking systems undermines its argument that its conduct alleged in the complaint should be excused as part of a "dynamic status quo."

The District argues that the ALJ should have relied on PERB's upholding of past practices in *Modesto*, *supra*, PERB Decision No. 347, *California State University* (1989) PERB Decision No. 756-H (*CSU*), and *Cajon Valley Union School District* (1995) PERB Decision No. 1085 (*Cajon Valley*). The *Modesto* and *CSU* decisions are distinguishable. *Modesto* involved the consistent past practice of conducting consecutive evaluations of all substandard teachers, without any use of employer discretion as to which substandard teachers to evaluate

consecutively. *CSU* concerned a practice based on long-standing language in the parties' collective bargaining agreement that employees must pay to park at CSU facilities, regardless of the parking rate set by CSU.

In *Cajon Valley*, *supra*, PERB Decision No. 1085, the Board held that the school district's unilateral reduction of the hours of several vacant classified bargaining unit positions was not a violation because it was consistent with the district's long-standing and consistent past practice of altering the hours of part-time classified positions to meet operational needs.[19] There was no discussion of the "dynamic status quo," and the decision did not cite to or attempt to distinguish *Regents II*, *supra*, PERB Decision No. 356-H. Instead, it concluded that there was a past practice that permitted the employer to change the hours of vacant positions. We believe that the two *Regents* decisions discussed above and the cases relied on by the ALJ more appropriately apply to the facts of this case. (*Regents I*, *supra*, PERB Decision No. 1689-H and *Regents II*, *supra*, PERB Decision No. 356-H.)

Waiver Of Right To Bargain

The ALJ rejected each of the District's waiver arguments, concluding that there was no waiver by contract, inaction or by failure to demand bargaining. The District excepts to the ALJ's findings and conclusions regarding its waiver defense. We discuss each below after reviewing the general legal principles guiding our discussion.

The ALJ correctly noted that any waiver of bargaining rights must be "'clear and unmistakable,' demonstrating 'an intentional relinquishment of the right to bargain.'" (Proposed dec. at p. 25, citing *Rio Hondo*, *supra*, PERB Decision No. 2313, p. 5, emphasis in

[19] As PERB held in *Huntington Beach Union High School District* (2003) PERB Decision No. 1525, the fact that a position is vacant does not excuse the employer from its duty to bargain over a change in hours for the position.

original.) Accordingly the "burden of establishing a waiver is upon the party asserting it." (*Id.* at p. 25, citing *Rio Hondo* at p. 6.) As the Board has explained in *City of Milpitas* (2015) PERB Decision No. 2443-M at p. 20, citing to *County of Santa Clara* (2013) PERB Decision No. 2321-M:

> [W]aiver is disfavored and must be clear and unmistakable. 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, and (2) the employee organization clearly, unmistakably and intentionally relinquished its right to meet and confer in good faith.

A generally-worded management rights clause will not be construed as a waiver of statutory bargaining rights. (*Norris School District* (1995) PERB Decision No. 1090 at p. 19.) With these principles in mind, we turn to the District's exceptions concerning waiver.

Waiver by Contract

The District reasserts its claim that by agreeing to a combination of contractual provisions, UTLA has waived and relinquished its right to demand bargaining over the observation ranking procedure. We agree with the ALJ's rejection of this contention for reasons explained in the proposed decision at pp. 32-35.

We also reject the District's assertion that *Santa Clara County Peace Officers Association v. County of Santa Clara* (2014) 224 Cal.App.4th 1016 (*Santa Clara*) dictates a different result. At issue in *Santa Clara* was an MOU provision that explicitly reserved to the employer the right to convert some work shifts from a "12 Plan" (for a total of 85.75 hours biweekly) to either a "5/8" or a "4/10" Plan (both for a total of 80 hours biweekly), after providing the union 45 days' notice and an opportunity to meet and confer over the implementation of the shift change. The court found that this clause did not waive the union's

right to meet and confer about the implementation of the shift change, but that it did waive any right to postpone the implementation beyond 45 days. (*Id*. at pp. 1038-1039.)

The *Santa Clara* court agreed that the MOU did not explicitly authorize the County to offer alternatives to converting 12 Plan employees to either the 4/10 or 5/8 Plans. However, after citing to a maxim of jurisprudence that "'the greater contains the less,'" the court concluded that since the County was able to assign all 12 Plan employees to 40-hour workweeks and 80 hours biweekly on one of two other plans, it was "implicit that the County could offer 12 Plan employees other formulas for working 80 hours biweekly." (*Santa Clara*, *supra*, 224 Cal.App.4th at p. 1042.) This interpretation is not tantamount to holding that a management rights clause must be broadly construed, contrary to the District's assertions.

In contrast to *Santa Clara*, *supra*, 224 Cal.App.4th 1016, neither the CBA nor the parties' 2012 supplement to Article X explicitly reserves to the District the right to implement specific classroom observation criteria or rubrics. In short, nothing in *Santa Clara* persuades us that we should ignore the numerous precedential cases followed by the ALJ that hold that a broadly worded management rights clause will not waive the right to bargain over a specific change unless the clause specifically mentions the subject matter of the change.

The District also argues that the ALJ erred by not relying on *Contra Costa Community College District* (1990) PERB Decision No. 804 (*Contra Costa*). We agree with the ALJ's discussion of this case and take this opportunity to disavow *Contra Costa* to the extent it holds that a generally worded clause reserving to management the exclusive right to adopt all past, existing and future policies "except to the extent that such action shall be contrary to the

specific terms of this contract," waives the exclusive representative's right to bargain over specific matters within the scope of representation.[20] (*Id.* at p. 9; emphasis omitted.)

The District additionally contends that CBA Article IV, Section 12.0 and Article X constitute a waiver of UTLA's right to bargain over the observation ranking system. We disagree. Article IV Section 12 simply restates the rights and obligations of EERA section 3543.2 subsection (a)(3) regarding the items designated as topics for consulting, such as educational objectives, content of courses and curriculum, etc.

This language is not a "clear and unmistakable waiver" of UTLA's right to bargain over evaluation and classroom observation criteria and rubrics. As explained above, the observation ranking system is not a matter over which UTLA has merely a right to consult. It is a mandatory subject of negotiation.

The District objects that the ALJ erroneously overlooked Article X, Sections 4 and 5, which it claims gives it the authority to make unilateral changes in the classroom observation process and other evaluation matters. The ALJ did not overlook Article X. He simply did not agree with the District's characterization of its provisions. On page 32 of the proposed decision, the ALJ noted the District's claim that nothing in Article X limits the District's authority to implement a four-level observation scoring system. He then concluded, "[A]fter reviewing the CBA language at issue in this case, I find no clear and unmistakable waiver. . . ." (*Id*. at p. 33.)

We agree that these sections of Article X, do not constitute a clear and unmistakable waiver of UTLA's right to bargain over the observation rating system. Sections 4.0 and 4.1

[20] The ALJ was also justified in not following *Contra Costa* because the facts in that case presented an issue of whether the broadly worded management rights clause acted as a zipper clause. The union in *Contra Costa* sought to bargain a new subject that was not addressed in the CBA. It was not a case of unilateral change. (*Contra Costa*, *supra*, PERB Decision No. 804.)

provide that an employee being evaluated shall establish objectives for the year in cooperation with the evaluator. If they are unable to reach agreement on objectives and the employee is dissatisfied with the evaluator's determination, the employee has a right to appeal the matter. This article also provides that the objectives may be modified during the school year if performance problems develop or constraints are identified which will affect the evaluatee's progress towards meeting established objectives.

This language does not waive UTLA's right to bargain over the observation ranking system, as it relates only to procedures applicable to individual employees who are to be evaluated in any given year. Nothing in this language clearly and unmistakably waives UTLA's right to bargain over a change in observation criteria and ranking systems.

Article X, Section 5 requires that observations of the evaluatee be followed by conferences to discuss his or her performance and that appropriate counselling and assistance be provided to improve performance. As with Section 4, this provision relates to the rights of individual unit members who are being evaluated. It does not remotely constitute a clear and unmistakable waiver of UTLA's bargaining rights.

The District also excepts to the ALJ's findings and conclusions regarding the bargaining history of these various CBA provisions, especially the management rights clause. Specifically, it objects to the ALJ's rejection of Fisher's testimony because it was contrary to the plain meaning of the CBA. The ALJ's conclusions regarding bargaining history on pp. 35-37 of the proposed decision are reasonable and we affirm them for the reasons stated in the proposed decision.

Waiver By Inaction

The District excepts to the ALJ's rejection of its argument that UTLA waived its right to bargain by inaction, and his conclusion that prior to May 24, 2013, UTLA was not on notice that the District intended to implement the new observation ranking system. The District asserts that UTLA was on notice for several years that the District intended to rely on the criteria of the TLF for classroom observations.

The question of notice is one of fact, and the record supports the ALJ's determination that UTLA was not on notice that the District intended to implement a new observation rating system using the TLF prior to May 24, 2013. In the face of repeated assurances by the District that it intended to bargain over negotiable changes regarding evaluations, it cannot be said that UTLA's participation in ad hoc committees or other District processes constitute a waiver of the right to bargain.

A union may only waive its right to bargain by inaction if the union had notice (i.e., advance knowledge) of the proposed change and then failed to request negotiations over the matter. (*County of Santa Clara*, *supra*, PERB Decision No. 2321-M, pp. 27-29.) For reasons explained by the ALJ at pp. 26-27 of the proposed decision, we agree that UTLA did not waive its rights by inaction.

Remedy

The District excepts to the ALJ's order for the District to compensate employees for any financial losses incurred as a direct result of the unilaterally implemented four-level observation rating system, arguing that the complaint does not seek any such relief, and there is no evidence in the record that anyone incurred such financial losses as a direct result of four-level rubrics. We reject this exception. The District may raise the issue of financial harm or lack thereof at compliance proceedings before the Office of the General Counsel.

Nor does the fact that the complaint did not seek a back pay remedy preclude the Board from ordering it. PERB Regulation 32640, subdivision (a) (which specifies the elements contained in a complaint) does not require that the complaint specify the remedy that PERB or the charging party is seeking. Rather, EERA section 3541.5, subdivision (c) specifies that:

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

This language nowhere suggests that the Board's broad remedial powers are limited by a prayer for relief that may or may not be in the complaint.

In *California State Employees' Association v. Public Employment Relations Board* (1996) 51 Cal.App.4th 923, 946, the court held:

> Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an opportunity to meet and confer over the decision and its effects. [Citations omitted.] This is usually accomplished by requiring the employer to rescind the unilateral change and to make employees "whole" from losses suffered as a result of the unlawful unilateral change.

(See also, *San Bernardino City Unified School District* (1998) PERB Decision No. 1270.)

An order directing the District to compensate employees for any financial losses incurred as a direct result of the unilaterally implemented four-level observation rating system is consistent with restoring employees to the status quo ante by making them whole.

Post-Hearing Memorandum of Understanding

On or about September 25, 2015, the District filed a "NOTICE TO PERB REGARDING MEMORANDUM OF UNDERSTANDING RELATING TO EDUCATOR DEVELOPMENT, SUPPORT AND EVALUATION MATTERS." The District apprised the Board that subsequent to the issuance of the proposed decision, UTLA and the District entered into a tentative Memorandum of Understanding relating to "Educator Development, Support and Evaluation Matters." (*Id*. at p. 1.) According to the District, the Memorandum of Understanding (which was attached to the Notice) contains terms relating to the teacher evaluation process that are at issue in the within case.

It is unclear what the District intended by this Notice, as it was unaccompanied by any request or explanation. The District does not suggest this agreement renders this case moot, nor request that the record be re-opened.[21] Suffice to say, this document does not alter our consideration of this case.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Los Angeles Unified School District (LAUSD) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by unilaterally implementing a four-level observation rating system on or around May 24, 2013. This conduct also interfered with the rights of employees to be represented by the employee organization of their choosing and with the right of UTLA to represent employees in their employment relations. All other claims in the complaint, as amended, are dismissed.

[21] Moreover, the document does not satisfy the requirements for a motion to reopen the record under PERB Regulation 32320, subdivision (a)(2).

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing policies within the scope of representation.

2. Interfering with employees' right to be represented by their chosen employee organization.

3. Interfering with the right of United Teachers Los Angeles (UTLA) to represent its members in negotiations.

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

1. Rescind any and all use of the four-level observation rating system announced on or around May 24, 2013, as applied to certificated bargaining unit members.

2. Compensate employees in the certificated bargaining unit for any financial losses incurred as a direct result of all unilaterally implemented four-level observation rating system. Any financial losses should be augmented by interest at a rate of 7 percent per year.

3. Within ten (10) workdays of the service of a final decision in this matter, post copies of the Notice, attached hereto as an appendix, at all work locations where notices to employees in the certificated bargaining unit customarily are posted. The Notice must be signed by an authorized agent of LAUSD, 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. The Notice shall also be posted by electronic message,

intranet, internet site, and other electronic means customarily used by LAUSD to communicate with employees in the certificated bargaining unit.

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

Chair Gregersen and Member Banks joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-5824-E, *United Teachers Los Angeles v. Los Angeles Unified School District*, in which all parties had the right to participate, it has been found that the Los Angeles Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by unilaterally implementing a new four-level observation ranking system on or around May 24, 2013.

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing policies within the scope of representation.

2. Interfering with employees' right to be represented by their chosen employee organization.

3. Interfering with the right of United Teachers Los Angeles to represent its members in negotiations.

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

1. Rescind any and all use of the four-level observation rating system announced on or around May 24, 2013, as applied to certificated bargaining unit members.

2. Compensate employees in the certificated bargaining unit for any financial losses incurred as a direct result of all unilaterally implemented four-level observation rating system. Any financial losses should be augmented by interest at a rate of 7 percent per year.

Dated: _____ LOS ANGELES UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS LOS ANGELES, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5824-E PROPOSED DECISION (December 24, 2014)

Appearances: Holguin, Garfield, Martinez & Quiñonez, APLC, by Jesus E. Quiñonez and Michael Wertheim, Attorneys, for United Teachers Los Angeles; Littler Mendelson, P.C., by William J. Emanuel and Barrett K. Green, Attorneys, for Los Angeles Unified School District.

Before Eric J. Cu, Administrative Law Judge.

In this case, an exclusive representative alleges that a public school employer changed existing policies concerning performance evaluations and created a new position without satisfying its bargaining obligations under Educational Employment Relations Act (EERA).[1]

PROCEDURAL HISTORY

On June 18, 2013, United Teachers Los Angeles (UTLA) filed an unfair practice charge with Public Employment Relations Board (PERB or the Board), claiming that Los Angeles Unified School District (LAUSD or the District) unilaterally changed multiple existing policies. On September 4, 2013, the PERB Office of the General Counsel issued a complaint alleging that LAUSD unilaterally imposed a new four-level observation rating system as part of its evaluation process. The PERB complaint further alleged that LAUSD unilaterally created a new "Teacher Growth and Development Cycle Lead Teacher" position, and also bypassed UTLA by publicizing that position directly to UTLA's bargaining unit members. On

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

September 30, 2013, LAUSD filed an answer to the PERB complaint, denying all the substantive allegations and asserting multiple affirmative defenses.

On October 23, 2013, the parties participated in an informal settlement conference, but the matter did not settle. Thereafter, the case was set for formal hearing.

On May 16, 2014, the parties agreed to allow UTLA to amend the PERB complaint to add new allegations. The amendment added the new allegations that, in April 2014, LAUSD unilaterally changed the Final Evaluation Report form used for UTLA unit members' performance evaluations by adding sections for "Observation of Teacher's Practice," "Contributions on Student Outcomes/Support of Student Learning," and "Additional Professional Responsibilities." The parties further agreed that the new allegations would be deemed denied by LAUSD.

The formal hearing took place on June 2-4, 2014. The parties then submitted closing briefs on August 27, 2014. At that point, the record was closed and the case was considered submitted for decision.

FINDINGS OF FACT[2]

The Parties

LAUSD is a public school employer within the meaning of EERA section 3540.1, subdivision (k). UTLA is an exclusive representative within the meaning of EERA section 3540.1, subdivision (e). UTLA represents a bargaining unit with roughly 30,000 members, including LAUSD's teachers and other certificated employees.

[2] The Findings of Fact will discuss some of the events in this case out of chronological order because, in my view, doing so is the most effective way to present the factual findings cohesively.

The Collective Bargaining Agreement

UTLA and LAUSD are parties to a collective bargaining agreement (CBA or Agreement) that was in effect during the times relevant to this case. The CBA contains provisions governing various aspects of LAUSD's relationship with the certificated unit including, as relevant to this case, evaluations, extra-duty stipends, and compensation for training. The CBA also contains provisions concerning "District Rights." The following is a discussion of CBA provisions and other policy documents relevant to this case.

The Observation and Evaluation Procedure

CBA Article X governs certificated employee evaluations. For most employees, the process begins with a planning conference between the teacher being evaluated and his or her supervising administrator. Under Article X, section 4.0, the two work together to establish "objectives" for the year as well as "strategies" for accomplishing those objectives. Under section 4.1(a), objectives shall relate to, among other matters, "[s]tandards of expected student progress and achievement for the grade[.]" Other assessment categories identified in Section 4.1 include knowledge of subject matter, effective use of teaching techniques, and maintenance of professional relationships.

Under section 5.0, supervising administrators observe employees throughout the school year and give written feedback. Traditionally, that feedback includes being rated on assessment categories, such as the ones identified in Section 4.1. Before the end of the school year, employees receive a Final Evaluation Report, which rates employees based on their progress towards the goals established at the beginning of the school year.

LAUSD provided examples of Final Evaluation Report forms dating back to 1973, before UTLA was recognized as an exclusive representative. Those records show that LAUSD reformatted the forms over the years for various reasons, including incorporating negotiated

changes about the evaluation process into the form. In addition, in or around 1985, LAUSD moved to a Scantron-based form, in order to enter and record information from the evaluation forms automatically. Every Final Evaluation Report form for the past 30 years employs multiple assessment categories, scored on a three-level rating system. For instance, in the most recent Final Evaluation Report form preceding the changes alleged in this case, the three scores were, from highest to lowest, "Meets," "Needs Improvement," and "No." At some point, the parties agreed to conform those assessment categories to the California Standards for the Teaching Professions (CSTP). It is undisputed that UTLA has never previously requested negotiations over any changes to the Final Evaluation Report Form. At all times, employees' overall rating was based on a two-level scale, i.e., "Meets Standard Performance" or "Below Standard Performance." Witnesses testified that, before and after the events in this case, the overall evaluation rating is determined after reviewing all the assessment categories together.

In addition to the Final Evaluation Report form, LAUSD also sometimes used rubrics to convey expectations and standards of performance to teachers. For example, to help teachers understand the District's reading curriculum, some administrators used a rubric with a four-level scoring system to place teacher's proficiency in that curriculum onto a continuum. It is unclear to what extent LAUSD used rubrics District-wide, and there was no evidence that LAUSD ever notified UTLA of its use of those rubrics before employing them.

District Rights Clauses

The CBA also contains various provisions regarding LAUSD's retained rights and authority. CBA Article II, section 3.0 states:

> The District may determine and revise any of its policies, rules, regulations, or procedures. However, in the event of a conflict between the terms of this Agreement and any District policies, rules, regulations or procedures, the terms of this Agreement shall prevail.

In addition, Article III, section 1.0, states:

> The intention of this Article is to provide that the District retains all rights and powers which have not been limited by the other Articles of this Agreement. The provisions of this Article are not intended to expand the rights of the District beyond statutory and constitutional limits, or in any manner to waive or diminish the rights of UTLA or the employees as provided in the other Articles of this Agreement. In the event that there is a conflict between the retained rights of the District under this Article and the rights of UTLA or employees as set forth elsewhere in this Agreement, the provisions of the other Articles of this Agreement shall prevail.

Article III, section 3.0, specifies that "all matters which are beyond the scope of negotiations under Government Code Section 3543.2, and also all rights which are not limited by the terms of this Agreement, are retained by the District." The section then enumerates 11 areas in which the District reserved its authority including, as relevant to this case, "the classes to be taught and the other duties and services to be rendered by District personnel to students and to the public, and the support services to be provided to employees and other District personnel; and the methods, personnel, and materials to be utilized in such services." It is undisputed that all District rights provisions existed in essentially the same form since the first CBA negotiated between UTLA and LAUSD.

LAUSD presented some evidence about the development of the District rights sections in negotiations. According to then-District chief negotiator Dick Fisher, LAUSD was upfront at the outset of negotiations that it would be "proposing language that will permit full operation of the District and including the right to make changes in negotiable subjects, so long as they're not in conflict with the other terms of the agreement." However, when asked whether he possessed any bargaining notes about these conversations, he testified that all the discussions about the management rights provisions occurred in later sessions, where the actual

contract language was drafted. He said "since these meetings all occurred in drafting session, there wouldn't have been notes like you would have if you were having more plenary sessions with the full teams." Fisher also said that he clearly explained the intent behind the proposed management rights language to then-UTLA executive director Don Baer. Baer was not on UTLA's negotiating team, and it was unclear to what extent Baer communicated with UTLA's team. Fisher said that he was certain that UTLA's full team understood the meaning behind the management rights provisions because the language "was still there" in the final agreement.

Salary Differentials

The CBA also contains various provisions concerning salary differentials for special duty. For example, in Appendix E, employees serving in a coordinator or a lead teacher capacity, in addition to their regular full-time teaching duties, are eligible for a differential of $637 per semester.

Paid Professional Development

Although not a part of the CBA, LAUSD has a past practice, codified in its "Rules of the Board of Education," of paying employees for District-sponsored training projects. Under these rules, the highest pay-rate for training is $25 per hour.

The Parties' Prior Efforts to Reform Employee Performance Evaluations

Both parties expended significant effort to review and reform teacher evaluations. For example, in 2009, LAUSD formed a Teacher Effectiveness Task Force to develop recommendations for changing evaluations, teacher support mechanisms, tenure rules, compensation, and education-based legislative changes. The task force included representatives from various education community groups such as LAUSD management, UTLA representatives, and representatives from Associated Administrators of Los Angeles

(AALA), the union representing LAUSD certificated supervisors. Certificated supervisors are responsible for evaluating District teachers.

In April 2010, the task force reported its recommendations, such as using "multiple measures or data points" in evaluations and developing "rubrics" demonstrating what expected performance "looks like." The task force's report did not focus heavily on the negotiability of any of its recommendations, but it did state that "our unions will be asked to consider revisions to collective bargaining agreements," and any planned actions by LAUSD should be "in alignment" with those agreements.

In November 2010, the District, UTLA, and AALA formed an Evaluation Working Group "as part of their ongoing separate negotiations processes (District-UTLA, and District-AALA)." The purpose of the group was to share information between the three organizations "to facilitate the […] eventual resolution of performance evaluation issues at the separate negotiations tables." Although the working group contained members of each of the three organizations' bargaining teams, it is undisputed that working groups' efforts did not constitute formal negotiations.

The working group met weekly for around seven months. On or around March 25, 2011, the group released a set of written "Group Thoughts" in order to "inform subsequent negotiations [and] to jointly develop the next certificated performance evaluation system that will lead to improved teaching and learning in the Los Angeles Unified School District." Among the issues covered in the "Group Thoughts" document was using "evaluation rubrics" to "encourage improved teaching and learning and professional growth." The document further discussed using an "evaluation/observation rubric that delineates at least four levels of teaching proficiency."

After the tri-partite Evaluation Working Group concluded its work, UTLA formed its own internal Teacher Evaluation Work Group, which examined existing research concerning performance evaluations as well as other negotiated evaluation systems throughout the country. This UTLA-specific group produced a draft framework of its findings on or around March 6, 2012. It is unclear whether any of this group's recommendations were shared with LAUSD. UTLA also participated in a state-wide group on the subject of evaluations.

Development of the Teaching and Learning Framework

In late Summer or early Fall 2010, LAUSD put out a request for bids to develop a new teacher training and development framework. A private company named Teaching and Learning Solutions (TLS) submitted a bid and was awarded the project. In the ensuing months, TLS created what became known as LAUSD's Teaching and Learning Framework (TLF) based on a nationally-recognized body of research and accompanying text.

Multiple people described the purpose of the TLF as developing a "common language" about educational practices in order to make the evaluation process more objective and universally understood. For example, in a letter to UTLA, LAUSD stated that the TLF would "provid[e] a common language and understanding for what effective teaching in LAUSD looks like and is expected to be."

In November 2010, LAUSD assembled an "Ad Hoc TLF Committee" to advise the District on the creation of the TLF. LAUSD invited UTLA to select representatives and other teachers to participate. The first committee meeting was held in December 2011. During the meeting, District representatives explained the concepts behind the TLF to the committee and sought their input. According to Drew Furedi, LAUSD's representative responsible for coordinating the Ad Hoc TLF Committee, LAUSD informed the committee that "where there

is a need to negotiate [over implementing the TLF] we will do so and we will follow our responsibilities."

The TLF was designed as a set of overarching standards pertaining to different aspects of the teaching profession. The TLF standards were consistent with the CSTP. Each of the five TLF standards has sub-parts called "components," and each component is further divided into elements. The TLF also includes "rubrics," which breaks each element down into what TLS co-founder Albert Miller called "descriptive language." The rubrics illustrate performance in each element along a continuum with four categories, ranging from "ineffective," "developing," "effective," to "highly effective."

On or around April 28, 2011, LAUSD sent a letter to certificated employees describing its efforts to reform its teacher and administrator support mechanisms, including evaluations. Those efforts would later be named the Teacher Growth and Development Cycle (TGDC). LAUSD also announced a new pilot program starting in the 2011-2012 school year to incorporate the TLF into the teacher observation and evaluation process at a select set of school sites. The letter also said that LAUSD would seek "the input and participation of our collective bargaining partners" and that "LAUSD remains committed to the collective bargaining process." UTLA objected to the implementation of the pilot program, to the extent it changed matters subject to negotiations. The pilot program ran during the 2011-2012 and the 2012-2013 school years.[3]

LAUSD then presented feedback from the pilot implementation to the Ad Hoc TLF Committee and made some changes to the TLF system in or around March 2012. At this

[3] The pilot program is the subject of another PERB unfair practice charge between the parties, PERB case number LA-CE-5661-E, which is currently in abeyance at the request of the parties. The parties agreed that the issues in that dispute would not be litigated directly in the present case.

second meeting, LAUSD repeated its earlier assertion that it would negotiate over implementation of the TLF, as required by law.

The *Doe v. Deasy* Litigation

In November 2011, a group of LAUSD students filed a petition for writ of mandate in Los Angeles Superior Court seeking to compel LAUSD to comply with the Stull Act.[4] One of the issues in the petition was LAUSD's alleged failure to utilize student performance in the evaluation of certificated employees. UTLA and AALA were named as real parties in interest.[5] In July 2012, a superior court judge issued a judgment granting the petitioners' writ. The court ordered LAUSD to modify its evaluation procedures to incorporate elements of student progress, as required by the Stull Act. The court stated "[s]ome or all of these issues may be required to be subject of collective bargaining with UTLA and AALA. The Court is not opining on that issue." The District was ordered to demonstrate compliance with the requirements of the writ by December 4, 2012, to allow for any required bargaining. Afterwards, LAUSD and UTLA mutually agreed to suspend their earlier ongoing negotiations over evaluation reform and focus on negotiations specific to the court order.

On November 30, 2012, LAUSD and UTLA reached agreement on a document entitled "LAUSD-UTLA December 2012 Evaluation Procedures to Supplement Article X" (the Supplemental Agreement). Section 1.0 of the Supplemental Agreement required that the initial planning phase of the evaluation process, described in Article X, section 4.0, include a "review, discussion, and incorporation of multiple measures of student achievement toward District-adopted and State-adopted standards[.]" Section 1.3 required that employees'

[4] The Stull Act is codified at Education Code section 44600 et seq., and contains provisions concerning certificated employee performance evaluations.

[5] PERB was also joined as an intervening party.

objectives and strategies identified in the initial planning phase, involve student achievement and be incorporated into the evaluation process.

The May 24, 2013 Letter

On the morning of May 24, 2013, LAUSD sent to UTLA a draft version of a letter it planned on sending to all its teachers. In the letter, LAUSD announced the full-scale incorporation of the TLF for the 2013-2014 year. This included use of a four-level rating system for observing teachers' performance as part of the evaluation process. Rather than apply all of the TLF elements, LAUSD decided to use only a set of 15 "focus elements" for the 2013-2014 evaluation cycle. The letter also announced that principals would identify a "TGDC Lead Teacher" for each school site to support the teachers subject to the new process that year. The letter stated that the TGDC Lead Teacher would receive an additional stipend and be eligible for paid training opportunities.

Later than morning, UTLA counsel Jesus Quiñonez e-mailed John Bowes, then-LAUSD's then-Director of Labor Relations, stating "What is this? I suggest that the District not distribute this letter until there has been an opportunity for review and discussion between the parties." LAUSD issued the letter to all teachers later that day.

On May 31, 2013, Quiñonez again e-mailed Bowes, this time demanding that LAUSD rescind the May 24, 2013 letter and bargain over the changes to the evaluation procedure, the creation of a new lead teacher position, and changes to training requirements.

Bowes responded to Quiñonez by e-mail on June 4, 2013. He said that LAUSD had no plans on changing the overall evaluation ratings from a two-level (Meets Standards or Below Standards) system. He also recognized that changing the final evaluation ratings would require negotiations. Bowes also said that the TGDC Lead Teacher would be paid according to

existing contract provisions for coordinating differentials. He likewise said that the training opportunities were consistent with existing policy on paid professional development.

The 2013-2014 Final Evaluation Report

On or around April 2, 2014, LAUSD began using a new Final Evaluation Report. Information is input into the report by principals via an Internet-based computer platform. For the first time, the report includes a section entitled "Observation of Teacher's Practice," where teachers may be scored on each of the 15 TLF focus elements identified for the 2013-2014 school year. Each of these 15 elements corresponds, at least generally, to one or more of the standards in the CSTP. This assertion was made by TLS co-founder Miller and was not contradicted anywhere in the record by UTLA. Each also corresponds to at least one assessment category from the prior Final Evaluation Report. As with the prior evaluation form, the 2013-2014 form had a *three-level rating system* for each of the assessment categories. The three scores on the 2013-2014 Final Evaluation Report form were "ineffective," "developing," or effective." These scores were intended to correspond to the f*our-level rating system* in the TLF rubrics, but there was no option to score an employee with the fourth and highest score, "highly effective." Instead, LAUSD representative Brian Lucas said that principals could score employees as being "highly effective" in the comments section of the form.

The report also included a section entitled "Contribution to Student Outcomes/Support for Student Learning." The stated purpose of that section was to assess employees regarding student progress towards District and State standards, including standardized test scores. This section included space for teachers to describe their "objectives" and "strategies" on that issue. This section also includes a section entitled "Target Date," but no evidence was submitted about the purpose of this section.

The report also included a new section entitled "Additional Professional Responsibilities." This section listed 11 assessment categories. As with the "Observation of Teacher's Practice" section, the 11 assessment categories in this section correspond to both the CSTP and to items from the prior Final Evaluation Report form. In fact, reviewing those two sections collectively, nearly all of the assessment categories on the 2013-2014 Final Evaluation Report were also on the prior form.

ISSUES

I. Did LAUSD enact an unlawful unilateral policy change by (A) implementing a four-level rating system for teacher observations, based on the TLF; (B) creating a new TGDC Lead Teacher position; or (C) modifying the Final Evaluation Report form to include sections on "Observation of Teacher's Practice," "Contributions to Student Outcomes/Support for Student Learning," and "Additional Professional Responsibilities?"

II. Did LAUSD bypass UTLA by its May 24, 2013 and June 11, 2013 communications to certificated unit members about the TGDC Lead Teacher position?

CONCLUSIONS OF LAW

I. UTLA's Unilateral Change Claims

A unilateral policy change is a "per se" violation of the duty to bargain in good faith where: (1) the employer took action to change existing policy; (2) the policy change concerned 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; and (4) the change has a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9, (*Fairfield-Suisun USD*) citing *Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 10; *Walnut Valley Unified School District* (1981) PERB Decision No. 160, p. 5.)

A. The Four-Level Observation Rating System

UTLA's first claim concerns LAUSD's use of a four-level observation rating system for teacher observations in the 2013-2014 school year. There is no serious debate that the first, third, and fourth elements of the unilateral change test, as articulated in *Fairfield-Suisun* USD, *supra*, PERB Decision No. 2262 are met for this claim. It is undisputed that LAUSD began using a new four-level observation rating system in the 2013-2014 school year and that LAUSD refused to bargain over that change. Finally, it is undisputed that LAUSD used the four-level system throughout the 2013-2014 school year and maintains the right to continue using it indefinitely. The primary issues are whether the change concerned matters within the scope of representation and/or whether LAUSD was excused from any bargaining obligations.

1. The Scope of Representation

The primary question regarding UTLA's prima facie case for a unilateral policy change is whether LAUSD's implementation of the four-level observation rating system changed a matter within the scope of representation.

a. The Negotiability of Evaluation Procedures

EERA section 3543.2, subdivision (a) defines the "scope of representation" as "matters relating to wages, hours of employment, and other terms and conditions of employment." The statute further defines "terms and conditions of employment" as including "procedures to be used for the evaluation of employees." In the present matter, LAUSD contrasts evaluation "procedures," which it does not and cannot dispute are subject to bargaining, with evaluation "criteria," which it argues are part of its managerial prerogative. PERB has long interpreted the evaluation procedures clause in EERA section 3543.2, subdivision (a) broadly. For instance, in *Modesto City Schools* (1983) PERB Decision No. 347, the Board found that a school district's policy for conducting consecutive annual evaluations for employees rated as

"substandard" was an evaluation procedure and was within the scope of representation. (*Id*. at pp. 9-10.) In addition, in both *Compton Community College District* (1990) PERB Decision No. 798 (*Compton CCD*) and *Jefferson School District* (1980) PERB Decision No. 133 (*Jefferson SD*), the Board found complaint policies were evaluation procedures under EERA section 3543.2(a). *Compton CCD*, involved a comprehensive policy for students to file complaints against teachers. (*Id*. at proposed decision, pp. 3-4.) The Board reasoned that, because the complaints were made part of employees' personnel files, "it may safely be assumed that teacher evaluation procedures include a review of those complaints, along with other material in the file pertinent to performance[.]" (*Ibid*.) *Jefferson SD*, similarly involved a public complaint process. The Board again found that it was likely that the substance of the complaints would be used to assess employees' performance. (*Id*. at p. 18-19.) It accordingly held that the process was an evaluation procedure and was subject to negotiations. (*Ibid*.)

The union in *Jefferson SD*, *supra*, PERB Decision No. 133, also argued that a proposal about the handling of employee supply requests related to evaluations as well because the lack of proper supplies could impact employee performance. The Board rejected this argument as too "tenuous and attenuated." (*Id*. at pp. 31-32.) Nothing in the union's supply proposal directly involved materials or information used to evaluate employees. (*Ibid*.) In *Newark Unified School District* (2007) PERB Decision No. 1895, the union made a proposal limiting how the school district could report and disseminate state standardized test results. (*Id*. at pp. 10-11.) The Board concluded that the union's proposal was overbroad because it was not limited to how scores could be used on evaluations. The Board concluded that the proposal was not sufficiently related to employee evaluations to make it fall within the scope of representation. (*Id*. at pp. 11-12.)

After reviewing the record in the present case, including the TLF materials submitted by LAUSD, I conclude that the four-level observation rating system is an evaluation procedure within the meaning of EERA section 3543.5, subdivision (a). I reach this conclusion primarily because, at its core, the new rating system is the process or methodology used for assessing and giving feedback to teachers about their performance. As in *Compton CCD*, *supra*, PERB Decision No. 798, and *Jefferson SD*, *supra*, PERB Decision No. 133, the rating system here pertains to how LAUSD documents material used to evaluate employees. As with those cases, it is undisputed that employees' scores on the new four-level observation rating system are part of employees' personnel files.

LAUSD's attempt to describe the new rating system as evaluation "criteria" is unavailing here. The rating system does not set forth the standards for assessing employees. Rather, it is the mechanism LAUSD employed to score employees on their adherence to performance standards. In rejecting LAUSD's argument, I note that LAUSD's use of TLF elements to discuss the teaching practice is not squarely at issue in this case. The PERB complaint focuses upon LAUSD's use of the new four-level observation rating system. UTLA's closing brief, likewise, focuses on the scoring system, not the TLF itself. It is accordingly beyond the scope of this proceeding to decide whether it was unlawful for LAUSD to develop the TLF and use as part of its effort to improve discourse about the teaching practice. But according to EERA section 3543.2, subdivision (a), LAUSD is required to bargain with UTLA prior to incorporating those efforts into its evaluation procedures. Where the Legislature expressly places an issue within the scope of representation, it is "neither necessary nor proper [to balance] the potential benefits of negotiating a particular item against the employer's managerial prerogatives." (*Huntington Beach Union High School District* (2003) PERB Decision No. 1525, pp. 8-9.)

b. Application of the Anaheim Test

Even if one concluded that the four-level observation scoring system was not an evaluation procedure under EERA section 3543.2, subdivision (a), I would nevertheless find that the system is within the scope of representation. PERB's longstanding test for determining the negotiability of issues not enumerated in EERA is set forth in *Anaheim Union High School District* (1981) PERB Decision No. 177, p. 4. That test, commonly referred to as the "Anaheim Test," states:

> A subject is negotiable even if not specifically enumerated if: (1) it is logically and reasonably related to hours, wages, or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission. [parentheses in original]

(*Id*. at pp. 3-4, citing *Jefferson SD*, *supra*, PERB Decision No. 133, *Healdsburg Union High School District and Healdsburg Union School District* (1980) PERB Decision No. 132, *San Mateo City School District* (1980) PERB Decision No. 129, *Palos Verdes Peninsula Unified School District/Pleasant Valley School District* (1979) PERB Decision No. 96; see also *San Francisco Unified School District* (2009) PERB Decision No. 2048, p. 5.)

In this case, the record is clear that the first two elements of this test are satisfied. For instance, even the new rating system was not an evaluation procedure, in-and-of-itself, the system unquestionably relates to such procedures. (*Standard School District* (2005) PERB Decision No. 1775, proposed decision, p. 12 ["[The] PAR program need not itself be an evaluation procedure; it need only be related (logically and reasonably) to evaluation procedures."].)

Regarding the second element, it is undisputed that the subject of evaluation reform, including the scoring system to be used, was a major concern for both parties. So much so, that the parties, along with AALA, formed an Evaluation Working Group, composed of negotiating team members from each organization. Both parties also devoted years to studying ways to improve evaluations, including developing a multi-score assessment system. This is likely because performance evaluations are one of the most elemental ways that employees interact with management. It would not be appropriate to give the employer unilateral control over this fundamental aspect of the employer-employee relationship.

Both parties have also historically turned to collective bargaining to resolve their differences over evaluations. The parties have previously negotiated and agreed to the two-level final overall evaluation score. The parties have also negotiated over the substance of evaluations, agreeing to incorporate the CSTP and the various assessment categories contained in CBA Article X, section 4.1.

In addition, in 2010, both parties engaged in negotiations to further improve evaluation procedures, including the assessment scoring system. The parties also jointly formed the Evaluation Working Group, together with AALA, "as part of their ongoing separate negotiations processes[.]" Throughout the development of the TLF, LAUSD representatives acknowledged that aspects of the new system might be subject to negotiations, stating words to the effect of "where there is a need to negotiate [over implementing the TLF] we will do so and we will follow our responsibilities." LAUSD asserts no arguments that the second element of the Anaheim Test is not met here.

LAUSD disputes that the third prong of the Anaheim test was established here. It asserts that the decision to use the four-level observation rating system was a managerial prerogative and that negotiating over such a system would interfere with its authority to set

educational policy. However, the Board has concluded otherwise in a series of notably similar cases. In *Walnut Valley Unified School District* (1983) PERB Decision No. 289 (*Walnut Valley USD*), an employer unilaterally implemented a process for assessing employees over age 65 for continued employment. (*Id*. at p. 4.) The Board held that evaluation factors such as the employee's effectiveness as a teacher, classroom management skills, professionalism, and planning and preparation abilities were not "issues of fundamental policy which would significantly abridge the employer's freedom to manage or achieve its mission." (*Id*. at pp. 8-9, partially reversed on other grounds in *Long Beach Community College District* (2009) PERB Decision No. 2002, pp. 11-12.);[6] see also *Holtville Unified School District* (1982) PERB Decision No. 250 (*Holtville USD*), pp. 7-8 [Holding a policy for reviewing employees age 70 and older for compulsory retirement was subject to negotiations].)

In *Trustees of the California State University (San Marcos)* (2004) PERB Decision No. 1635-H (*CSU San Marcos*), the existing policy performance evaluation rating system included four preliminary numeric scores for different evaluation categories.[7] The average of

[6] Specifically, the Board in *Long Beach Community College District*, *supra*, PERB Decision No. 2002 reversed the part of *Walnut Valley USD*, *supra*, PERB Decision No. 289 holding that the statute of limitations was an affirmative defense that the respondent had the burden of proving at hearing. *Long Beach CCD*, was itself later reversed on that issue in *Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 3.)

[7] *CSU San Marcos*, *supra*, PERB Decision No. 1635-H was decided under HEERA (Gov. Code, § 3560 et seq.). Unlike in EERA, the HEERA definition of scope of representation does not expressly include evaluation procedures. (Gov. Code, § 3562, subdivision (q).) In addition, the test for negotiability under HEERA differs slightly from the Anaheim Test. (*Regents of the University of California* (2010) PERB Decision No. 2094-H, pp. 17-18.) PERB has traditionally views the two tests similarly. (*Ibid*.) When deciding cases under EERA, PERB may rely upon cases decided under other collective bargaining statutes with parallel provisions and other labor relations agencies with similar functions, such as the National Labor Relations Board (NLRB). (*Centinela Valley Union High School District* (2014) PERB Decision No. 2378 (*Centinela Valley UHSD*), proposed decision, p. 13, fn. 8, citations omitted.)

all the preliminary scores determined employees' overall rating. (*Id*. at proposed decision, p. 5.) The employer changed this policy by adding a new fifth and highest score. (*Id*. at proposed decision, p. 6.) The employer also gave managers more discretion in determining employees' overall rating. PERB concluded that the change was within the scope of representation. (*Id*. at proposed decision, pp. 2-3.)

The District cites to *State of California (Department of Corrections)* (2008) PERB Decision No. 1967-S (*Department of Corrections*), decided under the Ralph C. Dills Act.[8] In that case, PERB considered the negotiability of a new process to evaluate the competency of the physician employees responsible for prison inmate healthcare. (*Id*. at proposed decision, p. 37.) PERB recognized the precedent set by *Holtville USD*, *supra*, PERB Decision No. 250 and *Walnut Valley USD*, *supra*, PERB Decision No. 289 and concluded that "criteria and procedures for evaluating competency of employees under normal circumstances [was] a negotiable topic." (*Department of Corrections*, *supra*, at proposed decision, pp. 44-46.) However, PERB found that the situation in *Department of Corrections* was distinguishable due to the "extraordinary" facts of that case. (*Id*. at proposed decision, p. 47.) Those facts included massive failures in the existing evaluation system due to physicians who should not have been eligible to practice medicine and a serious lack of capable supervisors to assess doctors' competency. (*Id*. at proposed decision, pp. 48-49.) These breakdowns, which were detailed in a report by independent healthcare experts, included physicians treating patients outside their area of training, resulting in inmates' deaths. (*Id*. at proposed decision, p. 9, 47.) This led to a court order demanding revisions to existing evaluation procedures. (*Id*. at

[8] The Dills Act is codified at Government Code § 3512, et seq. Unlike EERA, the Dills Act definition of the "scope of representation" does not expressly include the procedures to be used for evaluating employees. (Gov. Code, § 3516.)

proposed decision, pp. 12-13.) Accordingly, PERB held that "the decision to implement the [new evaluation] program primarily involved the need to provide constitutionally acceptable healthcare and prevent inmate deaths." (*Id*. at proposed decision, p. 52.) PERB decided, under those unique circumstances, that the newly imposed evaluation system was not subject to bargaining. (*Ibid*.)

The present case bears only limited resemblance to *Department of Corrections*, *supra*, PERB Decision No. 1967-S. As in that case, there was concern about the effectiveness of LAUSD's existing evaluation system. And similar to *Department of Corrections*, it is undisputed that evaluations impact the quality of education at the District. LAUSD also assembled a task force to study the issue of evaluations. The task force concluded that substantial improvements were required in the District's evaluation practices, the Education Code, and other aspects of State education policy. However, I conclude that the situation here does not rise to the extraordinary circumstances presented in *Department of Corrections.* There is no evidence, for example, that teachers were assigned to teach subjects or grade levels without the proper qualifications or certifications. Even if that were the case, the four-level observation rating system would not address that problem directly. Notwithstanding the superior court's decision in the *Doe v. Deasy* litigation, there was no court order in this case demanding replacement of the existing three-level observation rating system. Although seeking to provide better guidance to teachers and improve student learning are laudable goals, there is simply no evidence that any failures of LAUSD's existing observation and evaluation system ever reached emergency proportions. Even if that were proven to be the case, there was no showing that switching to a four-level observation rating system would quell the emergency.

While it is true that the Teacher Effectiveness Task Force recommended using rubrics to show teachers what each of the CSTPs "look like," there was no specific recommendation to adopt a four-level observation rating system. As LAUSD points out, the task force report describes the District's existing *two-level overall evaluation rating* as "one-dimensional" with only a "tenuous link" between the evaluation score and actual teacher performance. Yet, it is undisputed LAUSD continues to employ that system and that LAUSD's unilateral adoption of a *four-level observation rating* system would not address the concerns raised in the report. Nor did the report comment on the efficacy of the *three-level observation rating* system. I also note that that the task force report specifically recognizes the need to negotiate over some of its policy recommendations. Thus, I conclude that the task force report does not support LAUSD's assertion that it should have the ability to move from a three-level to a four-level observation rating system without negotiations.

I also reject the assertion that negotiating over the four-level observation rating system unduly interferes with LAUSD's ability to communicate its expectations to teachers and to improve the quality of its education services. Just about every evaluation systems aims to improve employee performance and enhance the quality of an employer's services. This is one of the explicit purposes of the evaluation article in the parties' CBA which, of course, was negotiated with UTLA.

The record shows that LAUSD has used rubrics in the past, including rubrics with multiple scores. This proposed decision does not reach the issue of whether the District could or should use rubrics or other tools to articulate its expectations to teachers. That said, when the District integrated its rubrics into the evaluation system, including a new four-level observation rating system, it was required to bargain with UTLA over how this changed negotiable aspects of the evaluation system.

Under these circumstances, I find no overriding managerial interest in using the four-level observation rating system. There was no showing that negotiating over this system would demonstrably affect the District's ability to carry out its core educational purpose. Nor was there any showing of extraordinary circumstances that would lead PERB to depart from the precedent set in *CSU San Marcos*, *supra*, PERB Decision No. 1635-H, *Walnut Valley USD*, *supra*, PERB Decision No. 289, and *Holtville USD*, *supra*, PERB Decision No. 250.[9]

c. Exclusion From the Scope of Representation

LAUSD argues that it is not required to bargain over the changes at issue in this case because the Education Code allows the District's governing board to establish the evaluation system. This argument is based on the premise that EERA was not intended to supersede provisions of the Education Code. (EERA, § 3540.) In addressing the potential overlap between the collective bargaining statutes that PERB enforces and other laws, the Board has stated "when external law establishes immutable provisions in an area otherwise within the scope of representation, matters are negotiable only to the extent of the employer's discretion, that is, to the extent that the external law does not 'set an inflexible standard or insure immutable provisions.'" (*Berkeley Unified School District* (2012) PERB Decision No. 2268 (*Berkeley USD*), p. 9, quoting *San Mateo City School Dist. v. PERB* (1983) 33 Cal.3d 850 (*San*

[9] LAUSD also argues that use of the four-level observation rating system was only subject to a duty to consult under EERA section 3543.2, subdivision (a), which permits a public school employer to consult with an employee organization in matters not within the scope of representation. LAUSD argues that because it only had the obligation to consult with UTLA over the four-level rating system, it was therefore outside the scope of representation. I reject this argument as circular. A matter is not outside the scope of representation because it is subject to the consult provision in EERA section 3543.2, subdivision (a). Rather, a subject may be covered by the consult clause if it is outside the scope of representation. (See *Redwoods Community College District* (1987) PERB Decision No. 650, proposed decision, pp. 49-50.) Because I conclude that the four-level observation rating system was either a negotiable evaluation procedure or another negotiable aspect of the evaluation process, I find that the consult clause in EERA section 3543.2, subdivision (a) does not apply.

Mateo City SD), pp. 864-865.) For negotiations over matters also covered by external law, the parties may negotiate about incorporating those matters into a collectively-bargained agreement. (*Berkeley USD*, p. 9.) The parties may not negotiate terms which replace, set aside, or nullify inflexible provisions of the external law. (*San Mateo City SD*, p. 864.) No supersession occurs when a matter under consideration for negotiations is either permitted under the Education Code or where the Code does not preclude any variance from its terms. (*Jefferson SD*, *supra*, PERB Decision No. 133, p. 9.)

PERB applied these standards in *Lucia Mar Unified School District* (2001) PERB Decision No. 1440 (*Lucia Mar USD*). That case concerned Education Code provisions giving a school district some discretion over subcontracting its transportation services. (*Id*. at proposed decision, p. 54.) There, PERB "declined to find issues pre-empted by permissive or discretionary Education Code provisions which gave districts discretion and flexibility to act." (*Id*. at proposed decision, pp. 52-53, citations omitted.) To the contrary, while "'mandatory language [in the Education Code] will remove a subject from EERA's bargaining obligation[,] permissive or discretionary language will have the opposite result, provided the subject is otherwise negotiable.'" (*Id*. at proposed decision, p. 53, quoting *Fremont Unified School District* (1997) PERB Decision No. 1240.) Thus, language giving the employer some discretion over using contract labor for transportation services did not preempt the duty to negotiate over that matter. (*Ibid*.; see also *Centinela Valley UHSD*, *supra*, PERB Decision No. 2378, pp. 7-8 [holding that the Education Code's provisions on paid time off for union business did not preclude negotiations over union release time].)

In this case, LAUSD is correct that the Stull Act, at Education Code section 44660, gives school districts discretion to "establish a uniform system of evaluation and assessment for the performance of all certificated personnel within each school district of the state[.]"

However, that provision is substantially similar to permissive, discretionary language in *Lucia Mar USD*, *supra*, PERB Decision No. 1440. As in that case, the language in the Stull Act relied upon by LAUSD does not create an "inflexible standard" or "immutable provisions" regarding the use of a four-level observation rating system. Nor was any section cited indicating that the Legislature intended parts of the evaluation process to be outside the scope of representation. For these reasons, I reject LAUSD's argument that evaluations are excluded from the scope of representation under the Education code.

UTLA has established that LAUSD's unilateral change to a four-level observation rating system was a policy change within the scope of representation. This action violates the duty to negotiate in good faith unless LAUSD's bargaining obligation was excused.

2. Waiver of the Duty to Bargain

LAUSD argues that any duty to bargain over the four-level observation rating system in this case was excused because UTLA waived its right to bargain over the matter. The Board has long found that the waiver of negotiating rights must be "clear and unmistakable," demonstrating "an intentional relinquishment of the right to bargain." (*Rio Hondo Community College District* (2013) PERB Decision No. 2313 (*Rio Hondo CCD*), p. 5 (emphasis in original), citing *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74, *California State Employees Assn. v. PERB* (1996) 51 Cal.App.4th 923, pp. 937-938 (*CSEA*).) This is because there is strong public policy against finding waivers based solely on inference. (*Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 28, citing *Long Beach Community College District* (2003) PERB Decision No. 1568.) Accordingly, the "burden of establishing a waiver is upon the party asserting it, whether the claimed waiver is grounded in alleged inaction, contact language, or a simple failure to demand bargaining." (*Rio Hondo CCD*, *supra*, p. 6.) LAUSD espouses two waiver theories in this case: (a) that

LAUSD gave notice of the new rating system but UTLA failed to request bargaining; and (b) that the management rights clause in the CBA privileges LAUSD to change the observation rating system. Each theory will be discussed separately below.

a. UTLA's Failure to Request Negotiations Earlier

An exclusive representative may waive its right to bargain over an issue "where the employer shows that the exclusive representative failed to demand to negotiate, despite having received sufficient notice of the proposed change." (*West Covina Unified School District* (1993) PERB Decision No. 973, pp. 13-14, citing *Cloverdale Unified School District* (1991) PERB Decision No. 911.) However, "[s]ilence, by itself is never clear and unambiguous." (*Rio Hondo CCD*, *supra*, PERB Decision No. 2313, p. 7.) Thus, to find a waiver, there must be other indicators that the union intentionally relinquished its right to bargain. (*Ibid*.) Although an unreasonable delay in making a bargaining demand may be evidence of a waiver, the reasonableness of the delay turns on the specific facts of each case. (*Id*., citing *Compton Community College District* (1989) PERB Decision No. 720; *Victor Valley Union High School District* (1986) PERB Decision No. 565.) Moreover, the union must have had notice (i.e., advance knowledge) of the proposed change and then fail to request negotiations over the matter. (*County of Santa Clara* (2013) PERB Decision No. 2321-M, pp. 27-29.)

In *Santee Elementary School District* (2006) PERB Decision No. 1822, the employer notified the union that it planned on adopting new board policies concerning strikes and other concerted activities at its governing board meeting around 20 days later. The union expressed concerns about the new policy, but never demanded bargaining. (*Id*. at p. 3.) The Board found that union had adequate notice of the employer's intent to change its policy and the record showed that the union made the conscious decision to not request negotiations. (*Id*. at p. 4.) The Board accordingly found a waiver of the right to bargain. (*Id*. at p. 5.) In contrast, in *Rio*

Hondo CCD, the Board found no waiver of the right to demand bargaining over the negotiable effects of installing security cameras on school premises. In that case, there was no clear timeline for the implementation and the union's internal deliberations about whether to request bargaining did not suggest any actual intent to waive its rights. (*Id*. at pp. 7-8.)

In this case, LAUSD argues that it notified UTLA of its intent to create the TLF as early as October 2010. LAUSD also asserts that UTLA knew about its plans regarding the TLF and the four-level observation ratings system by its participation in the Ad Hoc TLF Committee from December 2011 to March 2012. According to LAUSD, UTLA's March 31, 2013 bargaining demand was an unreasonable delay under the circumstances. This argument is unpersuasive because, as in *Rio Hondo CCD*, *supra*, PERB Decision No. 2313, prior to March 24, 2013, UTLA was not on notice that LAUSD intended to implement the new four-level observation rating system. In fact, LAUSD's statements up until that point indicated that it would bargain with UTLA over any negotiable changes relating to the TLF. During both Ad Hoc TLF Committee meetings, LAUSD representatives expressly informed the committee that it would bargain over the implementation of the TLF. Before that, on April 28, 2011, LAUSD stated in a letter about the TLF and evaluations that it remained "committed to the collective bargaining process." Thus, although UTLA had notice that LAUSD was developing a new framework, there was insufficient notice that LAUSD would implement that framework into its evaluation system prior to completing bargaining. LAUSD also did not present any evidence indicating that UTLA consciously decided against requesting negotiations on this issue. For these reasons, I cannot conclude that UTLA, by its silence, intended to waive any right to bargain over the four-level observation rating system.

b. Waiver by Contract[10]

LAUSD also argues that UTLA waived the right to negotiate over the present changes to the evaluation and observation system based on various CBA provisions delineating LAUSD's retained authority, or "management rights." A union may "waive its right to negotiate a matter within the scope of representation by consciously yielding that right in a management rights clause." (*Berkeley Unified School District* (2004) PERB Decision No. 1729, warning letter, p. 3.) This sets a high bar. To meet it, the contract language must "specifically reserve for management the right to take certain action or implement changes regarding the issues in dispute." (*Id*., citing *CSEA*, *supra*, 51 Cal.App.4th 923, pp. 938-940.) A generally worded management rights clause will not be construed as a waiver. (*Rocklin Unified School District* (2014) PERB Decision No. 2376 (*Rocklin USD*), proposed decision, pp. 39-40; *San Bernardino City Unified School District* (1998) PERB Decision No. 1270 (*San Bernardino City USD*), proposed decision, p. 57, citing *Norris School District* (1995) PERB Decision No. 1090, *Dubuque Packing Co*. (1991) 303 NLRB No. 386.) A party may use extrinsic evidence such as bargaining history to establish a contract-based waiver. The, extrinsic evidence must "reflect[] a conscious abandonment of the right to bargain *over a particular subject*." (*Placentia Unified School District* (1986) PERB Decision No. 595 (*Placentia USD*), p. 4 (emphasis supplied), citing *Palo Verde Unified School District* (1983) PERB Decision No. 321; *St. Mary's Hosp*. (1982) 260 NLRB 1237.) In addition, where the

[10] PERB has limited authority to interpret agreements. PERB may do so only as needed to decide issues within its jurisdiction, such as unfair practice charges. (*County of Sonoma* (2012) PERB Decision No. 2242-M, p. 15, citing *Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, *County of Ventura* (2007) PERB Decision No. 1910-M.) When PERB is called upon to review agreements, traditional rules of contract interpretation apply. (*Ibid*.) In this case, both parties acknowledge that PERB must interpret the parties' agreements to resolve the present dispute.

contract language is clear and unambiguous on its face, reliance on bargaining history to establish a waiver is not appropriate. (*Barstow Unified School District* (1996) PERB Decision No. 1138 (*Barstow USD*), p. 16, citing *Colusa Unified School District* (1983) PERB Decision No. 296.)

In this case, LAUSD argues that different CBA provisions work together to establish that UTLA waived its right to negotiate over the four-level observation rating system. Its argument is based on the premise that the management rights language in the CBA gives the District the authority to make any changes not specifically limited by the CBA. LAUSD's position has some traction in an early Board decision. In *Contra Costa Community College District* (1990) PERB Decision No. 804 (*Contra Costa CCD*), the Board interpreted an "Entire Agreement" article, stating in relevant part

> The adoption or institution of all past, existing and future policies, procedures, practices and customs shall be exclusively within the discretion of management, except to the extent that such action shall be contrary to the specific terms of this contract.

(*Id*. at p. 9 (emphasis removed).) The Board interpreted that language to mean the employer had "the exclusive right to determine any new policy or procedure which does not conflict with the terms of the contract[,]" and that it was therefore not obligated to bargain over changes to its training programs, unless the union used an available reopener request for that purpose. (*Id*. at pp. 9-10.) I have no subsequent PERB decision reaching a similar conclusion based on comparable contract language. Nor have the parties cited to such a case.

More recently, PERB has applied the standards for finding a waiver by contract more stringently and has concluded that contract must expressly confer unilateral or exclusive authority over a *specific* subject. For instance, in *San Bernardino City USD*, *supra*, PERB Decision No. 1270, The Board found that an employer unilaterally changed employee sick

leave policies. (*Id*. at p. 3.) In that case, the parties' contract included a "district rights" clause stating, in part, that "the adoption of policies, rules, regulations and practices shall only be limited by the specific and express terms of this agreement." (*Id*. at proposed decision, p. 57.) PERB found that "the District Rights clause to be generally worded rather than clear and specific." (*Ibid*.) PERB also noted that contract language did not mention either any leave policies or the employer's exclusive right to change policy. (*Ibid*.; see also *Los Angeles Unified School District* (2002) PERB Decision No. 1501 (*Los Angeles USD*),. at p. 4.)

In *Rocklin USD*, *supra*, PERB Decision No. 2376, PERB reviewed contract language broadly authorizing the district to "determine its organization; direct the work of its employees, determine the times and hours of operations, determine the kinds of levels of services to be provided and the methods and means of providing them; establish its educational policies, goals and objectives[.]" (*Id*. at proposed decision, pp. 2-3.) The employer argued that the contact language authorized it to remove work from the bargaining unit. PERB concluded that this language merely "describe[d] the general authority of the District to manage its operations[,]" and did not "specifically reserve to the employer the right to take certain action or implement specific unilateral changes." (*Id*. at proposed decision, pp. 39-40, citing *Lucia Mar USD*, *supra*, PERB Decision No. 1440.)[11] In *Hacienda La Puente Unified School District* (1997) PERB Decision No. 1186 (*Hacienda La Puente USD*), PERB found that contract language authorizing the employer to "direct the work of its employees," "determine the times and hours of operation," "determine staffing patterns," and "assign" employees "limited only by the specific and express terms of this agreement" did not allow the employer to unilaterally

[11] PERB did, however, conclude that the union waived the right to bargain over the change by failing to timely request bargaining. (*Rocklin USD*, *supra*, PERB Decision No. 2376, proposed decision, p. 42.)

change employee work shifts. (*Id*. at proposed decision, pp. 15, 18-19.) PERB concluded that the language did "not contain the level of specificity required under PERB law to constitute a clear and unmistakable waiver of [the union's] right to negotiate about shift changes." (*Id*. at proposed decision, p. 18.)

The Board did find a contractual waiver in *Long Beach Community College District* (2008) PERB Decision No. 1941 (*Long Beach CCD*). There, the parties' agreement gave the employer the "exclusive right" to, among other actions, "direct the work of its employees," "determine staffing patterns," and "contract out work" (*Id*. at p. 4). The Board found the union expressly waived its right to bargain over the employer's use of contract labor. (*Id*. at pp. 17-18;[12] see also *Barstow USD*, *supra*, PERB Decision No. 1138, p. 14.)

Federal authority applies a similar "clear and unmistakable waiver" standard when reviewing management rights clauses. (See *Local Joint Executive Board of Las Vegas v. NLRB* (9th Cir. 2008) 540 F.3d 1072, p. 1075, citing *Metro Edison Co. v. NLRB* (1983) 460 U.S. 693, p. 708.) In *Walt Disney World Co*. (2013) 359 NLRB No. 73, the NLRB reviewed contract language reserving the employer's "right to staff functions as deemed appropriate" and a generally worded clause giving the employer authority over selecting employees, scheduling, and assignments "[e]xcept as expressly and clearly limited by this Agreement[.]" (*Id*. at p. 20.) The NLRB concluded that the language did not authorize the employer to eliminate classifications within the bargaining unit. (*Id*. at pp. 21-22.) In contrast, in *Kennemetal, Inc*., (2012) 358 NLRB No. 68, the NLRB found that contract language expressly entitling the employer to make reasonable provisions regarding the health and safety of employees authorized the employer to unilaterally create a checklist requiring employees to

[12] The Board found that the employer was still obligated to bargain over the effects of any plan to contract out. (*Id*. at p. 19-20.)

inspect machinery for safety problems. (*Id*. at pp. 5, 10-11.) In *Virginia Mason Hospital* (2012) 358 NLRB No. 64, the NLRB found that an employer hospital was not required to bargain over the requirement that any nurse who had not taken anti-viral medication must wear facemasks as a precaution against spreading the influenza virus. (*Id*. at pp. 5-6.) In that case, the parties' contract included a management rights clause giving the hospital the authority to "promulgate rules, regulations and personnel [policies]" as well as to "determine the materials and equipment to be used[.]" (*Id*. at p. 5.) The NLRB concluded that there was no duty to bargain because of the management rights language and because the facemask requirement was "simply an extension of the infection control guidelines already in effect[.]" (*Id*. at pp. 5-6.)

i. The Parties' Contract Language

In the present dispute, LAUSD cites to multiple CBA provisions in support of its contract-based waiver argument. It relies on CBA Article II, section 3.0, which authorizes the District to "determine and revise any of its policies, rules, regulations, or procedures" not in conflict with the CBA. CBA Article III, section 1.0 also states that the "District retains all rights and powers which have not been limited by the other Articles of this Agreement." That clause was immediately followed by the statement that "[t]he provisions of this Article are not intended to expand the rights of the District beyond statutory and constitutional limits[.]" LAUSD also notes that nothing in Article X, concerning unit member evaluations and discipline, limits the District's authority implement a four-level observation scoring system.

Article III, section 3.0 also enumerates a set of the District's "retained rights" over which the District may "determine, establish, change or discontinue, in whole or in part, temporarily or permanently." Among the enumerated items in section 3.0 are, "[t]he classes to be taught and other duties and services to be rendered by District personnel to students and to the public[,]" as well as "educational policies, objectives, standards, and programs."

After reviewing the CBA language at issue in this case, I find no clear and unmistakable waiver of the right to bargain over changes to how observations are rated. I reach the same conclusion when reading each relevant section separately or together as a whole. Nothing in the CBA gives the District any specific authority to make changes to classroom observations, to evaluations in general, or to any matters within the scope of representation. I find that the generally-phrased references to policies, rules, procedures, District services, and educational standards do not authorize unilateral action over employee observations or evaluations.

I likewise conclude that the CBA does not indicate that UTLA consciously yielded its right to bargain over those issues. (See *Rocklin USD*, *supra*, PERB Decision No. 2376, *Lucia Mar USD*, *supra*, PERB Decision No. 1440; *Hacienda La Puente USD*, *supra*, PERB Decision No. 1186.)[13] In fact, the statement in the parties' management rights article that the "provisions in this Article are not intended to expand the rights of the District beyond statutory and constitutional limits" is a strong indicator that UTLA did not intend to yield their EERA-based right to negotiate over evaluation procedures or other matters within the scope of representation. (EERA, SS 3543.2, subdivision (a), 3543.3.)[14] Moreover, after reading the

[13] The lack of any specific reference to the specific change that occurred here also distinguishes this case from *Long Beach CCD*, *supra*, PERB Decision No. 1941, *Barstow USD*, *supra*, PERB Decision No. 1138, and *Kennemetal*, *supra*, 358 NLRB No. 68. In each of those cases, the parties' contract language gave them the express authority to take exclusive action on the specific issue in dispute (e.g., contracting out, health and safety procedures). Likewise, unlike in *Virginia Mason Hospital*, *supra*, 358 NLRB No. 64, the new four-level observation rating system was not simply the codification of existing policies.

[14] As a reference point, EERA, including its mandatory bargaining provisions was enacted in 1975. (*Long Beach Community College District* (2003) PERB Decision No. 1564, p. 11 citing *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, p. 177.) This was around three years before the parties negotiated their first agreement containing the above-referenced management rights language.

CBA as a whole, I conclude that the parties were aware of how to draft language conferring exclusive and unilateral authority over employment matters. For example, in Article XVI, S 2.0(c), the parties vested the "sole and exclusive right" to design employees' health and welfare programs to joint committee of District and UTLA representatives. As in *Rocklin USD*, *supra*, PERB Decision No. 2376, I also find the fact that the parties did not give the District specific authority over observation or evaluation matters to be further evidence that UTLA did not intend to waive its right to negotiate over these changes.

Notwithstanding the Board's decision in *Contra Costa CCD supra*, PERB Decision No. 804, I also reject the argument that LAUSD was excused from bargaining based on CBA language authorizing the District to make "any policy changes not specifically limited by the CBA." Decisions such as *San Bernardino City USD*, *supra*, PERB Decision No. 1270, and *Los Angeles USD*, *supra*, PERB Decision No. 1501 better reflect the Board's current position on contract-based waivers and are more consistent with PERB's position as a whole on the issue of waivers.[15] In both of those cases, the Board found that contract language similar to the terms relied upon by LAUSD here were not specific enough to constitute waivers of the right to bargain.

LAUSD argues that declining to find a waiver of the right to bargain would render the management rights provisions in the CBA meaningless which, under traditional principles of contract interpretation, should be avoided. (See *County of Sonoma* (2011) PERB Decision No. 2173-M, p. 16, citing *State of California (Department of Corrections)* (1999) PERB Decision No. 1317-S.) This argument is unpersuasive because it is an overstatement to claim

[15] See *Vessey & Co., Inc. v. Agricultural Labor Relations Bd.* (1989) 210 Cal.App.3d 629, pp. 666-7 [holding that an expert labor agency may modify or not apply earlier decisions at its discretion]; *U.S. Fidelity & Guaranty Co. v. Superior Court* (1988) 204 Cal.App.3d 1513, pp. 1522-23 [holding that later decisions "refine" earlier precedent].

that the conclusions reached in this proposed decision leave any CBA terms without effect. The findings here relate only to the District's unilateral adoption of a four-level observation rating system. It does not necessarily mean that the District did not successfully retain other rights for itself. For example, codifying, even without modifying each party's rights under the law or the agreement, is a valid purpose for contractual language. (See e.g., *Jefferson SD*, *supra*, PERB Decision No. 133, p. 9 ["Employer-employee relations are inherently improved when the respective parties are well informed as to their mutual rights and obligations."] It is beyond the scope of this proceeding to speculate on other purposes the management rights clauses might serve. For that reason, I decline to do so.

ii. The Parties' Bargaining History

LAUSD also asserts that the parties' bargaining history supports its interpretation of a broad-based contractual waiver. Extrinsic evidence such as bargaining history may contribute to finding the existence of a contract-based waiver where the contract terms are subject to different interpretations and where the negotiating history reflects "a conscious abandonment of the right to bargain over a particular subject." (*Barstow USD*, *supra*, PERB Decision No. 1138, p. 16; *Placentia USD*, *supra*, PERB Decision No. 595 , p. 4, citations omitted.)

A member of LAUSD's original negotiating team, Fisher, testified about the District's intent when proposing the various management rights provisions for the first CBA in 1978. He said that the District's goal was to reserve for itself the authority to make any changes not specifically incorporated into the CBA. However, I find Fisher's testimony to contradict the plain meaning of the CBA. Specifically, Article III, section 1.0 expressly restricts LAUSD's management rights to within existing statutory authority, which I presume to include the statutory obligation to bargain over negotiable subjects.

I also find that Fisher's testimony is inconclusive in at least four key areas. First, Fisher did not testify about the extent to which the parties discussed the District's authority over evaluations and observations. It is therefore unclear whether UTLA purposefully surrendered its right to bargain over those specific issues during negotiations. (See *Placentia USD*, *supra*, PERB Decision No. 595, p. 4.)

Second, Fisher testified that he was upfront at the outset of negotiations that the District would be "proposing language that will permit full operation of the District and including the right to make changes in negotiable subjects, so long as they're not in conflict with the other terms of the agreement." Based on this testimony, Fisher clearly understood how to phrase a proposal reserving for itself the exclusive right to change negotiable matters. Yet, there was no evidence that LAUSD ever made such a proposal during negotiations. Nor does language explicitly authorizing the District to make changes to negotiable subjects appear anywhere in either the 1978 CBA or the present agreement. Thus, even if LAUSD expressed its goal to possess the authority to make changes within the scope of representation, I find no evidence that the District proposed language that would actually achieve its goal.

Third, Fisher's testimony was internally inconsistent. During his direct testimony, Fisher said that he expressed the District's intent for the management rights provisions at the very outset of negotiations. However, on cross-examination, Fisher said that there were no notes of any of his conversations about the management rights clauses "since these meetings all occurred in drafting session, there wouldn't have been notes like you would have if you were having more plenary sessions with the full teams." I view this testimony with suspicion because it means either that the parties convened drafting sessions at the opening of negotiations before any tentative agreements were reached or that Fisher's recall of his

conversations during those negotiations was inaccurate. I find that either conclusion casts doubt on the persuasiveness of Fisher's testimony on this issue.

Fourth, Fisher never testified that the two negotiating teams ever reached a consensus over the interpretation of LAUSD's management rights language. Rather, Fisher concluded that the two sides had a common understanding simply because LAUSD's proposed language "was still there" at the end of the process. Fisher said he spoke with UTLA's then-executive director Baer, who was not part of UTLA's negotiating team. But, LAUSD did not establish to what extent Baer communicated anything Fisher said to UTLA's actual negotiators. For all these reasons, I conclude that LAUSD's bargaining history evidence does not support its waiver argument.

3. LAUSD's "Dynamic Status Quo" Defense

As a complementary argument to its waiver theory, LAUSD contends that its history of making changes to its evaluative rating systems has created a "dynamic status quo" that allowed for unfettered discretion to create the four-level observation rating system at issue in this case. Although the duty to bargain in good faith generally precludes parties from unilaterally altering the status quo, in some situations, the status quo is dynamic and must take into account the regular and consistent past patterns of change. (*Pajaro Valley Unified School District* (1978) PERB Decision No. 51 (*Pajaro Valley USD*), pp. 6-7, citing *Stratford Industries, Inc.* (1974) 215 NLRB 682.) In those situations, changes that are consistent with an established pattern do not alter the status quo and need not be negotiated beforehand. (*Ibid.*) However, changes that derive from an employer's exercise of discretion are not considered to be within the "dynamic status quo." (*Regents of the University of California* (2004) PERB Decision No. 1689-H (*UC Regents*), proposed decision, pp. 29-31.) The Board stressed the importance of this distinction by stating:

> "Where the employer has traditionally exercised a large measure of discretion in making such changes, it is impossible for the exclusive representative to know whether or not there has been a substantial departure from past practice, and therefore the exclusive representative may properly insist that the employer negotiate regarding such changes."

(*Id*. at p. 30, quoting *Regents of the University of California* (1983) PERB Decision No. 356-H, pp. 16-17.)

In *Pajaro Valley USD*, *supra*, PERB Decision No. 51, the District had a "historic and accepted practice" of contributing only a fixed sum to employee medical premium costs. (*Id*. at p. 10.) All other costs, including cost increases, were automatically passed along to employees. The Board held that the employer was entitled to continue this practice after the parties' contract expired without disturbing the status quo even if it meant passing along subsequent healthcare cost increases to unit members. (*Ibid*.)

PERB reached the opposite conclusion in *UC Regents*, *supra*, PERB Decision No. 1689-H. There, the employer had a practice of setting its healthcare contributions equal to the lowest cost plan offered by its medical benefits provider. When the price of the lowest cost plan changed, the employer changed its contribution amount. (*Id*. at proposed decision, pp. 6-7.) After the parties' contract expired, the employer modified that practice, and instead changed its contribution amount for budgetary reasons. (*Id*. at proposed decision, pp. 12-13.) The Board held that those changes were not part of a "dynamic status quo" because the changes were the product of the employer's discretion, not a pre-determined methodology. Accordingly, the changes were subject to bargaining. (*Id*. at proposed decision pp. 31-32.) The Board expressly distinguished its holding from *Pajaro Valley USD*, *supra*, PERB Decision No. 51, where the post-contract changes to healthcare costs were the product of a fixed formula and required "no exercise of discretion by the district." (*UC Regents* at p. 29.)

In the present case, LAUSD contends that it had a regular past practice of modifying the way it rates teachers during classroom observations. It cites in support numerous different times certain District administrators applied instructional rubrics using four or more ratings when discussing instructional practices with teachers. It is undisputed that LAUSD did not negotiate over its past use of rubrics with UTLA. However, I find this argument to be unpersuasive given that there was no showing that those prior changes followed a discernible pattern or methodology. Rather, LAUSD maintains that its administrators made those changes through the exercise of their discretion and for subjective reasons. Thus, there is no evidence that the change to a four-level observation rating system was consistent with a fixed methodology, such as what existed in *Pajaro Valley USD*, *supra*, PERB Decision No. 51. Discretionary changes, such as the changes undertaken here, cannot form the basis of a dynamic status quo. (*UC Regents*, *supra*, PERB Decision No. 1689-H, propose decision, pp. 31-32; see also *San Jacinto Unified School District* (1994) PERB Decision No. 1078 (*San Jacinto USD*).)[16]

4. LAUSD's Other Defense

LAUSD also relies on *Continental Telephone Company of California* (1985) 274 NLRB 1452 (*Continental Telephone*), in support of its claim that there was no obligation to bargain here. That case presents a hybrid of other theories discussed above and is ultimately

[16] To the extent that LAUSD argues that UTLA waived the right to request future negotiations over a four-level rating system because of its past failure to request bargaining, this argument would be rejected as well. An exclusive representative's "'acquiescence in previous unilateral changes does not operate as a waiver of the right to bargain for all times.'" (*Hacienda La Puente USD*, *supra*, PERB Decision No. 1186, proposed decision, p. 15, quoting *San Jacinto USD*, *supra*, PERB Decision No. 1078.) Moreover, there was no evidence that the District gave UTLA notice and the opportunity to request bargaining prior to using the rubrics in question. Nor was there evidence in the record about how those past rubrics were used, if at all, in employee evaluations. Thus, I cannot conclude that UTLA's failure to request bargaining on these issues in the past was a conscious abandonment of its right to negotiate.

unpersuasive for the same reasons. There, the NLRB found that the union waived the right to bargain over a revised employee attendance policy both because of a management rights clause giving the employer the authority to modify personnel rules including "working schedules," and because the employer had previously notified the union of two other attendance policy changes and the union specifically declined to request negotiations. (*Id*. at p. 1453.) The NLRB considered those two circumstances together and concluded that the union's conscious decision to not request bargaining for earlier attendance policy changes lent credence to the employer's argument that the parties intended the management rights clause to entitle it to make the changes at issue. (*Ibid*.)

In the present case, LAUSD argues that it too has broad-based managerial rights language and a history of using rubrics with a four-level rating system. In *Continental Telephone*, *supra*, 274 NLRB 1452, the union failed to request negotiations even after being informed about the past policy changes. (*Id*. at p. 1452.) In this case, in contrast, there was no evidence when, if ever LAUSD informed UTLA of its past use of rubrics with a four-level observation rating system. Nor does LAUSD's management rights language pertain, even generally, to the subject of evaluations. For these reasons, I find *Continental Telephone* distinguishable.

UTLA has established all the elements of a prima facie case regarding its claim over the four-level observation rating system. It proved that LAUSD changed a policy within the scope of representation without giving UTLA notice and the opportunity to request negotiations. LAUSD has not set forth any persuasive arguments excusing its bargaining obligations on this issue. Therefore, its unilateral implementation of the four-level observation rating system breached the duty to bargain in good faith, in violation of EERA section 3543.5, subdivisions (a), (b), and (c). (See *Centinela Valley UHSD*, *supra*, PERB Decision No. 2378, p. 10.)

B. Creation of a TGDC Lead Teacher Position

UTLA alleges that LAUSD violated the duty to negotiate in good faith by unilaterally creating a new position entitled "TGDC Lead Teacher." The Board has previously found that "where management seeks to create a new classification to perform a function not previously performed or to abolish a classification and cease engaging in the activities performed by that classification, it need not negotiate its decision." (*Alum Rock Union Elementary School District* (1983) PERB Decision No. 322, p. 11 (*Alum Rock UESD*).) This is because management has an "overriding interest in determining which functions are necessary to the accomplishment of its mission." (*Id*. at p. 10; see also *City of Alhambra* (2010) PERB Decision No. 2139-M, pp. 15-16;[17] *Redwoods Community College District* (1997) PERB Decision No. 1242, proposed decision, pp. 27-28.) On the other hand, "the creation or abolition of a classification which merely transfer[s] existing functions and duties from one classification to another involve no overriding managerial prerogative." (*Ibid*.) Those changes are negotiable. (*Ibid*.)

In this case, UTLA argues that LAUSD unilaterally created a TGDC Lead Teacher position in the May 24, 2013 letter, where then-Superintendent Deasy stated that principals will be asked "to identify a TGDC Lead Teacher" who will "support teachers at [each] site who will be engaging in the TGDC." The letter also indicates that the TGDC Lead Teacher will be paid via stipend and will have paid training opportunities. LAUSD Director of Personnel Services and Research Killeen said that the TGDC Lead Teacher is a regular full-time teacher who performs additional duties related to the TGDC. No witness or document

[17] *City of Alhambra*, *supra*, PERB Decision No. 2139-M was decided under the Meyers-Milias-Brown Act (Gov. Code § 3500 et seq.). Cases decided under the MMBA do not apply the Anaheim Test when determining whether a matter is within the scope of representation. (*Ibid*.)

provided more detailed information. UTLA has the burden of proving this and all the elements of a prima facie case for unilateral change. Based on this sparse record, I cannot conclude that LAUSD created a new "TGDC Lead Teacher" position or classification. Nothing in the May 24, 2013 letter states that LAUSD was creating a new position. Killeen flatly contradicts this assertion by stating that the TGDC Lead Teacher was merely a full-time teacher that was assigned "additional duties related to the TGDC program" and was compensated for the additional work using the coordinator differential provisions in the CBA.

Even if UTLA had proven that LAUSD created a new position, the record is inconclusive as to the TGDC Lead Teacher "perform[ed] a function not previously performed" or was assigned the work of existing classifications. (*Alum Rock UESD*, *supra*, PERB Decision No. 322, p. 11.) Killeen did state that the TGDC Lead Teacher performed "additional duties," but neither he nor any other witness or document provided more insight into the work performed by the alleged new position. Without this information, I cannot determine whether the decision to create any new position was negotiable or a managerial prerogative.

For all these reasons, UTLA's assertion that LAUSD unilaterally created a new TGDC Lead Teacher position was not proven with facts at the hearing and is therefore dismissed.

C. Changes to the Final Evaluation Report Form

UTLA also alleges that LAUSD unilaterally changed the Final Evaluation Report form used during the 2013-2014 school year. According to the amendments to the PERB complaint, LAUSD added: (1) a new section entitled "Observation of Teacher's Practice; (2) a new section entitled "Contributions to Student Outcomes/Support for Student Learning;" and (3) new evaluation criteria in the section entitled "Additional Professional Responsibilities." Both parties acknowledge that all three sections were added to the Final Evaluation Report form

without bargaining. Less clear is whether those new sections amounted to any substantive negotiable change to the evaluation or observation process.

1. The "Observation of Teacher's Practice" and the "Additional Professional Responsibilities" Sections

The first issue regarding the alleged change to the Final Evaluation Report is whether the form and organizational changes altered anything substantive about the evaluation procedure. As discussed above, evaluation procedures are within the scope of representation. (EERA, § 3543.2, subdivision (a).) Likewise, creating a new process for assessing employees' performance is subject to negotiations. (*Compton CCD*, *supra*, PERB Decision No. 798, proposed decision, pp. 3-4; *Holtville USD*, *supra*, PERB Decision No. 250, pp. 7-9; *Jefferson SD*, *supra*, PERB Decision No. 133, pp. 18-19.) The criteria or categories for evaluation are also subject to bargaining. (*Walnut Valley USD*, *supra*, PERB Decision No. 289, pp. 8-9.) In this case, however, UTLA has not established that the new "Observation of Teacher's Practice" and "Additional Professional Responsibilities" sections together, actually modified existing evaluation procedures, created a new evaluation process, or changed existing evaluation criteria. UTLA argues that these sections contain new, un-negotiated evaluation categories, but a closer examination of those sections reveals otherwise. Each of the items listed in those two new sections correspond, at least roughly, to categories from the prior Final

Evaluation Report form and items in CBA Article X, section 4.1.[18] In addition, when comparing the newly implemented 2013-2014 Final Evaluation Report form to its immediate predecessor, virtually all of the assessment categories in the "Observation of Teacher's Practice" and the "Additional Professional Responsibilities" sections of the 2013-2014 form also appeared in the prior form. This is unsurprising because the changes were designed to conform to the CSTP and to the CBA, which set evaluation standards both before and after the changes alleged in this case.

Although the assessment categories in the 2013-2014 form are described somewhat differently from the prior form, it was incumbent on UTLA to put forth evidence, or at least an explanation, concerning how this different language actually amounted to any tangible change in assessment categories. UTLA's failure to do so leaves me unable to find that a policy change occurred here.

Similarly, the 2013-2014 form continues to use a three-level rating system, but with different names from what was used in the prior year.[19] However, there was no showing that this terminology change impacted employees' evaluations or other working conditions. Both before and after LAUSD began using the 2013-2014 Final Evaluation Report, employees were

[18] For example, in the 2013-2014 Final Evaluation Report, the "Standards-Based Learning Activities" section in the "Observation of Teacher's Practice" section corresponds to various items in "Classroom Performance" section of the prior form. Similarly, the "Feedback to Students" section in the 2013-2014 Final Evaluation Report corresponds to items in the "Support for Student Learning" and the "Developing as a Professional Educator" sections of the prior form. Likewise, Items #1 and #2 in the "Additional Professional Responsibilities" section of the 2013-2014 form corresponds to items in the "Punctuality, Attendance, and Recordkeeping" section of the prior form. Item #7 of the 2013-2014 form is essentially equivalent to items in the "Developing as a Professional Educator" of the prior form.

[19] The three ratings in the most recent Final Evaluation Report form preceding the change were "Meets," "Needs Improvement," and "No." The 2013-2014 form used the scores "Effective," "Developing," and "Ineffective."

given a final overall rating of "Meets Standard Performance" or "Below Standard Performance." Unlike in *CSU San Marcos*, *supra*, PERB Decision No. 1635-H, there was no showing in this case that supervising administrators have any different discretion in assigning an overall evaluation score based on the new Final Evaluation Report form.[20]

Without evidence about how the assessment categories in the "Observation of Teacher's Practice" and "Additional Professional Responsibilities" sections of the new Final Evaluation Report actually differed from what was previously in place, I cannot find that the content in these section changed any matters within the scope of representation.

2. The "Contributions to Student Outcomes/Support for Student Learning" Section

The new "Contributions to Student Outcomes/Support for Student Learning" section does contain new content not present in prior evaluation forms. Specifically, this section includes space for describing both "objectives" and "strategies" relating to student progress in State-adopted standardized test results.[21] However, the content of this section was consistent with existing provisions about evaluations contained in CBA Article X and the Supplemental Agreement. For instance, CBA Article X, 4.0, directs teachers and supervising administrators to work together to develop the teacher's objectives for that school year. According to section 4.1(a), the issues to be discussed when setting objectives include "[s]tandards of expected

[20] This holding does not disturb my earlier finding that the unilateral implementation of a four-level observation rating system violated the duty to bargain in good faith. The allegations in the amendment to the PERB complaint were specific to the Final Evaluation Report form itself and nothing on that form pertains to the four-level observation rating system.

[21] The section also includes an item entitled "Target Date," but no evidence was submitted about the purpose of that item.

student performance and achievement[.]" That same section contemplates the identification and use of both "objectives" and "strategy-based planning methods."

In addition, section 1.0 of the Supplemental Agreement requires the objective and strategy development process under Article X, section 4.0 to include a "review, discussion, and incorporation of multiple measures of student achievement and progress toward District-adopted and State-adopted standards[.]" Supplemental Agreement section 1.3 specifically requires that the objectives and strategies relating to student achievement scores be incorporated into teachers' evaluations.

The "Contributions to Student Outcomes/Support for Student Learning" section merely incorporates the changes to the evaluation process agreed to in the Supplemental Agreement in the most basic way. The agreement requires LAUSD to use both teachers' objectives and strategies on the issue of student outcomes in evaluations. This section simply inputs those two items onto the evaluation form. I find that this section of the form was consistent with the District's authority under the parties' agreements.[22] In other words, UTLA has failed to prove that LAUSD departed from existing policy by adding this section to the evaluation form.

3. Changes to the Composition of the Final Evaluation Report Form

To the extent that UTLA argues that LAUSD was required to bargain over purely structural or organizational changes to its evaluation form, regardless of content, that argument is rejected under the facts presented here. I find insufficient evidence to conclude that LAUSD's composition changes to the Final Evaluation Report form here satisfy the elements of the Anaheim Test for negotiability.

[22] There was no evidence or argument that the items in this section were used for some other purpose. As with all elements of the prima facie case for a unilateral change, UTLA, as the charging party, has the burden of demonstrating that a change occurred here.

It is clear that the first element of the test is met here. Even purely structural or organizational changes the Final Evaluation Report form straightforwardly relate to evaluation procedures, which is an enumerated subject of bargaining. (See EERA, § 3543.2, subdivision (a).) Neither party maintains otherwise.

Regarding the second element of the test, it is perhaps implicit that employers have an interest in the structure and organization of their own records, including personnel records. This interest was evident from the record in this case. For example, in or around 1985, LAUSD reformatted the Final Evaluation Report to incorporate Scantron technology, allowing the District to scan and maintain the data on the form automatically. The content of the 1985 form was not different from the prior form. LAUSD said that it created the "Observations of Teacher's Practice" section of the 2013-2014 Final Evaluation Report form in order to include all 15 of its TLF "focus elements" in one place. It placed the remainder of the assessment categories used in the past into the "Additional Professional Responsibilities" section. LAUSD said that it used this structure to better communicate its expectations about teacher performance.[23] I thus conclude that the format of its evaluation forms was of a significant concern to the District as part of its responsibility to manage its operations.

Employees' interest in the format of the Final Evaluation Report is less clear. While one might presume that employees' have a significant interest in the subject-matter of their performance evaluations, the same cannot be as easily said about the structure of the evaluation form. UTLA has not presented any evidence or argument that the new format of the Final Evaluation Report form has changed or has the potential to change either the evaluation

[23] It bears repeating that there was no evidence that LAUSD changed either the content of its performance expectations or administrator's discretion in giving overall evaluation scores. Both before and after LAUSD began using the 2013-2014 form, the assessment categories on the evaluation form were tied to the CSTP.

process or any other aspect of employee working conditions. Before and after the change the form includes the same subjects and the same three-level scoring system.

There is also no evidence that UTLA has ever requested negotiations over past changes to the Final Evaluation Report in its more than 30 year history representing the bargaining unit. While this fact is insufficient to find any waiver of the right to bargain, it does suggest that the issue is not so significant to UTLA or its membership and that UTLA did not believe that collective bargaining was a means to assert its views about evaluation forms. This, coupled with the fact that there is no apparent or asserted employee interest in the format of the evaluation form leads me to conclude that this issue was not of significant concern to employees. Therefore, UTLA has failed to prove that these organizational changes to the Final Evaluation Report form meet the second element of the Anaheim Test.

Finally, I also conclude that the changes purely to the format of the Final Evaluation Report form involved primarily matters within LAUSD's managerial prerogative which are not subject to negotiations. As explained above, employers have a significant interest in the composition and format of their personnel records. They similarly have an interest in directing how supervisory personnel communicate and interact with rank-and-file employees. When separated from the content of the forms, these interests predominantly concern managerial operations. There was no showing how these issues bear upon matters of importance to

employees. For these reasons, I conclude that LAUSD was not required to negotiate over purely format-based changes to the Final Evaluation Report form.[24]

UTLA has not proven that the changes to the 2013-2014 Final Evaluation Report changed anything substantive about the evaluation process or about the subject matter of evaluations. Nor has UTLA established that the purely organizational changes to the form were subject to bargaining. Therefore, its allegations in the amendment to the PERB complaint are dismissed.

II. LAUSD's Direct Communication With UTLA Bargaining Unit Members

An employer "bypasses" an exclusive representative when it communicates directly with employees to undermine the union's authority to represent unit members. (*Muroc Unified School District* (1978) PERB Decision No. 80, pp. 19-20.) PERB generally recognizes two theories of bypass. The first type occurs when an employer engages in direct bargaining with represented employees, such as presenting proposals to bargaining unit members not already exchanged and/or discussed with the bargaining representative. (*Trustees of the California State University* (2006) PERB Decision No. 1871-H (*CSU Trustees*), dismissal letter, p. 3.) Under this theory, an employer unlawfully negotiates directly with employees when it deals directly with its employees: (1) to create a new policy of general application, or (2) to obtain a waiver or modification of existing policies applicable to those employees. (*Walnut Valley Unified School District*, *supra*, PERB Decision No. 160, p. 6.)

[24] It is at least theoretically possible that changes to the composition of the evaluation form has effects or impacts that are within the scope of representation. (See *Alum Rock UESD*, *supra*, PERB Decision No. 322, p. 9.) However, there is no obligation to bargain over purely speculative effects. (*Trustees of the California State University* (2012) PERB Decision No. 2287-H, p. 12, citations omitted.) Rather, allegations should be "specific, logical, and fact-based." (*Id*. at pp. 18-19.) Here, there was no evidence or allegation about the effect the organizational changes had on UTLA members. I decline to speculate on what those impacts might be.

The second generally recognized theory of bypass is where the employer engages in a "campaign to disparage the exclusive representative's negotiators so as to drive a wedge between union representation and the bargaining unit employees." (*CSU Trustees*, *supra*, PERB Decision No. 1871-H, dismissal letter, p. 3, citing *Safeway Trails, Inc.* (1977) 233 NLRB 1078, 1081-82.)

In this case, the PERB complaint, as amended, asserts that LAUSD bypassed UTLA as the exclusive representative of the certificated unit by communicating directly with unit members through the May 24, 2013 letter and by another communication on June 11, 2013. There was no evidence at hearing about any communication sent or received on June 11. Focusing instead on the May 24 letter, UTLA fails to establish that LAUSD negotiated directly with unit members. Rather, the record shows that the letter merely announced its final decision to implement a four-level observation rating system and to recruit TGDC Lead Teachers. Likewise, nothing in the letter could be interpreted as disparaging UTLA or its negotiators. Setting aside for the moment the unlawful nature of LAUSD's decision to implement the new rating system, merely announcing its decision to UTLA's members does not amount to an unlawful bypass. For these reasons, UTLA has failed to establish that LAUSD committed an unlawful bypass.[25] This claim is therefore dismissed.

REMEDY

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

> The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair

[25] UTLA does not mention the bypass claim in either its opening statement, at hearing, or in its closing brief. Nor does anything in the opening statement or brief indirectly support this claim.

> practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

In this case, it has been found that LAUSD violated EERA by unilaterally imposing a four-level observation rating system as part of the evaluation process for UTLA members. In *CSEA v. PERB*, *supra*, 51 Cal.App.4th 923, 946, the court held:

> Restoration of the status quo is the normal remedy for a unilateral change in working conditions or terms of employment without permitting bargaining members' exclusive representative an opportunity to meet and confer over the decision and its effects. [Citation.] This is usually accomplished by requiring the employer to rescind the unilateral change and to make employees "whole" from losses suffered as a result of the unlawful unilateral change.

(See also *Desert Sands Unified School District* (2010) PERB Decision No. 2092, p. 33 (*Desert Sands USD*), p. 31.)

Restoration of the status quo is an appropriate remedy in this case. Accordingly, LAUSD is ordered to rescind the implementation of its four-level observation rating system, as it applies to the certificated bargaining unit, and to make all certificated employees who were affected by that rating system whole for any financial losses incurred as a direct result of the unilateral change. Any financial losses shall be augmented by interest at a rate of 7 percent per annum. (*Desert Sands USD*, *supra*, PERB Decision No. 2092, p. 34.)

The Board has found that it is also appropriate in these circumstances to order the employer to cease and desist from violating EERA and to post a notice of the violation. (*Desert Sands USD*, *supra*, PERB Decision No. 2092, p. 33, citing *Davis Unified School District, et al.* (1980) PERB Decision No. 116.) These remedies effectuate the purposes of EERA by informing employees that the controversy over this matter has been resolved and that the employer will comply with the ordered remedy. (*Ibid*.) The notice posting shall include

both a physical posting of paper notices at all places where certificated bargaining unit members are customarily placed, as well as a posting by "electronic message, intranet, internet site, and other electronic means customarily used by [LAUSD] to communicate with its employees in the bargaining unit." (*Centinela Valley UHSD*, *supra*, PERB Decision No. 2378, pp. 11-12, citing *City of Sacramento* (2013) PERB Decision No. 2351-M.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Los Angeles Unified School District (LAUSD) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. LAUSD violated EERA by unilaterally implementing a four-level observation rating system on or around March 24, 2013. All other claims in the complaint, as amended, are dismissed.

Pursuant to section 3451.5, subdivision (c) of EERA, it hereby is ORDERED that LAUSD, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally implementing policies within the scope of representation.

2. Interfering with employees' right to be represented by their chosen employee organization.

3. Interfering with the right of United Teachers Los Angeles (UTLA) to represent its members in negotiations.

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

1. Rescind any and all use of the four-level observation rating system, as applied to certificated bargaining unit members.

2. Compensate employees in the certificated bargaining unit for any financial losses incurred as a direct result of all unilaterally implemented four-level observation rating system. Any financial losses should be augmented by interest at a rate of 7 percent per year.

3. Within 10 workdays of the service of a final decision in this matter, post copies of the Notice, attached hereto as an appendix, at all work locations where notices to employees in the certificated bargaining unit customarily are posted. The Notice must be signed by an authorized agent of LAUSD, 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. The Notice shall also posted by electronic message, intranet, internet site, and other electronic means customarily used by LAUSD to communicate with employees in the certificated bargaining unit.

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

Right to Appeal

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

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 or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 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, 32091 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).)

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-5824-E, *United Teachers Los Angeles (UTLA) v. Los Angeles Unified School District (LAUSD)*, in which all parties had the right to participate, it has been found that LAUSD violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by unilaterally implementing a four-level observation rating system on or around March 24, 2013.

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

A. CEASE AND DESIST FROM:

1. Unilaterally implementing policies within the scope of representation.

2. Interfering with employees' right to be represented by their chosen employee organization.

3. Interfering with the right of United Teachers Los Angeles (UTLA) to represent its members in negotiations.

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

1. Rescind any and all use of the four-level observation rating system, as applied to certificated bargaining unit members.

2. Compensate employees in the certificated bargaining unit for any financial losses incurred as a direct result of all unilaterally implemented four-level observation rating system. Any financial losses should be augmented by interest at a rate of 7 percent per year.

Dated: _____ LOS ANGELES UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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