



**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD**

OROVILLE SECONDARY TEACHERS
ASSOCIATION, CTA/NEA,

Charging Party,

v.

OROVILLE UNION HIGH SCHOOL DISTRICT,

Respondent.

CASE NO. SA-CE-2843-E

PERB Decision No. 2627

February 22, 2019

Appearances: California Teachers Association, by Jennifer Weiser Bezoza, Attorney, for Oroville Secondary Teachers Association; Dannis Woliver Kelley, by Diana Halpenny, Attorney, for Oroville Union High School District.

Before Banks, Shiners, and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Charging Party Oroville Secondary Teachers Association, California Teachers Association/National Education Association (OSTA or Association) and Respondent Oroville Union High School District (District) to the proposed decision of an administrative law judge (ALJ). The complaint, as amended, alleged that in the midst of contract negotiations the District: (1) violated the Educational Employment Relations Act (EERA)¹ section 3543.1, subdivision (c), when it denied OSTA's request that its bargaining team members be released for a full day to prepare for an upcoming bargaining session, and (2) violated section 3543.5, subdivision (c) when it unilaterally changed its policy concerning leave time by requiring certain members of OSTA's bargaining team to use contractual

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

Personal Necessity Leave while they were away from work to participate in Association business. Following a formal hearing, the ALJ dismissed the released time allegation but found that the District committed the alleged unilateral change.

OSTA's exceptions can be distilled into three main arguments. First, OSTA excepts to the ALJ's alleged failure to apply a reasonableness standard to its request for released time. Second, OSTA excepts to the ALJ's conclusion that *San Mateo Community College District* (1993) PERB Decision No. 1030 (*San Mateo*) necessitated dismissal of its released time claim. Finally, OSTA excepts to the ALJ's conclusion that when the parties included Article 4.6 in their collective bargaining agreement (CBA), they agreed to a more restrictive use of released time than provided for in EERA section 3543.1, subdivision (c), by excluding negotiations preparation from released time coverage. OSTA also excepts to certain factual findings underlying the ALJ's conclusions.

While the District agrees with the ALJ's conclusion that it did not unlawfully refuse to grant reasonable released time, the District excepts to the ALJ's other conclusions of law and to the omission of certain findings of fact. Specifically, the District excepts to the ALJ's conclusion that negotiations preparation is eligible for statutory released time subject to reasonableness. The District also excepts to the ALJ's conclusion that it implemented an unlawful unilateral change by requiring certain members of OSTA's bargaining team to use Personal Necessity Leave to participate in Association business.

We have reviewed the entire record in this matter, including both parties' exceptions and responses thereto. Based on that review, we affirm in part and reverse in part the proposed decision.

FINDINGS OF FACT

Background

OSTA and the District were parties to a CBA with effective dates of May 27, 2015 through June 30, 2016. The CBA provided several types of leave that are relevant to this case.

Article 4.6 governed released time for OSTA's bargaining team and stated:

The District shall provide substitutes for five (5) representatives of the Association's bargaining team, without loss of compensation, to attend negotiations, impasse proceedings, and fact-finding hearings.

The District bore the full cost of this released time, including payment of substitute teachers to cover the released teachers' classes. There was no limit on the amount of released time a member of OSTA's bargaining team could take under this CBA provision. According to the parties' practice, released time included time spent caucusing during negotiations, and there was no limit on the amount of time either party could caucus. However, the record does not reflect any instances prior to January 2016 in which OSTA requested in advance that its bargaining team be released for a full day to prepare for negotiations.

Article 17.9 governed Association Leave and provided:

- A. Each Association representative shall be entitled to three (3) days of professional leave without loss of pay for conducting the business of, or representing, a recognized professional educational organization at a local, state or national conference.
- B. All expenses, in addition to substitute payment, shall be borne by the Association.
- C. The Association President or his designee shall notify the Superintendent and/or Principal at least three (3) days in advance which unit members will be on professional leave.

- D. The leave granted by virtue of this policy shall not be deducted from any other leave provided for by State law and/or this Agreement.
- E. Leave granted under this section is not cumulative from year to year.

When an employee took Association Leave, the District charged OSTA for the cost of the substitute used to cover the employee's absence. Although Article 17.9 remained unchanged at all times relevant to this case, OSTA attempted at least once to modify its terms. On December 3, 2014, OSTA submitted a proposal to modify Article 17.9.A as follows:

In a given fiscal year, The [sic] OSTA Executive Board, or their designee, shall be entitled to a combined total fifty (50) days of Organizational Leave. In addition, the OSTA bargaining team will be entitled to one additional release day for each scheduled day of negotiations.

On February 3, 2015, the District countered with the following proposal:

In a given school year, OSTA shall be entitled to use up to fifty (50) days of release time for elected OSTA officers for purposes of OSTA business. This leave is in addition to the required reasonable released time for negotiations and grievance processing provided under the EERA (Gov't Code section 3540 et seq.)

Procedures for the use of days under this section are as follows:

1. OSTA shall provide to the district at the start of each school year the list of names of the elected officers who may use the release days.
2. OSTA shall provide the district with as much advance written notice of the requested release days under this section as possible, but at least five (5) days prior to usage, unless a shorter time is authorized by the superintendent.
3. The officer who is released shall be paid their normal daily rate of pay and shall accrue retirement credit for leaves under this section. The district and the employee

shall make their normal respective retirement contributions.

4. Upon payment by the district of the employee's salary, the district shall submit an invoice to OSTA with the amount OSTA is required to reimburse the district. The reimbursement shall include all compensation paid to or on behalf of the employee, including the employee's gross salary, salary-driven costs, the district's pro-rata retirement contribution on behalf of the employee, and a pro-rata portion of the employee's health benefits.

OSTA believed the District's counterproposal to be cost-prohibitive. Moreover, while discussing the District's counterproposal, OSTA came to believe that EERA already required the District to grant reasonable released time for negotiations preparation. OSTA therefore withdrew its Association Leave proposal.

Article 17.15 governed Personal Necessity Leave and provided in relevant part:

- A. Any unit member may, at his/her election, use seven (7) days of his/her paid sick leave allotment during each school year in case of personal necessity. (Ed. Code § 44981.)

OSTA's bargaining team members had, at times, used Personal Necessity Leave to engage in Association business, including preparing for negotiations.

The District tracked teachers' outstanding leave credits by using a computerized system called "AESOP." At the time in question, teachers contacted the District employee responsible for securing substitute teachers (the sub-finder) when they needed to take leave. The sub-finder would then request a substitute and input the leave into AESOP using a drop-down menu of predefined values, such as Family Medical Leave Act leave, jury duty, or sick leave. For members of OSTA's bargaining team, the drop-down menu in AESOP included Negotiations and Association Leave as part of the predefined values. Negotiations had no balance while Association Leave had a balance of three days annually, in accordance with the

CBA. Other employees could contact the District if they were eligible for Association Leave, and the District would add that option to the employee's drop-down menu along with a corresponding balance.

The Current Dispute

OSTA and the District negotiate annually over salary, pursuant to CBA reopeners. In addition to salary, each party may reopen two additional provisions of the CBA. For the 2015-2016 school year, OSTA chose leaves and class size. The District chose evaluations and benefits. The parties engaged in 11 bargaining sessions over the course of the 2015-2016 school year.

During this period, OSTA's bargaining team consisted of OSTA President Teisha Hase (Hase), Bargaining Chair and lead negotiator Scott Martin (Martin), Leanna Felardo (Felardo), Dave Gnesda (Gnesda), and Tammy Boehme (Boehme). Mark Leach (Leach), CTA's business agent, provided representational services to OSTA. The District's lead negotiator was Diana Halpenny (Halpenny).

OSTA's bargaining team met before the start of the school year on August 8, 2015, to develop proposals for a bargaining session later that month. Accordingly, the bargaining team did not use any leave to attend this preparation session.

The parties met for bargaining on August 26, 2015. OSTA initially proposed to increase salary by 9.75 percent retroactive to July 1, 2015 and to enhance teachers' sick leave accrual. The District presented a proposal to develop new evaluation procedures and maintain benefit levels. In addition to the issues contained in the formal proposals, the parties also discussed conforming sick leave provisions to new law, new teacher orientation, medical benefits, and sports coaches' stipends.

The parties next met for bargaining on September 15, 2015. Prior to the session, the parties reached an agreement on new teacher orientation. At the session, the parties exchanged two rounds of counterproposals on the open articles and narrowed their differences somewhat. OSTA reduced its salary increase proposal to 8.35 percent retroactive to July 1, 2015, while the District increased its salary proposal to 4 percent retroactive to July 1, 2015. The parties also discussed including longevity steps on the salary schedule and the salary of a social worker position in the bargaining unit.

The parties next met and exchanged counterproposals on October 6, 2015. During this session, the District's negotiators stated they had no authorization to offer more than a 4 percent salary increase. The parties additionally discussed budget figures and a shortage of substitutes.

OSTA's bargaining team met on November 10, 2015 to prepare for the next bargaining session. The parties originally scheduled this date for bargaining, but OSTA cancelled the session based on the District's representation that it lacked authority to make a more generous salary proposal. The bargaining team used Association Leave on this date. It did not request released time because it also engaged in Association business that was not necessarily related to bargaining, including organizing, planning site visits, and creating a presentation for the District's Governing Board.

The parties next met for bargaining on December 1, 2015. OSTA presented a proposal to increase salary in the 2015-2016 school year by 7 percent followed by another increase the following school year that would be based on "the percentage increase on the FCMAT^[2]

² FCMAT stands for the Fiscal Crisis Management and Assistance Team.

calculator line (change over prior year), at the time of the P2^[3] report, to be paid retroactively to July 1, 2016.”

The District responded with a complex proposal. Unlike its previous salary proposals that entailed simple percentage increases, the District’s new counterproposal provided for a 4 percent salary increase in 2015-2016, followed by another increase the next year based on the percentage increase on the FCMAT calculator line; multiplied by the cost of a 1 percent increase to the salary schedule; and adjusted by the net decrease or increase in the cost of step and column,⁴ the District’s State Teachers Retirement System contribution, and health and welfare benefits including OSTA retiree benefits costs. The remaining dollar figure then would be divided by the cost of a 1 percent salary increase and the resulting figure would be the percentage increase applied to the 2015-2016 salary schedule. OSTA had difficulty evaluating the proposal because, at that time, the District had not provided the values for the figures by which the formula was to be adjusted. In the same session in which the District made this proposal, the parties agreed they might be near impasse on salary, thereby adding pressure on OSTA to evaluate the proposal and determine how to proceed. In addition to wages and the other issues contained in the formal proposals, the parties discussed budget figures and the possible addition of employees to the bargaining unit.

Thereafter, the parties met for bargaining on January 6, 2016. The District proposed to modify certain leave provisions in Article 17 and OSTA proposed a 7 percent salary increase in 2015-2016, followed by a 1.5 percent increase the following year. The District offered a

³ The P2 report demonstrated what portion of the average daily attendance funds the District was allowed to retain.

⁴ “Step and column” refers to increments on the salary schedule. Customarily, steps denote the number of years a teacher has worked in a district and columns denote the number of secondary education credits a teacher has completed.

counterproposal similar in most respects to its December 1, 2015 proposal, except for the final step, which guaranteed a minimum 1.5 percent raise and conditioned any further raise on the aforementioned complex formula. OSTA learned for the first time at this session the actual values of the figures on which the formula was to be based. The parties scheduled their next bargaining session for February 2, 2016.

Following the January 6, 2016 bargaining session, OSTA's bargaining team members determined they needed one full day to prepare for the February 2, 2016 session given the complexity of issues and the parties' continued acknowledgment of the possibility of impasse on salary. To assess the District's salary proposal, the bargaining team also needed time to review new budget information including a first interim budget report, the Governor's budget, and the revised FCMAT calculator.⁵ In addition to the District's new salary counterproposal, OSTA had to evaluate proposals related to the other open articles, including a new issue related to individual sports coaching contracts.

In this round of bargaining, OSTA had not previously requested a full day to consider the District's counterproposals or to review financial data. Instead, the team had most often performed such functions on days scheduled for negotiations, before the parties met with one another and during lengthy caucus periods held periodically in the middle of such sessions.⁶ In this instance, however, the team determined that it would not be constructive to wait until February 2, 2016 to consider its response to the District's new counterproposals.

⁵ OSTA received the first interim budget report on December 15, 2015, but the Governor's budget was not released until around January 10, 2016, and the FCMAT calculator could not be revised until after that date.

⁶ It was not practical for the bargaining team to prepare during breaks in the workday because they worked at different school sites, and it was similarly difficult for them to meet during non-work time given their various family schedules.

At the time, Martin was responsible for notifying the District whenever the bargaining team needed substitutes. His practice was to notify the District's sub-finder, who processed the request and entered the absence in AESOP. Martin typically did not tell the sub-finder what type of leave to charge the bargaining team and relied on the District to make the proper designation. The District also did not have a practice of contacting OSTA to ask why it was requesting substitutes.

On January 11, 2016, Martin sent an e-mail to Jaymie Martinez (Martinez), the District's sub-finder, with the subject line "negotiations." The e-mail stated:

The OSTA bargaining team is going to prepare for negotiations on January 20. We will need subs for myself, David Gnesda, Teisha Hase, Leanna Felardo, and Tammy Boehme.
Thanks, Scott.

Martin testified that his intent was to ask for released time so the bargaining team could prepare for the February 2, 2016 bargaining session, though he did not specify this to Martinez.

On January 12, 2016, Martinez replied to Martin stating:

I have entered you all in to Aesop so I can work on getting subs . . . Just let me know if the date changes and I make [sic] necessary adjustments.

Martinez entered the absence as "Negotiations" from the drop-down menu in AESOP.

On January 13, 2016, Martin sent an e-mail to Martinez with the subject line "negotiations prep." The e-mail stated:

David had a conflict on the 20th so we are rescheduling to January 27. Is it easier for you to cancel our subs on the 20th (not for David) and reschedule for the 27th? Or is it easier for you if we all do it on Aesop ourselves?

Martinez replied later that day stating she would take care of it for the bargaining team.

On January 27, 2016, the bargaining team met at the CTA office for a full-day review of the outstanding proposals and possible paths toward an agreement. At approximately 7:40 a.m., Martin received a call from his principal inquiring where he was and informing him that the District had cancelled his substitute. Martin contacted Deana Fallen (Fallen), the District's Senior Personnel Technician, to inquire about his substitute. Fallen informed him the District had cancelled substitutes for the entire bargaining team. She explained that an assistant to Superintendent Corey Willenberg (Willenberg) had noticed the bargaining team was coded in AESOP as out for negotiations, but no negotiations were scheduled for that day. Martin explained that the team was in a full-day meeting to prepare for the next session. By this time, however, the school day had already begun, and the District was unable to find substitutes for all members of the bargaining team.⁷ Hase then called District Chief Business Officer Susan Watts (Watts) to say she was upset that the District cancelled the substitutes. Watts replied that it was an honest mistake.

The District did not change the leave designation back to Negotiations Leave in AESOP. Rather, Fallen designated the January 27, 2016 absences of Martin, Gnesda, and Boeme as Association Leave. Hase and Felardo had already used their allotted three days of Association Leave that school year so Fallen designated their absences as Personal Necessity Leave. Fallen testified that she believed it was the best option for Hase and Felardo because she thought the only alternative would have been to designate their absences as unpaid. Fallen informed Hase and Felardo of the designation by e-mail, as follows:

Your 1/27/16 absence will be charged to [Personal Necessity Leave]; you have already used all of your allowed association leave for the school year.

⁷ Martin's colleagues covered his classes and received compensation time for doing so.

Fallen did not contact Hase or Felardo to seek or obtain their approval prior to designating the absences as Personal Necessity Leave, and Hase and Felardo did not contact Fallen after receiving her e-mail, nor did they ask Willenberg for extra Association Leave days. Willenberg testified that Fallen's actions were in accordance with the terms of the CBA.

After addressing the issues surrounding their cancelled substitutes, OSTA's bargaining team members met as planned on January 27, 2016. They spent the bulk of their time discussing the District's novel salary proposal, as that was the most important issue and the one most likely to create an overall impasse. To this end, they reviewed newly available financial documents including the first interim budget report (which showed the State would cover a larger portion of gap funding than the District had initially anticipated), the Governor's budget, and the updated FCMAT calculator. The team also discussed other outstanding bargaining issues in dispute, as well as paths toward agreement that had worked in other school districts. One such strategy was the use of non-binding "supposals" in conjunction with both parties agreeing not to take any notes of what was said during the session. The bargaining team also discussed the possibility of developing a collapsed salary schedule as another potential path toward agreement.

On February 2, 2016, when the parties next met, Leach asked to meet privately with Halpenny and Willenberg in a sidebar away from the negotiations table. Leach told them he had prepared a letter asking the District to pay for OSTA's negotiations preparation on January 27, 2016, as EERA section 3543.1 covered negotiations preparation time.⁸ Leach also

⁸ Willenberg testified that Leach never explained what OSTA did on January 27, 2016 to justify the released time. Leach took the stand as a rebuttal witness, testifying that he did explain to Willenberg at their February 2, 2016 sidebar the reasons why the full-day meeting was necessary and appropriate. The ALJ found Leach's rebuttal testimony to be improper

stated that OSTA's negotiations preparation time constituted costs which were to be reimbursed to the District as State-mandated costs. Willenberg or Halpenny responded that reasonable released time was a subject of negotiation and that the District had not received its State-mandated reimbursement costs for years. The parties then met for negotiations, and the District agreed to OSTA's suggestion that they use supposals and not take notes during the session. This strategy helped the parties reach a tentative agreement on salary by the end of the month.

On February 18, 2016, Leach sent the previewed letter to Willenberg, stating that preparations for negotiations fell within EERA's released time provision. The letter also demanded that the District reinstate Hase's and Felardo's Personal Necessity Leave, and that in the future, the District pay the entire cost of the bargaining team's absences when they were preparing for negotiations. Willenberg did not respond to Leach's letter.

DISCUSSION

I. The Released Time Allegation

EERA provides that "[a] reasonable number" of union representatives "shall have the right to receive reasonable periods of released time without loss of compensation when meeting and negotiating and for the processing of grievances." (EERA, § 3543.1, subd. (c).) EERA defines "meeting and negotiating" to include meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreements on matters within the scope of representation. (*Id.*, § 3540.1, subd. (h).)

rebuttal testimony that could have been offered in OSTA's case-in-chief, but noted that Leach's rebuttal testimony would not impact the outcome of this decision. OSTA excepts to the ALJ's evidentiary ruling. We need not reach OSTA's exception, as we agree with the ALJ that Leach's rebuttal testimony would not impact the outcome of this decision.

Relying on a long line of Board precedent that broadly interprets the terms “meeting and negotiating” to include the entire negotiating process, the ALJ found that negotiations preparation may be eligible for released time under EERA section 3543.1, subdivision (c), subject to reasonableness. OSTA urges us to uphold this principle, arguing that preparing for negotiations is integral to the negotiations process and functionally indistinguishable from caucusing, which we have noted falls within EERA’s released time provision. The District disagrees with the ALJ’s conclusion that negotiations preparation is eligible for statutory released time.

A. EERA’s Released Time Provision Includes Reasonable Preparation Time

When the Board has had occasion to address the scope of EERA section 3543.1, subdivision (c), it has taken a broad view of reasonable released time. In *Magnolia School District* (1977) EERB Decision No. 19,⁹ the employer had a policy of restricting released time to the 30 minutes of nonteaching time at the end of the school day, and refused the union’s request for released time during the instructional day. The Board found that the employer’s rigid and inflexible policy violated EERA because “reasonable released time” under section 3543.1, subdivision (c) required the employer to assume an open attitude in its consideration of the amount of released time to be allowed and any changing circumstances. (*Id.* at p. 5.)

Shortly thereafter, the Board affirmed its expansive interpretation of EERA section 3543.1, subdivision (c) in *Sierra Joint Community College District* (1981) PERB Decision No. 179 (*Sierra*). In *Sierra*, the members of the employee organization’s bargaining team arranged their teaching schedules so that two afternoons each week were clear for negotiations. At the outset of negotiations, the employee organization proposed a released time arrangement

⁹ Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

that would have allowed bargaining team members a reduction from their normal teaching loads. (*Id.* at p. 2.) The employer rejected the proposal, arguing, in part, that statutory released time was required only during periods of actual meeting and negotiating. (*Id.* at p. 3.) The Board adopted a broader interpretation of the phrase “meeting and negotiating” in EERA section 3543.1, subdivision (c), and held that “meeting and negotiating” is not limited to the time the parties are actually in session and instead encompasses time spent in the “negotiating process.” (*Id.* at pp. 5-6; see also *State of California (Department of Personnel Administration)* (1993) PERB Decision No. 995-S (*DPA*), p. 9 [statutory released time can be used for preparation time depending on the circumstances].) Rather than employ a categorical approach, in *Sierra* we held that the amount of released time that is reasonable is a question of fact and depends on the particular circumstances of the case. (*Sierra, supra*, PERB Decision No. 179, p. 7; see also *DPA, supra*, PERB Decision No. 995-S, adopting proposed decision at pp. 27-32 [applying reasonableness standard to claim of denial of statutory released time for negotiations preparation].)

In *Burbank Unified School District* (1978) PERB Decision No. 67 (*Burbank*), on which the District relies, the Board found that the employer’s refusal to grant released time to the union’s bargaining team for rest and recuperation after a 14-hour mediation session that ended in the early hours of a weekday morning did not, under the circumstances of the case, violate EERA. (*Id.* at p. 4.) The Board went on to state that EERA section 3543.1, subdivision (c), limits the purposes for which a school district must grant released time and does not require it to grant released time for all activities related to negotiations. (*Id.* at pp. 4-5.) The Board explained:

Meeting and negotiating includes the time spent at the negotiating table. It includes mediation and factfinding, which are

continuations of the negotiating process. It also includes caucusing, which is an integral part of the process. Meeting and negotiating does not include the time necessary to prepare for negotiations. Nor, under normal circumstances, does it include rest and recuperation time after a negotiations session is concluded.

(*Id.* at p. 5.)

The Board's statement that statutory released time categorically excludes preparation time deviates from our broad interpretation of "meeting and negotiating" in EERA section 3543.1, subdivision (c) as including the entire negotiating process. We therefore reject *Burbank's* categorical approach for several reasons.¹⁰

First, since *Burbank* was decided, the Board has repeatedly declined any categorical determination of the scope of the released time requirement in favor of an approach that considers the factual circumstances of each case. We have thus rejected the very narrow construction of "meeting and negotiating" that *Burbank* suggests, preferring a more nuanced understanding that collective bargaining is a process and that the time employees are excused from duty without loss of compensation need not "precisely coincide" with the time actually spent in face-to-face negotiations. (*Sierra, supra*, PERB Decision No. 179, p. 5; see also *Magnolia School District, supra*, EERB Decision No. 19, p. 5 and *Muroc Unified School District* (1978) PERB Decision No. 80, pp. 10-14 [describing various considerations to

¹⁰ *Burbank's* suggestion that preparation time is not eligible for statutory released time was not raised by the facts of the case, nor was it necessary to the Board's resolution of the "central issue" before it regarding rest and recuperation. (*Burbank, supra*, PERB Decision No. 67, p. 4.) Hence, we are not bound by this dicta. (*San Marcos Unified School District* (2003) PERB Decision No. 1508, pp. 21-22, citing *United Steel Workers of America v. Board of Education* (1984) 162 Cal.App.3d 823, 834 [PERB, like the courts, is not bound by dicta].) However, as we explain below, we reject this statement on substantive, not technical, grounds.

determine the reasonableness of both the amount of released time granted and the number of employees to be released].)

Second, it would elevate semantics over function to categorically distinguish between time spent in “caucus” and time denominated as “negotiations preparation” without considering the facts of each case. When the OSTA bargaining team met on January 27, 2016, their tasks—analyzing relevant information provided by the District, drafting counterproposals, and, most importantly, considering paths toward agreement in the face of the parties’ recent discussions of impasse—could be described as either “caucusing” or “negotiations preparation” depending upon whether they occurred on a day when the parties met for negotiations.

Arbitrarily differentiating between the compensability of caucus time and preparation time without examining the surrounding circumstances would not advance the efficiency of negotiations or harmonious labor relations. It is not efficient to require in all instances that the exclusive representative’s bargaining team wait until the day of a scheduled bargaining session to call for a caucus. Indeed, doing so would incentivize behavior that the employer’s bargaining team could potentially see as upsetting—being made to wait in another room for most or all of a day for a caucus that was largely predictable. While such caucuses by both employers and unions may be common, a categorical rule requiring the parties to meet at the bargaining table before the union calls a full-day caucus to prepare for negotiations, simply so that such preparation time is compensable under the EERA, does not efficiently move the negotiations process forward.

The false dichotomy between preparation and caucusing is particularly evident here, where the Association’s negotiations preparation created both the procedural and substantive

path forward that led to an agreement. In fact, the District's proposed rule would, on average, make negotiations more protracted and less productive. This would be a hindrance to the negotiating process, as well as to a good faith relationship between parties. (See *Anaheim Union High School District* (1981) PERB Decision No. 177, pp. 7-8 [policy underlying EERA section 3543.1, subdivision (c) is "the intent that school negotiations proceed expeditiously and an acknowledgment that such a result is more readily obtained if employees are relieved from work for negotiations"].) For these reasons, we reject *Burbank's* suggestion that negotiations preparation time is not compensable released time under section 3543.1, subdivision (c) as a matter of law.

In light of the foregoing, we clarify our precedent by holding that time necessary to prepare for negotiations is a part of the negotiations process and, thus, qualifies for statutory released time under EERA section 3543.1, subdivision (c), subject to reasonableness. To allay any concerns that union representatives may now abuse the statutory right to released time for negotiations preparation, we note two important points. First, use of statutory released time for negotiations preparation is subject to a reasonableness standard, which serves as a check on excessive use of such time. Second, an employee organization and a school district employer may agree to a particular amount of released time for preparation. (See *Gilroy Unified School District* (1984) PERB Decision No. 471, p. 5 ["the parties may negotiate what constitutes a 'reasonable' number of representatives and a 'reasonable' amount of release time"].) Such an agreement would provide even greater clarity regarding reasonable use of released time for bargaining preparation.

B. OSTA Did Not Waive The Right to Be Released For Preparation Time

The ALJ concluded that although the District's refusal to grant released time for negotiations preparation would normally violate EERA section 3543.1, subdivision (c), the District did not violate the Association's right to released time because the Association had allegedly agreed that released time would not be used for such preparation. Citing *San Mateo, supra*, PERB Decision No. 1030, the ALJ explained that EERA's released time provision is suspended during the term of a CBA.

In *San Mateo, supra*, PERB Decision No. 1030, the Board analogized EERA section 3543.1, subdivision (c) to corollary provisions in the Higher Education Employer-Employee Relations Act, section 3560 et seq. (HEERA) and the Ralph C. Dills Act, section 3512 et seq. (Dills Act) to conclude that released time under EERA section 3543.1, subdivision (c) is to be determined in accordance with the parties' memorandum of understanding when one is in effect. (*San Mateo, supra*, PERB Decision No. 1030, p. 17; see HEERA, § 3569; Dills Act, § 3518.5.) We need not determine, based on the facts before us, whether *San Mateo* was correctly decided because the CBA between the District and OSTA does not exclude negotiations preparation time from released time eligibility.

Article 4.6 of the CBA states: "The District shall provide substitutes for five (5) representatives of the Association's bargaining team, without loss of compensation, to attend negotiations, impasse proceedings, and fact-finding hearings." The evidence supports a finding that by including Article 4.6 in their CBA, the parties limited to five the number of bargaining team members entitled to released time, but did not otherwise limit statutory rights to reasonable released time. (See *Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, p. 18

[“inclusion in a collective bargaining agreement of statutory rights established by EERA—such as the right to access or release time—does not ‘replace or set aside’ those provisions of the Act, but augments and reinforces them”].) Although the provision is silent as to preparation time, it is undisputed that the District compensates bargaining team members pursuant to Article 4.6 for their caucus time. As noted *ante*, there is no meaningful distinction between caucus time and the preparation time at issue here. We thus find no basis in the language of Article 4.6 upon which to conclude that the parties intentionally excluded preparation time from the scope of contractual released time.

Nor does the parties’ past conduct under Article 4.6 support the ALJ’s interpretation of that provision. The instant dispute arises because on January 27, 2016, OSTA for the first time requested released time for “negotiations preparation.”¹¹ Because the Association had never before made such a request, there is no evidence about how the District treated such requests in the past. Accordingly, the parties’ past conduct does not support finding that Article 4.6 excludes preparation time. (See *Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 753 [the parties’ performance under the contract may be evidence of their intent].)

Nor is there any evidence that OSTA intentionally relinquished its right to statutory released time for negotiations preparation. Waivers of statutory rights must be “clear and unmistakable.” (*San Marcos Unified School District, supra*, PERB Decision No. 1508, pp. 27-28.) The affirmative defense of establishing a statutory waiver rests with the District. (*Los Angeles Unified School District* (2017) PERB Decision No. 2518, p. 40.) The record establishes that Article 4.6 had existed in the parties’ CBA for at least 15 years before the

¹¹ That OSTA had not previously requested released time for negotiations preparation did not preclude it from asking for released time on January 27, 2016, as the parties had no clear and consistent past practice in that respect.

events at issue here. The evidence also shows that on December 3, 2014, OSTA withdrew a released time proposal which explicitly included negotiation preparation time because it came to believe then that EERA section 3543.1, subdivision (c), already granted it a right to such time. Because prior to December 3, 2014, the Association did not believe it had a statutory right to released time for negotiations preparation, it could not have knowingly and intentionally relinquished that right by agreeing to Article 4.6 many years before that date.

C. OSTA's Released Time Request Was Reasonable

Having found that neither EERA nor the parties' CBA categorically precluded OSTA's bargaining team from taking released time for negotiations preparation, we consider whether OSTA's request was reasonable under the circumstances. OSTA presented substantial evidence to demonstrate why it was reasonable to request a single day of released time between bargaining sessions. OSTA requested one day of released time to prepare for negotiations well into a bargaining cycle that began the prior August. Six bargaining sessions had already taken place. In the context of the entire bargaining cycle that ultimately spanned 11 bargaining sessions in 2015-2016, the record reflects that the request was reasonable for a number of reasons.

First, the District's January 6, 2016 salary proposal was based on a different concept than previous salary proposals, and required an analysis for a complex, multi-step formula and multiple variables of unknown value to OSTA. It was only at the January 6, 2016 session that OSTA learned the actual values of the figures for which the formula was to be adjusted. OSTA was thus unable to evaluate the import and effects of the District's proposal until after this session concluded.

Second, it was only after the January 6, 2016 session that OSTA had access to most of the new budget information that was integral to analyzing the District's salary proposal. Although the District sent Leach the first interim budget report on December 15, 2015, the Governor's budget was not available until around January 10, 2016, and the parties could not revise the FCMAT calculator until after release of the Governor's budget. The District's salary proposal, in turn, was anchored to the percentage increase on the FCMAT calculator line.

Third, following the January 6, 2016 session, OSTA had to craft responses to several other outstanding proposals, including family leave, the coaches' contract, and incorporation of new members into the unit.

Finally, the parties were deep into the 2015-2016 bargaining cycle when the January 6, 2016 session closed with the specter of impasse looming. Indeed, it is at this critical late stage in the negotiations that any union bargaining team must make the difficult and tricky assessment of what elements must be included in the employer package for membership to ratify it and avoid ensuing impasse procedures.

For all these reasons, it was reasonable in this case for OSTA to spend one full day preparing for the next bargaining session set for February 2, 2016. While OSTA could have foregone its preparation day and instead waited until the February 2, 2016 session to caucus and then analyze the District's proposals, it instead took the more reasonable path of requesting a single day of released time to fully prepare for the bargaining session ahead.

The District argues that we cannot hold it responsible because it was not aware that OSTA had requested released time under EERA section 3543.1, subdivision (c). Specifically, the District claims that OSTA failed to explicitly request released time for negotiations preparation before the bargaining team's January 27, 2016 meeting. Regardless, the District

was aware of OSTA's intent to utilize statutory released time by February 2, 2016, at the very latest, during Halpenny's and Willenberg's sidebar conversation with Leach. Accordingly, the District could still have analyzed whether OSTA's request was reasonable; instead, it categorically rejected the bargaining team's eligibility for released time.

Because the District failed to provide OSTA's bargaining team a reasonable amount of released time for negotiations preparation, we conclude that it violated EERA section 3543.1, subdivision (c). Its conduct also constituted a derivative violation of EERA sections 3543.5, subdivisions (a) and (b).

II. The Unilateral Change Allegation

The District excepts to the ALJ's conclusion that it violated EERA section 3543.5, subdivision (c), when it unilaterally changed its existing policy by requiring certain members of OSTA's bargaining team to use contractual Personal Necessity Leave to participate in Association business.

EERA provides that it is unlawful for an employer to refuse or fail to meet and negotiate in good faith with an exclusive representative. (EERA, § 3543.5, subd. (c).) An employer commits a per se violation of its duty to bargain in good faith where: (1) it 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. (*Los Angeles Unified School District, supra*, PERB Decision No. 2518, p. 13, citing *Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9.)

There is no dispute that the Personal Necessity Leave is within the scope of representation and that the District did not provide OSTA notice or an opportunity to bargain over requiring two bargaining team members to use Personal Necessity Leave for Association business. The District excepts, however, to the ALJ's conclusions that the District's action constituted a change in policy and had a generalized effect or continuing impact on the terms and conditions of employment of bargaining unit members. We address each argument in turn.

A. Change in Policy

A change in policy generally falls into one of three categories: (1) changes to the parties' written agreements; (2) changes in established past practices; or (3) newly created policies, or application or enforcement of an existing policy in a new way. (*County of Monterey* (2018) PERB Decision No. 2579-M, p. 10; *Marysville Joint Unified School District* (1983) PERB Decision No. 314, pp. 8-9.) The ALJ properly found that the District's decision to require Hase and Felardo to take Personal Necessity Leave to participate in Association business on January 27, 2016 was a change in policy because it altered the terms of the parties' CBA.

The policy for Personal Necessity Leave as set forth in Article 17.15.A. places the decision to take such leave on the employee. It specifically provides an employee may use Personal Necessity Leave "at his/her election." The District does not dispute the voluntary nature of Personal Necessity Leave. Instead, it asserts it did not "require" Hase and Felardo to take Personal Necessity Leave on January 27, 2016 to attend OSTA's negotiations preparation session. However, Fallen did not contact Hase or Felardo prior to designating their January 27, 2016 absences as Personal Necessity Leave. Her e-mails to Hase and Felardo also state their absences "will" be charged as Personal Necessity Leave. Given Fallen's failure to contact

Hase or Felardo prior to making the designation and the language in her subsequent e-mails, it is reasonable to conclude Hase and Felardo were required to take Personal Necessity Leave on that date.

The District asserts Hase and Felardo never contacted Fallen or Willenberg to challenge the Personal Necessity Leave designation. However, that does not change the fact that the District unilaterally designated the absences as Personal Necessity Leave. The District also asserts that Fallen categorized the absences as Personal Necessity Leave because Hase and Felardo had used their allotment of Association Leave for the year, and the designation of Personal Necessity Leave helped them. This ignores Hase and Felardo's potential entitlement to other forms of leave in lieu of Personal Necessity Leave, such as the use of accrued compensation time or leave under Education Code section 44987.¹² Even assuming those types of leaves were unavailable, Article 17.15.A. still required the employee to make the Personal Necessity Leave designation, not the District.

Based on the above, the District's decision to require Hase and Felardo to use Personal Necessity Leave to participate in OSTA business on January 27, 2016, was a change to its existing policy.

B. Generalized Effect or Continuing Impact

The District argues that any decision to require Hase and Felardo to use Personal Necessity Leave was an isolated breach of the CBA. However, the generalized effect or continuing impact element of the prima facie case is satisfied when the employer's action is

¹² Education Code section 44987 states that a school district must grant a leave of absence, without loss of compensation, to any employee to serve as an elected officer of any public employee organization. Following the school district's payment to the employee, the employee organization will reimburse the school district for all compensation paid to the employee on account of the leave.

based on its belief that it had a contractual or other right to take the action without negotiating with the union. (*City of Montebello* (2016) PERB Decision No. 2491-M, p. 15, citing *County of Riverside* (2003) PERB Decision No. 1577-M.) Here, Willenberg testified Fallen's conduct was consistent with the terms of the CBA. Therefore, OSTA has satisfied the generalized effect or continuing impact element.

Based on the above, the District violated EERA section 3543.5, subdivision (c), when it implemented an unlawful unilateral change by requiring Hase and Felardo to use Personal Necessity Leave to participate in Association business on January 27, 2016. This conduct also constituted derivative violations of EERA section 3543.5, subdivisions (a) and (b).

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Oroville Union High School District (District): (1) denied Oroville Secondary Teachers Association (OSTA or Association) bargaining team members a reasonable amount of released time to prepare for negotiations, and (2) unilaterally changed policy by requiring OSTA members Teisha Hase and Leanna Felardo to use Personal Necessity Leave to participate in Association business on January 27, 2016. By this conduct, the District violated EERA sections 3543.1, subdivision (c) and 3543.5, subdivisions (a), (b), and (c).

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

A. CEASE AND DESIST FROM:

1. Denying OSTA bargaining team members a reasonable amount of released time to prepare for negotiations.

2. Unilaterally changing policy by requiring OSTA members to use Personal Necessity Leave to participate in Association business.
3. Interfering with the rights of bargaining unit members to be represented by OSTA.
4. Denying OSTA its right to represent bargaining unit employees.

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

1. Provide OSTA bargaining team members a reasonable amount of released time to prepare for negotiations, as requested by OSTA.
2. Rescind the policy of requiring OSTA members to take Personal Necessity Leave to participate in Association business.
3. Reimburse OSTA for any costs incurred on behalf of all five OSTA bargaining team members for negotiations preparation on January 27, 2016, including but not limited to any costs incurred for substitutes.
4. Make whole all five OSTA bargaining team members who attended the January 27, 2016 negotiations preparation meeting and were adversely affected by the District's violations of EERA, including:
 - a. Restore any and all leave deducted from those employees' leave balances as a result of the District's unlawful violations of EERA.
 - b. Change all AESOP records related to those employees' absences on January 27, 2016 to Negotiations Leave.
5. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to District faculty customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an

authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. The District shall also post the Notice by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with faculty members. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

6. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations 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 OSTA.

Members Shiners and Krantz joined in this Decision.

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



After a hearing in Unfair Practice Case No. SA-CE-2843-E, *Oroville Secondary Teachers Association v. Oroville Union High School District*, in which all parties had the right to participate, it has been found that the Oroville Union High School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., when it denied Oroville Secondary Teachers Association (OSTA or Association) bargaining team members a reasonable amount of released time to prepare for negotiations and unilaterally changed policy by requiring OSTA members Teisha Hase and Leanna Felardo to use Personal Necessity Leave to participate in Association business.

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

A. CEASE AND DESIST FROM:

1. Denying OSTA bargaining team members a reasonable amount of released time to prepare for negotiations.
2. Unilaterally changing policy by requiring OSTA members to use Personal Necessity Leave to participate in Association business.
3. Interfering with the rights of bargaining unit members to be represented by OSTA.
4. Denying OSTA its right to represent bargaining unit employees.

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

1. Provide OSTA bargaining team members a reasonable amount of released time to prepare for negotiations, as requested by OSTA.
2. Rescind the policy of requiring OSTA members to take Personal Necessity Leave to participate in Association business.
3. Reimburse OSTA for any costs incurred on behalf of all five OSTA bargaining team members for negotiation preparation on January 27, 2016, including but not limited to any costs incurred for substitutes.
4. Make whole all five OSTA bargaining team members who attended the January 27, 2016 negotiations preparation meeting and were adversely affected by the District's violations of EERA, including:

a. Restore any and all leave deducted from those employees' leave balances as a result of the District's unlawful violations of EERA.

b. Change all AESOP records related to those employees' absences on January 27, 2016 to Negotiations Leave

Dated: _____

OROVILLE UNION HIGH SCHOOL DISTRICT

By: _____

Authorized Agent

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