STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER NO. 77,

Charging Party,

v.

LODI UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SA-CE-2852-E

PERB Decision No. 2723

May 26, 2020

Appearances: Alex S. Leenson, Attorney, for California School Employees Association and its Chapter No. 77; Kingsley Bogard by Kim Kingsley Bogard and Ethan T. Retan, Attorneys, for Lodi Unified School District.

Before Shiners, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the California School Employees Association and its Chapter No. 77 (CSEA) to a proposed decision dismissing CSEA's charge and the corresponding complaint. The complaint alleged the Lodi Unified School District (District) violated the Educational Employment Relations Act (EERA or Act)[1] by unilaterally changing policy and repudiating the parties' collective bargaining agreement (CBA) when it directed employees to schedule and take vacation instead of

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

paying out vacation accruals in excess of the maximum carryover amount, and disciplined employees who did not comply with the directive. The administrative law judge (ALJ) dismissed the charge, finding there had been no "meeting of the minds" regarding the relevant contract language and insufficient evidence of past practice to support finding a unilateral change. CSEA filed timely exceptions challenging the proposed decision's primary legal conclusions.

After review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we reverse the ALJ's legal conclusions. We find the District unilaterally deviated from clear and unambiguous contract language, which allowed employees to cash out excess vacation leave balances remaining at the beginning of each fiscal year and did not require employees with excess leave balances to use vacation hours before the end of the fiscal year or be subject to discipline. Alternatively, CSEA presented sufficient evidence to resolve in its favor any alleged ambiguities in the contract language.

FACTUAL AND PROCEDURAL SUMMARY[2]

The District is a public school employer covered by EERA. CSEA is the exclusive representative of a unit of approximately 1,400 classified employees at the District. Two successive CBAs, covering 2010-2012 and 2013-2016 respectively, lie at the heart of the parties' dispute. In each of these two CBAs, Article XII included provisions governing employees' accrual and use of vacation.[3]

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[2] Neither party excepted to the ALJ's factual findings or any procedural issues.

[3] By the time of the hearing, the parties had executed a successor agreement covering 2017-2020 that carried over the disputed language in Article XII without change.

Relevant CBA Provisions on Vacation and the Parties' 2013-2016 Negotiations

In the 2013-2016 CBA, Article XII Vacation provides, in relevant part:

> **"XII. VACATION (Revised 2013)**
>
> **"A. Eligibility**
>
> "All employees in the bargaining unit shall earn paid vacation time under this Article. Vacation benefits are earned on a fiscal year basis – July 1 – June 30th.
>
> [¶ . . . ¶]
>
> **"D. Vacation Scheduling**
>
> "Vacation shall be scheduled in advance at times requested by employees, insofar as practicable, as determined by the employee's immediate supervisor and within the work requirements of the District. If there is a conflict between employees who are working at the same sites as to when vacation shall be taken, the employee with the greatest District seniority (hire date) requesting vacation shall be given preference.
>
> "1. Vacation shall not be scheduled during the first six (6) months of employment; however, upon successful completion of six months of paid service, vacation may be scheduled including all vacation accrued during this six (6) month period and any accrued vacation thereafter.
>
> "2. An employee in the bargaining unit shall be permitted to interrupt or terminate vacation leave in order to begin another service, provided the employee supplies notice and supporting information regarding the basis for such interruption or termination.
>
> [¶ . . . ¶]

“I. **Vacation Postponement**

“If a bargaining unit employee’s vacation becomes due during a period when he/she is on leave due to illness or injury, he/she may request:

“1. that his/her vacation date be changed. The District shall grant such request in accordance with vacation dates available at that time.

“2. to carry over his/her vacation to the following year. Such request shall be made through submission (within two (2) weeks of the employee’s return to duty) of a written vacation plan to the employee’s supervisor for approval.

“J. **Vacation Carryover (Revised 1996-97)**

“1. Full-Time Employees

“a. A full-time employee may carry over accrued vacation from one fiscal year to the succeeding year up to a maximum of the following:

Up to ten (10) years of service	10 days
Ten (10) years through nineteen (19) years of service	15 days
Twenty (20) years and over (New 1987-88)	20 days

“b. Every July 1, vacation accrual in excess of the maximum carry over permitted shall be paid out in the next practicable supplemental pay period (typically September 10th).

“2. Part-Time Employees

“a. Carryover in Excess of the Maximum

“Effective upon ratification, vacation accrual in excess of the maximum carry over permitted (see J.1.a.) shall be paid out to employee.

“b. Carryover Within the Maximum

> “Employees with vacation accrual at or below the maximum carryover permitted:
>
> “i. Shall be permitted to schedule vacation in accordance with Section D until such time as their vacation accrual is depleted.
>
> “ii. In the alternative to, or in conjunction with, 2.b(1), an employee may submit a written request no later than June 30 for the payment of any or all vacation accrual. Payment, to the extent requested, shall be annualized in the employee’s regular paychecks for the succeeding school year.”

During negotiations for the 2013-2016 CBA, CSEA agreed to two District proposals to change language in Article XII. First, the parties *removed* language that had appeared in the Vacation Carryover provision of the 2010-2012 CBA, which was found then at Article XII, section (I), subdivision (2) (XII.I.2).[4] The excised language provided:

> “Each employee who wishes to avoid the carryover cap in I.1 shall submit a written vacation plan (not later than September 15) for supervisor approval which uses the excess by the coming June 30. In the absence of an approved plan the District will schedule sufficient vacation for the employee to reduce him/her below the cap.”

[4] Throughout, we utilize the method of abbreviating the contract provisions which is used in the CBA. The parties not only altered the Vacation Carryover language but moved the entire provision from XII.I in the 2010-2012 CBA to XII.J in the 2013-2016 CBA.

Second, the parties *added* article XII.J.1.b to Vacation Carryover, which states: "Every July 1, vacation accrual in excess of the maximum carry over permitted shall be paid out in the next practicable supplemental pay period (typically September 10)."

During bargaining, District negotiators stated that they believed these changes would help to streamline and automate the leave process and eliminate concerns about unfunded liability for accrued vacation.[5] CSEA did not ask detailed questions about what the modified language would mean in practice, nor did the District offer any such detailed explanation. CSEA agreed to the changes to Vacation Carryover in the form proposed by the District.

The parties ratified and approved the CBA in approximately October 2013. Initial payments to employees for vacation hours in excess of the annual cap were made in approximately December 2013 or January 2014. On September 10, 2014, 160 bargaining unit employees were paid for a combined 5,762.78 hours, which represented accrued vacation hours over the vacation cap as of June 30, 2014.

District Directs Employees to Schedule Vacation

In May or early June 2015, CSEA learned that District supervisors were directing bargaining unit employees with excess vacation carryover hours to schedule vacation to reduce those hours before July 1. At this time, Kyle Harvey (Harvey), CSEA Labor Relations Representative, called Neil Young (Young), the District's

[5] Article XII.I.2 was negotiated in the late 1990s/early 2000s to address vacation carryover but was never enforced. As a result, large quantities of accrued and unused vacation created an unfunded liability for the District. Mike McKilligan, Assistant Director of Personnel for the District, and a member of the District's negotiating team for the 2013-2016 CBA, testified that XII.I.2 had not been working, which led the District to propose the changes.

Personnel Director for classified and certificated employees. They discussed CSEA's claim that the District had changed its vacation scheduling policy. Young responded there was no change in District policy.

Discipline and the Related Grievances and Appeals

On June 2, 2015, three bargaining unit employees—Custodians Gary Canepa (Canepa) and John Ramirez (Ramirez), and Groundskeeper Ramon Ibarra (Ibarra)—received memos from McNair High School Principal James Davis (Davis), advising they had vacation hours over the negotiated maximum carryover. Davis directed each to turn in, by 9:00 a.m. on June 5, 2015, requested vacation dates between June 5 and 30, 2015, to stay at or below the cap. None of the employees wished to take vacation, and all believed they should be paid for excess hours over the maximum carryover based on the CBA. On June 4, 2015, Harvey sent a letter to Young, demanding that the District cease and desist the unilateral change in vacation scheduling. By June 5, 2015, Canepa, Ibarra, and Ramirez each submitted a Classified Absence Request Form stating he was not requesting or planning to take vacation time in June.

On June 9 and 10, 2015, Canepa, Ibarra, and Ramirez received letters of reprimand from Davis for failing to schedule vacation by June 5, 2015. The reprimands directed the employees to schedule vacation by 9:00 a.m. the next day; if they failed to do so, the District would consider it an act of insubordination for which discipline would be recommended. Canepa, Ibarra, and Ramirez did not comply with the directives contained in the letters of reprimand. On June 11, 2015, each employee was served with a Statement of Charges accusing him of insubordination and

willful/knowing violation of District rules, policies, or procedures for failing to schedule vacation as directed. Each was suspended for four days and directed to take vacation on specified dates in June.

CSEA filed two related grievances, challenging both the District's directives to the three employees to schedule vacations prior to June 30, 2015, and the resulting reprimands. The grievances alleged violations of Articles XII.A, XII.D, and XII.J, as well as the CBA article on discipline. The grievances were denied at lower levels and ultimately consolidated for arbitration before Arbitrator Robert D. Steinberg on November 15, 2015.

Canepa, Ibarra, and Ramirez each timely appealed their discipline as well. Their appeals were consolidated for a formal hearing on November 2, 2015, before Office of Administrative Hearings ALJ Karen J. Brandt.

Both Arbitrator Steinberg and ALJ Brandt found in the employees' favor. Steinberg found that:

> "1. The District violated Article XII (Vacation) of the CBA for certain bargaining unit members who were projected to exceed their maximum vacation carryovers as of June 30, 2015.
>
> "2. The remedy hereby recommended to the District Board is that affected employees forced to take vacation in 2015 in order to avoid vacation excess above the maximum have that time added to their 2015-16 vacation bank, and that they be paid off for these hours in or by September 2016 to the extent the vacation time remains unused."
>
> (Footnote omitted.)

ALJ Brandt dismissed the disciplinary actions against Canepa, Ibarra, and Ramirez, and made several factual findings. However, per the parties' CBA, both

Arbitrator Steinberg's and ALJ Brandt's decisions were advisory and subject to review by the District's Board. The District's Board rejected both decisions to the extent they interpreted the parties' CBA. In response to Arbitrator Steinberg's advisory decision, the District's Board announced its own interpretation of the contract language on April 19, 2016 via Board Resolution No. 2016-26:

> "1. Supervisors continue to have an obligation to 1) schedule vacation in advance, 2) provide an opportunity for employees to request times for vacation and 3) break ties for competing vacation requests using seniority.
>
> "2. The payout provision set forth in XII.J applies only to employees with vacation accrual in excess of the cap on July 1 due to circumstances outside their control (e.g. illness or injury). See XII.I.
>
> "4. Due to the late ratification date of the Agreement (December 2013), Article XII could not be effectively implemented in the 2013/2014 school year.
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> "i. It was not reasonable to expect employees District wide to schedule vacation in the remaining five (5) months of the school year; and
>
> "ii. It would have created an undue burden on the District to permit employees district wide to take vacation in a condensed period.
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> "5. Article XII was implemented in full force and effect for the 2014/2015 school year, only six (6) months following ratification."

Though it rejected ALJ Brandt's findings which interpreted the CBA, the District's Board nevertheless rescinded the discipline, reimbursing Canepa, Ibarra, and Ramirez for the days they had been suspended without pay.

On July 15, 2016, CSEA filed an unfair practice charge alleging the District made an unlawful unilateral change by implementing a new vacation policy. On March 13, 2017, CSEA filed an amended charge, which also alleged unilateral change based on contract repudiation. On May 5, 2017, the Office of the General Counsel issued a complaint that alleged: (1) before June 2, 2015, the District vacation accrual policy allowed employees to accumulate a maximum number of vacation hours, cash out excess balances remaining at the beginning of each fiscal year (July 1), and did not require employees projected to be over the maximum carryover to use vacation hours by the end of the fiscal year (June 30) or be subject to discipline; (2) on or about June 2, 2015, the District changed policy by directing employees over the maximum carryover to use vacation hours by June 30 and disciplining those who refused; (3) the District acted without affording Charging Party CSEA prior notice and an opportunity to negotiate the policy change and/or its effects; and (4) by these actions the District failed and refused to bargain in good faith in violation of EERA section 3543.5, subdivision (c), interfered with the rights of bargaining unit employees in violation of EERA section 3543.5, subdivision (a), and denied Charging Party its right to represent bargaining unit employees in violation of EERA section 3543.5, subdivision (b). A July 7, 2017 informal settlement conference did not resolve the matter, and it was set for hearing. On October 27, 2017, the District filed a motion to dismiss the complaint for mootness, which the ALJ denied on December 26, 2017.[6] A formal hearing was

[6] The District asserted mootness based on rescinding the discipline for Canepa, Ibarra, and Ramirez, and subsequently admitting that it could not use failure to schedule vacation as a basis for disciplinary action. When the District made these concessions, it did not reimburse employees for excess vacation they were prevented

held on February 8, 2018, and the ALJ's decision dismissing the complaint issued on May 17, 2019. CSEA filed timely exceptions, and the District filed a timely response.

DISCUSSION

It is unlawful for a public school employer to "[r]efuse or fail to meet and negotiate in good faith with an exclusive representative." (EERA, § 3543.5, subd. (c).) A unilateral change to a matter within the scope of representation constitutes a per se violation of the duty to meet and negotiate. (*Stockton Unified School District* (1980) PERB Decision No. 143, p. 22.) To establish a prima facie case of an unlawful unilateral change, a charging party must prove: (1) the employer took action to change policy; (2) the change in policy 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 action 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.) The Board has recognized three general categories of unilateral changes: (1) changes to the parties' written agreement; (2) changes in established past practice; and (3) newly created policy or application or enforcement of existing policy in a new way. (*Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6.)

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from cashing out. The District also apparently continued requiring employees to reduce their vacation balances below the limit by taking vacation. As part of enforcing our remedy, along with the direction set out in footnote 11, *infra*, the compliance officer will need to consider whether the District ever ceased to enforce its new interpretation and resumed permitting employees to accumulate and cash out excess vacation leave.

The issues raised by CSEA's exceptions, and the fundamental dispute between the parties, center on the first element of the prima facie case: whether the District took actions to change policy, either by changing the terms of the agreement or altering its past practice regarding vacation scheduling and cash out of vacation hours over the maximum carryover amount.[7] Resolving this question requires us to interpret the parties' CBA.

"PERB may interpret contract language if doing so is necessary in deciding an unfair practice charge case." (*County of Ventura* (2007) PERB Decision No. 1910-M, p. 9.) Traditional rules of contract law guide interpretation of a collective bargaining agreement between a public employer and a recognized employee organization. (*National City Police Officers' Assn. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279; *Grossmont Union High School District* (1983) PERB Decision No. 313, pp. 15-16.) "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." (Civ. Code, § 1636.) "[T]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.) Thus, the Board must avoid interpreting contract language in a way which leaves a provision without effect.

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[7] CSEA's exceptions challenge four aspects of the proposed decision: (1) that there was no "meeting of the minds" regarding the relevant contract provision; (2) that CSEA's interpretation of the CBA was unreasonable and unsupported by Article XII as a whole; (3) that the ALJ misconstrued the relevant bargaining history; and (4) that the ALJ did not properly assess the evidence of past practice. CSEA's exceptions focus on the parties' agreement and related past practice, and do not raise the third category of unilateral change (i.e., newly created policy or application or enforcement of existing policy in a new way).

(*State of California (Department of Corrections)* (1999) PERB Decision No. 1317-S, p. 9.)

Where contractual language is clear and unambiguous, it is unnecessary to go beyond the plain language of the contract itself to ascertain its meaning. (Civ. Code, § 1638; *Marysville Joint Unified School District* (1983) PERB Decision No. 314, p. 9.) Where contract terms are ambiguous, we may look to bargaining history and past practice to discern the parties' intent. (*State of California (Department of Forestry and Fire Protection)* (2018) PERB Decision No. 2546-S, pp. 9-10.) Regarding the latter, the parties' past practice under the contract before the dispute arose, i.e., "[t]he parties' practical construction of a contract," provides "important evidence of their intent."[8] (*Antelope Valley Community College District* (2018) PERB Decision No. 2618, p. 19 (*Antelope Valley)*.)

I. The Plain Language of Article XII

Turning first to the language of the CBA, we find it to be clear and unambiguous on its face when read as a whole. Article XII.D provides, in pertinent part: "Vacation shall be scheduled in advance at times requested by employees, insofar as

[8] Although the parties' past practice may be used to interpret ambiguous contract language, past practice may also be used to determine whether the parties have created a binding term or condition of employment that is not found in a written agreement. (See, e.g., *County of Sonoma* (2012) PERB Decision No. 2242-M, pp. 17-19 [finding charging party failed to prove the existence of "an unwritten but established past practice" that was binding on the county]; see also *Pasadena Area Community College District*, *supra*, PERB Decision No. 2444, p. 12 [for purposes of determining an unlawful unilateral change, an existing policy may be "contained in a written agreement, in written employer rules or regulations, or in an unwritten established past practice"].) As noted *post*, we decline to consider whether the parties' conduct here created an enforceable past practice outside of the CBA.

practicable, as determined by the employee's immediate supervisor and within the work requirements of the District." This language requires employees to schedule vacation in advance, subject to the District's work requirements as determined by the employee's supervisor.[9] Article XII.J.1.b provides, in relevant part: "Every July 1, vacation accrual in excess of the maximum carry over permitted shall be paid out in the next practicable supplemental pay period (typically September 10th)." Thus, vacation that exceeds the maximum carryover amount must be cashed out on an annual basis. Read together, the plain language of Article XII.D and XII.J.1.b gives employees the right to schedule their vacation, and to have any accrued vacation in excess of the carryover amount cashed out at the start of the next fiscal year.

The ALJ found this plain language reading leaves Article XII.I (Vacation Postponement) without force or effect, but we find no such challenge. Read in the context of the entire article, XII.I creates an exception to the mandatory annual cash out: while most employees must either use their vacation or have it cashed out at the end of the fiscal year (in order to avoid accumulating banked vacation that creates an unfunded liability for the District), those who are on leave due to illness or injury and thereby prevented from taking a scheduled vacation may be allowed to carry that

[9] The District argues that Article XII.D gives supervisors the authority to schedule vacation for employees. Unlike the District, we do not read the phrase "[v]acation shall be scheduled" to be a grant of authority in the absence of any indication who—the employees or the District—shall schedule the vacation. However, to the extent this phrase could render the language of XII.D ambiguous, we find, for reasons discussed *post*, that extrinsic evidence does not support the District's interpretation.

vacation time over for use the following fiscal year. This reading gives effect to sections XII.D, XII.I, and XII.J.1.b.

Accordingly, reading the CBA's unambiguous language as a whole shows that the District deviated from policy when it overrode these two contractual mandates: (1) employees maintain the right to schedule their vacation, subject to work requirements as determined by their supervisors; and (2) at the conclusion of each fiscal year, the District must pay out accrued but unused vacation time over the maximum carryover amount, except that employees experiencing an illness or injury may exceed the carryover cap if their illness or injury prevented them from taking vacation during the fiscal year.

II. Extrinsic Evidence on the Meaning of Article XII

As an alternative basis for our finding, even if the CBA provisions were ambiguous, CSEA presented sufficient evidence to resolve any ambiguity in its favor. Where contract language is susceptible to more than one interpretation, we still begin by assessing the language in question and its overall context within the contract, weighing which interpretation is most plausible. (*Temple City Unified School District* (1989) PERB Decision No. 782, p. 8.) For the reasons discussed above, CSEA's interpretation is far more plausible than the District's interpretation.

When an ambiguity exists, it is proper to rely on extrinsic evidence to help ascertain the meaning of a written instrument. (*Modesto City Schools* (1983) PERB Decision No. 347, pp. 11-12.) Here, we consider two primary categories of extrinsic evidence: the parties' practice under the contract language and the bargaining history, which includes analyzing the language the parties excised from the contract.

First, our contract interpretation draws support from how the District dealt with excess vacation carryover that employees held upon CBA ratification and on July 1, 2014. In approximately December 2013 or January 2014 (shortly after the parties ratified the new CBA), and again in September 2014, the District cashed out vacation balances over the maximum carryover amount.[10] There is no evidence that, prior to May 2015, the District ordered employees whose vacation banks exceeded the carryover cap to schedule vacation prior to the end of the fiscal year, nor is there evidence that the District scheduled vacation on behalf of employees. Then, in approximately late May 2015, the District began requiring employees to draw down their vacation banks before the end of the fiscal year to avoid a vacation cash out.

On these same facts, the ALJ found no fixed and established past practice, relying on *Desert Sands Unified School District* (2010) PERB Decision No. 2092 for the proposition that parties are bound only by past practices that are "regular and consistent" or "historic and accepted." (*Id*. at p. 25.) We need not reach the question of whether the parties' past practice was sufficient to meet this standard because the inquiry is fundamentally different when the parties' past practices are considered to help interpret the meaning of contract language.[11] (*Antelope Valley*, *supra*, PERB

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[10] We find the District's assertions that the year following ratification was an "adjustment period" unpersuasive, particularly as it waited until the conclusion of the 2014-2015 school year to assert its alleged right to force employees to schedule vacation.

[11] To the extent CSEA's exceptions raise past practice as an alternate theory of unilateral change, we decline to consider that alternative basis for finding a unilateral change, having found the past practice sufficient to aid in interpreting the contract language. (See *Los Angeles Unified School District* (2015) PERB Decision No. 2432,

Decision No. 2618, p. 21.) In such circumstances, "the past practice is but one tool for interpreting the contract, and therefore need not be as definitive as when it is defining the status quo in the absence of a contract term." (*Id.* at p. 22.) We find the District's conduct—cashing out vacation balances over the maximum carryover amount twice in the year following ratification—indicative of the meaning of Article XII.

The District asserts that even independent of former Article XII.I.2, it has, and has long had, the right to schedule vacation on behalf of employees. However, neither the CBA nor the parties' past practice supports this claim. Record evidence shows employees have scheduled their vacation in the past, and that even when XII.I.2 was in effect, the District did not schedule vacation on behalf of employees with excess accrued vacation or require such employees to schedule vacation time to draw down their leave banks. In fact, the District proposed the changed contract language in 2013 because supervisors failed to enforce XII.I.2 for many years, leading to employees with large vacation balances and a resulting unfunded liability for the District.

Most importantly, the parties bargained to delete the very contract language in the 2010-2012 CBA upon which the District could, at one time, have relied to schedule employees' vacation: "In the absence of an approved plan the District will schedule sufficient vacation for the employee to reduce him/her below the cap." This bargaining history strongly supports CSEA's interpretation of the CBA, viz., that employees schedule vacation subject only to management's right to reject a vacation request for

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p. 2; *Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4 [the Board need not address alleged errors that would not impact the outcome of the case].)

work requirements, and the District may not order employees to schedule vacation hours, or schedule vacation on their behalf, in order to avoid its contractual obligation to cash out hours over the maximum carryover amount on an annual basis.

Further, it is undisputed that the District did not explain, and CSEA did not ask, how the deletion of XII.I.2 and the addition of XII.J.1.b would work in practice.[12] While the ALJ therefore found that there was no "meeting of the minds," that is not the operative standard.

California law directs us to an alternate analysis of the parties' conduct during negotiations. In *Merced County Sheriff's Employees' Association v. County of Merced* (1987) 188 Cal.App.3d 662, the court analyzed labor negotiations under traditional common law principles and explained as follows:

> "'The manifestations of the parties are operative in accordance with the meaning attached to the parties by one of them if . . . that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.' ([cf.] Rest.2d Contracts, § 20, subd. (2)(b) [and com. d.]; see also Rest.2d Contracts, § 201, subd. (2).) [A] party may be bound by a negligent manifestation of assent, provided the other party is not negligent. (*Id.*, citing Rest.2d Contracts, § 20, com. d.)"

(*Id.* at p. 673.)

Applying this principle here, we find CSEA had no reason to know that, in deleting the section which explicitly stated that supervisors could schedule vacation on

[12] For this reason, we give no weight to the parties' varying testimony regarding their unexpressed intent and subjective understandings of these contract provisions. (*Modoc County Office of Education* (2019) PERB Decision No. 2684, p. 17; *Grossmont Union High School District*, *supra*, PERB Decision No. 313, pp.15-16.)

behalf of employees, the District believed it maintained that same right elsewhere in the CBA. It is undisputed that the District did not inform CSEA of its understanding of how the modified article would function in practice and that CSEA did not ask questions about the District's vacation proposal. By the plain language, the District appeared to replace the provisions of XII.I.2—requiring employees over the cap to submit vacation plans and providing that supervisors may schedule vacation on behalf of employees—with a provision to cash out balances over the cap on an annual basis. CSEA was reasonable in its belief that the plain language spoke for itself, and the District should reasonably have anticipated this understanding. In such circumstances, the District negligently agreed to the terms of the agreement, but CSEA was not equally negligent, and the District is bound by its agreement.

The plain language of the CBA and the extrinsic evidence presented support an interpretation of Article XII that requires the District to cash out vacation hours accrued in excess of the maximum carryover amount each year, without a right to require employees to schedule vacation, allow the District to schedule it on their behalf, or discipline employees for failing to comply with directives to schedule or take vacation accruals exceeding the cap. CSEA established that the District made a change in policy when it instead forced employees to schedule vacation, disciplined employees who refused to do so, and announced an interpretation of Article XII contrary to the plain meaning and established understanding of the CBA's vacation policy.

III. Remaining Elements of Unilateral Change and Concurrent Violations

Having established the District changed policy, we find CSEA easily met the other elements to establish an unlawful unilateral change. The Board has long held

that vacation is negotiable and squarely within the scope of representation. (See, e.g., *Los Rios Community College District* (1988) PERB Decision No. 684 p. 12, fn. 7.) There is no dispute the District made the change without providing CSEA with notice or an opportunity to bargain. The District's ongoing enforcement of an interpretation contrary to the parties' agreement has a continuing impact on the bargaining unit. (*City of Davis* (2016) PERB Decision No. 2494-M, pp. 23-34.) The District thus violated EERA section 3543.5, subdivision (c) by unilaterally changing the vacation policy enshrined in Article XII of the parties' CBA. This conduct concurrently violates subsections EERA 3543.5, subdivision (a) and EERA 3543.5, subdivision (b) because it necessarily interferes with employees in the exercise of protected rights by denying the statutory right of an exclusive representative to represent unit members in their employment relations. (*San Francisco Community College District* (1979) PERB Decision No. 105, pp.12-13.)

REMEDY

EERA confers on the Board broad remedial powers, including the authority to issue cease and desist orders and to require such affirmative action as the Board deems necessary to effectuate the policies and purposes of the Act. (EERA, § 3541.3, subd. (i); *Mt. San Antonio Community College Dist. v. PERB* (1989) 210 Cal.App.3d 178, 189.) PERB's customary remedy for an employer's unlawful unilateral change in policy includes restoration of the prior status quo, including back pay and benefits, and interest thereon for employees who have suffered loss as a result of the unlawful conduct. (*Antelope Valley*, *supra*, PERB Decision No. 2618, pp. 23-24; *State of California (Employment Development Department)* (1999) PERB

Decision No. 1318-S, p. 12; *Corning Union High School District* (1984) PERB Decision No. 399, pp. 7-8; *Regents of the University of California* (1983) PERB Decision No. 356-H, pp. 19-22.)

In addition to standard cease and desist and notice posting remedies, here we order a return to the status quo wherein employees whose accrued but unused leave exceeds the annual cap can cash out excess balances remaining at the beginning of each fiscal year. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 12, quoting *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 823 [an employer's unilateral change to employment terms "makes impossible the give and take that are the essence of labor relations."].) We further order the District to make whole employees who, by virtue of the District's unilateral change in policy, have been required to take vacation at times they would not have otherwise chosen and have therefore been denied their right to cash out vacation time exceeding the maximum carryover amount. To make these employees whole, the District must pay affected employees for vacation hours they were ordered to schedule or which were scheduled on their behalf to avoid exceeding the maximum carryover amount, plus interest.[13]

[13] A make-whole award must be tailored "to expunge the actual consequences" of an unfair practice, including restoration of "the economic status quo that would have obtained but for the respondent's wrongful act." (*City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 13 (*Pasadena*); *Ponce Construction, Inc.* (2001) 333 NLRB No. 40, p. 2.) Our remedies therefore include "measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice, even when doing so necessarily entails some degree of uncertainty as to the precise relationships." (*Pasadena*, *supra*, PERB Order No. Ad-406-M, p. 13.) An order that may require the compliance officer to engage in some approximation is preferable to "permitting the employer to evade liability because of uncertainty caused by the employer's own unlawful conduct, and thus leaving an unfair practice

The Board will stay its order to return to the status quo, including its accompanying back pay order, for 90 days following the date this decision is no longer subject to appeal. This will allow the parties to negotiate over possible alternative remedies and any other remedial issues, including but not limited to CBA modifications, the identity of the employees who should be made whole, and the nature of such make-whole relief. If the parties fail to reach agreement on remedial issues by the end of this 90-day period, the orders to return to the status quo and pay back pay shall go into effect.[14]

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it has been found that the Lodi Unified School District (District) violated the Educational Employment Relations Act (EERA) by unilaterally changing its classified employee vacation policy in violation of Government Code section

unremedied." (*Id.* at pp. 8, 13-14, & 26-27.) Reimbursement is therefore appropriate to the extent compliance proceedings show it is more likely than not that the District's conduct caused it to hold monies that otherwise would have been paid out to an employee, who was instead forced to take vacation at a time not of his or her choosing. Such restoration of the status quo is not a windfall to employees, as taking vacation at a time not of one's choosing contravenes the intended use of vacation leave and deprives employees of the cash out provision that the parties negotiated. (See *Antelope Valley*, *supra*, PERB Decision 2618, pp. 26-27 [PERB orders make whole relief to compensate employees for the difference between what they actually earned and what they would have earned, but for the employer's illegal conduct, and such a remedy also provides a financial disincentive and deterrent against future unlawful conduct].)

[14] While 90 days should provide sufficient time to complete negotiations over remedial issues, the parties may mutually agree to extend this period, or lacking mutual agreement, may apply to the compliance officer to extend the stay if good cause is shown.

3543.5, subdivision (c). The District did so by forcing employees to use vacation leave rather than permitting them to accrue and cash out excess vacation leave, and in certain cases by disciplining or threatening to discipline employees who did not comply with directives to schedule such vacation. By this conduct, the District also interfered with employees' rights to be represented, in violation of Government Code section 3543.5, subdivision (a), and denied California School Employees Association and its Chapter No. 77 (CSEA) its right to represent employees in their employment relations with a public agency, in violation of Government Code section 3543.5, subdivision (b). Pursuant to section 3541.3, subdivision (i) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing vacation policy without meeting and negotiating with CSEA.

2. Forcing employees to use vacation leave, rather than permitting them to accrue and cash out excess vacation leave.

3. Disciplining employees who do not comply with directives to schedule vacation.

4. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

5. Denying CSEA its right to represent employees in their employment relations with the District.

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

1. Return to the status quo ante, by allowing employees to accumulate vacation leave over the maximum number of vacation hours per fiscal year and cash out excess balances remaining at the beginning of each fiscal year.

2. Make whole all employees forced to take vacation in order to avoid the contractually-mandated cash out beginning in May 2015, by paying affected employees back pay for any vacation hours they were forced to use to stay under the maximum carryover amount, plus interest at a rate of seven percent per annum.

3. With regard to provisions 1. and 2. above requiring the District to reinstate the status quo ante and make the affected employees whole via back pay, this Order shall be stayed for 90 days during which the parties may meet and confer over a mutually acceptable alternative remedy. In the event no agreement is reached within 90 days, the stay will expire and all provisions of this Order shall take effect. The parties may mutually agree to extend the 90-day period, or lacking mutual agreement, may apply to the compliance officer to extend the stay if good cause is shown.

4. Within 10 workdays following the date this decision is no longer subject to appeal, post at all work locations where notices to bargaining unit employees represented by CSEA are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means

customarily used by the District to communicate with its CSEA-represented employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

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

Members Shiners and Krantz joined in this Decision.

APPENDIX A

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-2852-E, *California School Employees Association, Chapter 77 v. Lodi Unified School District*, in which all parties had the right to participate, it has been found that the Lodi Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. when it unilaterally changed its classified employee vacation policy. By this conduct the District also interfered with employees' rights to be represented, in violation of Government Code section 3543.5, subdivision (a), and denied California School Employees Association and its Chapter No. 77 (CSEA) its right to represent employees in their employment relations with a public agency, in violation of Government Code section 3543.5, subdivision (b).

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing vacation policy without meeting and negotiating with CSEA.

2. Forcing employees to use vacation leave, rather than permitting them to accrue and cash out excess vacation leave.

3. Disciplining employees who do not comply with directives to schedule vacation.

4. Interfering with bargaining unit members' right to participate in the activities of an employee organization of their own choosing.

5. Denying CSEA its right to represent employees in their employment relations with the District.

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

1. Return to the status quo ante, by allowing employees to accumulate vacation leave over the maximum number of vacation hours per fiscal year and cash out excess balances remaining at the beginning of each fiscal year.

2. Make whole all employees forced to take vacation in order to avoid the contractually-mandated cash out beginning in May 2015, by paying affected employees back pay for any vacation hours they were forced to use to stay under the maximum carryover amount, plus interest at a rate of seven percent per annum.

3. The order to return to the status quo and make employees whole shall be stayed for 90 days to provide the parties an opportunity to meet and negotiate over a mutually acceptable remedy. If the parties cannot reach an agreement within 90 days, this order shall take effect.

Dated: ______________________ LODI 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.